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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,  
Plaintiff,  
v.  
JOHN DOE subscriber assigned IP  
address 107.135.65.209,  
Defendant.

Case No.: 16-cv-1883-WQH-MDD  
**ORDER GRANTING MOTION  
FOR EARLY DISCOVERY**  
**[ECF NO. 4]**

Before the Court is Plaintiff's *Ex Parte* Motion for Leave to Serve a Third Party Subpoena prior to a Rule 26(f) Conference filed on October 11, 2016. (ECF No. 4). The identity of the Defendant is not known at this time. For the reasons discussed below, Plaintiff's Motion is **GRANTED**.

**I. PROCEDURAL HISTORY**

In their Complaint, filed on July 25, 2016, Plaintiff alleges that the subscriber or user of the above-referenced Internet Protocol ("IP") address violated federal copyright law by using the BitTorrent file distribution network to copy and distribute Plaintiff's copyrighted work through the

1 Internet without Plaintiff's permission. (ECF No. 1).

2 Plaintiff motion seeks an order permitting it to serve a third party  
3 subpoena, pursuant to Fed. R. Civ. P. 45, on Internet Service Provider  
4 ("ISP") AT&T U-verse requiring the ISP to supply the name and address of  
5 its subscriber to Plaintiff.

## 6 II. LEGAL STANDARDS

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

19 "The Ninth Circuit has held that when the defendants' identities are  
20 unknown at the time the complaint is filed, courts may grant plaintiffs  
21 leave to take early discovery to determine the defendants' identities 'unless  
22 it is clear that discovery would not uncover the identities, or that the  
23 complaint would be dismissed on other grounds.'" *808 Holdings, LLC v.*  
24 *Collective of December 29, 2011 Sharing Hash*, No. 12-cv-0186 MMA (RBB),  
25 2012 WL 1648838, \*3 (S.D. Cal. May 4, 2012) (quoting *Gillespie*, 629 F.2d at  
26

1 642). “A district court’s decision to grant discovery to determine  
2 jurisdictional facts is a matter of discretion.” *Columbia Ins.*, 185 F.R.D. at  
3 578 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430  
4 n.24 (9th Cir. 1977)).

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

### 21 III. ANALYSIS

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

23 “A plaintiff identifies Doe defendants with sufficient specificity by  
24 providing the unique IP addresses assigned to an individual defendant on  
25 the day of the allegedly infringing conduct, and by using ‘geolocation  
26

1 technology' to trace the IP addresses to a physical point of origin." 808  
2 *Holdings*, 2012 WL 1648838, at \*4 (quoting *OpenMind Solutions, Inc. v.*  
3 *Does 1-39*, No. C-11-3311 MEJ, 2011 WL 4715200 (N.D. Cal. Oct. 7, 2011);  
4 *Pink Lotus Entm't, LLC v. Does 1-46*, No. C-11-02263 HRL, 2011 WL  
5 2470986 (N.D. Cal. June 21, 2011)).

6 In Exhibit A to its Complaint, Plaintiff alleges that the user of the  
7 subject IP address engaged in allegedly infringing activity involving  
8 approximately 100 of Plaintiff's copyrighted works from April 17, 2014,  
9 through June 30, 2016. (ECF No. 1-2). In support of the instant Motion,  
10 Plaintiff submitted declarations regarding the manner in which the  
11 allegedly infringing IP address was identified; identifying the ISP as AT&T  
12 U-verse; and located the IP address in San Marcos, California, within the  
13 Southern District of California. See Exhibits B through E-1 to Plaintiff's  
14 Motion (ECF Nos. 4-2 through 4-7). Critically, the Declaration of Attorney  
15 Henrik Mosesi states that he performed the geolocation approximately 3  
16 weeks prior to filing the Complaint. (ECF No. 4-7 ¶ 12). The last  
17 infringement is alleged to have occurred on June 30, 2016, and the  
18 Complaint was filed on July 25, 2016. Accordingly, the effort to geolocate  
19 the IP address occurred within weeks of last allegedly offending download.

