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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
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12 MALIBU MEDIA, LLC,

13 Plaintiff,

14 v.

15 JOHN DOE subscriber assigned IP
16 address 76.167.92.151,

17 Defendant.

Case No.: 16-cv-1913 BEN (JLB)

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

[ECF No. 4]

18
19 Presently before the Court is Plaintiff’s *Ex Parte* Motion for Leave to Serve a Third
20 Party Subpoena Prior to a Rule 26(f) Conference. (ECF No. 4.) No opposition was filed,
21 as no defendant has been named or served. For the reasons set forth below, Plaintiff’s
22 Motion is **GRANTED**.

23 **I. BACKGROUND**

24 Plaintiff operates a subscription-based website, X-art.com, where it displays its
25 copyrighted materials. (ECF No. 4-1 at 7.) Plaintiff asserts that the person or entity
26 assigned Internet Protocol (“IP”) address 76.167.92.151 has “habitually” infringed
27 Plaintiff’s copyrighted works on the X-art.com website through his, her, or its use of the
28 online BitTorrent file distribution network. (*Id.*)

1 On July 28, 2016, Plaintiff filed a Complaint against Defendant “JOHN DOE
2 subscriber assigned IP address 76.167.92.151.” (ECF No. 1.) The Complaint alleges
3 copyright infringement against Defendant and asserts that Plaintiff is the registered
4 copyright holder of 27 works allegedly infringed by Defendant. (*Id.* at 5–7; ECF No. 1-3.)
5 Plaintiff asserts Defendant used the BitTorrent file distribution network to copy and
6 distribute Plaintiff’s copyrighted works without Plaintiff’s consent. (ECF No. 1 at 5.)

7 Because Defendant used the Internet to commit the alleged copyright infringement,
8 Plaintiff knows Defendant only by his, her, or its IP address, which was assigned to
9 Defendant by his, her, or its Internet Service Provider (“ISP”), Time Warner Cable. (ECF
10 No. 4-1 at 7.) Plaintiff asserts ISPs “maintain internal logs that record the date, time, and
11 customer identity for each IP address assignment made by that ISP” and thus Time Warner
12 Cable can use the above-stated IP address to identify Defendant. (*Id.*) Accordingly,
13 Plaintiff seeks leave of Court to serve on Time Warner Cable a Rule 45 subpoena to obtain
14 Defendant’s “true name and address” so that Plaintiff may serve Defendant and prosecute
15 the claims raised in its Complaint. (*Id.*)

16 II. LEGAL STANDARDS

17 A. Early Discovery

18 Discovery is generally not permitted before the parties have conferred pursuant to
19 Federal Rule of Civil Procedure 26(f) unless authorized by court order. Fed R. Civ. P.
20 26(d)(1). “[H]owever, in rare cases, courts have made exceptions, permitting limited
21 discovery to ensue after filing of the complaint to permit the plaintiff to learn the
22 identifying facts necessary to permit service on the defendant.” *Columbia Ins. Co. v.*
23 *Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999). Requests to conduct discovery
24 prior to a Rule 26(f) conference are granted upon a showing of good cause by the moving
25 party, which may be found “where the need for expedited discovery, in consideration of
26 the administration of justice, outweighs the prejudice to the responding party.” *Semitoool,*
27 *Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal. 2002). “A district
28 court’s decision to grant discovery to determine jurisdictional facts is a matter of

1 discretion.” *Columbia Ins. Co.*, 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells*
2 *Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

3 District courts in the Ninth Circuit apply a three-factor test for determining whether
4 good cause exists to allow for expedited discovery to identify Doe defendants. *See*
5 *Columbia Ins. Co.*, 185 F.R.D. at 578–80. “First, the plaintiff should identify the missing
6 party with sufficient specificity such that the Court can determine that defendant is a real
7 person or entity who could be sued in federal court.” *Id.* at 578. Second, the plaintiff
8 “should identify all previous steps taken to locate the elusive defendant” to ensure that the
9 plaintiff has made a good faith effort to identify and serve process on the defendant. *Id.* at
10 579. Third, the plaintiff “should establish to the Court’s satisfaction that plaintiff’s suit
11 against defendant could withstand a motion to dismiss.” *Id.* (citing *Gillespie*, 629 F.2d at
12 642). Further, the plaintiff “should file a request for discovery with the Court, along with
13 a statement of reasons justifying the specific discovery requested as well as identification
14 of a limited number of persons or entities on whom discovery process might be served and
15 for which there is a reasonable likelihood that the discovery process will lead to identifying
16 information about defendant that would make service of process possible.” *Id.* at 580
17 (citing *Gillespie*, 629 F.2d at 642).

