

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  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DALLAS BUYERS CLUB, LLC, a Texas  
limited liability company,  
  
Plaintiff,  
  
v.  
  
DOE-72.199.251.97,  
  
Defendant.

Case No.: 15cv2033-BAS (DHB)

**ORDER GRANTING PLAINTIFF'S  
EX PARTE MOTION TO EXPEDITE  
DISCOVERY**

**[ECF No. 3]**

On September 11, 2015, Plaintiff Dallas Buyers Club, LLC filed an *Ex Parte* Motion for Expedited Discovery. (ECF No. 3.) Because Defendant has not been named or served, no opposition or reply briefs have been filed. For the reasons discussed below, Plaintiff’s Motion is **GRANTED**.

**I. PROCEDURAL HISTORY**

On September 11, 2015, Plaintiff filed a Complaint against Doe, a subscriber assigned IP address 72.199.251.97 (“Defendant”). (ECF No. 1.) Plaintiff alleges a single cause of action for direct copyright infringement. Plaintiff asserts that it is the registered copyright holder of the motion picture *Dallas Buyers Club*. (See ECF No. 1 at ¶¶ 4, 6.) Plaintiff contends Defendant used the BitTorrent file distribution network to copy and distribute Plaintiff’s copyrighted work through the Internet without Plaintiff’s permission.

1 (ECF No. 1 at ¶ 35.)

2 On September 11, 2015, Plaintiff filed the instant Motion in which Plaintiff seeks  
3 leave to take early discovery to learn the identity of Defendant from his or her Internet  
4 Service Provider (“ISP”), Cox Communications. Specifically, Plaintiff seeks an order  
5 permitting it to serve a Rule 45 subpoena on Cox Communications for the identity of the  
6 account holder assigned to Defendant’s IP address, and for further reasonable discovery  
7 as may be needed.

8 **II. LEGAL STANDARDS**

9 Generally, discovery is not permitted without a court order before the parties have  
10 conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1).  
11 “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to  
12 ensue after filing of the complaint to permit the plaintiff to learn the identifying facts  
13 necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185  
14 F.R.D. 573, 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th  
15 Cir. 1980)). Requests for early or expedited discovery are granted upon a showing by the  
16 moving party of good cause. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D.  
17 273, 275-76 (N.D. Cal. 2002) (applying “the conventional standard of good cause in  
18 evaluating Plaintiff’s request for expedited discovery”).

19 “The Ninth Circuit has held that when the defendants’ identities are unknown at  
20 the time the complaint is filed, courts may grant plaintiffs leave to take early discovery to  
21 determine the defendants’ identities ‘unless it is clear that discovery would not uncover  
22 the identities, or that the complaint would be dismissed on other grounds.’” 808  
23 *Holdings, LLC v. Collective of December 29, 2011 Sharing Hash*, No. 12-cv-0186 MMA  
24 (RBB), 2012 WL 1648838, \*3 (S.D. Cal. May 4, 2012) (quoting *Gillespie*, 629 F.2d at  
25 642). “A district court’s decision to grant discovery to determine jurisdictional facts is a  
26 matter of discretion.” *Columbia Ins.*, 185 F.R.D. at 578 (citing *Wells Fargo & Co. v.*  
27 *Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

28 ///

1 District courts apply a three-factor test when considering motions for early  
2 discovery to identify Doe defendants. *Id.* at 578-80. First, “the plaintiff should identify  
3 the missing party with sufficient specificity such that the Court can determine that  
4 defendant is a real person or entity who could be sued in federal court.” *Id.* at 578.  
5 Second, the plaintiff “should identify all previous steps taken to locate the elusive  
6 defendant” to ensure that the plaintiff has made a good faith effort to identify and serve  
7 process on the defendant. *Id.* at 579. Third, the “plaintiff should establish to the Court’s  
8 satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss.”  
9 *Id.* (citing *Gillespie*, 629 F.2d at 642). Further “the plaintiff should file a request for  
10 discovery with the Court, along with a statement of reasons justifying the specific  
11 discovery requested as well as identification of a limited number of persons or entities on  
12 whom discovery process might be served and for which there is a reasonable likelihood  
13 that the discovery process will lead to identifying information about defendant that would  
14 make service of process possible.” *Id.* at 580.

