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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP address  
76.167.77.34,

Defendant.

Case No.: 15CV2928-BTM(BLM)

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

**[ ECF No. 5 ]**

Currently before the Court is Plaintiff’s February 11, 2016 *Ex Parte* MOTION FOR LEAVE TO SERVE A THIRD PARTY SUBPOENA PRIOR TO A RULE 26(f) CONFERENCE. ECF No. 5. Because the Defendant has not been identified, no opposition or reply briefs have been filed. Having reviewed Plaintiff’s motion and all supporting documents, the Court **GRANTS** the motion for the reasons set forth below.

**BACKGROUND**

Plaintiff alleges that it “operates a popular subscription based website where it displays its copyrighted material.” ECF No. 5. at 8. On December 28, 2015, Plaintiff filed a complaint against John Doe alleging direct copyright infringement. ECF No. 1. Plaintiff alleges that

1 Defendant has illegally infringed and distributed several of its copyrighted movies<sup>1</sup> over the  
2 internet. Id. at 1. Plaintiff further alleges that Defendant, who is only known “by his, her, or  
3 its IP Address” infringed Plaintiff’s copyrights through the BitTorrent File Distribution Network.  
4 Id. at 3. Plaintiff describes the BitTorrent File Distribution Network as a “common per-to-peer  
5 file sharing system[] used for distributing large amounts of data, including, but not limited to,  
6 digital movie files.” Id. Plaintiff states that BitTorrent allows its users to interact directly with  
7 one another without the use of an intermediary host and permits the distribution of a large file  
8 without creating a heavy load on an individual source computer or network. Id. Plaintiff further  
9 explains the process of distributing a large file through BitTorrent and Plaintiff notes that the  
10 BitTorrent protocol breaks a file down into several small pieces<sup>2</sup> that are exchanged among  
11 users, which allows an infringer to then collect the individual pieces and reassemble them in a  
12 manner that allows a file to be opened and utilized. Id.

13 On February 11, 2016, Plaintiff filed the instant motion. ECF No. 5. Plaintiff seeks an  
14 order from the Court allowing it to serve a subpoena to Defendant’s Internet Service Provider<sup>3</sup>  
15 (“ISP”) seeking Defendant’s true name and address pursuant to Federal Rule of Civil Procedure  
16 45. Id. at 8.

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21 <sup>1</sup> The movies titles include Made for Each Other, Body Language, Catching the Sun, Keep  
22 Cumming Kylie, Cum Inside the Fantasy Suite, Sexy En Noir, Every Mans Sexy Camping Trip, A  
23 [] Picnic, Competition, Alexis Love Me, Capture Me, Dangerous When Wet, In Love With Little  
24 Caprice, Life in the Fast Lane, Casual Sex, Supermodel Sex, and One Show for Each. ECF No. 1  
at Exh. B.

25 <sup>2</sup>Each piece is assigned a unique cryptographic hash value which is used to properly route the  
26 pieces among BitTorrent users. ECF No. 1. at 3-4. Each complete digital file also has a  
27 cryptographic hash value. Id. at 4. This hash value is used to determine that a file contains all  
of its pieces and is complete. Id.

28 <sup>3</sup> The ISP at issue is Time Warner Cable. ECF No. 5. at 8.

1 **DISCUSSION**

2 **A. The Cable Privacy Act**

3 The Cable Privacy Act generally prohibits cable operators from disclosing personally  
4 identifiable information regarding subscribers without the prior written or electronic consent of  
5 the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may disclose such information  
6 if the disclosure is made pursuant to a court order and the cable operator provides the subscriber  
7 with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable operator is defined as “any person  
8 or group of persons (A) who provides cable service over a cable system and directly or through  
9 one or more affiliates owns a significant interest in such cable system, or (B) who otherwise  
10 controls or is responsible for, through any arrangement, the management and operation of such  
11 a cable system.” 47 U.S.C. § 522(5). Accordingly, Plaintiff seeks an Order instructing Time  
12 Warner Cable to produce documents and information sufficient to identify the user of the  
13 specified IP address.