18 **B. The Cable Privacy Act**

19 The Cable Privacy Act generally prohibits cable operators from disclosing
20 personally identifiable information about subscribers without the prior written or electronic
21 consent of the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may disclose
22 a subscriber’s personally identifiable information if the disclosure is made pursuant to a
23 court order and the cable operator provides the subscriber with notice of the order.
24 47 U.S.C. § 551(c)(2)(B). A cable operator is defined as “any person or group of persons
25 (A) who provides cable service over a cable system and directly or through one or more
26 affiliates owns a significant interest in such cable system, or (B) who otherwise controls or
27 is responsible for, through any arrangement, the management and operation of such a cable
28 system.” 47 U.S.C. § 522(5).

1 **III. DISCUSSION**

2 **A. Early Discovery**

3 Plaintiff seeks an order allowing it to serve a Rule 45 subpoena on Time Warner
4 Cable before the parties conduct a Rule 26(f) conference in this case so that Plaintiff may
5 obtain the true name and address of Defendant. (ECF No. 4-1 at 7.) For the reasons set
6 forth below, Plaintiff’s Motion is **GRANTED**.

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

8 For the Court to grant Plaintiff’s motion, Plaintiff must first identify Defendant with
9 enough specificity to enable the Court to determine Defendant is a real person or entity
10 who would be subject to the jurisdiction of this Court. *See Columbia Ins. Co.*, 185 F.R.D.
11 at 578. This court has previously determined that “a plaintiff identifies Doe defendants
12 with sufficient specificity by providing the unique IP addresses assigned to an individual
13 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation
14 technology’ to trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v.*
15 *Collective of December 29, 2011 Sharing Hash*, No. 12cv00186 MMA (RBB), 2012 WL
16 12884688, at *4 (S.D. Cal. May 8, 2012) (citing *Openmind Solutions, Inc. v. Does 1–39*,
17 No. C-11-3311 MEJ, 2011 WL 4715200, at *5–6 (N.D. Cal. Oct. 7, 2011); *Pink Lotus*
18 *Entm’t, LLC v. Does 1–46*, No. C-11-02263 HRL, 2011 WL 2470986, at *6–7 (N.D. Cal.
19 June 21, 2011)).

20 In cases where it is unclear whether the subject IP address is “dynamic” or “static,”
21 such as here, it matters when Plaintiff’s geolocation efforts were performed.¹ In the context
22 of dynamic IP addresses, “a person using [a particular IP] address one month may not have
23 been the same person using it the next.” *State v. Shields*, No. CR06352303, 2007 WL
24 1828875, at *6 (Conn. Sup. Ct. June 7, 2007). It is most likely that the user of IP address

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26 ¹ Static IP addresses are addresses which remain set for a specific user. Dynamic IP addresses are
27 randomly assigned to internet users and change frequently. Consequently, for dynamic IP addresses, a
28 single IP address may be re-assigned to many different computers in a short period of time.” *Call of the*
Wild Movie, LLC v. Does, 770 F. Supp. 2d 332, 356 (D.D.C. 2011) (citing *London-Sire Records, Inc. v.*
Doe 1, 542 F. Supp. 2d 153, 160 (D. Mass. 2008)).

1 76.167.92.151 is a residential user and that the IP address assigned by Cox
2 Communications is dynamic.² Thus, if Plaintiff’s geolocation efforts were performed in
3 the temporal proximity to the offending downloads, they may be probative of the physical
4 location of the subject IP subscriber. If not, the geolocation of the subject IP address may
5 potentially be irrelevant.