### 15 III. ANALYSIS

#### 16 A. Identification of Missing Party with Sufficient Specificity

17 First, Plaintiff must identify Defendant with enough specificity to enable the Court  
18 to determine that Defendant is a real person or entity who would be subject to the  
19 jurisdiction of this Court. *Columbia Ins.*, 185 F.R.D. at 578. This Court has previously  
20 determined that “a plaintiff identifies Doe defendants with sufficient specificity by  
21 providing the unique IP addresses assigned to an individual defendant on the day of the  
22 allegedly infringing conduct, and by using ‘geolocation technology’ to trace the IP  
23 addresses to a physical point of origin.” *808 Holdings*, 2012 WL 1648838, at \*4 (quoting  
24 *OpenMind Solutions, Inc. v. Does 1-39*, No. C-11-3311 MEJ, 2011 WL 4715200 (N.D.  
25 Cal. Oct. 7, 2011); *Pink Lotus Entm’t, LLC v. Does 1-46*, No. C-11-02263 HRL, 2011  
26 WL 2470986 (N.D. Cal. June 21, 2011)).

27 Here, Plaintiff has filed a chart that lists the unique IP address corresponding to  
28 Defendant, and the dates and times of the purportedly infringing activity, as well as the

1 city in which the IP address is located. (ECF No. 1-2.) Consequently, Plaintiff has  
2 identified Defendant with sufficient specificity. *See OpenMind Solutions*, 2011 WL  
3 4715200, at \*2 (concluding that plaintiff satisfied the first factor by identifying the  
4 defendants' IP addresses and by tracing the IP addresses to a point of origin within the  
5 State of California); *Pink Lotus Entm't*, 2011 WL 2470986, at \*3 (same). In addition,  
6 Plaintiff has presented evidence that the identified IP address is physically located in this  
7 district. (*See* ECF No. 1-2.)

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

9 Next, Plaintiff must describe all prior steps it has taken to identify the defendant in  
10 a good faith effort to locate and serve him or her. *See Columbia Ins.*, 185 F.R.D. at 579.  
11 Plaintiff states it has been able to identify much about Defendant, including which ISP  
12 provider he or she uses, where he or she is generally located, and what software he or she  
13 used to commit the alleged acts of infringement. (ECF No. 3-1 at 5.) However, Plaintiff  
14 generally maintains that there are no other practical measures available to determine the  
15 actual identity of Defendant. Thus, Plaintiff appears to have obtained and investigated  
16 the available data pertaining to the alleged infringement in a good faith effort to locate  
17 Defendant. *See OpenMind Solutions*, 2011 WL 4715200, at \*3; *MCGIP, LLC v. Does 1-*  
18 *149*, 2011 WL 3607666, \*2 (N.D. Cal. Aug. 3, 2011); *Pink Lotus Entm't*, 2011 WL  
19 2470986, at \*3.

#### 20 **C. Ability to Withstand a Motion to Dismiss**

21 “Finally, to be entitled to early discovery, [Plaintiff] must demonstrate that its  
22 Complaint can withstand a motion to dismiss.” *808 Holdings*, 2012 WL 1648838 at \*5  
23 (citing *Columbia Ins.*, 185 F.R.D. at 579).

##### 24 **1. Ability to State a Claim Upon Which Relief Can Be Granted**

25 In order to establish copyright infringement, a plaintiff must show: (1) ownership  
26 of a valid copyright, and (2) that the defendant violated the copyright owner's exclusive  
27 rights under the Copyright Act. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir.  
28 2004); 17 U.S.C. § 501(a). Here, Plaintiff alleges it owns the registered copyright of the

1 work that Defendant allegedly copied and distributed using the BitTorrent file  
2 distribution network. (ECF No. 1 at ¶¶ 4, 6.) Plaintiff also alleges it did not permit or  
3 consent to Defendant’s copying or distribution of its work. (*Id.* at ¶ 35.) It appears  
4 Plaintiff has stated a prima facie claim for copyright infringement that can withstand a  
5 motion to dismiss.

## 6 **2. Personal Jurisdiction**

7 Plaintiff bears the burden of establishing jurisdictional facts. *See Columbia Ins.*  
8 *Co.*, 185 F.R.D. at 578. Plaintiff’s Complaint indicates that Defendant is located in this  
9 judicial district. (*See* ECF No. 1-2 (showing the IP address associated with Defendant is  
10 located in La Mesa, California). The Complaint also alleges that Defendant’s acts of  
11 copyright infringement occurred using an IP address traced to a physical location in this  
12 district, and that Defendant is believed to reside in California. (ECF No. 1. at ¶ 3, 14.)

