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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AF HOLDINGS LLC,)	Civil No. 12cv01525 LAB(RBB)
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S
)	RENEWED EX PARTE APPLICATION
v.)	FOR LEAVE TO TAKE EXPEDITED
)	DISCOVERY [ECF NO. 5]
JOHN DOE,)	
)	
Defendant.)	
_____)	

Plaintiff's "Renewed Ex Parte Application for Leave to Take Expedited Discovery" was filed on August 13, 2012 [ECF No. 5]. Because no Defendant has been named or served, no opposition or reply briefs have been filed. For the reasons discussed below, the Renewed Ex Parte Application is **GRANTED**.

I. PROCEDURAL HISTORY

On June 20, 2012, Plaintiff AF Holdings, LLC ("AF Holdings") filed a Complaint with attachments [ECF No. 1]. The Plaintiff asserts copyright infringement claims against John Doe ("Defendant"). (Compl. 7-10, ECF No. 1.) Defendant allegedly copied and distributed a video that AF Holdings purports to be the registered owner of, and hold the exclusive rights to. (Id. at 1-

1 2.) First, the Plaintiff alleges a claim for direct copyright
2 infringement, stating that on May 23, 2012, Defendant reproduced
3 and distributed the copyrighted video through the Internet without
4 Plaintiff's authorization. (Id. at 1, 7.) Second, AF Holdings
5 pleads contributory copyright infringement, asserting that
6 Defendant illegally obtained the video and assisted others in doing
7 the same. (Id. at 1, 7-8.) Third, Plaintiff contends Defendant
8 was negligent in failing to adequately secure his or her Internet
9 access to prevent its unlawful use by others. (Id. at 9.)

10 Eight days after filing the Complaint, on June 28, 2012, AF
11 Holdings filed an "Ex Parte Application for Leave to Take Expedited
12 Discovery." (Pl.'s Ex Parte Appl. 1, ECF No. 3.) The Plaintiff
13 sought permission to take "early discovery" from the Doe
14 Defendant's Internet Service Provider ("ISP"), Cox Communications,
15 to ascertain the Defendant's identity. (Id. at 1-2; see id.
16 Attach. #1 Decl. Hansmeier 10 ("Plaintiff needs early discovery
17 from the ISPs, so that the name and address of the accused
18 infringer can be obtained by Plaintiff").)

19 The "Ex Parte Application for Leave to Take Expedited
20 Discovery" was denied on July 25, 2012 [ECF No. 4]. The Court
21 determined that emergency consideration was not necessary because
22 Cox Communications maintains subscriber information for three
23 years. (Order Den. Pl.'s Ex Parte Appl. 4, ECF No. 4.) The Court
24 also held that AF Holdings failed to discuss whether its request
25 was a proper subject for ex parte consideration. (Id. at 3.)

26 On August 13, 2012, Plaintiff filed a "Renewed Ex Parte
27 Application for Leave to Take Expedited Discovery" [ECF No. 5].
28 There, AF Holdings argues that its original ex parte application

1 seeking expedited discovery was proper and that the "IP assignment
2 logs" it seeks will be destroyed within six months. (Pl.'s Renewed
3 Ex Parte Appl. 2-3, ECF No. 5.) The Court finds that this document
4 is more properly construed as an application for reconsideration of
5 the Court's July 25, 2012 "Order Denying Plaintiff's Ex Parte
6 Application for Leave to Take Expedited Discovery" [ECF No. 4].

7 **II. APPLICATION FOR RECONSIDERATION**

8 Motions or applications for reconsideration of prior orders
9 are brought pursuant to Civil Local Rule 7.1(i). S.D. Cal. Civ. R.
10 7.1(i). In an application for reconsideration, a party seeking the
11 same relief as that previously denied must set forth "(1) when and
12 to what judge the [prior] application was made, (2) what ruling or
13 decision or order was made thereon, and (3) what new or different
14 facts and circumstances are claimed to exist which did not exist,
15 or were not shown, upon such prior application." Id. at 7.1(i)(1).

