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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 STRIKE 3 HOLDINGS, LLC,  
12 Plaintiff,  
13 v.  
14 JOHN DOE subscriber assigned IP  
15 address 45.16.231.149,  
16 Defendant.

Case No.: 21cv1726-BAS-LL

**ORDER GRANTING EX PARTE  
APPLICATION FOR LEAVE TO  
SERVE A THIRD PARTY  
SUBPOENA PRIOR TO A RULE  
26(f) CONFERENCE**

**[ECF No. 4]**

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18 Currently before the Court is Plaintiff's November 4, 2021 "Ex-Parte Application  
19 for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference." ECF No. 4.  
20 Because the Defendant has not been identified, no opposition or reply briefs have been  
21 filed. Having reviewed Plaintiff's application and all supporting documents, the application  
22 is **GRANTED** for the reasons set forth below.

23 **I. BACKGROUND**

24 Plaintiff alleges it "is the owner of original, award winning adult motion pictures  
25 featured on its subscription-based adult websites." ECF No. 4-1 at 7. On October 6, 2021,  
26 Plaintiff filed a complaint against John Doe subscriber assigned IP address 45.16.231.149  
27 alleging copyright infringement. ECF No. 1 ("Compl."). Plaintiff alleges Defendant  
28 illegally infringed by downloading and distributing thirty-one of its copyrighted movies

1 over the BitTorrent file distribution network for an extended period of time. *Id.* at ¶¶ 1, 4.  
2 Plaintiff describes the BitTorrent network as a “system designed to quickly distribute large  
3 files over the Internet.” *Id.* at ¶ 18. Plaintiff further alleges that Defendant, who “attempted  
4 to hide this theft by infringing Plaintiff’s content anonymously,” can be identified by his  
5 or her Internet Service Provider (“ISP”), AT&T U-verse, through his or her IP address  
6 45.16.231.149. *Id.* at ¶ 5.

7 On November 4, 2021, Plaintiff filed the instant application. ECF No. 4. Plaintiff  
8 seeks an order from the Court allowing it to serve a subpoena to Defendant’s ISP seeking  
9 Defendant’s true name and address pursuant to Federal Rule of Civil Procedure 45 so that  
10 Plaintiff may serve Defendant and prosecute the claims in its complaint. ECF No. 4-1 at 8.

## 11 **II. LEGAL STANDARD**

### 12 **A. The Cable Privacy Act**

13 The Cable Privacy Act generally prohibits cable operators from disclosing  
14 personally identifiable information regarding subscribers without the prior written or  
15 electronic consent of the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may  
16 disclose such information if the disclosure is made pursuant to a court order and the cable  
17 operator provides the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable  
18 operator is defined as “any person or group of persons (A) who provides cable service over  
19 a cable system and directly or through one or more affiliates owns a significant interest in  
20 such cable system, or (B) who otherwise controls or is responsible for, through any  
21 arrangement, the management and operation of such a cable system.” 47 U.S.C. § 522(5).

### 22 **B. Early Discovery**

23 A party may not seek discovery from any source before the Rule 26(f) conference  
24 unless that party first obtains a stipulation or court order permitting early discovery. Fed.  
25 R. Civ. P. 26(d)(1). Courts in the Ninth Circuit apply the “good cause” standard in deciding  
26 whether to permit early discovery. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D.  
27 273, 276 (N.D. Cal. 2002) (adopting the conventional standard of “good cause” in  
28 evaluating a request for expedited discovery). Good cause exists “where the need for

1 expedited discovery, in consideration of the administration of justice, outweighs the  
2 prejudice to the responding party.” Id. Good cause for expedited discovery has been found  
3 in cases involving claims of infringement and unfair competition. Id. In infringement cases,  
4 expedited discovery is frequently limited to allowing plaintiffs to identify Doe defendants.  
5 See Cell Firm Holdings, LLC v. Doe-72.220.126.76, Case No.: 16cv2234-BEN (BLM),  
6 2016 WL 4793161, at \*3 (S.D. Cal. Sept. 14, 2016) (granting motion for expedited  
7 discovery in infringement case to obtain only the true name and address of the Doe  
8 defendant); Quad Int’l, Inc. v. Does 1-6, No. 2:12-cv-2631 LKK KJN, 2013 WL 142865,  
9 at \*4 (E.D. Cal. Jan. 11, 2013) (granting motion for expedited discovery in infringement  
10 case to obtain Doe defendant’s name and contact information); UMG Recordings, Inc. v.  
11 Doe, No. C-08-03999 RMW, 2008 WL 4104207, at \*3 (N.D. Cal. Sept. 4, 2008) (granting  
12 leave to take expedited discovery in infringement case for documents that would reveal the  
13 identity and contact information for each Doe defendant).

