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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 MALIBU MEDIA, LLC.,
13 Plaintiff,

14 vs.

15 JOHN DOE subscriber assigned IP
16 address 76.126.99.126,
17 Defendant.

18 _____
19 and related cross actions

) **Case No.: 3:15- cv-04441-WHA**

)
)
) **OPPOSITION TO PLAINTIFF’S**
) **MOTION FOR ENTRY OF AN ORDER**
) **AUTHORIZING PLAINTIFF TO SERVE**
) **A THIRD PARTY SUBPOENA ON**
) **COMCAST AUTHORIZING COMCAST**
) **TO RELEASE CERTAIN SUBSCRIBER**
) **INFORMATON ABOUT DEFENDANT**

) **[ORAL ARGUMENT NOT REQUESTED]**
)

20 JOHN DOE subscriber assigned IP address 76.126.99.126 (“JOHN DOE”) opposes
21 Plaintiff’s request for a second subpoena to be served on COMCAST as follows:
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2 **I. THE SUBPOENA ON COMCAST SHOULD NOT BE ALLOWED IN ITS**
3 **CURRENT FORM AND SHOULD BE MODIFIED AS IT IS OVERBROAD.**

4 Plaintiff's seek from Comcast a range of information regarding IP Address
5 "76.126.99.126." As it is written, it is overbroad in scope and will result in irrelevant
6 information that is largely inadmissible at trial. Further, given that Collette Pelissier, owner of
7 Malibu Media, and a computer programmer, found nothing on Defendant's hard drive, this
8 discovery request is disproportionate under Fed. R. Civ. P. 26.

9 The scope of discovery under Fed. R. Civ. P. 45 is bound by Fed. R. Civ. P. 34. The scope
10 of Fed. R. Civ. P. 34 is controlled by Fed. R. Civ. P. 26. See *Garedakis v. Brentwood Union School*
11 (ND CAL Dckt. 145, 3/23/2016) 14-cv-04799-PJH (DMR).

12 Fed. R. Civ. P. 26 requires that discovery requests be both relevant and proportional to the
13 needs of the case. Fed. R. Civ. P. 26 is reviewed under the abuse of discretion standard. *Ecuador*
14 *v. Mackay* (9th Cir., 2014) 742 F.3d 860.

15 The defect of the subpoena is a result of the problem assuming that "an IP is a person".
16 IP addresses connect "computers", not people. See *Weinstein v. Islamic Republic of Iran* (D.C.
17 Cir., 2016) No. 14-7193 attached as Ex. 1. The IP address is controlled by the Internet Service
18 Provider (in this case Comcast) who then assigns (i.e. licenses) that IP address to a customer. In
19 some sense, Comcast operates no differently than the old "Pacific Bell", who assigned a
20 telephone number to a residence. A better analogy, given that any person can access a WiFi
21 signal, would be a payphone¹.

22 To further complicate matters, a customer is assigned a *dynamic* IP address which
23 Comcast may change at its discretion during the period. As Comcast testified in *United States*
24 *v. Vosburgh* (3rd Cir., 2010) 602 F.3d 512, 523:

25 ...A witness from Comcast testified about IP addresses and the process
26 by which Comcast responds to requests from law enforcement to match IP
addresses to individual Comcast subscribers. He explained that Comcast's
automated system assigns a unique IP number to each customer on a dynamic
basis, and that the "lease period" for each IP address is approximately 6-8 days.

¹ A payphone is a coin-operated public telephone, now rarely seen in public. See
<https://en.wikipedia.org/wiki/Payphone>.

1 At the expiration of that lease period, the assignment of an address to a particular
2 computer may or may not be renewed. He further explained that Comcast can
3 trace an IP address back to a particular customer's account, through IP
assignment logs that go back 180 days. (*Id.*, emphasis added).

4 Objections as to overbreadth are made to categories “(a)” and “(b)” are as follows:

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6 (a) Any and all document(s) that refers, relates to, or comprises a record that the
7 Defendant received a Digital Millennium Copyright Act (DMCA) notice,
8 pursuant to 17 U.S.C. 512(c) (1)(C), including but not limited to the DMCA
9 record.

10 (b) Any and all document(s) that relates to or comprises a record that the
11 Defendant received a copyright infringement notice forwarded by Comcast,
12 pursuant to any copyright.

13 i) The Subpoena is overbroad as to “time” as to categories (a) and (b) and should be
narrowed for the time period from August 10, 2015 to August 28, 2015.

14 As the Defendant is defined as the “John Doe subscriber IP Address 76.126.99.126”, the
15 literal interpretation of the subpoena is that Comcast will return documents associated with IP
16 Address 76.126.99.126 for any time period. But, given that Comcast rotates IP addresses every
17 6-8 days, Comcast will return documents for other subscribers’ activities.

18 Therefore, subpoena should be limited in scope to the time period from August 10, 2015
19 to August 28, 2015.

20 ii) The Subpoena is irrelevant as to the request for “DMCA Notices” as to categories (a)
and (b) and such information is readily discoverable from the Plaintiff

21 The DMCA notice is to limit liability to the ISP as a transitory provider of
22 information. See 17 USC §512(a). If the ISP does not transmit the notice to the subscriber,
23 then the ISP can be liable for copyright infringement.

24 The ISP is not a party to this lawsuit, so obtaining DMCA notices to support ISP
25 liability is irrelevant and, therefore, not needed for discovery.

26 Plaintiff is in possession of their own DMCA notices sent to the
subscriber/Defendant, via the ISP, so there is a more readily available source available.

1 To the extent that Plaintiff needs “other” DMCA notices, there is nothing in the
2 DMCA that would impute liability to the subscriber regarding other DMCA notices. The
3 Plaintiff lacks standing to enforce copyrights it does not own.

4 **II. CONCLUSION**

5 The subpoena is overly broad as to time and to the scope of production. Until the
6 Plaintiff corrects the scope of the Subpoena, it should be denied.

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9 Respectfully Submitted,

10 /s/J. Curtis Edmondson/
11 J. Curtis Edmondson
12 Counsel for the Defendant
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