16 Here, Plaintiff seeks the same relief (expedited discovery)
17 that was previously denied. (Pl.'s Renewed Ex Parte Appl. 1, ECF
18 No. 5; Order Den. Pl.'s Ex Parte Appl. 3, ECF No. 4.) It contends
19 that its original ex parte application was denied by this Court
20 because AF Holdings failed to demonstrate that its request should
21 be considered on an ex parte basis, and because the subscriber
22 information did not face "imminent destruction." (Pl.'s Renewed Ex
23 Parte Appl. 1, ECF No. 5.) Accordingly, Plaintiff has provided the
24 information required for reconsideration pursuant to subsections
25 one and two of Local Rule 7.1(i)(1). Next, Plaintiff must prove
26 that new or different circumstances merit reconsideration of the
27 Court's ruling.

28 //

1 **A. "New or Different Facts and Circumstances"**

2 **1. Whether the application was a proper subject for ex parte**
3 **consideration**

4 AF Holdings maintains that its original application was
5 properly designated as "ex parte" because Defendant's identity is
6 unknown, and he therefore cannot be put on notice of the
7 application. (Id. at 2.) Currently, Defendant is only known by
8 his IP address. (Id.) "The only way Plaintiff can ascertain the
9 Defendant's identity is to issue a subpoena to Defendant's Internet
10 Service Provider, which is the sole entity that is in possession of
11 Defendant's identifying information." (Id.) Plaintiff concludes
12 that because there is no known party to oppose the application, ex
13 parte relief is appropriate. (Id.)

14 In the Order Denying Plaintiff's Ex Parte Application for
15 Leave to Take Expedited Discovery, the Court observed, "AF Holdings
16 does not discuss whether its request is a proper subject for ex
17 parte consideration or why the regular noticed motion procedures
18 must be bypassed." (Order Den. Pl.'s Ex Parte Application for
19 Leave 3, ECF No. 4.) In Plaintiff's Renewed Ex Parte Application,
20 AF Holdings attempts to address these shortcomings.

21 AF Holdings makes many of the same statements in its second
22 ex parte application as it did in the first. (Compare Pl.'s Ex
23 Parte Appl. 4, 10-11, ECF No. 3 (stating that Plaintiff cannot name
24 or serve an unknown Defendant; AF Holdings needs the identifying
25 information sought in its motion; and John Doe's identity is
26 unknown); id. Attach. #1 Decl. Hansmeier 9 (stating that the only
27 information known about John Doe is his IP address) with Pl.'s
28 Renewed Ex Parte Appl. 2, ECF No. 5 (stating that Defendant's

1 identity is unknown; Defendant can only be identified by his IP
2 address; Defendant cannot be put on notice or oppose the motion;
3 and a subpoena is needed to identify the Defendant).) The thrust
4 of Plaintiff's argument is that because it did not know the
5 identity of John Doe, it did not believe that the Court's regular
6 noticed motion procedure should apply. Even so, an ex parte
7 application seeks priority over regularly scheduled motions, so the
8 basis for granting Plaintiff that priority must be considered.

9 **2. Whether the "IP assignment logs" face imminent**
10 **destruction**

11 Next, Plaintiff asserts that it did not misrepresent in its
12 original application that the information it seeks faces imminent
13 destruction. (Id. at 3.) The original ex parte application was
14 denied on the basis that no emergency relief was required because
15 Cox Communications maintains subscriber information for three
16 years. (Id. (citing Order Den. Pl.'s Ex Parte Appl. 4, ECF No.
17 4).) AF Holdings now clarifies that it seeks the "IP Assignment
18 Logs" which Cox Communications only maintains for six months.
19 (Pl.'s Renewed Ex Parte Appl. 3, ECF No. 5 (citing id. Ex. A).)
20 "Several months have already passed since Plaintiff observed the
21 Defendant's infringing conduct over his IP address." (Id. (citing
22 Compl., ECF No. 1).) AF Holdings urges that the information it
23 seeks is therefore "under imminent threat of destruction." (Id.)

