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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

QOTD Film Investment LTD.,

Plaintiff,

v.

Doe-72.220.214.236,

Defendant.

Case No.: 16-cv-00759-LAB (JLB)

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

[ECF No. 5]

Presently before the Court is Plaintiff’s Ex Parte Motion to Expedite Discovery. (ECF No. 5.) No opposition was filed, as no defendant has been named or served. For the reasons set forth below, Plaintiff’s Motion is **GRANTED**.

I. BACKGROUND

Plaintiff is an affiliate of Benaroya Pictures, a production company with a catalog of major motion pictures. (ECF No. 1 at 2, ¶5.) Plaintiff claims to be the registered copyright owner of the motion picture Queen of the Desert. (ECF No. 5-1 at 1.) Plaintiff asserts the person or entity assigned Internet Protocol (“IP”) address 72.220.214.236 “is a BitTorrent user, or ‘peer,’ whose computer is interconnected with others and used for illegally copying and distributing Plaintiff’s motion picture to others.” (Id.)

1 On March 31, 2016, Plaintiff filed a Complaint against Defendant “Doe-
2 72.220.214.236.” (ECF No. 1.) The Complaint alleges direct copyright infringement
3 against Defendant and asserts Plaintiff is the registered copyright holder for the motion
4 picture allegedly infringed by Defendant. (Id. at ¶¶6-8, 13) Plaintiff asserts Defendant
5 used the BitTorrent file distribution network to copy and distribute Plaintiff’s copyrighted
6 motion picture without Plaintiff’s consent “on over 120 occasions, between 01/29/2016 at
7 01:19:46 (UST) and 1/31/2016 at 17:17:45 (UST).” (Id. at ¶13.)

8 Because Defendant used the Internet to commit the alleged copyright infringement,
9 Plaintiff knows Defendant only by his, her, or its IP address, which was assigned to
10 Defendant by his, her, or its Internet Service Provider (“ISP”), Cox Communications.
11 (ECF No. 5-1 at 2.) In the present Motion, Plaintiff asserts Cox Communications has “the
12 records which tie the IP address used to infringe Plaintiff’s rights to a specific party who
13 contracted with Cox Communications for service” and thus Cox Communications can use
14 the above-listed IP address to identify Defendant. (Id.) Accordingly, “Plaintiff seeks leave
15 to serve a Rule 45 subpoena on the ISP Cox Communications. . . . limited to the name and
16 address of the individual/individuals associated with the IP address named as Defendant”
17 in order to prosecute Plaintiff’s copyright infringement against Defendant. (Id.)

18 II. LEGAL STANDARDS

19 A. Early Discovery

20 Generally, discovery is not permitted absent a court order before the parties have
21 conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed R. Civ. P. 26(d)(1).
22 “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to
23 ensue after filing of the complaint to permit the plaintiff to learn the identifying facts
24 necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*,
25 185 F.R.D. 573, 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.3d 637, 642 (9th
26 Cir. 1980)). Requests to conduct discovery prior to a Rule 26(f) conference are granted
27 upon a showing of good cause by the moving party, which may be found “where the need
28 for expedited discovery, in consideration of the administration of justice, outweighs the

1 prejudice to the responding party.” *Semitool, Inc. v. Tokyo Electron Am., Inc.*,
2 208 F.R.D. 273, 275–76 (N.D. Cal. 2002). With respect to Internet infringement cases,
3 “courts routinely find good cause exists to issue a Rule 45 subpoena to discover[] a Doe
4 defendant’s identity prior to a Rule 26(f) conference, where a plaintiff makes a prima facie
5 showing of infringement, there is no other way to identify a Doe defendant, and there is a
6 risk an ISP will destroy its logs prior to the conference.” *Bright Solutions for Dyslexia,*
7 *Inc. v. Doe 1*, 15-cv-1618-JSC, 2015 WL 5159125, at *1 (N.D. Cal. Sept. 2, 2015) (quoting
8 *UMG Recordings, Inc. v. Doe*, C-08-1193-SBA, 2008 WL 4104207, at *4 (N.D. Cal. Sept.
9 3, 2008)).

10 District courts in the Ninth Circuit apply a three-factor test for determining whether
11 good cause exists to allow for expedited discovery to identify Doe defendants.
12 *Columbia Ins. Co.*, 185 F.R.D. at 578–80. “First, the plaintiff should identify the missing
13 party with sufficient specificity such that the Court can determine that defendant is a real
14 person or entity who could be sued in federal court.” *Id.* at 578. Second, the plaintiff
15 “should identify all previous steps taken to locate the elusive defendant” to ensure the
16 plaintiff has made a good faith effort to identify and serve process on the defendant.
17 *Id.* at 579. Third, the plaintiff “should establish to the Court’s satisfaction that plaintiff’s
18 suit against defendant could withstand a motion to dismiss.” *Id.* (citing *Gillespie*, 629 F.2d
19 at 642).