14 **B. Early Discovery**

15 A party may not seek discovery from any source before the Rule 26(f) conference unless  
16 that party first obtains a stipulation or court order permitting early discovery. Fed. R. Civ. P.  
17 26(d)(1). Courts in the Ninth Circuit apply the “good cause” standard in deciding whether to  
18 permit early discovery. Semitol, Inc. v. Tokyo Electron America, Inc., 208 F.R.D. 273, 276 (N.D.  
19 Cal. 2002) (adopting the conventional standard of “good cause” in evaluating a request for  
20 expedited discovery). Good cause exists “where the need for expedited discovery, in  
21 consideration of the administration of justice, outweighs the prejudice to the responding party.”  
22 Id. Good cause for expedited discovery has been found in cases involving claims of infringement  
23 and unfair competition or in cases where the plaintiff seeks a preliminary injunction. Id. In  
24 infringement cases, expedited discovery is frequently limited to allowing plaintiffs to identify Doe  
25 defendants. See UMG Recordings, Inc. v. Doe, 2008 WL 4104207, \* 3 (N.D. Cal. 2008) (granting  
26 leave to take expedited discovery for documents that would reveal the identity and contact  
27 information for each Doe defendant).

28 District courts in the Ninth Circuit apply a three-factor test when considering motions for

1 expedited discovery to identify certain defendants. Columbia Ins. Co. v. Seescandy.com, 185  
2 F.R.D. 573, 578-80 (N.D. Cal. 1999). First, the plaintiff should “identify the missing party with  
3 sufficient specificity such that the Court can determine that the defendant is a real person or  
4 entity who could be sued in federal court.” Id. Second, the plaintiff must describe “all previous  
5 steps taken to locate the elusive defendant” to ensure that plaintiff has made a good faith effort  
6 to identify the defendant. Id. Third, plaintiff should establish that its lawsuit could withstand a  
7 motion to dismiss. Id.

8 1. Identification of Missing Party with Sufficient Specificity

9 First, Plaintiff must identify the Doe defendant with sufficient specificity to enable the  
10 Court to determine that the Doe defendant is a real person subject to the Court’s jurisdiction.  
11 Plaintiff has provided a declaration stating it retained Excipio GmbH, a German company that  
12 provides forensic investigation services to copyright owners, to monitor the BitTorrent file  
13 distribution network to find IP addresses being used to distribute Plaintiff’s copyrighted works  
14 without authorization. ECF No. 5-3 at 1-2, Declaration of Daniel Susac (“Susac Decl.”). While  
15 working for Excipio, Mr. Susac used forensic software called Network Activity Recording and  
16 Supervision (“NARS”) to scan the BitTorrent network for infringement involving Plaintiff’s  
17 copyrighted materials. Id. at 2. The scan showed that the IP address identified by Plaintiff  
18 transmitted copies or portions of copies of Plaintiff’s copyrighted works. Id. Plaintiff also  
19 provided a declaration from Mr. Patrick Paige, a former detective in the computer crimes unit of  
20 the Palm Beach County Sheriff’s Department and founder of Computer Forensics, LLC. ECF No.  
21 5-4 (“Paige Decl.”). Mr. Paige declares that “[t]he only entity able to correlate an IP address to  
22 a specific individual at a given date and time is the Internet Service Provider.” Id. at 3. Mr.  
23 Paige further declares that “Plaintiff is likely to identify the infringer,” but that Plaintiff must  
24 subpoena that ISP in order to learn the Defendant’s true identity. Id. Finally, Plaintiff states  
25 that it has used “proven IP address geolocation technology which has consistently worked in  
26 similar cases to ensure that the Defendant’s acts of copyright infringement occurred using an  
27 Internet Protocol address (“IP address”) traced to a physical address located within this  
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1 District.”<sup>4</sup> ECF No. 1 at 2; see also ECF No. 5 at 20.

2 Because Plaintiff has provided the Court with the unique IP address and the dates and  
3 time of connection, provided the name of the ISP and/or cable operator that provided Internet  
4 access for the user of the identified IP address, and used geolocation technology, the Court finds  
5 that Plaintiff has made a satisfactory showing that John Doe is a real person or entity behind  
6 the alleged infringing conduct who would be subject to suit in federal court.

7 2. Previous Attempts to Locate Defendants

8 Second, Plaintiff must describe all prior attempts it has made to identify the Doe  
9 defendant in a good faith effort to locate and serve them. Plaintiff retained a private computer  
10 investigator to identify the IP addresses of BitTorrent users who were allegedly reproducing  
11 Plaintiff’s copyrighted material. Susac Decl. Although Plaintiff’s computer investigator obtained  
12 John Doe’s IP address, “[t]he only entity able to correlate an IP address to a specific individual  
13 at a given date and time is the Internet Service Provider.” Paige Decl. at 3. Plaintiff also notes  
14 that it attempted to find Defendant’s IP address by searching on various web search tools such  
15 as Google and reviewing numerous sources of authority. ECF No. 5. at 21. The Court therefore  
16 finds that Plaintiff has made a good faith effort to identify and locate John Doe.