24 As discussed in the Court's prior order, "Ex parte
25 applications are a form of emergency relief that will only be
26 granted upon an adequate showing of good cause or irreparable
27 injury to the party seeking relief." Clark v. Time Warner Cable,
28 No. CV 07-1797-VBF(RCx), 2007 U.S. Dist. LEXIS 100716, at *2 (C.D.

1 Cal. May 3, 2007) (citing Mission Power Eng'g Co. v. Cont'l Cas.
2 Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995)). The moving party
3 must be "without fault" in creating the need for ex parte relief or
4 establish that the "crisis [necessitating the ex parte application]
5 occurred as a result of excusable neglect." Id. An ex parte
6 application seeks to bypass the regular noticed motion procedure;
7 consequently, the party requesting ex parte relief must establish a
8 basis for giving the application preference. See id. United
9 States District Court Southern District of California Civil Local
10 Rule 7.1(e) outlines the procedures for filing regular motions.
11 Kashani v. Adams, No. 08cv0268 JM(AJB), 2009 U.S. Dist. LEXIS
12 34153, at *4 (S.D. Cal. Apr. 21, 2009) (citing S.D. Cal. Civ. R.
13 7.1(e)). Ex parte proceedings are reserved for emergency
14 circumstances. Id.

15 Plaintiff essentially argues that new or different facts and
16 circumstances exist because the relevant information will be
17 destroyed in six months rather than three years. (Pl.'s Renewed Ex
18 Parte Appl. 3, ECF No. 5.) It alleges that Defendant John Doe
19 illegally downloaded Plaintiff's video on May 23, 2012. (See
20 Compl. 6, ECF No. 1.) Because the Internet Service Provider
21 maintains Internet Protocol address log files for 180 days, AF
22 Holdings satisfies the standard for ex parte relief. See Clark,
23 2007 U.S. Dist. LEXIS 100716, at *2; see also Mission Power Eng'g
24 Co., 883 F. Supp. at 492 ("In other words, [the ex parte
25 application] must show why the moving party should be allowed to go
26 to the head of the line in front of all other litigants and receive
27 special treatment.") Ordinarily, six months is adequate time for a
28 noticed motion to be briefed and ruled upon. "'Ex parte

1 applications are not intended to save the day for parties who have
2 failed to present requests when they should have" Mission
3 Power Eng'g Co., 883 F. Supp. at 493 (quoting In re Intermagnetics
4 Am. Inc., 101 B.R. 191, 193 (C.D. Cal. 1989)). Nevertheless,
5 Plaintiff's missteps can be attributed to excusable neglect. See
6 Clark, 2007 U.S. Dist. LEXIS 100716, at 2. Accordingly, the
7 request for leave to take expedited discovery will be granted.

8 **III. CONCLUSION**

9 AF Holdings has adequately demonstrated that "new or different
10 facts and circumstances" merit reconsideration of the Court's
11 "Order Denying Plaintiff's Ex Parte Application for Leave to Take
12 Expedited Discovery" [ECF No. 4]. Plaintiff's "Renewed Ex Parte
13 Application for Leave to Take Expedited Discovery" [ECF No. 5] is
14 therefore **GRANTED**. It is granted leave to serve a subpoena on
15 Defendant John Doe's Internet Service Provider to obtain the
16 subscriber's name, address, length of service, and telephone number
17 associated with IP address 68.105.113.37 on May 23, 2012.

18 IT IS SO ORDERED.

19
20 Dated: October 23, 2012


RUBEN B. BROOKS
United States Magistrate Judge

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22 cc: Judge Burns
23 All Parties of Record
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