14 District courts in the Ninth Circuit apply a three-factor test for determining whether  
15 good cause exists to allow for expedited discovery to identify certain defendants. Columbia  
16 Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999). First, the plaintiff  
17 should “identify the missing party with sufficient specificity such that the Court can  
18 determine that the defendant is a real person or entity who could be sued in federal court.”  
19 Id. at 578. Second, the plaintiff must describe “all previous steps taken to locate the elusive  
20 defendant” to ensure that plaintiff has made a good faith effort to identify the defendant.  
21 Id. at 579. Third, plaintiff should establish that its lawsuit could withstand a motion to  
22 dismiss. Id.

### 23 **III. DISCUSSION**

#### 24 **A. Identification of Missing Party with Sufficient Specificity**

25 For the Court to grant Plaintiff’s motion, Plaintiff must first identify the Doe  
26 defendant with sufficient specificity to enable the Court to determine that the Doe  
27 defendant is a real person subject to the Court’s jurisdiction. Id. at 578. District courts in  
28 the Ninth Circuit have determined that a plaintiff identifies Doe defendants with sufficient

1 specificity by providing a unique IP address on the day of the alleged infringement, and by  
2 using “geolocation technology” to trace the IP addresses to a physical point of origin. See  
3 Strike 3 Holdings, LLC v. Doe, Case No.: 18cv231-BEN (BLM), 2018 WL 1071711, at  
4 \*2 (S.D. Cal. Feb. 23, 2018) (citations omitted); OpenMind Sols., Inc. v. Does 1-39, No.  
5 C 11-3311 MEJ, 2011 WL 4715200, at \*2 (N.D. Cal. Oct. 7, 2011) (finding plaintiff met  
6 its burden to identify the Doe defendants with sufficient specificity by identifying the  
7 unique IP addresses of individuals engaged in BitTorrent protocol and using geolocation  
8 technology to trace the IP addresses to a point of origin within the state of California); Pink  
9 Lotus Entm’t, LLC v. Does 1-46, No. C-11-02263 HRL, 2011 WL 2470986, at \*3 (N.D.  
10 Cal. June 21, 2011) (same). Others have found that merely identifying the IP addresses  
11 assigned to the defendants on the day of the purported infringement is sufficient to satisfy  
12 the first factor. See, e.g., First Time Videos, LLC v. Does, No. C 11-01675 LB, 2011 WL  
13 1431619, at \*2 (N.D. Cal. Apr. 14, 2011) (“First, First Time Videos has identified the Doe  
14 defendants with sufficient specificity by submitting a chart listing each of the defendants  
15 by the IP address assigned to them on the day it alleges the particular defendant engaged  
16 in the infringing conduct.”). This Court finds the first standard persuasive.

17 Here, Plaintiff provides a declaration from David Williamson, an information and  
18 systems management consultant, currently employed as Plaintiff’s Chief Technology  
19 Officer. ECF No. 4-2, Declaration of David Williamson (“Williamson Decl.”), ¶¶ 11-12.  
20 Mr. Williamson states that he “oversaw the design, development, and overall creation of  
21 the infringement detection system called VXN Scan,” which Plaintiff owns and uses to  
22 “identify the IP addresses used by individuals infringing Plaintiff’s movies via the  
23 BitTorrent protocol.” Id. ¶ 40. Mr. Williamson explains the VXN Scan system in detail,  
24 which involves, in part, a proprietary BitTorrent client that emulates the behavior of a  
25 standard BitTorrent client by repeatedly downloading data pieces from peers within a  
26 BitTorrent network that are distributing Plaintiff’s movies. Id. ¶¶ 52-55. Mr. Williamson  
27 states that other components of VXN Scan retrieve and store identical copies of every  
28 network packet that is sent and received by the proprietary BitTorrent client, which