13 Therefore, at this early juncture, it appears Plaintiff has alleged sufficient facts to  
14 show it can likely withstand a motion to dismiss for lack of personal jurisdiction because  
15 Defendant’s IP address was traced to a location in this district. *See 808 Holdings*, 2012  
16 WL 1648838 at \*6-7.

## 17 **2. Venue**

18 “The venue of suits for infringement of copyright is not determined by the general  
19 provision governing suits in the federal district courts, rather by the venue provision of  
20 the Copyright Act.” *Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1143 (N.D. Cal. 2007)  
21 (citing 28 U.S.C. § 1400(a); *Lumiere v. Mae Edna Wilder, Inc.*, 261 U.S. 174, 176  
22 (1923)). “In copyright infringement actions, venue is proper ‘in the district in which the  
23 defendant or his agent resides or may be found.’” *Brayton Purcell LLP v. Recordon &*  
24 *Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting 28 U.S.C. § 1400(a)). “The  
25 Ninth Circuit interprets this statutory provision to allow venue ‘in any judicial district in  
26 which the defendant would be amenable to personal jurisdiction if the district were a  
27 separate state.’” *Id.*

28 ///

1 In the Complaint, Plaintiff alleges venue is proper because, although Defendant's  
2 true identity is unknown, Defendant is believed to reside (and therefore can be found in  
3 this district), and a substantial part of the infringing acts complained of occurred in this  
4 district. (ECF No. 1 at ¶ 3, 13.) Defendant appears to have an IP address in this district.  
5 Accordingly, Plaintiff's Complaint can likely survive a motion to dismiss.

6 **D. Specific Discovery Request**

7 Here, Plaintiff requests leave to serve a Rule 45 subpoena on Cox  
8 Communications. Plaintiff indicates the subpoena will be limited to requesting the name  
9 and address of the subscriber associated with Defendant's IP address. The Court finds  
10 this limitation is appropriate. Therefore, the Court determines Plaintiff has shown good  
11 cause to subpoena records from Cox Communication for the identity of the subscriber  
12 assigned to Defendant's IP address. However, once Plaintiff is able to identify and serve  
13 Defendant, the need for early discovery ceases. Therefore, Plaintiff's request for leave to  
14 conduct any further discovery is denied at this time.

15 **E. Cable Privacy Act**

16 Finally, the Court must consider the requirements of the Cable Privacy Act, 47  
17 U.S.C. § 551. The Act generally prohibits cable operators from disclosing personally  
18 identifiable information regarding subscribers without the prior written or electronic  
19 consent of the subscriber. 47 U.S.C. § 551(c)(1). A cable operator, however, may  
20 disclose such information if the disclosure is made pursuant to a court order and the cable  
21 operator provides the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). The  
22 ISP that Plaintiff intends to subpoena in this case is a cable operator within the meaning  
23 of the Act.

24 **IV. CONCLUSION**

25 For the reasons set forth above, Plaintiff's *Ex Parte* Motion for Expedited  
26 Discovery is **GRANTED**, as follows:

27 1. Plaintiff may serve a subpoena on Defendant's ISP, Cox Communications,  
28 seeking the name and address of the subscriber assigned to Defendant's IP address.

1           2.     The subpoena must provide a minimum of forty-five (45) days notice before  
2 any production and shall be limited to one category of documents identifying the  
3 particular subscriber listed on Exhibit 1 to Plaintiff's Complaint. (ECF No. 1-2.) The  
4 requested information should be limited to the name and address of the subscriber. Cox  
5 Communications may seek a protective order if it determines there is a legitimate basis  
6 for doing so.

7           3.     Cox Communications shall have fourteen (14) calendar days after service of  
8 the subpoena to notify the subscriber that his or her identity has been subpoenaed by  
9 Plaintiff. The subscriber whose identity has been subpoenaed shall then have thirty (30)  
10 calendar days from the date of the notice to seek a protective order or file any other  
11 responsive pleading.

12           4.     Plaintiff shall serve a copy of this Order with any subpoena obtained and  
13 served pursuant to this Order to Cox Communications. Cox Communications, in turn,  
14 must provide a copy of this Order along with the required notice to the subscriber whose  
15 identity is sought pursuant to this Order.

16           5.     No other discovery is authorized at this time.

17           **IT IS SO ORDERED.**

18 Dated: September 25, 2015



Hon. David H. Bartick  
United States Magistrate Judge