17 3. Whether Plaintiff Can Withstand a Motion to Dismiss

18 a. Copyright infringement

19 “[A] plaintiff who claims copyright infringement must show: (1) ownership of a valid  
20 copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the  
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23 <sup>4</sup> “Some district courts in the Ninth Circuit, including this one, have determined that a plaintiff  
24 identifies Doe defendants with sufficient specificity by providing the unique IP address assigned  
25 to an individual defendant on the [date] of the alleged infringing conduct, and by using  
26 ‘geolocation technology’ to trace the IP address to a physical point of origin.” See Malibu Media,  
27 LLC v. Does 1-19, 2012 WL 2152061, at \* 3 (S.D. Cal. June 12, 2012) (citing Openmind Solutions,  
28 Inc. v. Does 1-39, 2011 WL 4715200, at \* 2 (N.D. Cal. Oct. 7, 2011); Pink Lotus Entm’t v. Does  
1-46, 2011 WL 2470986, at \* 3 (N.D. Cal. June 21, 2011)). Others have found that merely  
identifying the IP addresses assigned to the defendants on the day of the purported infringement  
is sufficient to satisfy the first factor. Id. (citing MCGIP, LLC v. Does 1-149, 2011 WL 3607666,  
at \* 2 (N.D. Cal. Aug. 15, 2011)). Here, Plaintiff has done both. ECF No. 1.

1 Copyright Act.” Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. §  
2 501(a) (2003); Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000)). To prove  
3 a claim of direct copyright infringement, “a plaintiff must show that he owns the copyright and  
4 that the defendant himself violated one or more of the plaintiff’s exclusive rights under the  
5 Copyright Act.” Id. (citation omitted).

6 Plaintiff purports to be the exclusive rights holder of the copyrighted works at issue. ECF  
7 No. 1 at 1, Exh. B. Plaintiff alleges that between January 22, 2015 and November 8, 2015,  
8 Defendant infringed Plaintiff’s copyrighted works by using the BitTorrent File Distribution  
9 Network. ECF Nos. 1 at Exh. B and 5 at 11. Plaintiff further alleges that Defendant downloaded,  
10 copied, and distributed complete copies of Plaintiff’s works without authorization. ECF No. 1 at  
11 5, Exh. A. Accordingly, Plaintiff has alleged the prima facie elements of direct copyright  
12 infringement and could withstand a motion to dismiss these claims. See Columbia Ins. Co., 185  
13 F.R.D. at 579-80.

### 14 CONCLUSION

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16 Having found good cause, the Court **GRANTS** Plaintiff’s motion for expedited discovery.  
17 For the foregoing reasons, it is hereby ordered that:

18 1. Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45, on Time Warner  
19 Cable that seeks only the true name and address of John Doe. Plaintiff may not subpoena  
20 additional information;

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

23 3. Within fourteen (14) calendar days after service of the subpoena, Time Warner  
24 Cable shall notify the subscriber that its identity has been subpoenaed by Plaintiff. The  
25 subscriber whose identity has been subpoenaed shall have thirty (30) calendar days from the  
26 date of such notice to challenge the disclosure by filing an appropriate pleading with this Court  
27 contesting the subpoena;


28 4. If Time Warner Cable wishes to move to quash the subpoena, it shall do so before

1 the return date of the subpoena. The return date of the subpoena must allow for at least forty-  
2 five (45) days from service to production. If a motion to quash or other customer challenge is  
3 brought, Time Warner Cable shall preserve the information sought by Plaintiff in the subpoena  
4 pending resolution of such motion or challenge; and

5 5. Plaintiff shall serve a copy of this Order with any subpoena obtained and served  
6 pursuant to this Order to Time Warner Cable. Time Warner Cable, in turn, must provide a copy  
7 of this Order along with the required notice to the subscriber whose identity is sought pursuant  
8 to this Order.

9 **IT IS SO ORDERED.**

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11 Dated: 2/16/2016

  
12 Hon. Barbara L. Major  
13 United States Magistrate Judge  
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