20 In these cases, it is most likely that the subscriber is a residential user  
21 and the IP address assigned by ISP is "dynamic."<sup>1</sup> Consequently, it matters  
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24 <sup>1</sup> "Static IP addresses are addresses which remain set for a specific user. . . .  
25 Dynamic IP addresses are randomly assigned to internet users and change  
26 frequently. . . . Consequently, for dynamic IP addresses, a single IP address  
may be re-assigned to many different computers in a short period of time."

1 when the geolocation was performed. In the context of dynamic IP  
2 addresses, “a person using [an IP] address one month may not have been  
3 the same person using it the next.” *State of Connecticut v. Shields*, No.  
4 CR06352303, 2007 WL 1828875 \*6 (Conn. Sup. Ct. June 7, 2007). If  
5 performed in temporal proximity to the offending downloads, the  
6 geolocation may be probative of the physical location of the subscriber. If  
7 not, less so, potentially to the point of irrelevance. Here, Plaintiff appears  
8 to have conducted the required geolocation close enough in time to the  
9 allegedly offending behavior to be probative.

10 Consequently, Plaintiff has identified the Defendant, at this point,  
11 with sufficient specificity. *See OpenMind Solutions*, 2011 WL 4715200, at  
12 \*2 (concluding that plaintiff satisfied the first factor by identifying the  
13 defendants’ IP addresses and by tracing the IP addresses to a point of origin  
14 within the State of California); *Pink Lotus Entm’t*, 2011 WL 2470986, at \*3  
15 (same). In addition, Plaintiff has presented evidence that the identified IP  
16 address is physically located in this district.

17 **B. Previous Attempts to Locate Defendant**

18 Plaintiff appears to have obtained and investigated the available data  
19 pertaining to the alleged infringement in a good faith effort to locate  
20 Defendant. *See OpenMind Solutions*, 2011 WL 4715200, at \*3; *MCGIP,*  
21 *LLC v. Does 1-149*, 2011 WL 3607666, \*2 (N.D. Cal. Aug. 3, 2011); *Pink*  
22 *Lotus Entm’t*, 2011 WL 2470986, at \*3.

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*Call of the Wild Movie, LLC v. Does*, 770 F. Supp. 2d 332, 356-57 (D. D.C.  
26 2011)(citations omitted).

1           **C.    Ability to Withstand a Motion to Dismiss**

2           Here, the Complaint alleges that Plaintiff owns the registered  
3 copyright of the work that Defendant allegedly copied and distributed using  
4 the BitTorrent file distribution network and that it did not permit or  
5 consent to Defendant’s copying or distribution of its work. It appears  
6 Plaintiff has stated a *prima facie* claim for copyright infringement that can  
7 withstand a motion to dismiss.

8           **D.    Personal Jurisdiction**

9           As discussed above, Plaintiff has sufficiently established that it is  
10 likely that the Defendant is located within the Southern District of  
11 California and is subject to the personal jurisdiction of the Court.

12           **E.    Venue**

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

24           As discussed above, Defendant is likely to be located in this District  
25 and the acts complained of also likely occurred here. Accordingly, venue  
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1 appears proper in this District at this time.

2 **F. Specific Discovery Request**

3 Plaintiff has not provided a proposed subpoena. Plaintiff stated,  
4 however, that it will seek to obtain only the name and address of the  
5 subscriber associated with the IP address from the ISP.

6 The Court finds Plaintiff has shown good cause to subpoena records  
7 from AT&T U-verse identifying the subscriber assigned to the subject IP  
8 address at the identified times. The subpoena must be limited to  
9 documents identifying the subscriber's name and address during the  
10 relevant period. That information should be sufficient for Plaintiff to be  
11 able to identify and serve Defendant. If Plaintiff is unable to identify and  
12 serve Defendant after receiving a response to the subpoena, Plaintiff may  
13 seek leave from the Court to pursue additional discovery.

14 **G. Cable Privacy Act**

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

24 **IV. CONCLUSION**

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

