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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **OAKLAND**

11 MALIBU MEDIA, LLC,

12 Plaintiff,

13 vs.

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15 JOHN DOE subscriber assigned IP address
16 76.126.99.126,

17 Defendant.
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Case Number: 3:15-cv-4441-WHA

**PLAINTIFF’S REPLY IN SUPPORT OF
ITS MOTION FOR ENTRY OF AN
ORDER AUTHORIZING PLAINTIFF TO
SERVE A THIRD PARTY SUBPOENA
ON COMCAST AND AUTHORIZING
COMCAST TO RELEASE CERTAIN
SUBSCRIBER INFORMATION ABOUT
DEFENDANT**

21 **PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION FOR ENTRY OF AN ORDER**
22 **AUTHORIZING PLAINTIFF TO SERVE A THIRD PARTY SUBPOENA ON COMCAST**
23 **AND AUTHORIZING COMCAST TO RELEASE CERTAIN SUBSCRIBER**
24 **INFORMATION ABOUT DEFENDANT**

25 Plaintiff, Malibu Media, LLC (“Plaintiff”), by and through undersigned counsel, hereby files
26 its Reply in Further Support of its Motion for Entry of an Order Authorizing Plaintiff to Serve a
27 Third Party Subpoena on Comcast and Authorizing Comcast to Release Certain Subscriber
28 Information About Defendant, and states:

1 1. In Defendant’s Opposition to Plaintiff’s Motion for Entry of an Order Authorizing
2 Plaintiff to Serve a Third Party Subpoena on Comcast and Authorizing Comcast to Release Certain
3 Subscriber Information About Defendant (“Defendant’s Opposition”) [CM/ECF 59], Defendant
4 argues that Plaintiff’s subpoena should not be allowed because Plaintiff “found nothing on
5 Defendant’s hard drive[.]” Defendant is incorrect. And, Defendant fails to mention that he did not
6 produce all of his hard drives until only just recently, after Plaintiff found evidence they existed and
7 were missing.¹

8 2. Plaintiff has evidence that Defendant installed qBitTorrent on his hard drive – the
9 very same BitTorrent client used to infringe Plaintiff works. Plaintiff is still in the process of
10 examining the remaining drives but has ample evidence establishing Defendant’s BitTorrent use.
11 Indeed, Plaintiff located countless online forum posts wherein: (1) Defendant boasts about his
12 BitTorrent use dating as far back as 2011; (2) Defendant discusses his method of procuring
13 pornography through BitTorrent; and (3) Defendant responds to postings which contain X-Art
14 content.² With each day, Plaintiff uncovers more evidence establishing Defendant’s liability.
15 Plaintiff seeks additional information from Comcast relevant to further establish liability or
16 alternatively defeat Defendant’s defenses.

17 3. Defendant’s notion that “[t]he defect of the subpoena is a result of the problem
18 assuming that ‘an IP is a person’” is flawed. [CM/ECF 59, p 2]. Here, Plaintiff is suing Defendant
19 for copyright infringement he committed through the Internet. Plaintiff has strong evidence that the
20 infringement was committed by Defendant and not another individual. Information pertaining to
21 Defendant’s Internet usage to commit copyright infringement is relevant to this litigation.

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25 ¹ Although Plaintiff requested these drives in its original production, Defendant only recently produced them.
Plaintiff’s expert is working expeditiously to examine same.

26 ² Plaintiff only recently discovered these postings and is attempting to save them. Accordingly, Plaintiff recently sent
27 Defendant a preservation letter-instructing Defendant to not access his online forum accounts until preservation is
complete. Plaintiff is unable to attach these postings as exhibits to this Reply because they contain Defendant’s
identifying information.

1 4. Defendant argues that the subpoena to Comcast should not be allowed because “a
2 customer is assigned a dynamic IP address which Comcast may change at its discretion during the
3 period... [and] Comcast will return documents for other subscribers’ activities.” [CM/ECF 59, p.
4 2]. First, to be clear, Plaintiff is not subpoenaing the activity of third party subscribers who may
5 have been assigned Defendant’s IP address at a different point in time. Plaintiff’s subpoena seeks
6 information regarding *the individual assigned the IP address at a particular point in time*. Plaintiff
7 is only subpoenaing Defendant’s information.