6 Here, the Court concludes that Plaintiff’s Motion sufficiently demonstrates that
7 Defendant is likely subject to the Court’s jurisdiction. First, the declaration of Attorney
8 Henrik Mosesi filed in support of Plaintiff’s Motion states that Plaintiff’s forensic
9 investigator, IPP International UG, “utilizes technology which ensures that Defendant’s IP
10 address is correctly recorded at the exact time of infringement and is always accurate.”
11 (ECF No. 4-6 at ¶ 6.) Second, Attorney Mosesi’s declaration states that Plaintiff
12 “referenced Defendant’s IP Address against Maxmind Premium’s IP geolocation
13 database,” which “is about 95% accurate in the U.S.,” to determine “both the ISP of the
14 Defendant and that . . . Defendant was using an IP Address assigned to a location city
15 inside this District.” (*Id.* at ¶¶ 7–10.) Third, Attorney Mosesi’s declaration states that
16 Plaintiff traced Defendant’s IP address to a physical location in this District
17 “approximately three weeks before filing this action.” (*Id.* at ¶ 12.) As the last infringing
18 act is alleged to have occurred on June 4, 2016 (ECF No. 4-1 at 10), and Plaintiff’s
19 Complaint was filed on July 28, 2016 (ECF No. 1), Plaintiff’s effort to geolocate IP address
20 76.167.92.151 occurred within weeks of the last allegedly infringing act. Thus, even if
21 Defendant’s IP address is dynamic, the Court finds that based on the timing of Plaintiff’s
22 IP tracing efforts and the documented success of Plaintiff’s investigator and the Maxmind
23 geolocation service, Plaintiff has met its evidentiary burden of showing that Defendant’s
24 IP address likely resolves to a physical address located in this District.

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28 ² “Most consumer IP addresses are ‘dynamic’ as opposed to ‘static.’” *Call of the Wild Movie*,
770 F. Supp. 2d at 356.

1 **2. Previous Attempts To Locate Defendant**

2 For the Court to grant Plaintiff’s Motion, Plaintiff must next identify all of the steps
3 it took to locate Defendant to ensure the Court it made a good faith effort to identify and
4 serve process on Defendant. *See Columbia Ins. Co.*, 185 F.R.D. at 579. The Court
5 concludes that Plaintiff has met this burden. First, Plaintiff retained a private Internet
6 forensic investigator, IPP International UG, to monitor the BitTorrent file distribution
7 network for the presence of Plaintiff’s copyrighted works and to identify the IP addresses
8 of devices that are found distributing Plaintiff’s copyrighted works. (ECF No. 4-4.)
9 Second, Plaintiff “diligently attempted,” albeit unsuccessfully, “to correlate Defendant’s
10 IP address to Defendant by searching for Defendant’s IP address on various web search
11 tools” and “has further conducted its own diligent research on its ability to identify
12 Defendant by other means by reviewing numerous sources of authority . . . (e.g., legislative
13 reports, agency websites, informational technology guides, governing case law, etc.)”
14 (ECF No. 4-1 at 21.) Third, the declaration of Patrick Paige, a former detective in the
15 Computer Crimes Unit of the Palm Beach County, Florida, Sherriff’s Office and founder
16 of Computer Forensics, LLC, states that “during the initial phase of Internet based
17 investigations, the offender is only known . . . by an IP address” and “[t]he only entity able
18 to correlate an IP address to a specific individual at a given date and time is the Internet
19 Service Provider.” (ECF No. 4-3 at ¶¶ 13–14.) Based on the above, the Court is satisfied
20 that Plaintiff has made a good faith effort to locate Defendant and that Plaintiff cannot, on
21 its own, locate Defendant with any greater specificity than it already has. Accordingly, the
22 Court finds Plaintiff has sufficiently satisfied the second prong of the Ninth Circuit’s “good
23 cause” test.

