

1 Mark G. Tratos (Bar No. 1086)
tratosm@gtlaw.com
2 Thomas F. Kummer (Bar No. 1200)
kummert@gtlaw.com
3 Kara B. Hendricks (Bar No. 7743)
hendricksk@gtlaw.com
4 GREENBERG TRAUERIG, LLP
5 3773 Howard Hughes Parkway
Suite 400 North
6 Las Vegas, Nevada 89169
7 Telephone: (702) 792-3773
8 Facsimile: (702) 792-9002
Counsel for Plaintiff

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 Teller, an individual,
12 Plaintiff,
13 v.
14 Gerard Dogge (p/k/a Gerard Bakardy), an
individual.
15 Defendant.
16
17
18

Case No. 2:12-cv-00591-JCM-GWF

**EMERGENCY MOTION FOR
MIRROR IMAGING OF DOGGE’S
HARD DRIVE, AND FOR
STIPULATED CONSENT TO OBTAIN
VIDEOS FROM YOUTUBE**

19 Plaintiff Teller (“Teller”), by and through undersigned counsel, hereby moves this Court for
20 permission to mirror image Defendant Gerard Dogge’s (“Dogge”) hard drive, and for an order
21 directing Dogge to consent to the disclosure of the videos at issue from YouTube. This Motion is
22 based upon the pleadings and papers on file herein, the following Memorandum of Points and
23 Authorities, as well as the declaration and exhibits submitted in support thereof, and any oral

24 ///
25 ///
26 ///
27 ///
28 ///

GREENBERG TRAUERIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

1 argument allowed by this Court at the time of hearing, all of which are incorporated herein by this
2 reference.

3 DATED this 30th day of April, 2013.

4 GREENBERG TRAUIG, LLP

6 /s/ Mark G. Tratos

Mark G. Tratos (Bar No. 1086)
7 Thomas F. Kummer (Bar No. 1200)
8 Kara B. Hendricks (Bar No. 7743)
3773 Howard Hughes Pkwy, Suite 400 North
Las Vegas, NV 89169

9 Counsel for Plaintiff

12 **FED. R. CIV. P. 37(a) and LOCAL RULE 26-7(a) CERTIFICATION**

13 Counsel for Plaintiff has attempted to confer with Mr. Dogge, who is appearing *pro se*, in
14 good faith in an attempt to resolve the discovery disputes raised in this Motion without the need for
15 Court intervention. *See* Declaration of Mark G. Tratos (“Tratos Dec.”), attached hereto as **Exhibit 1**.
16 Mr. Dogge has not responded to various emails and letters attempting to address the issues raised in
17 this Motion. *See id.*, ¶ 3. Accordingly, counsel has been unable to resolve the matter without court
18 action, necessitating the instant Motion.

19 DATED this 30th day of April, 2013.

21 GREENBERG TRAUIG, LLP

23 /s/ Mark G. Tratos

Mark G. Tratos (Bar No. 1086)
24 Thomas F. Kummer (Bar. No. 1200)
25 Kara B. Hendricks (Bar No. 7743)
3773 Howard Hughes Pkwy, Suite 400 North
26 Las Vegas, NV 89169
Counsel for Plaintiff

GREENBERG TRAUIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND FACTUAL BACKGROUND**

3 **A. Overview**

4 This motion concerns the purportedly “missing” videos that are at the heart of this lawsuit for
5 copyright infringement and unfair competition. As the Court is aware, famous Las Vegas magician
6 Teller (of Penn & Teller) sued Belgian entertainer and magician Gerard Dogge. These claims arise
7 largely out of two videos Dogge posted on YouTube of Dogge performing Teller’s copyrighted work
8 “Shadows,” together with an offer to sell the illusion with props and instructions for around \$3,000.
9 There is no doubt that Dogge’s version is based upon Teller’s illusion, as Dogge states in the
10 comments to the video that “I’ve seen the great Penn & Teller performing a similar trick...” and
11 Dogge “tagged” the videos with key word tags including “Penn” and “Teller.” The print
12 advertisement Dogge created to advertise the illusion says “Better Than in Las Vegas.” Truly,
13 because of the overwhelming evidence, there is no doubt of Dogge’s intentions to capitalize on
14 Teller’s name, goodwill, and associated creative efforts in developing the unique and now well
15 known illusion.

