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**In the Court of Common Pleas of Philadelphia
Civil Trial Division**

Liberty Media Holdings, LLC, <i>Plaintiff,</i>	Jury Trial Demanded
v.	Term 2012
John Does 1-441, <i>Defendants.</i>	No.

**Plaintiff's Memorandum of Law Supporting its Motion for Leave
to Take Pre-Complaint Discovery Under Pa.R.Civ.P. 4003.8**

Summary of the Argument: A plaintiff may obtain pre-complaint discovery where the information it seeks is material and necessary to file its complaint, and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party. The Court may require a plaintiff requesting this pre-complaint discovery to particularly state how it will materially advance the preparation of a complaint. In this case, begun by a writ of summons, plaintiff has in its possession a list of Internet Protocol (IP) addresses of John Does who illegally downloaded and shared plaintiff's content. Plaintiff requests that this Court grant its motion so it may obtain the identities of John Does 1-441 from the internet service provider Comcast, and properly initiate legal proceedings to vindicate its rights against those who illegally shared plaintiff's content. Defendants will not be steamrolled or surprised by this discovery request, as the Cable TV Privacy Act of 1984 provides that any internet service provider notify customers before it discloses identifying information.

I. Matter before the Court.

Before this Court is plaintiff's request for leave of court to take pre-complaint discovery to serve a subpoena upon Comcast, a cable TV and internet service provider in Pennsylvania..

2. Statement of Question Involved.

Question: This is a case where pre-complaint discovery is necessary to identify the proper defendants against whom plaintiff may file a legally-sufficient complaint. In such a case, should the Court grant a request for leave of court to take pre-complaint discovery, that plaintiff may obtain the identities of the defendant to file a complaint?

Suggested Answer: Yes.

3. Facts.

3.1.Introduction.

A flash mob of ski-masked thieves barge into an electronics store. They run over to the DVD rack, stuff their pockets, then promptly run out the door. But these thieves weren't the sharpest tools in the shed — each was wearing a shirt with their home telephone number prominently printed on the back of it. And unfortunately for them, they didn't realize that a video camera in the store recorded the entire incident. The police, reviewing the surveillance footage, see the phone numbers, link the phone numbers to the thieves, and prosecute them for theft.

Now imagine that happened over the internet, and you understand precisely what happened here.

In this case, a swarm of individuals, believing they were anonymous, downloaded and shared plaintiff's content using BitTorrent, an on-line file-sharing protocol. While they thought their anonymity would shield them from being identified, they missed something.

Just like the ski masked mob, each of the John Doe defendants in this case left behind the electronic equivalent of their phone number printed on the back of their shirt — their internet protocol (IP) address.²

With this motion, plaintiff asks this Court to provide it with the tools to electronically unmask the 441 John Doe defendants. Plaintiff desires to serve a subpoena on Comcast Cable to link the IP addresses to the individuals behind them, based on its belief that the users of these IP addresses downloaded and distributed plaintiff's content.

3.2. The Parties — A Pornography Company and 441 Doe Defendants.

Plaintiff Liberty Media Holdings is a California Limited Liability Company doing business as CORBIN FISHER®. Liberty Media produces, markets, and distributes adult entertainment products, including Internet website content, videos, DVDs, photographs, etc. Plaintiff operates and maintains a website by and through which individuals who pay a monthly subscription fee can view its photographic and audiovisual works.

Defendant Does 1-441 are individuals whose true names and addresses are unknown to Plaintiff. These Doe defendants duplicated and distributed unauthorized and infringing copies of plaintiff's motion pictures. Plaintiff has obtained the internet protocol addresses assigned to the individual defendants.

Plaintiff can only further identify the individuals who downloaded and shares plaintiff's material by using pre-complaint discovery.

² An IP address is similar to a telephone number. It is a numerical label assigned to any device (like a computer or printer) that participates in a computer network that uses the internet protocol for communication. It is an identifier that links internet communication to the individual responsible for the internet account.