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

25 For the Court to grant Plaintiff’s Motion, Plaintiff must next show that its suit against
26 Defendant could withstand a motion to dismiss. *Columbia Ins. Co.*, 185 F.R.D. at 579
27 (citing *Gillespie*, 629 F.2d at 642). The Court finds Plaintiff has met this burden.
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1 Plaintiff's Complaint alleges a single cause of action against Defendant: direct
2 copyright infringement. (ECF No. 1 at 5–7.) To prove a claim of direct copyright
3 infringement, a plaintiff “must show: (1) ownership of a valid copyright; and (2) that the
4 defendant violated the copyright owner’s exclusive rights under the Copyright Act.”
5 *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a)
6 (2003)). Here, Plaintiff purports to be the exclusive owner of the 27 copyrighted works at
7 issue. (*Id.* at ¶ 31; ECF No. 1-3.) In addition, Plaintiff alleges that “[b]y using BitTorrent,
8 Defendant copied and distributed the constituent elements of each of the original works
9 covered by” Plaintiff’s copyrights and “Plaintiff did not authorize, permit or consent to
10 Defendant’s distribution of its works.” (ECF No. 1 at ¶¶ 32–33.) Accordingly, the Court
11 finds Plaintiff has alleged the *prima facie* elements of direct copyright infringement and its
12 suit against Defendant would likely withstand a motion to dismiss.

13 **4. Specific Discovery Request**

14 Finally, for the Court to grant Plaintiff’s Motion, Plaintiff “should file a request for
15 discovery with the Court.” *Columbia Ins. Co.*, 185 F.R.D. at 580 (citing *Gillespie*, 629
16 F.2d at 642). Although Plaintiff did not provide the Court with a proposed subpoena,
17 Plaintiff has provided the Court with sufficient information regarding its requested
18 discovery by stating in its Motion that it will seek from Time Warner Cable only the name
19 and address of the subscriber of IP address 76.167.92.151.

20 **B. The Cable Privacy Act**

21 Time Warner Cable is a “cable operator” within the meaning of the Cable Privacy
22 Act, and therefore the Court must consider the requirements of the Act in granting
23 Plaintiff’s Motion. The Cable Privacy Act generally prohibits cable operators from
24 disclosing personally identifiable information regarding subscribers without the prior
25 written or electronic consent of the subscriber, but cable operators may disclose personally
26 identifiable information if the disclosure is made pursuant to a court order and the cable
27 operator provides the subscriber with notice of the order. 47 U.S.C. § 551(c)(1)–(2).
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1 **IV. CONCLUSION**

2 For the reasons set forth above, the Court finds good cause exists to allow Plaintiff
3 to serve a Rule 45 subpoena upon Time Warner Cable at this time. Accordingly, Plaintiff's
4 Motion is **GRANTED** as follows:

5 1. Plaintiff may serve on Time Warner Cable a subpoena, pursuant to and
6 compliant with the procedures of Federal Rule of Civil Procedure 45, seeking only the
7 **name and address** of the subscriber assigned IP address 76.167.92.151 for the relevant
8 time period. Plaintiff shall not seek from Time Warner Cable any other personally
9 identifiable information about the subscriber;

10 2. Plaintiff's subpoena to Time Warner Cable must provide a minimum of 45
11 calendar days' notice before any production responsive to the subpoena shall be made to
12 Plaintiff;

13 3. At the time Plaintiff serves its subpoena on Time Warner Cable, Plaintiff shall
14 also serve on Time Warner Cable a copy of this Order;

15 4. Within 14 calendar days after service of the subpoena, Time Warner Cable
16 shall notify the subscriber assigned IP address 76.167.92.151 that his, her, or its identity
17 has been subpoenaed by Plaintiff **and** shall provide the subscriber a copy of this Order with
18 the required notice;

19 5. The subscriber whose identity has been subpoenaed shall have 30 calendar
20 days from the date of such notice to challenge Time Warner Cable's disclosure of his, her,
21 or its name and address by filing an appropriate pleading with this Court contesting the
22 subpoena;

23 6. If Time Warner Cable seeks to modify or quash the subpoena, it shall do so
24 as provided by Federal Rule of Civil Procedure 45(d)(3); and

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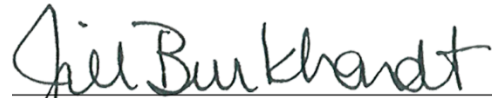
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1 7. In the event a motion to quash, modify, or otherwise challenge the subpoena
2 is properly brought before the Court, Time Warner Cable shall preserve the information
3 sought by the subpoena pending the resolution of any such motion.

4 **IT IS SO ORDERED.**

5 Dated: November 8, 2016

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7 Hon. Jill L. Burkhardt
8 United States Magistrate Judge

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