16 **B. The Videos Mysteriously Go Missing**

17 While the parties’ discussions regarding possible resolution were about to begin, Teller
18 submitted DMCA takedown notices to YouTube, and YouTube removed the videos. As the matter
19 proceeded, Dogge made it clear that he had retained the videos. After the case was filed, in his
20 initial disclosures, served on December 31, 2012, Dogge stated that he would “provide the Court a
21 copy of the videos at issue, the video that was removed from YouTube by the Plaintiff ‘The Rose
22 and her Shadow’ and a copy of Teller’s video, ‘Shadows.’” *See* Dogge’s Initial Disclosures (without
23 exhibits), attached hereto as **Exhibit 2**. The initial disclosures were served by email at 12:27 p.m.
24 *See* Email attaching Initial Disclosures, attached hereto as **Exhibit 3**. After reviewing Dogge’s
25 initial disclosures, Teller’s counsel sent an email – at 2:00 p.m. the same day – to Dogge requesting
26 the videos. *See* December 31, 2012 Email to Dogge, attached hereto as **Exhibit 4**. Teller received
27 no response. *See* Tratos Dec. **Exhibit 1, ¶¶ 4-5**.

28 ///

1 On January 11, 2013, Teller served his first round of discovery, including a request for
2 production of documents that requested the YouTube videos. When Dogge responded, he stated that
3 he “prefers” not to produce them. Accordingly, Teller followed up with a letter outlining the various
4 discovery deficiencies, including the failure to produce the videos. See February 15, 2013 letter,
5 attached hereto as **Exhibit 5**. Mindful of the fact that Dogge is proceeding *pro se*, Teller followed
6 up with two more letters, dated February 22nd and 27th. See February 22, 2013 letter, attached
7 hereto as **Exhibit 6**; and February 27, 2013 letter, attached hereto as **Exhibit 7**.

8 After repeated attempts to obtain the missing videos without court intervention, Teller finally
9 filed a motion to compel on April 6, 2013. See Doc. No. 57. Dogge opposed the motion, and, after
10 explaining the reasons that Dogge believes he should not have to produce the video, Dogge stated
11 that he “did search but can’t find the video, it may be possible that Defendant erased the video from
12 his computer in his last PC cleanup.” See Dogge’s Opposition, Doc. No. 59, at 2. On April 9, 2013,
13 the parties held a meet and confer conference in regards to the second round of discovery. In that
14 conference, the parties again discussed the videos. See Transcript of Meet and Confer Conference,
15 attached hereto as **Exhibit 8**. Dogge again represented that he would not be producing the video, as
16 it was no longer on his computer. See *id.*, at pp. 18-19.

17 This Court granted the motion to compel with respect to the videos on April 10, 2013, stating

18 Defendant is cautioned that the willful or negligent destruction of
19 documents or things after Defendant has been placed on notice of
20 their relevancy can subject him to the imposition of sanctions for
21 the failure to preserve the documents or things. In view of
22 Defendant’s somewhat equivocal statement, the Court will afford
23 Defendant the opportunity to produce the video(s) requested by
24 Plaintiff in Request No. 4. If Defendant is, in fact, unable to
25 produce the video, he must provide a reasonably detailed
26 explanation regarding the erasure or destruction of the video.

27 See Order on Motion to Compel, Doc. No. 62. The Court ordered that Dogge produce the video by
28 April 26, 2013. See *id.*

29 Teller has also investigated subpoenaing YouTube for the videos at issue. However, Teller
30 believes that it is possible that YouTube may choose to withhold the videos pending consent of
31 Dogge to release them. To that end, Teller requested that Dogge consent to YouTube releasing the
32 videos at issue. See Letter dated April 15, 2013, attached hereto as **Exhibit 9**. To date, Dogge has

1 not responded; accordingly, Teller followed up with a second letter dated April 22, 2013. *See* Letter
 2 dated April 22, 2013, attached hereto as **Exhibit 10**. Teller also requested that Dogge consent to
 3 having a mirror image taken of his hard drive. *Id.* Again, Teller has received no response.

4 On April 26, 2013, Dogge did not produce the video or any other discovery as ordered by
 5 this Court. However, due to Dogge’s recent statement that he did in fact delete the videos during a
 6 hard drive cleanup, Teller brings the instant motion for mirror imaging so that anything remaining on
 7 the computer can be examined and extracted, if possible. Teller makes this request on an expedited
 8 basis because Dogge has already admitted to – whether negligently or willfully – destroying key
 9 evidence in this litigation. Further, once a file is deleted, although it remains on the hard drive, it
 10 may be treated as “empty space” and written over by the computer. Accordingly, Teller respectfully
 11 requests that this Court order a mirror image of Dogge’s hard drive as soon as possible.¹ Teller also
 12 respectfully requests that this Court order Dogge to stipulate to YouTube releasing the now-removed
 13 videos to Teller.

