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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

11 COLUMBIA PICTURES) Case No. CV 06-1093 FMC (JCx)
12 INDUSTRIES, INC., DISNEY) DISCOVERY MATTER
13 ENTERPRISES, INC., PARAMOUNT) The Honorable Jacqueline Chooljian
14 PICTURES CORPORATION,)
15 TRISTAR PICTURES, INC.,) **PLAINTIFFS' SUPPLEMENTAL**
16 TWENTIETH CENTURY FOX FILM) **MEMORANDUM IN SUPPORT OF**
17 CORPORATION, WARNER BROS.) **PLAINTIFFS' MOTION FOR AN**
18 ENTERTAINMENT INC.,) **ORDER (1) REQUIRING**
19 UNIVERSAL CITY STUDIOS LLLP,) **DEFENDANTS TO PRESERVE**
and UNIVERSAL CITY STUDIOS) **AND PRODUCE CERTAIN**
18 PRODUCTIONS LLLP,) **SERVER LOG DATA, AND (2)**
19 Plaintiffs,) **FOR EVIDENTIARY SANCTIONS**
20 v.)
21 JUSTIN BUNNELL, FORREST) **REDACTED**
22 PARKER, WES PARKER, VALENCE) **FILED PURSUANT TO**
MEDIA, LLC, and DOES 1-10,) **PROTECTIVE ORDER**
22 Defendants.)

Date: April 3, 2007
Time: 9:30 a.m.
Ctrm: 20

Discovery Cut-off: May 4, 2007
Pretrial Conf. Date: Oct. 22, 2007
Trial Date: Dec. 4, 2007

1 The server data at issue *exists and is used* by defendants in responding to
2 every user request to download a dot-torrent file. J. Stip. 9:5-11:22; 20:10-21:8;
3 Horowitz Decl. ¶¶ 10-14. Defendants do not deny this; nor could they. Nor do
4 defendants deny that they readily could preserve this data simply by “turning on”
5 the logging function that comes with their server software. In the face of these
6 uncontroverted facts, defendants’ claim that they have no obligation to preserve this
7 data is baseless. As defendants know, the server data provides critical evidence of
8 which dot-torrent files are actually being downloaded from the TorrentSpy site, and
9 is directly probative of central issues in this case. Try as defendants might to
10 obfuscate the issues, defendants’ so-called “privacy” and First Amendment
11 arguments provide no justification for their destruction of important evidence.

12 **I. Preserving the Existing User Request Data Is Necessary and Simple.**

13 As set forth in plaintiffs’ contentions and the declaration of Professor
14 Horowitz, the user request data at issue *already exists*. The data is sent by users to
15 the TorrentSpy server every time they request a webpage or seek to download a dot-
16 torrent file, and defendants’ server *must* process that data in order for users to obtain
17 the dot-torrent file. J. Stip. 9:5-11:22; 20:10-21:8; Horowitz Decl. ¶¶ 10-14. While
18 accusing plaintiffs of “subterfuge,” J. Stip. 31:6, defendants never dispute that this is
19 how their technology works. Indeed, it is defendants who confuse two separate
20 issues – whether the user request data actually exists and whether the server logs
21 currently exist. The issue is not whether the server log files exist – they apparently
22 do not because defendants have deliberately chosen not to keep them. But
23 defendants do not, and cannot, deny that the user request data itself *does exist*, at
24 least until defendants erase it.

25 The fact that defendants must take some (minimal) affirmative steps to
26 preserve this data does not mean that defendants are “creating new evidence.” The
27 law is clear that once a party is required to preserve existing evidence, a party must
28 take affirmative steps to preserve it, such as moving emails that might otherwise be

1 automatically deleted to permanent storage. *E.g., In re Napster, Inc. Copyright*
2 *Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006) (party must preserve emails that
3 would otherwise be deleted under existing retention policy); *Nat'l Ass'n of*
4 *Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557-58 (N.D. Cal. 1987) "The
5 obligation to maintain discoverable materials is an affirmative one[.]". Such
6 preservation steps are not unusual and do not constitute "creating evidence." And as
7 plaintiffs' expert has made clear, the logging functionality already exists on
8 defendants' server software, and it is easily enabled.¹