3.3. Plaintiff's Request for Pre-Complaint Discovery.

As part of this pre-complaint discovery investigation, plaintiff intends to subpoena Comcast, an internet service provider, to determine the identity of each internet subscriber assigned the corresponding IP address on the date and time of infringement.

The information which plaintiff will request in subpoenas to be directed to Comcast is governed by 47 U.S.C. §551 (The Cable TV Privacy Act of 1984). The Cable TV Privacy Act prohibits cable operators from disclosing a subscriber's identifying information without either 1) the subscriber's express consent; or 2) a court order that specifically authorizes the disclosure.³

Accordingly, plaintiff requests that this Court issue the attached order instructing Comcast Cable to produce all documents or information sufficient to identify the user or users of the respective IP addresses as listed in Exhibit A during the corresponding dates and times.

Additionally, plaintiff asks permission to conduct pre-complaint discovery on each user identified by these internet service providers to determine whether the actual subscriber performed the acts complained of, or it was some other individual with access to the subscriber's internet connection.

3.4. Internet Service Providers, Internet Protocol Addresses, and How This Court Will Help Unmask the Defendants.

The infringement and other wrongful acts at issue in this action occurred online. In order to execute the illegal acts complained of, a user must connect to the internet.

³ The Act requires the ISP notify the subscriber of any such order. See 47 U.S.C. § 551(c)(2)(B).

Individuals gain access to the internet through an internet service provider (ISP). When an ISP provides internet access to a subscriber, it does so through a modem located at the subscriber's home or office. Each time the subscriber accesses the Internet, the ISP provides a unique number to the subscriber called an Internet protocol (IP) address. This is somewhat akin to a telephone number. The IP address for a subscriber may stay the same (a static IP address) or it may change from time to time (a dynamic IP address). An ISP generally records the times and dates it assigns each IP address to a subscriber.

Internet theft of content relies on the ability to identify the computers to and from information streams, which users search and exchange files. The technology identifies those computers through the IP address from which the computer connects to the Internet. In this manner, plaintiff identified the IP addresses from which individuals connected to the internet to unlawfully access plaintiff's works, make electronic copies of those works, and further distribute those works.

Plaintiff recorded the exact date and time individuals used various IP addresses to access the internet to illegally download, copy, and redistribute plaintiff's copyrighted work.

Anyone can perform a simple search on public databases to determine which Internet access provider controls a specific IP address. Plaintiff now seeks to subpoena Comcast, an ISP, to determine the name and address of the subscribers to whom they assigned the various IP addresses recorded.

3.5. Defendants Are Using BitTorrent to Steal Plaintiff's Works in a Virtual Flashmob Known as a Swarm.

Defendants downloaded and shared plaintiff's material via BitTorrent. BitTorrent is a mechanism through which internet users may share data electronically, and it is a notorious vehicle for internet piracy. Digital motion pictures are among the many types of files shared by BitTorrent users.

Instead of the stereotypical ideal of an internet user downloading a file from a single source, the BitTorrent protocol allows users to join a **swarm**, a group of connections from which they may to download and upload from each other simultaneously.

The life cycle of a file shared using BitTorrent begins with just one individual — the initial propagator, sometimes called a **seed** user or **seeder**. The initial propagator intentionally elects to share a file with a torrent swarm. The original file, in this case, contains plaintiff's entire copyrighted work.

Other members of the swarm connect to the seed to download the file. This download creates an exact digital copy of plaintiff's copyrighted work on each of the downloaders' computers. As additional thieves request the same file, each additional thief joins the collective swarm, and each new thief receives the same or different pieces of the file from each other thief in the swarm who has already downloaded any part of the file.

Eventually, once the initial propagator has distributed each piece of the file to at least one other thief, so that together the pieces downloaded by members of the swarm comprises the whole motion picture when reassembled, the initial propagator may leave the swarm, and the remaining thieves can still obtain a full copy of the motion picture by exchanging the pieces of the motion picture that each one has.

Essentially, these swarms work as a virtual flash mob, working together to facilitate the theft and unauthorized sharing of plaintiff's

works. Just as the courts hold the individuals in a mob of DVD thieves stealing DVDs from a brick-and-mortar store responsible for their theft, this court should allow plaintiff to proceed and hold the John Doe defendants responsible for theirs. The only difference here is the masked defendants are operating over the internet.