14 **II. LEGAL ARGUMENT**

15 **A. This Court Should Order a Mirror Imaging of Dogge’s Hard Drive**

16 Courts have permitted a party to mirror image the opposing party’s hard drive pursuant to
 17 Federal Rule 26(b)(2), where, as here, there have been “discrepancies or inconsistencies in the
 18 responding party’s discovery responses.” *See Ameriwood Industries, Inc. v. Liberman*, 2006 WL
 19 3825291 (E.D. Mo. 2006). “Information stored on a computer is discoverable, and the ‘only
 20 restriction in this discovery is that the producing party be protected against the undue burden and
 21 expense and/or invasion of privileged [or private] matter.” *See United Factory Furniture Corp. v.*
 22

23
 24 ¹ “A mirror image is an exact duplicate of the entire hard drive, and includes all the scattered clusters
 25 of the active and deleted files and the slack and free space.” *See Ameriwood Industries, Inc. v.*
 26 *Liberman*, 2006 WL 3825291, *1 n. 3 (E.D.Mo. 2006), *quoting U.S. v. Triumph Capital Group,*
 27 *Inc.*, 211 F.R.D. 31, 48 (D.Conn.2002). An expert trained in the area of data recovery produces a
 28 mirror image of the computer at issue by going to the location of the computer and performing the
 imaging there. The expert then recovers as much data as possible.

1 *Alterwitz*, 2012 WL 1155741, *4 (D. Nev. 2012), quoting *Playboy Enterprises v. Welles*, et al., 60
2 F.Supp.2d 1050 (S.D.Cal.1999). A court should consider “(1) the needs of the case, (2) the amount
3 in controversy, (3) the importance of the issues at stake, (4) the potential for finding relevant
4 material and (5) the importance of the proposed discovery in resolving the issues” in weighing the
5 benefit and the burden of the discovery. *Id.* “It is not unusual for a court to enter an order requiring
6 the mirror imaging of the hard drives of any computers that contain documents responsive to an
7 opposing party’s request for production of documents.” *See Balboa Threadworks, Inc. v. Stucky*,
8 2006 WL 763668, *3 (D. Kan. 2006).

9 Here, this Court has already determined that the videos at issue are relevant evidence and has
10 ordered Dogge to produce them. *See* April 10, 2013 Court’s Order, Doc No. 62. Dogge has
11 changed his explanations but has refused thus far to do so. There can be no doubt that the videos are
12 essential to the case, as they depict the infringing performance and the offer to sell the illusion. Even
13 Dogge himself had previously stated that he intended to make his defense by having the trier of fact
14 view the videos. The amount in controversy is significant; it is at least in the hundreds of thousands
15 of dollars. Defendant is liable for statutory damages and attorneys’ fees under the Copyright Act for
16 his willful infringement, *see* 17 U.S.C. §§ 504, 505, and Defendant may also be liable for an
17 undetermined amount as a result of the unfair competition claim. *See, e.g.*, Gilson on Trademarks §
18 7.02 (noting circumstances in which unfair competition is grounds for monetary relief). The issues
19 at stake are of great importance. In addition to ensuring that evasive discovery conduct and
20 spoliation are not rewarded, this case involves the blatant theft of another’s intellectual property,
21 followed by an attempt to sell the same to the world on YouTube. There is significant potential that
22 Mr. Dogge’s computer contains relevant material – this is not a situation where a party is seeking
23 documents or information that may or may not have existed in the first place.² Instead, Dogge has

24
25
26 ² As the *Ameriwood* court explained, courts have been cautious in permitting mirror imaging where
27 the request is broad in nature and “the connection between the computers and the claims in the
28 lawsuit are unduly vague or unsubstantiated in nature.” *See Ameriwood*, 2006 WL 3825291, at *4.

1 | claimed to have the videos as recently as December 31, 2012. Relatively little time has passed since
2 | then; with assistance from a forensic expert, there is a chance that the information that has been
3 | deleted (if, in fact, it has been deleted) could be recovered. However, time is of the essence, as once
4 | a file is deleted, although it remains on the hard drive, it may be treated as “empty space” and
5 | written over by the computer. As to the final factor, the importance of the proposed discovery to
6 | resolving the issues, the videos are arguably the most important evidence in the case. There can be
7 | no doubt as to the videos’ probative value. As noted in prior pleadings, the Court or the jury will be
8 | able to view the videos of Dogge’s illusion and Teller’s illusion and compare them for purposes of
9 | the substantial similarity element of copyright infringement. Each of these factors weighs in favor of
10 | permitting a mirror image.