8 5. The subpoena references Defendant as “the subscriber assigned IP address
9 76.126.99.126” because there is a protective order in this case and Plaintiff cannot name the
10 Defendant by his actual name. ‘John Doe subscriber IP Address 76.126.99.126’ is merely a
11 formality allowing Defendant to proceed anonymously in this litigation. Indeed, Defendant’s
12 counsel specifically requested that all of the subpoenas in this case refer to Defendant as ‘John Doe
13 subscriber IP Address 76.126.99.126’ and not by Defendant’s true name. Comcast knows that
14 Plaintiff seeks the information related specifically and only to the person who is the subscriber
15 assigned IP address 76.126.99.126 on August 20, 2015 at 19:35:34 UTC because Plaintiff listed this
16 information on its first subpoena to Comcast and Comcast responded with Defendant’s identity.³
17 Comcast has this record. Thus, Comcast is already aware of Defendant’s true identity and his status
18 as Defendant in this lawsuit.

19 6. Plaintiff has been granted leave to serve this exact subpoena on Comcast several
20 times, and Comcast has never objected on the basis that the dynamic IP address had been assigned
21 to several customers. This is because Comcast complies with this particular Subpoena by looking
22 up Defendant’s name/account number, which it already correlated to the IP address listed in the
23 case caption.

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27 ³ Plaintiff’s first subpoena served on Comcast in this case was to ascertain the true identity of the Subscriber assigned IP
address 76.126.99.126 on August 20, 2015 at 19:35:34 UTC.

1 7. Second, Defendant’s argument that Comcast only assigns IP addresses to a particular
2 person for 6-8 days at a time is flawed. Specifically, in *United States v. Vosburgh*, 602 F.3d 512,
3 523 (3d Cir. 2010) Comcast testified that “[a]t the expiration of that lease period, the assignment of
4 an address to a particular computer may or may not be renewed.” Comcast’s X-Finity website
5 provides further information on this process. “When you connect your computer directly to your
6 cable modem, you’re given a unique IP (Internet Protocol) address assigned by a Dynamic Host
7 Configuration Protocol (DHCP) server. This is essentially your address on the Internet. Your IP
8 address doesn’t change often, but there will be times when you’ll be assigned a short-term DHCP
9 lease and will need to release and renew your IP address before you can reconnect to the Internet.⁴”
10 Comcast further clarifies, “[a] properly configured device - regardless of the length of its lease -
11 automatically renews its DHCP lease when the current one expires.” *Id.* In short, Comcast’s own
12 website states that a customer’s IP address “doesn’t change often” and devices “automatically
13 renew.” This is consistent with the infringement in this case – Plaintiff has evidence of
14 infringement over a long period of time by the same IP address. It is absolutely relevant for
15 Plaintiff to obtain information from Comcast on whether Defendant was assigned the same IP
16 address during the entire period of infringement.

17 8. Lastly, Defendant claims that the request for DMCA Notices is irrelevant because
18 the ISP’s liability is not at issue. Plaintiff’s purpose in this request is not to establish any liability
19 against a third party. Plaintiff seeks DMCA notices to: (1) defeat Defendant’s argument that the
20 infringement is by a WiFi-hacker and he had no knowledge of its occurrence (evidence that
21 Defendant received multiple notices of copyright infringement can impeach any testimony that he
22 had no idea infringement was occurring); (2) correlate infringement records to Excipio’s Additional
23 Evidence in order to demonstrate the ongoing infringement of third party content; and (3) establish
24 Defendant’s ongoing use of the subject IP address for a period of time. And, if Defendant received
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27 ⁴ <https://customer.xfinity.com/help-and-support/internet/releasing-and-renewing-ip-address/>

1 notices of infringement for software and media content located on his computer and on the
2 Additional Evidence, it shows his pattern of infringement activity.

3 9. Plaintiff has previously used DMCA notices from Comcast to prove these very
4 points. *See e.g. Malibu Media, LLC v. Tashiro*, No. 1:13-cv-00205-WTL-MJD, 2015 U.S. Dist.
5 LEXIS 64281, at *31-32 (S.D. Ind. May 18, 2015) (“[Defendant] did ‘not recall receiving any
6 DMCA notices,’ but the deposition testimony from Comcast’s 30(b)(6) confirms that seven such
7 notices were sent. Thus, regardless of whether [defendant] ‘recall[ed]’ receiving the
8 communications from Comcast, the repeated notices of infringement sent to his email address
9 should have put him on notice that an infringement suit was likely.”)

10 For the foregoing reasons, Plaintiff respectfully requests the Court enter an order granting
11 Plaintiff’s Motion to subpoena Defendant’s ISP for further information.

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13 Date: September 28, 2016.

Respectfully submitted,

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15 By: /s/ Henrik Mosesi
16 Henrik Mosesi, Esq.
17 PILLAR LAW GROUP, APLC
18 Attorney for Plaintiff

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CERTIFICATE OF SERVICE

21 I hereby certify that on September 28, 2016, a true and correct copy of the foregoing
22 document was served via U.S. Mail and/or email to the following:

23 Joseph Curtis Edmondson
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Attorney for Defendant

By: /s/ Henrik Mosesi