20 **B. The Cable Privacy Act**

21 The Cable Privacy Act generally prohibits cable operators from disclosing
22 personally identifiable information about subscribers without the prior written or electronic
23 consent of the subscriber. 47 U.S.C. § 551(c)(1) (2015). However, a cable operator may
24 disclose a subscriber’s personally identifiable information if the disclosure is made
25 pursuant to a court order and the cable operator provides the subscriber with notice of the
26 order. *Id.* § 551(c)(2)(B). A cable operator is defined as “any person or group of persons
27 (A) who provides cable service over a cable system and directly or through one or more
28 affiliates owns a significant interest in such cable system, or (B) who otherwise controls or

1 is responsible for, through any arrangement, the management and operation of such a cable
2 system.” Id. § 522(5).

3 **III. DISCUSSION**

4 **A. Early Discovery**

5 Plaintiff seeks an order allowing it to serve a Rule 45 subpoena on Cox
6 Communications before the parties conduct a Rule 26(f) Conference in this case so Plaintiff
7 may obtain the true name and address of Defendant to protect and enforce Plaintiff’s rights
8 as set forth in the Complaint. (ECF No. 5-1.) For the reasons set forth below, Plaintiff’s
9 Motion is **GRANTED**.

10 **1. Identification of Missing Party with Sufficient Specificity**

11 For the Court to grant Plaintiff’s Motion, Plaintiff must first identify Defendant with
12 enough specificity to enable the Court to determine Defendant is a real person or entity
13 who would be subject to the jurisdiction of this Court. See *Columbia Ins. Co.*, 185 F.R.D.
14 at 578. This court has previously determined that “a plaintiff identifies Doe defendants
15 with sufficient specificity by providing the unique IP addresses assigned to an individual
16 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation
17 technology’ to trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v.*
18 *Collective of December 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C*
19 *D63C23C91*, 2012 WL 1648838, at *4 (S.D. Cal. May 4, 2012) (citing *Openmind*
20 *Solutions, Inc. v. Does 1–39*, No. C-11-3311 MEJ, 2011 WL 4715200, at *2 (N.D. Cal.
21 Oct. 7, 2011)); *Pink Lotus Entm’t, LLC v. Does 1–46*, No. C-11-02263 HRL, 2011 WL
22 2470986, at *3 (N.D. Cal. June 21, 2011)).

23 Here, the Court finds Plaintiff’s Complaint and the declaration of James S. Davis
24 filed in support of the present Motion sufficiently specify that Defendant would be subject
25 to this Court’s jurisdiction. The declaration of James S. Davis, the attorney representing
26 Plaintiff, states that Mr. Davis “personally went through the data provided by Plaintiff’s
27 investigators, MaverickEye UG (‘MaverickEye’) and selected the IP Address based upon
28 the traced distribution of Plaintiff’s Motion Picture.” (ECF No. 5-3 at ¶5.) “The Data

1 provided by MaverickEye is information that is related to an individual IP Address. This
2 data is the tracking record containing the ISP, unique file hash relating to the Motion
3 Picture, date, location, and number of instances wherein MaverickEye traced or observed
4 IP Address 72.220.214.236 making available an infringing copy of Plaintiff’s Motion
5 Picture.” (Id. at ¶6.) Mr. Davis “identified defendant, DOE-72.220.214.236, which on
6 121 occasions, between 01/29/2016 at 01:19:46 (UST) and 01/31/2016 at 17:17:45 (UST),
7 was observed through direct TCP/IP connection as infringing the Motion Picture . . . with
8 the unique hash 896B438F8D8F7C443F4B88A24322B8763A3E9885.” (Id. at ¶7; see
9 also ECF No. 5-2.) Mr. Davis personally entered the IP Address “into 3 separate websites
10 that contain a function for determining the location of an IP Address” and “confirmed by
11 geolocation trackers” that the Defendant’s use of the IP Address occurred in San Diego
12 County, California. (Id. at ¶¶8-10.)

13 Based on the above, the Court finds Plaintiff has identified Defendant with enough
14 specificity for the Court to determine Defendant is a real person or entity who would be
15 subject to the Court’s jurisdiction. Plaintiff has provided the Court with Defendant’s
16 unique IP address, the dates and times during which Plaintiff’s copyrighted materials were
17 infringed by a computer(s) using Defendant’s unique IP address, and a verified statement
18 that geolocation technology has found Defendant’s unique IP address to be physically
19 located within this district. See 808 Holdings, 2012 WL 1648838, at *4; see also ECF No
20 5-1 at 4; ECF Nos. 5-2 and 5-3. Accordingly, the Court finds Plaintiff has sufficiently
21 satisfied the first prong of the Ninth Circuit’s “good cause” standard.

22 **2. Previous Attempts to Locate Defendant**

23 For the Court to grant Plaintiff’s Motion, Plaintiff must next identify all of the steps
24 it took to locate Defendant to ensure the Court it made a good faith effort to identify and
25 serve process on Defendant. See Columbia Ins. Co., 185 F.R.D. at 579. The Court finds
26 Plaintiff met this burden.