11 | Several other factors also weigh in favor of permitting a mirror image to be taken. First,
12 | Dogge’s privacy interests will be protected, as Teller agrees to treat any findings as “Confidential.”
13 | As in *United Factory*, the Court may order that the expert who actually takes the mirror image of the
14 | hard drive will not personally view or retain custody of the image. Dogge will not have to transport
15 | his computer, as the expert will do the imaging at Dogge’s home (or wherever the computer is
16 | located).³ Finally, there will be no undue cost burden to Dogge, as Teller will pay for all costs

18 |
19 | For example, the *Ameriwood* court cautioned that “a party may not inspect the physical hard drives
20 | of a computer merely because the party wants to search for additional documents responsive to the
21 | party’s document requests,” but noted that “where the computer itself has been used to commit the
22 | wrong that is the subject of the lawsuit, certain items on the hard drive may be discoverable.” *Id.*
23 | Here, the computer itself was used to store and upload the infringing videos to YouTube, and was
24 | likely used to edit the video to the length Dogge sought and to add text, such as Dogge’s email
25 | contact information and “Easy to Perform,” which appeared at the end of the video. A mirror
26 | image will permit a forensic expert to attempt to recover the video, and will reveal if and when
27 | Dogge deleted the video.

28 | ³ Although Dogge may argue that a forensic examination without mirror imaging would be less
intrusive, Teller respectfully disagrees. A forensic examination would require access to Dogge’s
computer for longer than a mirror imaging procedure. Further, it would be much more costly to
Teller, as it would require Teller’s forensic expert to travel to Belgium to perform the forensic
examination, as opposed to having the mirror imaging done by a Belgian computer specialist and
then the actual examination performed in the United States.

1 associated with obtaining the mirror image. Courts routinely permit mirror imaging where the
 2 circumstances of the case warrant it. *See Balboa Threadworks, Inc. v. Stucky*, 2006 WL 763668, *3
 3 (D. Kan. 2006) (“It is not unusual for a court to enter an order requiring the mirror imaging of the
 4 hard drives of any computers that contain documents responsive to an opposing party’s request for
 5 production of documents.”); *see e.g., United Factory Furniture Corp. v. Alterwitz*, 2012 WL
 6 1155741; *Genworth Financial Wealth Management, Inc. v. McMullan*, 267 F.R.D. 443 (D. Conn.
 7 2010); *Coburn v. PN II, Inc.*, 2008 WL 879746 (D. Nev. 2008); *Playboy Enterprises v. Welles, et al.*,
 8 60 F.Supp.2d 1050. This is certainly one of those cases. Accordingly, this Court should order
 9 mirror imaging of Dogge’s hard drive.

10 **B. This Court Should Order Dogge to Stipulate to YouTube’s Release of the Videos**
 11 **to Teller.**

12 This Court should also order Dogge to stipulate to YouTube’s release of the videos to Teller,
 13 as the videos are in Dogge’s possession, custody, or control. Federal Rule of Civil Procedure 34,
 14 governing the production of documents, permits any party to request from any other party
 15 documents within that party’s possession, custody, or control. *See Fed. R. Civ. P. 34.* “If a
 16 responding party has a legal right to control the requested documents, including a right to obtain
 17 them on demand, that party must produce them, even if they are located beyond the jurisdiction of
 18 the court.” *See 10A Fed. Proc., L. Ed. § 26:624.* “Documents within a party’s possession, custody,
 19 or control are discoverable under Rule 34 even if they belong to nonparties or are also in the
 20 possession and control of a nonparty.” *Id.*

21 A number of courts have determined that where a party can prevent the disclosure of
 22 documents by withholding consent, that party has an affirmative duty to provide consent to comply
 23 with the Federal Rules. *See, e.g., Flagg v. City of Detroit*, 252 F.R.D. 346, 363 (E.D. Mich. 2008).
 24 In cases - arguably such as this one - where the Stored Communications Act (“SCA”) applies,⁴

25
 26
 27 ⁴ The Stored Communications Act, part of the Electronic Communications Privacy Act, prohibits
 28 companies who provide “remote computing service to the public” from “knowingly divulg[ing] to

1 courts have held that although the third party cannot disclose the contents of a party's
 2 communications directly, Federal Rule 34 mandates that the requestee give consent. As the *Flagg*
 3 court explains,

4 ...a party has an obligation under Rule 34 to produce materials within its
 5 control, and this obligation carries with it the attendant duty to take the
 6 steps necessary to exercise this control and retrieve the requested
 7 documents. Moreover, the Court already has explained that a party's
 8 disinclination to exercise this control is immaterial, just as it is immaterial
 9 whether a party might prefer not to produce documents in its possession or
 10 custody. Because the SkyTel archive includes communications that are
 potentially relevant and otherwise discoverable under the standards of
 Rule 26(b)(1), and because the City has "control" over this archive within
 the meaning of Rule 34(a)(1) and the case law construing this term, **the
 City must give any consent that might be required under the SCA...**