1 includes the IP address, date and time of the network transaction, the port number and  
2 BitTorrent client used to accomplish the network transaction. Id. ¶¶ 57-66. It also includes  
3 the “Info Hash” associated with the infringing computer file, which reflects the metadata  
4 of the underlying .torrent file being shared without authorization. Id. ¶ 54. Mr. Williamson  
5 further explains that VXN Scan also extracts infringing transaction data from each packet  
6 capture (“PCAP”), connects with Maxmind geolocation database to determine the ISP that  
7 assigned a particular IP address as well as the city and state the IP address traces to, and  
8 summarizes the extracted infringing transaction data in a tabular format. Id. ¶¶ 74-81.

9 Plaintiff also provides the declaration of Patrick Paige, a computer forensics expert  
10 retained by Plaintiff to analyze and retain forensic evidence captured by its VXN Scan  
11 system. ECF No. 4-2, Declaration of Patrick Paige (“Paige Decl.”), ¶¶ 3-9, 12-13. Mr.  
12 Paige states that he reviewed a PCAP from Plaintiff containing information related to a  
13 transaction that occurred on September 10, 2020 involving IP address 45.16.231.149. Id. ¶  
14 16. Mr. Paige attests that in reviewing the PCAP, he was able to confirm that the PCAP is  
15 evidence of a recorded transaction with 45.16.231.149 on September 14, 2021 and it  
16 correlates to a movie owned by Plaintiff. Id. ¶¶ 18-19.

17 Next, Plaintiff provides a declaration from Emilie Kennedy, Plaintiff’s in-house  
18 general counsel, in which Ms. Kennedy states that Plaintiff inputted IP address  
19 45.16.231.149 into Maxmind’s Geolocation Database prior to filing its complaint and prior  
20 to filing the instant motion, and both times, IP address 45.16.231.149 traced to a location  
21 in San Diego, California.<sup>1</sup> ECF No. 4-2, Declaration of Emilie Kennedy (“Kennedy  
22 Decl.”), ¶¶ 6-7.

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26 <sup>1</sup> Mr. Williamson stated that the VXN Scan system connects with the Maxmind database  
27 automatically to add the ISP that assigned the IP address, as well as the city and state it  
28 traces to, to a tabular output of infringing transaction data. Williamson Decl. ¶¶ 74-79. The  
VXN Scan system thus appears to trace the IP address to a city and state at or close to the  
time of infringement.

1 Finally, Plaintiff provides a declaration from Susan Stalzer, an employee of Plaintiff  
2 who reviews the content of its motion pictures and who was tasked with reviewing contents  
3 of the infringing files identified in Exhibit A to the complaint and comparing them to  
4 Plaintiff's original works to confirm they were identical, strikingly similar or substantially  
5 similar. ECF No. 4-2, Declaration of Susan Stalzer, ("Stalzer Decl."), ¶¶ 3, 7-11. Ms.  
6 Stalzer also states she used "American Registry for Internet Numbers ('ARIN') to confirm  
7 that the ISP AT&T U-verse did own Defendant's IP address at the time of the  
8 infringements, and hence has the relevant information to identify Doe Defendant." Id. ¶ 12.  
9 The dates of the alleged infringing activity in Exhibit A range from July 7, 2017 through  
10 June 15, 2021. ECF No 1-2.

11 Because Plaintiff has provided the Court with the unique IP address and the dates  
12 and times of connection plus the methodology for obtaining them, the name of the ISP  
13 and/or cable operator that provided internet access for the user of the identified IP address,  
14 and used Maxmind geolocation technology to trace the IP address to this District at or close  
15 to the time of the infringement and prior to filing the complaint and this motion, the Court  
16 finds that Plaintiff has made a sufficient showing that Doe Defendant with IP address  
17 45.16.231.149 likely resolves to a real person or entity with a physical address in this  
18 District. See Criminal Prods., Inc. v. Doe-72.192.163.220, No. 16-CV-2589 WQH (JLB),  
19 2016 WL 6822186, at \*2-3 (S.D. Cal. Nov. 18, 2016); 808 Holdings, LLC, 2012 WL  
20 12884688, at \*4.

