

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the Southern District of Florida

Malibu Media, LLC. <div style="text-align: right;"><i>Plaintiff</i></div>	Civil Action No: 0:14-cv-61957-JIC
v.	
John Doe subscriber assigned IP address 98.249.146.169, <div style="text-align: right;"><i>Defendant.</i></div>	

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Comcast Cable Holdings, LLC
 c/o CT Corporation
 1200 South Pine Island Road
 Plantation, FL 33324
 Telephone: 954-473-5503

[X] *Production*: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

Please produce documents identifying the name, address, and telephone number of the defendant John Doe listed in the below chart:

IP Address	Date/Time UTC
98.249.146.169	06/08/2014 00:13:41

Place: Lipscomb, Eisenberg & Baker, PL 2 South Biscayne Boulevard Ste. 3800 Miami, FL 33131	Date and Time: November 18th, 2014 @ 9:30 a.m.
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[] *Inspection of Premises*: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 9/30/14 CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR



Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing Plaintiff, who issues or requests this subpoena, are:

M. Keith Lipscomb, Esq., Lipscomb, Eisenberg & Baker, PL, 2 South Biscayne Boulevard, Ste 3800, Miami, FL. 33131, Telephone: (786) 431-2228, Email: klipscomb@lebfirm.com

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.****(1) Avoiding Undue Burden or Expense;**

Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;
(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it

requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;
(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.**(1) Producing Documents or Electronically Stored Information.**

These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is

privileged or subject to protection as trial preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-61957-CIV-COHN/SELTZER

MALIBU MEDIA, LLC,

Plaintiff,

vs.

JOHN DOE subscriber assigned to IP address
98.249.146.169,

Defendant.

ORDER GRANTING MOTION FOR LEAVE TO SERVE
THIRD PARTY SUBPOENA PRIOR TO RULE 26(f) CONFERENCE

THIS CAUSE is before the Court on Plaintiff's Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference (DE 5) and was referred to the undersigned pursuant to 28 U.S.C. § 636 (DE 4). The Court having considered the Motion (DE 5), Supporting Documents (DE 5-1, DE 5-2, DE 5-3, and DE 5-4), and being otherwise fully advised, it is hereby ORDERED that the Motion (DE 5) is GRANTED as set forth below.

Plaintiff brings this action for copyright infringement against Defendant John Doe subscriber assigned to IP address 98.249.146.169. See Complaint (DE 1). According to Plaintiff, "[t]he John Doe Defendant's IP address has been habitually used to infringe Plaintiff's copyrighted works." Memorandum at 3 (DE 5-1). More specifically, Plaintiff contends that Defendant has used "the BitTorrent file distribution network, to commit direct copyright infringement." Id. Because Defendant used the internet, "Plaintiff only knows Defendant by his Internet Protocol ('IP') address . . . assigned to . . . Defendant by his

respective Internet Service Provider ('ISP')." Id. Plaintiff represents that the ISP can identify Defendant; the ISP "maintain[s] internal logs, which record the date, time and customer identity for each IP address assignment made by that ISP." Id.

Plaintiff now moves the Court for leave "to serve limited, immediate discovery on the John Doe Defendant's Internet Service Provider, Comcast Cable (hereafter, ISP) so that Plaintiff may learn Defendant's true identity."¹ Id. Pursuant to Federal Rule of Civil Procedure 26(d)(1), except for circumstances not applicable here, a party may not propound discovery in advance of a Rule 26(f) conference absent a court order. In determining whether to permit early discovery, courts generally apply a "good cause" standard. See, e.g., Malibu Media, LLC v. John Doe, No. 2:13-cv-259-FTm-99SPC, 2013 WL 2154818, at *1 (M.D. Fla. May 17, 2013); Patrick Collins v. Does, 1-1219, 2010 WL 5422569, at *2 (N.D. Cal. Dec. 28, 2011); Arista Records LLC v. Does 1-19, 551 F. Supp. 2d 1, 6-7 (D.D.C. 2008). "In internet infringement actions, courts routinely find good cause exists to issue a Rule 45 subpoena to discover a Doe defendant's identity, prior to a Rule 26(f) conference, where a plaintiff makes: (1) a prima facie showing of infringement, (2) there is no other way to identify the Doe Defendant, and (3) there is a risk an ISP will

¹ "As a general rule, discovery proceedings take place only after the defendant has been served; however, in rare cases, courts have made exceptions, permitting limited discovery to ensue after filing of the complaint to permit the plaintiff to learn the identifying facts necessary to permit service on the defendant." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999) (recognizing that "[s]ervice of process can pose a special dilemma for plaintiffs in cases . . . [where] the tortious activity occurred entirely on-line"); see also Penalbert-Rosa v. Fortuno-Burset, 631 F.3d 592, 596 (1st Cir. 2011) ("A plaintiff who is unaware of the identity of the person who wronged her . . . can proceed against a 'John Doe' . . . when discovery is likely to reveal the identity of the correct defendant."); Davis v. Kelly, 160 F.3d 917, 921 (2d Cir. 1998) ("[C]ourts have rejected the dismissal of suits against unnamed defendants . . . identified only as 'John Doe's' . . . until the plaintiff has had some opportunity for discovery to learn the identities.").