3.6.Procedural Background and the Reasons for this Request for Pre-Complaint Discovery.

On Tuesday, April 17, 2012, plaintiff filed an action by writ of summons against 441 John Doe defendants, who have so far been identified by IP address only. Plaintiff believes that these John Doe defendants are Comcast customers.

To properly identify and serve the defendants who illegally shared plaintiff's content, plaintiff must conduct pre-complaint discovery to subpoena the IP address holders' identities. Plaintiff files this motion and ask that this Court grant its request for leave to file pre-complaint discovery for the following reasons:

- A. Pre-complaint discovery is necessary in this case to obtain the information material and necessary to the filing of the complaint—specifically defendants' identities. Plaintiff cannot file a legally sufficient pleading without identifying the defendants as persons, rather than simply as IP addresses;
- B. This request is not a fishing expedition, nor is it meant to cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party. Once this Court grants plaintiff's motion, plaintiff will serve Comcast with a subpoena. Under the Cable TV Privacy Act of 1984 (47 USC §551), Comcast must notice the Doe defendants of the subpoena. After notice, Com-

cast will provide plaintiff with the subscribers' identifying information;

- C. Defendants will not be steamrolled or surprised by this action. Under the Cable TV Privacy Act of 1984, 47 USC §551(c)(2)(b), a cable provider who provides identifying information regarding a customer must first provide notice to the subscriber before it discloses any such information. This includes internet service providers.

Plaintiff addresses each of these elements in turn in Argument.

4. Argument.

4.I. Pre-complaint Discovery is Necessary to File a Legally Sufficient Complaint. Though this Discovery, Plaintiff Will Ascertain John Doe Defendants' Identities.

Plaintiff requires pre-complaint discovery to learn defendants' identities, that it may properly serve them with civil process.

Plaintiff does not yet have any other identifying information of defendants other than IP address, which uniquely identify the John Doe defendants. To prosecute its claims to protect its intellectual property, plaintiff must learn the defendants' identities. These identities can be discerned by pre-complaint discovery.

Pre-complaint discovery is governed by Pa.R.Civ.P. 4003.8. Rule 4003.8 provides that a plaintiff may obtain pre-complaint discovery where (1) the information sought is material and necessary to the filing of the complaint; and (2) the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party.

In *McNeil v. Jordan*,⁴ the Pennsylvania Supreme Court explained the standard for obtaining pre-complaint discovery:

To obtain pre-complaint discovery, a litigant should be required to demonstrate his good faith as well as probable cause that the information sought is both material and necessary to the filing of a complaint in a pending action. A plaintiff should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading, as well as averring that, but for the discovery request, he will be unable to formulate a legally sufficient pleading. ... The reasonableness of a given request, as well as the existence of probable cause and the good faith of the party seeking discovery, are matters for the trial court to determine in the exercise of its sound discretion.

In this case, the identities of the John Doe defendants is material and necessary to the filing of a complaint against them. Plaintiff seeks the identities of John Doe defendants that have so far been identified only by IP address. Once Comcast provides the identities of these defendants to the plaintiff, then plaintiff will be able to properly name and serve the defendants with process under Pa.R.Civ.P. 400. Furthermore, without this specific identifying information, plaintiff will be wholly unable to prosecute its claims for conversation against defendants.

This request is made in good faith, as plaintiff has already identified, by IP address, those defendants who have illegally downloaded and shared its content.

⁴ 586 Pa. 413, 443 (Pa. 2006). This standard was later codified in Rule 4003.8

Additionally, there are no other practical measures plaintiff could take to identify the Doe defendants. Plaintiff is aware of no available information that would identify the infringing users, other than information maintained by their internet service provider. Because of the nature of internet transactions, plaintiff has no way of determining Doe defendants' identities except through a third-party subpoena.