9 For these central reasons, this case is not at all like the cases cited by
10 defendants, *Alexander v. FBI*, 194 F.R.D. 305 (D.D.C. 2000), and *Paramount*
11 *Pictures Corp. v. ReplayTV*, No. 01-9358, 2002 WL 32151632 (C.D. Cal. May 30,
12 2002). In *Alexander*, the plaintiffs sought to discover a list of persons whose FBI
13 reports had been requested by the White House during the tenure of a certain
14 employee. *Id.* at 310. The court held that defendants were not required to produce a
15 list because no such list existed; it would have to be created. Here, by contrast,
16 plaintiffs are asking the Court to order defendants to preserve evidence that is
17 *currently in existence*. This is no different than the well-established requirement
18 that a party to litigation must take affirmative steps to preserve emails after litigation
19 commences – even if the party had a pre-existing policy to routinely destroy emails
20 for innocent business reasons.

21 The Court's order in the *ReplayTV* case is equally inapposite. That case did
22 not involve data that already existed and was routinely sent by users *to a central*

23
24 ¹ Defendants misleadingly suggest that they would have to "install" a logging
25 functionality to preserve the user request server log data. J. Stip. 34:2, 5, 7, 10. But
26 no separate installation is required – as Professor Horowitz notes, the logging
27 functionality is a standard feature of defendants' own web server software, IIS 6.0.
28 Horowitz Decl. ¶¶ 9-10. The defendants merely need to turn this functionality on.

1 *server* and in fact used by those servers to respond to user requests. In other words,
2 in contrast to the situation here, *ReplayTV* did not involve the preservation of
3 existing data. Instead, it involved data about ReplayTV users' individual activities
4 that the Court found "is not now and has never been in existence." 2002 WL
5 32151632 at *2. Indeed, in *ReplayTV*, the Court noted that to collect the data
6 plaintiffs requested, "defendants would be required to undertake a major software
7 development effort, incur substantial expense, and spend approximately four months
8 doing so." *Id.* at 3. Here in contrast, the defendants need only take the minimal step
9 of turning on the logging functionality already present in their existing software – a
10 function that is "on" by default.

11 **II. The Privacy and First Amendment Arguments Are Meritless.**

12 The "privacy" concerns cited by defendants are red herrings. It is telling –
13 though not surprising – that defendants' real privacy concerns relate to *the very*
14 *users who are using TorrentSpy to infringe plaintiffs' copyrighted works.* See J Stip.
15 6:5-7 (expressing concern that server log data be used for "DMCA search
16 warrants"); 36:2-7 (same for "subpoenas"); 38:18-19 (same). But it is specious for
17 defendants to argue that they should not be required to log user activity because they
18 deliberately chose to switch off their servers' default logging function in order to
19 assure their users that their infringing activities would not be monitored.²

20

21 ² Defendants suggest that the behavior of users on the site will change once
22 defendants begin keeping server log data. J. Stip. 42:16-26. In other words,
23 defendants are concerned that infringing activity may decrease if infringers are
24 aware that logs of their downloads are being kept. That is not a legitimate argument
25 against *preserving evidence* in this case. It also supports a finding of direct
26 infringement as a sanction, as requested by plaintiffs, J. Stip 28:21-29:23. To the
27 extent defendants are suggesting that they will encourage their users to alter their
28 downloading behavior to artificially manipulate the data for purposes of this
litigation, defendants should be ordered to refrain from doing so.

28

1 At bottom, users do not have an expectation of privacy in the data they
2 voluntarily send to a third-party server, including their IP address information. *See*,
3 *e.g.*, *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S.Ct. 2577, 61 L. Ed. 220 (1979).
4 Further, the IP address information on its face does not identify any particular
5 individual, and it is the type of information that users should expect any interactive
6 website to receive – and keep. *See* Horowitz Decl. ¶ 13 (noting that the normal
7 practice is to retain user request data). And this case is wholly unlike *Gonzales v.*
8 *Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006), where the *government* sought search
9 term data from a third party and the court noted the “difference between a private
10 litigant revealing potentially sensitive information and having the information be
11 produced to the Government pursuant to civil subpoena” – namely that the
12 government may use then use that information for a criminal prosecution. *Id.* at
13 687. Defendants’ privacy arguments ring especially hollow given that defendants

14 [REDACTED]

15 As part of defendants’ document production, [REDACTED]

16 [REDACTED]

17 [REDACTED] Declaration of

18 Duane C. Pozza, dated March 20, 2007, ¶ 2, Ex. 1, 2. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]³

22 [REDACTED]

23 [REDACTED]³

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 (continue...)

