

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AF HOLDINGS LLC,

Plaintiff,

No. 2:12-cv-2204-JAM-EFB

vs.

JOHN DOE,

ORDER

Defendant.

Presently before the court is plaintiff's ex parte application for leave to serve a third party subpoena prior to the Rule 26 conference. Dckt. No. 8. For the reasons stated herein, the request will be granted.

I. BACKGROUND

Plaintiff, a producer of adult entertainment content, has filed this action against defendant John Doe, alleging claims for copyright infringement, contributory infringement, and negligence. *See generally* Compl., Dckt. No. 1. Plaintiff's complaint alleges that John Doe "knowingly and illegally reproduced and distributed Plaintiff's copyrighted [adult entertainment video entitled "Sexual Obsession"] by acting in concert with others via the BitTorrent file sharing protocol and, upon information and belief, continues to do the same." *Id.* ¶ 1. Plaintiff alleges that "Defendant's actual name is unknown to Plaintiff" and instead "is known to Plaintiff only by an

1 Internet Protocol address ('IP address'), which is a number assigned to devices, such as
2 computers, that are connected to the Internet.” *Id.* ¶ 4. According to plaintiff, “[i]n the course of
3 monitoring Internet-based infringement of its copyrighted content, Plaintiff’s agents observed
4 unlawful reproduction and distribution occurring over IP address 75.45.103.31 via the BitTorrent
5 file transfer protocol.” *Id.* Plaintiff contends that it “cannot ascertain Defendant’s actual identity
6 without limited expedited discovery.” *Id.*

7 II. DISCUSSION

8 On November 1, 2012, plaintiff filed an ex parte application for leave to take expedited
9 discovery prior to the Rule 26 conference in order to obtain defendant John Doe’s identity.
10 Dckt. No. 8; *see also* Hansmeier Decl., Dckt. No. 8-1. Specifically, plaintiff seeks to issue a
11 subpoena to AT&T Internet Services, the third party internet service provider (“ISP”) that
12 provided internet access to John Doe. Dckt. No. 8 at 2; Hansmeier Decl. ¶¶ 24, 28. Plaintiff
13 contends that it has gathered evidence of infringing activities, *id.* ¶¶ 16-27, and that when
14 presented with the IP address at issue and the date and time of infringing activity, AT&T Internet
15 Services should be able to identify the name and address of its subscriber, John Doe, because
16 “[a]n ISP generally records the time and dates that it assigns each IP address to a subscriber and
17 maintains for a period of time a record of such an assignment to a subscriber in logs maintained
18 by the ISP.” *Id.* ¶ 22. However, plaintiff argues that “ISPs typically keep log files of subscriber
19 activities for only limited periods of time—sometimes for as little as months or even
20 weeks—before erasing the data.” Dckt. No. 8 at 2 (citing Hansmeier Decl. ¶¶ 22, 28-29).

21 Plaintiff contends that its request for expedited discovery should be granted because
22 plaintiff’s need for limited early discovery outweighs any prejudice to defendant, and that ex
23 parte relief is proper since there is no known defendant with whom to confer and plaintiff’s
24 discovery request is directed at a third party. Dckt. No. 8 at 2. Specifically, plaintiff contends
25 that without knowing defendant’s identity, plaintiff “cannot name anyone in the complaint or
26 serve them with process.” *Id.* at 4. Plaintiff also argues that the ISP subscriber information “is

1 on the verge of permanent destruction,” and that when that information is destroyed, “Plaintiff
2 will have no ability to identify John Doe, and thus will be unable to prosecute its copyright
3 infringement claims.” *Id.* Plaintiff also argues that the need for limited early discovery
4 outweighs any prejudice to defendant since the request is limited in scope (plaintiff only seeks
5 basic identifying information), defendant has a minimal expectation of privacy in his basic
6 subscriber information, and the First Amendment is not a shield for copyright infringement. *Id.*
7 at 6-10. Finally, plaintiff contends ex parte relief is proper since there is no known defendant
8 with whom to confer. *Id.* at 10-11.