11 *See Flagg*, 252 F.R.D. 346, 363 (emphasis added). The *Flagg* court points out that "were it
 12 otherwise, a party could readily avoid its discovery obligations by warehousing its documents with a
 13 third party under strict instructions to release them only with the party's 'consent.'" *Id.* *See also*
 14 *Juror No. 1 v. Superior Court*, 142 Cal.Rptr.3d 151 (Cal. App. 2012) ("If the court can compel Juror
 15 Number One to produce the information, it can likewise compel Juror Number One to consent to the
 16 disclosure by Facebook. The SCA has no bearing on this issue.")

17 Likewise, in *Mintz v. Mark Bartelstein & Associates, Inc.*, the court explained that because
 18 the contents of certain text messages were within a party's "control" – meaning that as the
 19 originator, the party had the legal right to obtain the text messages – that party could request the text
 20 messages from the electronic communications service without offending the Stored Communications
 21 Act. *See* 885 F.Supp.2d 987, 993-95 (C.D. Cal. 2012). Accordingly, that court suggested that the
 22 party seeking the content of text messages simply serve a Rule 34 document request upon the
 23

24
 25 any person or entity the contents" of any electronic communication stored on behalf of their
 26 subscribers. *See* 18 U.S.C. 2702(a)(2). Assuming for the sake of argument that the SCA applies
 27 here, obtaining the lawful consent of the originator or the subscriber is an exception to the SCA
 28 that would permit YouTube to disclose the video.

1 opposing party.

2 Similarly, although outside of the SCA context, in the recent *F.T.C. v. Sterling Precious*
3 *Metals, LLC*, the Court ordered Sterling, as a customer of its web host who “surely has the
4 contractual right to obtain [information relevant to the operation of Sterling’s website],” to either
5 obtain the information from its web host or provide consent so that the plaintiff could obtain the
6 information. 2013 WL 1442180, *8-9 (S.D.Fla. 2013).

7 As in these cases, there is no doubt that Dogge had, and perhaps still has, control over the
8 YouTube videos, in that he controls whether YouTube releases the videos by withholding or
9 granting his consent. As the *Flagg* court noted, “a party’s disinclination to exercise this control is
10 immaterial, just as it is immaterial whether a party might prefer not to produce documents in its
11 possession or custody.” See *Flagg*, 252 F.R.D. 346, 363. Accordingly, Teller respectfully requests
12 that this Court order Dogge to provide his consent to Teller so that Teller may obtain the videos from
13 YouTube.

14 **III. CONCLUSION**

15 Teller urgently needs the Court’s assistance to stop Dogge from completely destroying
16 evidence. Even if Dogge did not intentionally destroy the videos and/or other evidence, the evidence
17 can be altered through normal computer use as the computer writes over what it believes to be empty
18 space. Accordingly, it is important to obtain the mirror-imaging as soon as possible to prevent any
19 further spoliation and destruction of this evidence. Teller also respectfully requests that this Court
20 order Dogge to provide the requisite consent to Teller so that Teller may obtain the videos from
21 YouTube.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

1 In light of the foregoing, Teller respectfully requests that this Court GRANT Teller’s Motion
2 for Mirror Imaging of Dogge’s Hard Drive and for Stipulated Consent to Obtain Videos From
3 YouTube.

4 Dated this 30th day of April, 2013

5 GREENBERG TRAUERIG, LLP

6 /s/ Mark G. Tratos

7 Mark G. Tratos (Bar No. 1086)

8 Thomas F. Kummer (Bar No. 1200)

9 Kara B. Hendricks (Bar No. 7743)

3773 Howard Hughes Pkwy, Suite 400 North

Las Vegas, NV 89169

10 Counsel for Plaintiff

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
GREENBERG TRAUERIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on April 30, 2013, service of the foregoing **EMERGENCY MOTION FOR MIRROR IMAGING OF DOGGE'S HARD DRIVE, AND FOR STIPULATED CONSENT TO OBTAIN VIDEOS FROM YOUTUBE** was made this date through the Court's CM/ECF electronic filing system, via electronic mail and United States mail, postage prepaid to:

Gerard Dogge
Hoevensebaan 2
2950 Kapellen
Belgium - Europe
Gerard-bakardy@hotmail.com

/s/ Cynthia L. Ney
An employee of Greenburg Traurig

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002