### 21 **B. Previous Attempts to Locate Defendant**

22 Second, Plaintiff must describe all prior attempts it has made to identify the Doe  
23 defendant in a good faith effort to locate and serve the Doe defendant. See Columbia Ins.  
24 Co., 185 F.R.D. at 579. Plaintiff states that it "diligently attempted to correlate Defendant's  
25 IP address to Defendant by searching for Defendant's IP address" on various internet  
26 search tools; by reviewing sources of authority such as legislative reports and informational  
27 technology guides for other means of identification; and by consulting with computer  
28 investigators and cyber security experts. ECF No. 4-1 at 14. Plaintiff states that despite

1 these efforts, it is unable to obtain the identity of the alleged infringer because although  
2 publicly available data enables Plaintiff to identify the ISP, city, and state associated with  
3 an IP address, it does not allow Plaintiff to obtain the name of the subscriber. Id. Plaintiff  
4 further states that Defendant’s IP address is “assigned to Defendant by his or her [ISP],  
5 which is the only party with the information necessary to identify Defendant by correlating  
6 the IP address with John Doe’s identity.” Id. at 7. Based on the above, the Court finds that  
7 Plaintiff has made a good faith effort to identify and locate the Doe defendant.

8 **C. Whether Plaintiff Can Withstand a Motion to Dismiss**

9 “[P]laintiff must make some showing that an act giving rise to civil liability actually  
10 occurred and that the [pre-service] discovery is aimed at revealing specific identifying  
11 features of the person or entity who committed that act.” Columbia Ins. Co. v.  
12 seescandy.com, 185 F.R.D. 573, 580 (N.D. Cal. 1999). “[A] plaintiff who claims copyright  
13 infringement must show: (1) ownership of a valid copyright; and (2) that the defendant  
14 violated the copyright owner’s exclusive rights under the Copyright Act.” Ellison v.  
15 Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citations omitted). “To prove a claim of  
16 direct copyright infringement, a plaintiff must show that he owns the copyright and that  
17 the defendant himself violated one or more of the plaintiff’s exclusive rights under the  
18 Copyright Act.” Id. (citation omitted).

19 Plaintiff states that it is the exclusive rights holder of the copyrighted works at issue  
20 and that they are registered with the United States Copyright Office. See ECF No. 4-1 at  
21 16; Compl. at ¶¶ 1-3, 31-33; ECF No. 1-2 (Exhibit A); Williamson Decl. ¶ 13; Stalzer Decl.  
22 ¶¶ 7-10. Plaintiff alleges Defendant infringed Plaintiff’s copyrighted works by  
23 downloading, copying, and distributing Plaintiff’s works using the BitTorrent file  
24 distribution network. See ECF No. 4-1 at 16; Compl. at ¶ 4; ECF No. 1-2. Plaintiff further  
25 alleges that it did not authorize, permit, or consent to Defendant’s copying or distributing  
26 its works. ECF No. 4-1 at 16; Compl. at ¶¶ 44, 51. Accordingly, Plaintiff has alleged the  
27 prima facie elements of direct copyright infringement and could withstand a motion to  
28 dismiss. See Ellison, 357 F.3d at 1076; Columbia Ins. Co., 185 F.R.D. at 579-80.

1           **IV. CONCLUSION**

2           Once Plaintiff learns the subscriber’s identity, it cannot rely on a bare allegation that  
3 he or she is the registered subscriber of an IP address associated with infringing activity to  
4 state a plausible claim for direct or contributory copyright infringement. Cobbler Nev.,  
5 LLC v. Gonzales, 901 F.3d 1142, 1144 (9th Cir. 2018); Strike 3 Holdings, LLC v. Doe  
6 70.95.181.51, No. 19-CV-73-WQH-WVG, 2019 WL 777416, at \*3 (S.D. Cal. Feb. 21,  
7 2019). However, at this point in the litigation, Plaintiff has made an adequate showing of  
8 the need to subpoena Defendant’s ISP. See Glacier Films (USA), Inc. v. Turchin, 896 F.3d  
9 1033, 1036 (9th Cir. 2018) (observing that the district court’s case management order  
10 permitting “limited discovery from an Internet Service Provider to establish a potential  
11 infringer’s identity” was part of a “practical solution” to manage a large number of peer-  
12 to-peer copyright infringement cases); Strike 3 Holdings, LLC v. Doe, No. 2:18-cv-02637-  
13 MCE-CKD, 2019 WL 935390, at \*4-5 (E.D. Cal. Feb. 26, 2019); Strike 3 Holdings, LLC  
14 v. Doe 70.95.181.51, 2019 WL 777416 at \*3. Thus, finding good cause, the Court  
15 **GRANTS** Plaintiff’s application for expedited discovery and **ORDERS** the following:

16           1. Plaintiff may serve a subpoena pursuant to Federal Rule of Civil Procedure  
17 45 on AT&T U-verse that seeks only the true name and address of the subscriber assigned  
18 IP address 45.16.231.149 during the time period of the allegedly infringing conduct  
19 described in Plaintiff’s complaint. Plaintiff shall not subpoena additional information.

20           2. Plaintiff may only use the disclosed information for the purpose of protecting  
21 its rights in pursuing this litigation.

22           3. Within fourteen calendar days after service of the subpoena, AT&T U-verse  
23 shall notify the subscriber that his or her identifying information has been subpoenaed by  
24 Plaintiff. The subscriber whose identity has been subpoenaed shall have thirty calendar  
25 days from the date of such notice to challenge the disclosure by filing an appropriate  
26 pleading with this Court contesting the subpoena.

27           4. If AT&T U-verse wishes to move to quash the subpoena, it shall do so before  
28 the return date of the subpoena. The return date of the subpoena must allow for at least



1 forty-five days from service to production. If a motion to quash or other customer challenge  
2 is brought, AT&T U-verse shall preserve the information sought by Plaintiff in the  
3 subpoena pending resolution of such motion or challenge.

4 5. Plaintiff shall serve a copy of this Order with any subpoena obtained and  
5 served pursuant to this Order to AT&T U-verse. AT&T U-verse, in turn, must provide a  
6 copy of this Order along with the required notice to the subscriber whose identity is sought  
7 pursuant to this Order.

8 6. Once Plaintiff learns the identity of the subscriber(s), Plaintiff shall provide a  
9 copy of this Order to that person or those persons when Plaintiff first makes contact with  
10 the subscriber regarding this case. At that same time, Plaintiff shall also provide the  
11 subscriber(s) a copy of the Ninth Circuit’s opinion in Cobbler Nevada, LLC v. Gonzales,  
12 901 F.3d 1142 (9th Cir. 2018). Once both have been provided to the subscriber(s), counsel  
13 for Plaintiff shall immediately file a declaration that confirms these have been provided to  
14 the subscriber.

15 7. Plaintiff and AT&T U-verse shall henceforth refer to the subscriber as  
16 “John/Jane Doe” and shall redact and omit from all future filings all information that  
17 identifies the subscriber personally. Such identifying information includes the subscriber’s  
18 name and address, unless and until the subscriber becomes a defendant in the above-  
19 captioned case. Plaintiff and AT&T U-verse shall refer to the subscriber generically in any  
20 filings and attach—under seal—a separate exhibit that includes the subscriber’s identifying  
21 information.<sup>2</sup>

22 8. The subscriber may initially proceed anonymously as “John/Jane Doe” until  
23 such time that there is sufficient proof before the Court that the subscriber is connected  
24 with the alleged infringement.

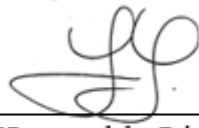
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27 <sup>2</sup> Before filing any document under seal, the parties shall follow and abide by applicable  
28 law, including Civil Local Rule 79.2, Section 2.j. of the Electronic Case Filing  
Administrative Policies and Procedures, and chambers rules.

1           9.     Plaintiff may not engage in any settlement discussions with the subscriber  
2 unless and until the subscriber has been served with the Complaint and the documents set  
3 forth in paragraph (6) above.

4           **IT IS SO ORDERED.**

5 Dated: November 18, 2021



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7 Honorable Linda Lopez  
8 United States Magistrate Judge

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