1 At any rate, defendants have completely ignored plaintiffs' offer, made
2 repeatedly, to accept on an initial basis the server log data with IP address
3 information redacted (provided defendants preserve the IP address data). J. Stip.
4 3:16-18; 24:15-18. The fact that defendants do not even address this argument
5 shows that the "privacy" arguments are nothing more than a smokescreen. Plaintiffs
6 do not believe that this step is necessary – but as a last resort, it alleviates any of
7 defendants' so-called privacy concerns, while assuring that evidence demonstrating
8 the actual uses of defendants' website will be preserved. Defendants also fail to
9 explain why the privacy concerns would not be resolved by recourse to an attorneys'
10 eyes only designation under the protective order, as would be the normal approach.
11 See J. Stip. 24:8-14 (citing cases).

12 Finally, no legitimate First Amendment concerns are present here. It is
13 undisputed that copyright infringement itself is not protected speech. See *A&M*
14 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001). And the
15 information plaintiffs are seeking here would not reveal the identities of individual
16 users, only their IP addresses. In the unlikely event plaintiffs ever needed to take
17 the additional step of seeking discovery from Internet Service Providers to learn the
18 real world identities of users from those IP addresses, the subpoena process would
19 provide the requisite safeguards. In the very cases cited by defendants, see J. Stip.
20 38:1-8, courts have unequivocally held that copyright plaintiffs may seek discovery
21 of infringers' identities notwithstanding any First Amendment concerns.⁴

22 _____
23 (continued from previous page)

24 [REDACTED]
25 [REDACTED] March 20, 2007 Pozza Decl. Ex. 2, 3 (emphasis added).

26 ⁴ See, e.g., *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257, 260-67
27 (D.D.C. 2003), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *Sony Music*
28 *Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2004).

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Dated: March 20, 2007

Respectfully submitted,

JENNER & BLOCK LLP

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1 **PROOF OF SERVICE**

2 I, Vicki S. Henderson, the undersigned, declare that:

3 I am employed in the County of Los Angeles, State of California, over the age of
4 18, and not a party to this cause. My business address is 10100 Santa Monica Boulevard,
5 Suite 2200, Los Angeles, California 90067-4120.

6 On March 20, 2007, I served a true copy of the **PLAINTIFFS' SUPPLEMENTAL**
7 **MEMORANDUM AND DECLARATION OF DUANE C. POZZA IN SUPPORT OF**
8 **PLAINTIFFS' MOTION FOR AN ORDER (1) REQUIRING DEFENDANTS TO**
9 **PRESERVE AND PRODUCE CERTAIN SERVER LOG DATA, AND (2) FOR**
10 **EVIDENTIARY SANCTIONS** on the parties in this cause by placing the above named
11 document in a sealed envelope addressed as set forth below, or on the attached service list.
12 I caused each such envelope, with postage thereon fully prepaid, to be deposited for
13 collection and mailing with the United States Postal Service in accordance with Loeb &
14 Loeb LLP's ordinary business practices.

15 Ira P. Rothken
16 ROTHKEN LAW FIRM
17 3 Hamilton Landing, Suite 224
18 Novato, CA 94949

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19 I am readily familiar with Loeb & Loeb LLP's practice for collecting and processing
20 correspondence for mailing with the United States Postal Service and Overnight Delivery
21 Service. That practice includes the deposit of all correspondence with the United States
22 Postal Service and/or Overnight Delivery Service the same day it is collected and
23 processed.

24 I certify that I am employed in the office of a member of the bar of this Court at
25 whose direction the service was made.

26 I declare under penalty of perjury that the foregoing is true and correct.

27 Executed on March 20, 2007, at Los Angeles, California.

28 
Vicki S. Henderson