destroy its logs prior to the conference.” Malibu Media, 2013 WL 2154818, at *1 (quoting UMG Recording, Inc. v. Doe, No. C 08-1193 SBA, 2008 WL 4104214, at *4 (N.D. Cal. Sept. 3, 2008)). Courts have also considered whether the defendant’s expectation of privacy outweighs the need for the requested discovery. See Elektra Entm’t Group, Inc. v. Doe, No. 5:08-CV-115-FL, 2008 WL 5111886, at *4 (E.D.N.C. Dec. 4, 2008).

Considering the above-listed factors, this Court concludes that good cause exists for the expedited discovery sought by Plaintiff. Plaintiff has established a prima facie claim of copyright infringement (which requires ownership of a valid copyright, and copying of constituent elements of the work that are original). See Complaint (DE 1) with Attached Exhibits (File Hashes and Copyrights-in-Suit for IP Address 98.249.146.169) (DE 1-2 and DE 1-3); Declaration of Colette Field (co-owner of Malibu Media) (DE 5-2); Declaration of Tobias Fieser (forensic investigator) (DE 5-4). In addition, it appears that Plaintiff only has Defendant’s IP address and lacks any other means of ascertaining Defendant’s identity. From the IP address, the ISP can access the identifying information of the subscriber. See Declaration of Patrick Paige, former detective in computer crimes unit of Palm Beach County Sheriff’s Department, ¶¶ 9, 10 (DE 5-3) (“[D]uring the initial phase of Internet based investigations, the offender is only known . . . by an IP address. The only entity able to correlate an IP address to a specific individual . . . is the Internet Service Provider (ISP).”); see also Malibu Media LLC v. John Does 1-2, No. 12-1342, 2012 WL 5928528, at *2 (C.D. Ill. Nov. 26, 2012) (“Because of the very nature of internet infringement, it is often the case that a plaintiff cannot identify an infringer in any way other than by IP number. Given the substantial federal policy underlying copyright law, it would be a travesty to let technology overtake the legal protection of that policy.”). Additionally, the

Court finds that Plaintiff's strong interest in ascertaining Defendant John Doe's true identity so that it may prosecute its copyright claim outweighs any privacy interest Defendant may possess. See Call of the Wild Movie, LLC v. Does 1-1062, Nos. 10-455(BAH), 10-569(BAH), 10-1520(BAH), 2011 WL 996786, at *12 (D.D.C. March 22, 2011) ("[A] number of other jurisdictions . . . have deemed that a file sharer's First Amendment right to anonymity is 'exceedingly small.'"); Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004) ("[D]efendants have little expectation of privacy in downloading and distributing copyrighted songs without permission.").

Accordingly, it is hereby ORDERED that Plaintiff's Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference (DE 5) is GRANTED as follows:

1. Plaintiff may serve, pursuant to the Federal Rules of Civil Procedure, a subpoena on the relevant Internet Service Provider ("ISP") commanding production (to Plaintiff) of the true name, address, telephone number, and e-mail address of the Defendant to whom the ISP assigned the IP address set forth on Exhibit A (DE 1-2) to the Complaint (DE 1). Plaintiff shall attach a copy of this Order to any such subpoena.

2. Plaintiff may also serve, pursuant to the Federal Rules of Civil Procedure, a subpoena in the same manner as above on any service provider that is identified in response to the subpoena as a provider of internet services to Defendant.

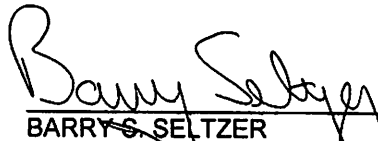
3. If the ISP qualifies as a "cable operator," as defined by 47 U.S.C. § 522(5),²

² Specifically, 47 U.S.C. § 522(5) defines "the term 'cable operator' [to] mean[] any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system[.]"

it shall then comply with 47 U.S.C. § 551(c)(2)(B),³ by sending a copy of this Order to Defendant.

4. Plaintiff may use the responsive information disclosed only to prosecute the claims made in its Complaint (DE 1).

DONE AND ORDERED in Fort Lauderdale, Florida, this 30th day of September 2014.


BARRY S. SETZER
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies to:

Honorable James I. Cohn
United States District Judge

All Counsel of Record

³ "A cable operator may disclose such [personal identifying] information if the disclosure is . . . made pursuant a court order authorizing such disclosure, [and] if the subscriber is notified of such order by the person to whom the order is directed[.]" 47 U.S.C. § 551(c)(2)(B).