9 Federal Rule of Civil Procedure 26(d)(1) provides that “[a] party may not seek discovery
10 from any source before the parties have conferred as required by Rule 26(f), except in a
11 proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by
12 these rules, by stipulation, or by court order.” Fed. R. Civ. P. 26(d)(1). Here, because plaintiff
13 does not know the identity of defendant John Doe, the parties have not yet met and conferred
14 under Rule 26(f). Therefore, plaintiff requests that the court authorize expedited discovery.

15 Courts in the Ninth Circuit apply a “good cause” test in deciding whether to permit
16 expedited discovery before the Rule 26(f) conference.¹ *Semitoal, Inc. v. Tokyo Electron Am.,*
17 *Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002); *see also Am. LegalNet, Inc. v. Davis*, 673 F. Supp.
18 2d 1063, 1066 (C.D. Cal. 2009); *In re Countrywide Financial Corp. Derivative Litig.*, 542 F.
19 Supp. 2d 1160, 1179 (C.D. Cal. 2008); *Matson & Isom Technology Consulting v. Dell Inc.*, 2008
20 WL 3863447 (E.D. Cal. Aug. 19, 2008); *Qwest Commc’ns Int’l, Inc.*, 213 F.R.D. 418, 419 (D.
21 Colo. 2003) (The “party seeking expedited discovery in advance of [the] Rule 26(f) conference
22 has the burden of showing good cause for the requested departure from usual discovery

23
24 ¹ “Courts are split as to whether a party seeking expedited discovery must satisfy a ‘good
25 cause’ or ‘reasonableness’ standard or the more stringent standard set forth in *Notaro v. Koch*, 95
26 F.R.D. 403, 405 (S.D.N.Y. 1982), which largely tracks the standard required for obtaining a
preliminary injunction.” *See Special Situations Cayman Fund, L.P. v. Dot Com Entm’t Grp.,*
Inc., 2003 WL 23350128, at *1 n.7 (W.D.N.Y. Dec. 5, 2003) (detailing the split). However,
courts in the Ninth Circuit have traditionally applied the “good cause” standard.

1 procedures.”). “Good cause exists ‘where the need for expedited discovery, in consideration of
2 the administration of justice, outweighs the prejudice to the responding party.’” *In re*
3 *Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d at 1179 (quoting *Semitoool, Inc.*, 208
4 F.R.D. at 276). The court must make this evaluation in light of “the entirety of the record . . .
5 and [examine] the reasonableness of the request in light of all the surrounding circumstances.”
6 *Semitoool, Inc.*, 208 F.R.D. at 275 (citation & quotation marks omitted) (emphasis removed); *Am.*
7 *Legalnet, Inc.*, 673 F. Supp.2d at 1067.

8 Good cause for expedited discovery is frequently found in cases involving claims of
9 infringement and unfair competition or in cases where the plaintiff seeks a preliminary
10 injunction. *Semitoool, Inc.*, 208 F.R.D. at 276; *Pod-Ners, LLC v. N. Feed & Bean of Lucerne Ltd.*
11 *Liability Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002). Recently, several courts have found good
12 cause to allow expedited discovery to ascertain the identities of Doe defendants in copyright
13 infringement actions. *See, e.g., Arista Records LLC v. Does 1-43*, 2007 WL 4538697, at *1
14 (S.D. Cal. Dec. 20, 2007); *SBO Pictures, Inc. v. Does 1-3036*, 2011 WL 6002620 (N.D. Cal.
15 Nov. 30, 2011) (authorizing expedited discovery as to one of the Doe defendants and dismissing
16 the remaining Doe defendants); *Hard Drive Prods., Inc. v. Does 1-130*, 2011 WL 5573960 (N.D.
17 Cal. Nov. 16, 2011) (same); *AF Holdings LLC v. Does 1-97*, 2011 WL 2912909 (N.D. Cal. July
18 20, 2011) (same); *Pac. Century Int’l Ltd. v. Does 1-101*, 2011 WL 2690142 (N.D. Cal. July 8,
19 2011) (same); *AF Holdings LLC v. Does 1-96*, 2011 WL 5864174 (N.D. Cal. Nov. 22, 2011)
20 (authorizing expedited discovery as to the 96 Doe defendants); *Berlin Media Art E.K. v. Does 1-*
21 *146*, 2011 WL 4056167 (E.D. Cal. Sept. 12, 2011) (authorizing expedited discovery as to the 146
22 Doe defendants); *but see Hard Drive Prods., Inc. v. Doe*, 2012 WL 90412 (E.D. Cal. Jan. 11,
23 2012) (denying request for expedited discovery where plaintiff sought to depose an individual
24 that plaintiff was able to identify); *Pac. Century Int’l Ltd. v. Does 1-101*, 2011 WL 5117424
25 (N.D. Cal. Oct. 27, 2011) (denying request for expedited discovery).

