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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP address
76.167.109.241,

Defendant.

Case No.: 16cv789-BEN (BLM)

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

[ECF No. 4]

Currently before the Court is Plaintiff's April 21, 2016 "*Ex Parte* Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference." ECF No. 4. 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. 4-1 at 8. On April 1, 2016, Plaintiff filed a complaint against John Doe alleging direct copyright infringement. ECF No. 1. Plaintiff alleges that Defendant has illegally infringed and distributed several of its copyrighted movies over the internet. *Id.* at 1. Plaintiff further alleges that Defendant, who is only known "by his, her, or its IP Address"

1 infringed Plaintiff's copyrights through the BitTorrent File Distribution Network. Id. at 3. Plaintiff
2 describes the BitTorrent File Distribution Network ("BitTorrent") as a "common peer-to-peer file
3 sharing system[] used for distributing large amounts of data, including, but not limited to, digital
4 movie files." Id. Plaintiff states that BitTorrent allows its users to interact directly with one
5 another without the use of an intermediary host and permits the distribution of a large file
6 without creating a heavy load on an individual source computer or network. Id. Plaintiff further
7 explains the process of distributing a large file through BitTorrent and notes that the BitTorrent
8 protocol breaks a file down into several small pieces¹ that are exchanged among users, which
9 allows an infringer to then collect the individual pieces and reassemble them in a manner that
10 allows a file to be opened and utilized. Id.

11 On April 21, 2016, Plaintiff filed the instant motion. ECF No. 4-1. Plaintiff seeks an order
12 from the Court allowing it to serve a subpoena to Defendant's Internet Service Provider² ("ISP")
13 seeking Defendant's true name and address pursuant to Federal Rule of Civil Procedure 45. Id.
14 at 8, 25.

15 **DISCUSSION**

16 **A. The Cable Privacy Act**

17 The Cable Privacy Act generally prohibits cable operators from disclosing personally
18 identifiable information regarding subscribers without the prior written or electronic consent of
19 the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may disclose such information
20 if the disclosure is made pursuant to a court order and the cable operator provides the subscriber
21 with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable operator is defined as "any person
22 or group of persons (A) who provides cable service over a cable system and directly or through
23 one or more affiliates owns a significant interest in such cable system, or (B) who otherwise
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25 ¹ 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 ² The ISP at issue is Time Warner Cable. ECF No. 4-1 at 8.

1 controls or is responsible for, through any arrangement, the management and operation of such
2 a cable system.” 47 U.S.C. § 522(5). Accordingly, Plaintiff seeks an Order instructing Time
3 Warner Cable to produce documents and information sufficient to identify the user of the
4 specified Internet Protocol (“IP”) address.

5 **B. Early Discovery**

6 A party may not seek discovery from any source before the Rule 26(f) conference unless
7 that party first obtains a stipulation or court order permitting early discovery. Fed. R. Civ. P.
8 26(d)(1). Courts in the Ninth Circuit apply the “good cause” standard in deciding whether to
9 permit early discovery. Semitool, Inc. v. Tokyo Electron America, Inc., 208 F.R.D. 273, 274
10 (N.D. Cal. 2002) (adopting the conventional standard of “good cause” in evaluating a request
11 for expedited discovery). Good cause exists “where the need for expedited discovery, in
12 consideration of the administration of justice, outweighs the prejudice to the responding party.”
13 Id. at 276. Good cause for expedited discovery has been found in cases involving claims of
14 infringement and unfair competition or in cases where the plaintiff seeks a preliminary injunction.
15 Id. In infringement cases, expedited discovery is frequently limited to allowing plaintiffs to
16 identify Doe defendants. See UMG Recordings, Inc. v. Doe, 2008 WL 4104207, *3 (N.D. Cal.
17 2008) (granting leave to take expedited discovery for documents that would reveal the identity
18 and contact information for each Doe defendant).

19 District courts in the Ninth Circuit apply a three-factor test when considering motions for
20 expedited discovery to identify certain defendants. Columbia Ins. Co. v. Seescandy.com, 185
21 F.R.D. 573, 578-80 (N.D. Cal. 1999). First, the plaintiff should “identify the missing party with
22 sufficient specificity such that the Court can determine that the defendant is a real person or
23 entity who could be sued in federal court.” Id. at 578. Second, the plaintiff must describe “all
24 previous steps taken to locate the elusive defendant” to ensure that plaintiff has made a good
25 faith effort to identify the defendant. Id. at 579. Third, plaintiff should establish that its lawsuit
26 could withstand a motion to dismiss. Id.