27 Plaintiff utilized investigators MaverickEye and geolocation trackers to identify the
28 Defendant. (ECF No. 5-3 at ¶¶5-11.) Plaintiff identified who Defendant uses as his or her

1 ISP, Cox Communications, where Defendant is generally located, and what software
2 Defendant used to commit the alleged acts of infringement. (Id.; ECF No. 5-1 at 5.)
3 However, Plaintiff generally maintains that there are no other practical measures available
4 to determine the actual identity of Defendant. Plaintiff appears to have obtained and
5 investigated the available data pertaining to the alleged infringement in a good faith effort
6 to locate Defendant. Accordingly, the Court finds Plaintiff has sufficiently satisfied the
7 second prong of the Ninth Circuit’s “good cause” standard.

8 **3. Whether Plaintiff’s Suit Can Withstand a Motion to Dismiss**

9 For the Court to grant Plaintiff’s Motion, Plaintiff must lastly show that its suit
10 against Defendant could withstand a motion to dismiss. *Columbia Ins. Co.*, 185 F.R.D. at
11 579 (citing *Gillespie*, 629 F.2d at 642). The Court finds Plaintiff has met this burden.

12 Plaintiff’s Complaint alleges only one cause of action against Defendant: direct
13 copyright infringement. (ECF No. 1 at 5–7.) To prove a claim of direct copyright
14 infringement, a plaintiff “must show: (1) ownership of a valid copyright; and (2) that the
15 defendant violated the copyright owner’s exclusive rights under the Copyright Act.”
16 *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a)
17 (2003)). Here, Plaintiff alleges it owns the registered copyright of the work that Defendant
18 allegedly copied and distributed using the BitTorrent file distribution network. (ECF No.
19 1 at ¶¶4, 6, 12; ECF No. 5-1 at 5.) In addition, Plaintiff also alleges it did not permit or
20 consent to Defendant’s copying or distribution of its work. (ECF No. 1 at ¶35; ECF No.
21 5-1 at 5.) Accordingly, the Court finds Plaintiff has alleged the prima facie elements of
22 direct copyright infringement and its suit against Defendant would likely withstand a
23 motion to dismiss.¹

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27 ¹ Personal jurisdiction and venue appear to be sufficiently pled as well given Plaintiff’s allegations that
28 Defendant’s IP Address has been traced to San Diego County (and therefore Defendant can be found in
this district) and the infringing acts complained of occurred in this district. (ECF No. 1 at ¶¶3, 13-16;
ECF Nos. 1-2, 5-2, and 5-3.)

1 Based on the above, the Court finds good cause exists to allow Plaintiff to serve a
2 Rule 45 subpoena upon Cox Communications at this time, and Plaintiff's Motion is
3 therefore **GRANTED**.

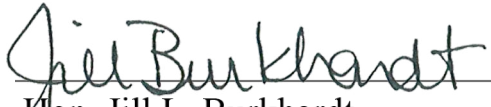
4 **B. The Cable Privacy Act**

5 Cox Communications is a "cable operator" within the meaning of the Cable Privacy
6 Act, and therefore the Court must consider the requirements of the Act in granting
7 Plaintiff's Motion. The Cable Privacy Act generally prohibits cable operators from
8 disclosing personally identifiable information regarding subscribers without the prior
9 written or electronic consent of the subscriber, 47 U.S.C. § 551(c)(1), but cable operators
10 may disclose personally identifiable information if the disclosure is made pursuant to a
11 court order and the cable operator provides the subscriber with notice of the order. As
12 such, **IT IS HEREBY ORDERED THAT:**

- 13 1. Plaintiff may serve on Cox Communications a Federal Rule of Civil Procedure
14 45 subpoena seeking the name and address of Defendant, the Cox
15 Communications subscriber assigned IP address 72.220.214.236. The Court
16 finds this information should be sufficient for Plaintiff to identify, locate, and
17 serve process on Defendant, and Plaintiff shall not seek from Cox
18 Communications any other personally identifiable information about Defendant
19 in its subpoena;
- 20 2. Plaintiff's subpoena to Cox Communications must provide a minimum of
21 45 calendar days' notice before any production responsive to the subpoena shall
22 be made to Plaintiff;
- 23 3. At the time Plaintiff serves its subpoena on Cox Communications, Plaintiff shall
24 also serve on Cox Communications a copy of this Order;
- 25 4. Within 14 calendar days after service of the subpoena, Cox Communications
26 shall notify the subscriber assigned IP address 72.220.214.236 that his, her, or its
27 identity has been subpoenaed by Plaintiff and shall provide the subscriber a copy
28 of this Order with the required notice;

- 1 5. The subscriber whose identity has been subpoenaed shall have 30 calendar days
2 from the date of such notice to challenge Cox Communications' disclosure of his,
3 her, or its name and address to Plaintiff by filing an appropriate pleading with
4 this Court contesting the subpoena;
- 5 6. If Cox Communications wishes to move to quash the subpoena, it shall do so
6 before it is required to respond to the subpoena by filing a motion to quash with
7 this Court; and
- 8 7. If a motion to quash or subscriber challenge is brought, Cox Communications
9 shall preserve the information sought by Plaintiff in the subpoena pending
10 resolution of any such motion or challenge.

11 Dated: April 5, 2016

12 
13 Hon. Jill L. Burkhardt
14 United States Magistrate Judge