26 ///

1 For example, in *Arista Records LLC*, the plaintiffs alleged that unidentified defendants
2 had used an online media distribution system to download and distribute plaintiffs' copyrighted
3 works to the public without permission. *Arista Records LLC*, 2007 WL 4538697, at *1.
4 Because the plaintiffs were only able to identify each defendant by a unique internet protocol
5 address assigned to that defendant, plaintiffs filed an ex parte application seeking leave to serve
6 immediate discovery on a third-party ISP to identify the Doe defendants' true identities. *Id.* The
7 court found good cause to allow expedited discovery based on the plaintiffs' prima facie
8 showing of infringement, the risk that the ISP would not long preserve the information sought,
9 the narrow tailoring of the requests to the minimum amount of information needed to identify the
10 defendants without prejudicing their rights, and the fact that the expedited discovery would
11 substantially contribute to moving the case forward. *Id.* The court further noted that, without
12 such discovery, plaintiffs could not identify the Doe defendants and would not be able to pursue
13 their lawsuit to protect their copyrighted works from infringement. *Id.*

14 Other courts have specifically noted that “[i]n this particular context, the court must
15 balance ‘the need to provide injured parties with an [sic] forum in which they may seek redress
16 for grievances’ against ‘the legitimate and valuable right to participate in online forums
17 anonymously or pseudonymously . . . without fear that someone who wishes to harass or
18 embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to
19 discover their identity.’” *Hard Drive Prods., Inc.*, 2011 WL 5573960, at *1 (quoting *Columbia*
20 *Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)); *see also Hard Drive Prods.,*
21 *Inc. v. Does 1-90*, 2012 WL 1094653, at *7 (N.D. Cal. Mar. 30, 2012) (stating that “the court
22 will not assist a plaintiff who seems to have no desire to actually litigate but instead seems to be
23 using the courts to pursue an extrajudicial business plan against possible infringers (and innocent
24 others caught up in the ISP net)”²).

25
26 ² Nothing in the record presently supports that plaintiff is using the court to “pursue an
extrajudicial business plan,” but the court notes some growing concern among district courts

1 Here, plaintiff has demonstrated good cause to conduct the expedited discovery
2 requested. Since John Doe is the only defendant asserted in the complaint, plaintiff cannot
3 proceed with this lawsuit without obtaining John Doe’s identity. *UMG Recordings, Inc. v. Does*
4 *1-4*, 2006 WL 1343597, at *1 (N.D. Cal. Apr. 19, 2006). Plaintiff’s representations presently
5 support that the IP address identified by plaintiff for John Doe – 75.45.103.31 – is associated
6 with a particular individual, and that the discovery sought will facilitate identification of, and
7 service of the summons and complaint on, that individual. Further, as plaintiff contends in its
8 application, there is a risk that the ISP used by John Doe may destroy the information plaintiff

9 _____
10 about these sorts of expedited discovery matters. For example, a judge in the Central District of
11 California recently granted plaintiff’s motion for expedited discovery and permitted expedited
12 discovery as to one Doe defendant, but severed the remaining nine defendants from the case and
13 concluded his order with the following:

14 **C. The economics of pornographic copyright lawsuits**

15 The Court is familiar with lawsuits like this one. [Citations omitted.]
16 These lawsuits run a common theme: plaintiff owns a copyright to a
17 pornographic movie; plaintiff sues numerous John Does in a single action
18 for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to
19 obtain the identities of these Does; if successful, plaintiff will send out
20 demand letters to the Does; because of embarrassment, many Does will
21 send back a nuisance-value check to the plaintiff. The cost to the plaintiff:
22 a single filing fee, a bit of discovery, and stamps. The rewards: potentially
23 hundreds of thousands of dollars. Rarely do these cases reach the merits.