27 1. Identification of Missing Party with Sufficient Specificity

28 First, Plaintiff must identify the Doe defendant with sufficient specificity to enable the

1 Court to determine that the Doe defendant is a real person subject to the Court's jurisdiction.
2 See id. at 578. Plaintiff has provided a declaration stating it retained Excipio GmbH, a German
3 company that provides forensic investigation services to copyright owners, to monitor the
4 BitTorrent file distribution network to find IP addresses being used to distribute Plaintiff's
5 copyrighted works without authorization. ECF No. 4-3, Declaration of Daniel Susac ("Susac
6 Decl.") at 1-2. While working for Excipio, Mr. Susac used forensic software called Network
7 Activity Recording and Supervision ("NARS") to scan the BitTorrent network for infringement
8 involving Plaintiff's copyrighted materials. Id. at 2. The scan showed that the IP address
9 identified by Plaintiff transmitted copies or portions of copies of Plaintiff's copyrighted works.
10 Id.

11 Plaintiff also provided a declaration from Mr. Paige, a former detective in the computer
12 crimes unit of the Palm Beach County Sheriff's Department and founder of Computer Forensics,
13 LLC. ECF No. 4-4, Declaration of Patrick Paige ("Paige Decl."). Mr. Paige declares that "[t]he
14 only entity able to correlate an IP address to a specific individual at a given date and time is the
15 Internet Service Provider ('ISP')." Id. at 3. Mr. Paige further declares that "Plaintiff is likely to
16 identify the infringer," but that Plaintiff must subpoena that ISP in order to learn the Defendant's
17 true identity. Id.

18 Finally, Plaintiff states that it has used "proven IP address geolocation technology which
19 has consistently worked in similar cases to ensure that the Defendant's acts of copyright
20 infringement occurred using an Internet Protocol address ('IP address') traced to a physical
21 address located within this District."³ ECF No. 1 at 2; see also ECF No. 4-1 at 20. Because
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23 ³ "Some district courts in the Ninth Circuit have determined that a plaintiff identifies Doe
24 defendants with sufficient specificity by providing the unique IP address assigned to an individual
25 defendant on the da[te] of the alleged infringing conduct, and by using 'geolocation technology'
26 to trace the IP address to a physical point of origin." See Malibu Media, LLC v. Does 1-19, 2012
27 WL 2152061, at *3 (S.D. Cal. June 12, 2012) (citing Openmind Solutions, Inc. v. Does 1-39,
28 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. Malibu Media, LLC, 2012 WL 2152061, at *3 (citing MCGIP, LLC v. Does

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

6 2. Previous Attempts to Locate Defendants

7 Second, Plaintiff must describe all prior attempts it has made to identify the Doe
8 defendant in a good faith effort to locate and serve them. See Columbia Ins. Co., 185 F.R.D. at
9 579. Plaintiff retained a private computer investigator to identify the IP addresses of BitTorrent
10 users who were allegedly reproducing Plaintiff's copyrighted material. See Susac Decl. Although
11 Plaintiff's computer investigator obtained John Doe's IP address, "[t]he only entity able to
12 correlate an IP address to a specific individual at a given date and time is the Internet Service
13 Provider" Paige Decl. at 3. Plaintiff also notes that it attempted to find Defendant's IP
14 address by searching on various web search tools such as Google and reviewing numerous
15 sources of authority. ECF No. 4-1 at 21. The Court therefore finds that Plaintiff has made a
16 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
21 Copyright Act." Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citations omitted).
22 To prove a claim of direct copyright infringement, "a plaintiff must show that he owns the
23 copyright and that the defendant himself violated one or more of the plaintiff's exclusive rights
24 under the Copyright Act." Id. (citation omitted).

25 Plaintiff purports to be the exclusive rights holder of the copyrighted works at issue. See

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1-149, 2011 WL 3607666, at *2 (N.D. Cal. Aug. 15, 2011)). Here, Plaintiff has done both. See
ECF No. 1.

1 ECF No. 1 at 1; id., Exh. B. Plaintiff alleges that between April 25, 2015 and January 27, 2016,
2 Defendant infringed Plaintiff's copyrighted works by using the BitTorrent File Distribution
3 Network. See id., Exh. B; ECF No. 4-1 at 11. Plaintiff further alleges that Defendant
4 downloaded, copied, and distributed complete copies of Plaintiff's works without authorization.
5 See ECF No. 1 at 5; id., Exh. A. Accordingly, Plaintiff has alleged the prima facie elements of
6 direct copyright infringement and could withstand a motion to dismiss these claims. See
7 Columbia Ins. Co., 185 F.R.D. at 579-80.

8 **CONCLUSION**

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

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

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

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

21 4. If Time Warner Cable wishes to move to quash the subpoena, it shall do so before
22 the return date of the subpoena. The return date of the subpoena must allow for at least forty-
23 five (45) days from service to production. If a motion to quash or other customer challenge is
24 brought, Time Warner Cable shall preserve the information sought by Plaintiff in the subpoena
25 pending resolution of such motion or challenge; and


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

1 to this Order.

2 **IT IS SO ORDERED.**

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4 Dated: 4/27/2016


Hon. Barbara L. Major
United States Magistrate Judge

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