Other courts have indicated that a plaintiff requesting early discovery to identify defendants should justify specific requests and explain how such requests will lead to identifying information about a defendant that would make service of process possible".⁵ The process explained above shows precisely how plaintiff's request will lead to the identification of defendants that will make service possible.

Sometimes, the internet subscriber is not the proper defendant in an action like as this. Plaintiff may seek to depose and issue interrogatories to the internet subscriber identified by the ISPs to determine whether any specific subscriber is a proper defendant in this action. Plaintiff believes that pre-complaint discovery under Pa.R.Civ.P 4003.8 is the only proper method to made this determination.

Therefore, plaintiff respectfully requests that this Court finds that it has satisfied the Supreme Court's requirements for pre-complaint

⁵ *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 580 (N.D. Cal 1999). The *Columbia* court additionally explained that "[s]ervice of process can pose a special dilemma for plaintiffs in cases ... in which the tortuous activity occurred entirely on-line." 185 F.R.D. at 580. For a further discussion of John Doe defendants, see *Gillespie v. Civiletti*, 629 F. 2d 637, 642 (9th Cir. 1980) ("As a general rule, the use of 'John Doe' to identify a defendant is not favored. However, situations arise ... where the identity of alleged defendants will not be known prior to the filing of a complaint. In such circumstances, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds.") (internal citations omitted).

discovery, explained in *McNeil v. Jordan* and later codified in Rule 4003.8, and grant its request to pre-complaint discovery.

4.2. This Request is Made with the Intent of Vindicating Plaintiff's Rights to its Content. Once a Subpoena is Issued, the Internet Service Provider with Promptly Comply with the Subpoena. It Will Not Cause Unreasonable Embarrassment or Expense to Any Party.

Plaintiff's request for pre-complaint discovery is proper under Pa.R.Civ.P. 4003.8.

Rule 4003.8(a) requires that when a plaintiff seeks pre-complaint discovery, that discovery must not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party. Plaintiff's pre-complaint will cause one of this.

In this case, plaintiff plainly admits that defendants, once identified, may be annoyed or embarrassed because they have been caught illegally downloading adult films. But this annoyance or embarrassment is not "unreasonable" by any means — and no more annoying or embarrassing than being named a defendant in any other lawsuit.

Additionally, there will be no unreasonable expense, oppression, or burden to any party should this court grant plaintiff's request for pre-complaint discovery. Comcast, as an ISP, has subscribers' information stored electronically. This information is easily accessible with only a few minutes' investment. It will be electronically transmitted to plaintiff with virtually no burden or expense to Comcast.

Therefore, because plaintiff's request for pre-complaint discovery is within the scope contemplated by Pa.R.Civ.P. 4008.3(a), this Court should grant the request and allow plaintiff to take pre-complaint discovery.

4.3. Defendants will not be Steamrolled or Surprised by this Action. Under the Cable TV Privacy Act of 1984, 47 USC § 551, a Cable Provider that Provides Identifying Information Regarding a Customer Must First Provide Notice to the Subscriber Before it Discloses any such Information. This Includes the Internet Service Providers Contemplated Here. Additionally, the Cable TV Privacy Act Provides Sufficient Time to Allow a Party to Object to a Subpoena, and Plaintiff Therefore requests that this Court not Require it to Comply with the Strict Requirements of Pa.R.Civ.P. 4009.21.

Plaintiff's request for pre-complaint discovery will comply with all notice requirements under the Pennsylvania Rules regarding third party subpoenas.

Under Pa.R.Civ.P 4009.21(a), "a plaintiff seeking production from a person not a party to [an] action shall provide written notice to every other party of the intent to serve a subpoena at least twenty days before the date of service." This notice serves to allow a party to object to the filing of the subpoena under Rules 4009.21 and 4009.24(b). Peculiar in this case is that plaintiff does not yet know defendants' identities, that it may provide notice to the defendants of this subpoena. While this at first presents a quandary to the plaintiff seeking pre-complaint discovery in this matter, this riddle can be quickly solved by looking to the Cable TV Privacy Act's own notice requirements.

Under the Cable TV Privacy Act of 1984, 47 USC §551, cable operators are prohibited from disclosing personally identifiable information concerning subscribers — unless the subscriber gives prior written or electronic consent or a court orders that the information be provided. Many internet service providers, including Comcast, are also cable operators.

In this case, once plaintiff serves pre-complaint discovery upon Comcast, Comcast must then notify all defendants of the subpoena before it turns over any identifying information to the plaintiff.

Because the Cable TV Privacy Act requires an ISP to provide notice of any subpoena regarding a subscriber's identity to the subscriber before it turns over any identifying information, plaintiff believes that Rule 4009.21's written notice requirement would be satisfied by any subpoena issued under the Act.

Plaintiff envisions the process as follows:

- First, plaintiff will serve a subpoena upon Comcast.
- Comcast will then provide notice of the subpoena to its subscribers.
- Comcast will not release any identifying information about its subscribers until the 20 day period mandated by Rule 4009.21 has passed. This will allow the subscribers sufficient time to object to the subpoena under the relevant Pennsylvania Rule.
- After the 20 day period mandated by Rule 4009.21 has elapsed, assuming no objection from John Doe defendants, Comcast will turn over the IP addresses to plaintiff.

This process keeps within the spirit of the Pennsylvania Rule while addressing a situation that Rule 4009.21 does not contemplate.

To ensure compliance with the guidelines established by the Cable TV Privacy Act, plaintiff requests that the Court order state clearly

that the Court contemplated the Cable Privacy Act and that the order specifically complies with the Act's requirements.⁶

Though plaintiff does not yet know Doe defendants' identities, and therefore cannot provide notice under the exact method contemplated by Pa.R.Civ.P. 4009.24, the notice provisions of the Cable TV Privacy Act alleviate any concerns regarding proper notice of the third party subpoena to the Doe defendants. Therefore, this Court should grant plaintiff's pre-complaint discovery request to file a third-party subpoena upon Comcast to disclose the identities of Doe defendants 1-441.

4.4. This Action is Not Precluded by Federal Copyright Law.

Finally, state court is proper for this action because plaintiff will not be proceeding under any theories under the Copyright Act, 17 USC §§ 101 et seq. Rather, plaintiff will proceed under theories of conversion and unjust enrichment.

Though this legal distinction has not yet been decided in Pennsylvania, other courts, considering similar cases, determined that state conversion and unjust enrichment claims are not preempted by the Copyright Act.⁷

In this case, those who have illegally downloaded and shared plaintiff's material have converted it and have been unjustly enriched by the enjoyment they have received from plaintiff's films. This enjoy-

⁶ See 47 USC §551; see also *Fonovisa, Inc. v. Does 1-9*, Case No. 07-1515 2008 U.S. Dist. LEXIS 27170 at * 21-25 (W.D. Pa. Apr. 3, 2008) (discussing the Cable TV Privacy Act in the circumstances of a Doe defendant's motion to quash a subpoena in federal litigation. The Court denied Doe defendant's motion).

⁷ See e.g., *Salestrac America LLC v. Żyskowski*, 635 F.Supp 2d 1178, 1184 (Dist Court D. Nevada 2009), and *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896 (9th Cir.1992) (distinguishing claims for conversion and unjust enrichment from Copyright Act claims).

ment would otherwise be reflected by a film's sales price, which is normally paid by law-abiding customers.

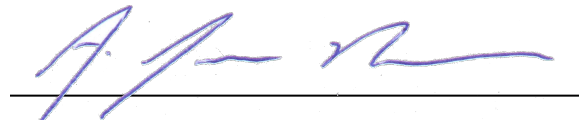
Therefore, because this state action will not be precluded by the Copyright Act, plaintiff asks this court to allow it to proceed and grant its motion for leave to take pre-complaint discovery.

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5. Relief.

WHEREFORE, because the pre-complaint discovery is necessary to file a sufficient complaint in this action, and because it does not run contrary to any rule or law, plaintiff Liberty Media Holdings, LLC, requests that this Court grant its Motion for Leave to take Pre-Complaint Discovery and enter the proposed order that accompanies this Motion.

RESPECTFULLY SUBMITTED,



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