24 The federal courts are not cogs in a plaintiff’s copyright-enforcement
25 business model. The Court will not idly watch what is essentially an
26 extortion scheme, for a case that plaintiff has no intention of bringing to
27 trial. By requiring Malibu to file separate lawsuits for each of the Doe
28 Defendants, Malibu will have to expend additional resources to obtain a
29 nuisance-value settlement—making this type of litigation less profitable.
30 If Malibu desires to vindicate its copyright rights, it must do it the
31 old-fashioned way and earn it.

32 *Malibu Media, LLC v. John Does 1 through 10*, 2012 U.S. Dist. LEXIS 89286, at *8-9 (C.D.
33 Cal. June 27, 2012); *see also Malibu Media, LLC v. Does 1-5*, 2012 WL 2001968, at *1
34 (S.D.N.Y. June 1, 2012) (permitting limited discovery but stating that the court “shares the
35 growing concern about unscrupulous tactics used by certain plaintiffs, particularly in the
36 adult films industry, to shake down the owners of specific IP addresses from which
37 copyrighted adult films were allegedly downloaded.”) (citing, among other authorities, *In re*
38 *BitTorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765 (E.D.N.Y. May 1,
39 2012)).

1 seeks and thereby preclude plaintiff from discovering John Doe’s true identity. Finally,
2 copyright infringement claims “necessarily involve[] irreparable harm to Plaintiff [], as a
3 copyright holder is presumed to suffer irreparable harm as a matter of law” when the ambit of its
4 copyright is invaded. *Id.* Accordingly, plaintiff’s request to subpoena AT&T Internet Services
5 to obtain limited information needed to identify defendant John Doe (name, addresses, telephone
6 numbers, and email addresses) will be granted.

7 **III. CONCLUSION**

8 Accordingly, IT IS HEREBY ORDERED that:

9 1. Plaintiff’s ex parte application for leave to take expedited discovery, Dckt. No. 8, is
10 granted.

11 2. Plaintiff may immediately serve a Rule 45 subpoena on AT&T Internet Services to
12 obtain the following information about defendant John Doe (based on the IP address listed for
13 him in the complaint – 75.45.103.31): name, address, telephone number, and email address.³ A
14 copy of this order shall be attached to the subpoena.

15 3. AT&T Internet Services will have thirty (30) days from the date a copy of this Order
16 and a copy of the subpoena are served upon it to serve John Doe with a copy of the subpoena and
17 a copy of this order. AT&T Internet Services may serve John Doe using any reasonable means,
18 including written notice sent to Doe’s last known address, transmitted either by first-class mail
19 or via overnight service. AT&T Internet Services and John Doe each shall have 30 days from
20 the date of service to file any motions in this court contesting the subpoena (including a motion
21 to quash or modify the subpoena). If that 30-day period lapses without John Doe or AT&T
22 Internet Services contesting the subpoena, AT&T Internet Services shall have 14 days to produce
23 to plaintiff the information responsive to the subpoena with respect to John Doe.

24
25 ³ Plaintiff has not made an adequate showing as to why it needs to discover the Media
26 Access Control number associated with John Doe on an expedited basis. Plaintiff should be able
to serve the summons and complaint on John Doe without acquiring the Media Access Control
number.


1 4. AT&T Internet Services shall confer with plaintiff before assessing any charge in
2 advance of providing the information requested in the subpoena. If AT&T Internet Services
3 elects to charge for the costs of production, AT&T Internet Services shall provide plaintiff with a
4 billing summary and cost reports.

5 5. AT&T Internet Services shall preserve all subpoenaed information pending AT&T
6 Internet Services' delivery of such information to plaintiff or the final resolution of a timely filed
7 and granted motion to quash the subpoena with respect to such information.

8 6. Any information disclosed to plaintiff in response to the subpoena may not be used for
9 any improper purpose and may only be used for protecting its rights as set forth in the complaint.

10 SO ORDERED.

11 Dated: November 6, 2012.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE