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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,
Plaintiff,
v.
JOHN DOE subscriber assigned IP
address 76.93.177.163,
Defendant.

Case No. 16CV1916-GPC(JMA)
**ORDER GRANTING
PLAINTIFF'S EX PARTE
MOTION FOR LEAVE TO SERVE
A THIRD PARTY SUBPOENA**
[ECF No. 4]

Before the Court is an Ex Parte Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference filed by Plaintiff Malibu Media, LLC ("Plaintiff"). (ECF No. 4.) For the reasons discussed below, Plaintiff's application is **GRANTED**.

I. PROCEDURAL HISTORY

On July 28, 2016, Plaintiff filed a Complaint against Defendant John Doe subscriber assigned IP address 76.93.177.163, ("Defendant"). (Compl., ECF No. 1). Plaintiff purports to be the registered owner of twelve (12) copyrighted movies which were allegedly illegally distributed by Defendant's IP address. Compl., ¶¶ 2-3 & Exs. A-B. The Complaint alleges copyright infringement of each of its copyrighted movies. *Id.* at ¶¶ 30-35. Plaintiff alleges that Defendant, using IP address 76.93.177.163,

1 infringed Plaintiff's copyrights by copying and distributing Plaintiff's motion
2 pictures through the BitTorrent file distribution network without Plaintiff's
3 permission or consent. Id. Plaintiff alleges Defendant engaged in
4 infringement activity between February 9 and June 28, 2016. Id., Exs. A-B.

5
6 Plaintiff seeks leave of court to serve a subpoena pursuant to Fed. R.
7 Civ. P. 45 on Defendant's internet service provider ("ISP"), Time Warner
8 Cable, in order to identify the subscriber and account holder assigned to
9 the IP address used by Defendant.

10 **II. LEGAL STANDARDS**

11 Generally, discovery is not permitted without a court order before the
12 parties have conferred pursuant to Federal Rule of Civil Procedure 26(f).
13 Fed. R. Civ. P. 26(d)(1). Yet, "in rare cases, courts have made exceptions,
14 permitting limited discovery to ensue after filing of the complaint to permit
15 the plaintiff to learn the identifying facts necessary to permit service on the
16 defendant." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577
17 (N.D. Cal. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
18 1980)). Courts grant these requests when the moving party shows good
19 cause for the early discovery. Semitool, Inc. v. Tokyo Elec. Am., Inc., 208
20 F.R.D. 273, 275-76 (N.D. Cal. 2002).

21 The Ninth Circuit has held that when the defendants' identities are
22 unknown at the time the complaint is filed, courts may grant plaintiffs leave
23 to take early discovery to determine the defendants' identities "unless it is
24 clear that discovery would not uncover the identities, or that the complaint
25 would be dismissed on other grounds." Gillespie, 629 F.2d at 642. A
26 district court's decision to grant discovery to determine jurisdictional facts is
27 a matter of discretion. Columbia Ins. Co., 185 F.R.D. at 578.

28 District courts apply a three-factor test when considering motions for

1 early discovery to identify certain defendants. Id. at 578-80. First, the
2 plaintiff should “identify the missing party with sufficient specificity such that
3 the Court can determine that defendant is a real person or entity who could
4 be sued in federal court.” Id. at 578. Second, the movant must describe
5 “all previous steps taken to locate the elusive defendant” to ensure that the
6 plaintiff has made a good faith effort to identify and serve process on the
7 defendant. Id. at 579. Third, the plaintiff should establish that its suit
8 against the defendant could withstand a motion to dismiss. Id. “[T]o
9 prevent abuse of this extraordinary application of the discovery process
10 and to ensure that the plaintiff has standing,” the plaintiff must show that
11 some act giving rise to liability actually occurred and that the discovery is
12 aimed at identifying the person who actually committed the act. Id. at 579-
13 80.

14 **III. DISCUSSION**

15 **A. Identification of Missing Parties with Sufficient Specificity**

16 First, Plaintiff must identify Defendant with enough specificity to
17 enable the Court to determine that the defendant is a real person or entity
18 who would be subject to the jurisdiction of this Court. Id. at 578. “[A]
19 plaintiff identifies Doe defendants with sufficient specificity by providing the
20 unique IP addresses assigned to an individual defendant on the day of the
21 allegedly infringing conduct, and by using “geolocation technology” to trace
22 the IP address to a physical point of origin. 808 Holdings, LLC v.
23 Collective of Dec. 29, 2011 Sharing Hash, 2012 WL 1648838, at *4 (S.D.
24 Cal. May 4, 2012). Here, Plaintiff identified the IP address of the computer
25 used by Defendant, and used geolocation technology to trace the IP
26 address 76.93.177.163 to San Diego, California. Compl., ¶ 5 & Exs. A-B.
27 Consequently, Plaintiff has identified Defendant with sufficient specificity
28 and has satisfied the first factor of the test for permitting early discovery.

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

2 Next, Plaintiff must identify all previous steps taken to identify the
3 Doe Defendant in a good faith effort to locate and serve it. See Columbia
4 Ins. Co., 185 F.R.D. at 579. According to Plaintiff, “Plaintiff knows
5 Defendant only by his or her IP address and has no way to ascertain
6 Defendant’s identity other than by subpoenaing the ISP.” Ex Parte Motion
7 at 9. “This is the case because although publicly available data allowed
8 Plaintiff to identify the specific ISP used by Defendant, as well as the city
9 associated with the IP address, it does not permit Plaintiff to ascertain the
10 identity of the subscriber or actual defendant. Accordingly, Plaintiff
11 appears to have investigated and obtained the data pertaining to the
12 alleged infringement in a good faith effort to locate Defendant.” Id., at 15-
13 16, quoting Cobbler Nevada LLC v. Doe 68.8.213.203, No. 15-CV-2729-
14 GPC(JMA), 2015 WL 9026554, at *2 (S.D. Cal. Dec. 15, 2015).

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

16 Lastly, to be entitled to early discovery, Plaintiff must demonstrate
17 that the Complaint can withstand a motion to dismiss. See Columbia Ins.
18 Co., 185 F.R.D. at 579.

19 1. Ability to State a Claim Upon Which Relief Can Be
20 Granted

21 Plaintiff alleges that it is the owner of the copyright for the twelve (12)
22 movies at issue, and that Defendant infringed Plaintiff’s copyrights by
23 copying and distributing Plaintiff’s movies through a public BitTorrent
24 network without Plaintiff’s permission or consent. Compl., ¶¶ 30-35. The
25 Court finds Plaintiff has alleged a prima facie case of copyright
26 infringement against Defendant.

27 2. Personal Jurisdiction

28 Plaintiff bears the burden of establishing jurisdictional facts. See

1 Columbia Ins. Co., 185 F.R.D. at 578. Plaintiff, using geolocation
2 technology, traced Defendant’s IP address to a point of origin within this
3 District. Compl., ¶ 5. Accordingly, Plaintiff has alleged sufficient facts to
4 show it can likely withstand a motion to dismiss for lack of personal
5 jurisdiction. See, e.g., Pink Lotus Entm’t, 2011 U.S. Dist. LEXIS 65614, at
6 *6-7.

7 3. Venue

8 Plaintiff alleges that venue in this District is proper as to Defendant
9 under 28 U.S.C. §§ 1391(b) and 1400(a). Compl., ¶ 7. “The venue of suits
10 for infringement of copyright is not determined by the general provision
11 governing suits in the federal district courts, rather by the venue provision
12 of the Copyright Act.” Goldberg v. Cameron, 482 F. Supp. 2d 1136, 1143
13 (N.D. Cal. 2007). Civil actions for copyright infringement “may be instituted
14 in the district in which defendant or his agent resides or may be found.” 28
15 U.S.C.A. § 1400(1) (West 2006). An individual “resides” for venue
16 purposes in the district of his domicile. James Wm. Moore, et al., Moore’s
17 Federal Practice, § 110.39[2], at 110-76 (3d ed. 2011). A defendant is
18 “found” for venue purposes where he is subject to personal jurisdiction. Id.
19 (footnote omitted); see also Brayton Purcell LLP v. Recordon & Recordon,
20 606 F.3d 1124, 1126 (9th Cir. 2010) (“This circuit interprets [28 U.S.C. §
21 1400(a)] to allow venue in any judicial district where, if treated as a
22 separate state, the defendant would be subject to personal jurisdiction.”).
23 Plaintiff alleges venue is proper because Defendant allegedly committed
24 the infringing acts complained of, and resides, in this District. Compl., ¶ 7.
25 Thus, venue appears to be proper.

26 Accordingly, Plaintiff’s Complaint can likely survive a motion to
27 dismiss.
28

1 **IV. CONCLUSION**

2 For the reasons set forth above, it is hereby ordered that Plaintiff's
3 Application is **GRANTED** as follows:

4 1. Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45
5 upon Time Warner Cable for the sole purpose of obtaining the *name and*
6 *address only* of Defendant John Doe subscriber assigned IP address
7 76.93.177.163. Time Warner Cable shall have fourteen (14) calendar days
8 after service of the subpoena upon it to notify its subscriber that his/her
9 identity has been subpoenaed by Plaintiff. The subscriber whose identity
10 has been subpoenaed shall have thirty (30) calendar days from the date of
11 such notice to challenge the disclosure to Plaintiff by filing an appropriate
12 pleading with this Court contesting the subpoena. If Time Warner Cable
13 intends to move to quash the subpoena, it must do so prior to the return
14 date of the subpoena. The return date of the subpoena must allow for at
15 least forty-five (45) days from service to production. If a motion to quash or
16 other customer challenge is brought, Time Warner Cable must preserve
17 the information sought by Plaintiff pending resolution of the motion or
18 challenge.

19 2. The subpoena shall not seek Defendant's telephone number,
20 email address, or Media Access Control (MAC) address, as this
21 information is not necessary for Plaintiff to identify and serve Defendant.

22 3. Plaintiff may use the information disclosed pursuant to the
23 subpoena only in pursuing this litigation.

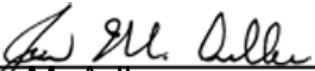
24 4. Plaintiff shall serve a copy of this order with any subpoena
25 served upon Time Warner Cable pursuant to this Order. Time Warner
26 Cable, in turn, must provide a copy of this Order along with the required
27 notice to the subscriber whose identity is sought pursuant to this Order.

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1 5. No other discovery is authorized at this time.

2 **IT IS SO ORDERED.**

3 DATED: October 24, 2016

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5 Jan M. Adler
6 U.S. Magistrate Judge

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