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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 CRIMINAL PRODUCTIONS, INC.,
11 Plaintiff,
12 v.
13 DOE-72.197.111.62,
14 Defendant.

Case No. 16-cv-2352 WQH (JLB)

**ORDER GRANTING PLAINTIFF'S
SECOND *EX PARTE* MOTION TO
EXPEDITE DISCOVERY**

[ECF No. 6]

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16 Presently before the Court is Plaintiff's second *Ex Parte* Motion to Expedite
17 Discovery. (ECF No. 6.) No opposition was filed, as no defendant has been named or
18 served. For the reasons set forth below, Plaintiff's Motion is **GRANTED**.

19 **I. BACKGROUND**

20 Plaintiff is the registered copyright owner of the motion picture *Criminal*. (ECF No.
21 6-1 at 1.) Plaintiff asserts the person or entity assigned Internet Protocol ("IP") address
22 72.197.111.62 has illegally copied and distributed *Criminal* through his, her, or its use of
23 the online BitTorrent file distribution network. (*Id.*)

24 Plaintiff commenced the instant action by filing a Complaint against Defendant
25 "Doe-72.197.111.62" on September 19, 2016. (ECF No. 1.) The Complaint alleges a
26 single claim of copyright infringement against Defendant. (*Id.* at 8-9.)

27 Because Defendant used the Internet to commit the alleged infringement, Plaintiff
28 knows Defendant only by his, her, or its IP address, which Plaintiff believes was assigned

1 to Defendant by the Internet Service Provider (“ISP”) Cox Communications. (ECF No. 6-
2 1 at 2.) In the present Motion, Plaintiff asserts that Cox Communications has “the records
3 which tie the IP address used to infringe Plaintiff’s rights to a specific party who contracted
4 with Cox Communications for service” and that “[w]ithout this information, plaintiff
5 cannot ascertain the identity of the defendant nor pursue this lawsuit to protect its valuable
6 copyrights.” (*Id.*) Accordingly, Plaintiff seeks leave to serve a Rule 45 subpoena on Cox
7 Communications to obtain the name and address associated with IP address 72.197.111.62.
8 (*Id.*)

9 Plaintiff filed its initial Motion for Early Discovery on September 23, 2016. (ECF
10 No. 4.) The motion was denied without prejudice on the basis that Plaintiff failed to state
11 the date(s) on which its counsel performed the geolocation of IP address 72.197.111.62
12 and to provide support regarding the probative value of its geolocation efforts in
13 determining whether the subscriber of IP address 72.197.111.62 is likely subject to the
14 personal jurisdiction of this Court. (ECF No. 5 at 4–5.) Plaintiff filed the instant Motion
15 for Early Discovery on November 8, 2016. (ECF No. 6.)

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.” *Semitool,*
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.*, 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells Fargo*
2 *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 Cox
4 Communications before the parties conduct a Rule 26(f) Conference in this case so that
5 Plaintiff may obtain the true name and address of Defendant. (ECF No. 6-1 at 2.) For the
6 reasons set 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
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26 ¹ “Static IP addresses are addresses which remain set for a specific user. Dynamic IP addresses
27 are randomly assigned to internet users and change frequently. Consequently, for dynamic IP addresses,
28 a 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 1828875, at *6 (Conn. Sup. Ct. June 7, 2007). It is most likely that the user of IP address
2 72.197.111.62 is a residential user and that the IP address assigned by Cox
3 Communications is dynamic.² Thus, if Plaintiff’s geolocation efforts were performed in
4 the temporal proximity to the offending downloads, they may be probative of the physical
5 location of the subject IP subscriber. If not, the geolocation of the subject IP address may
6 potentially be irrelevant.

7 Here, the Court concludes that the instant Motion sufficiently demonstrates that
8 Defendant is likely subject to the Court’s jurisdiction. Plaintiff attaches to its Motion a
9 table reflecting that the user of IP address 72.197.111.62 engaged in allegedly infringing
10 activity from May 9, 2016, through May 15, 2016. (ECF No. 6-2 at 1–2.) In addition,
11 Plaintiff attaches to its Motion the declaration of its counsel, James Davis, asserting that IP
12 address 72.197.111.62 belongs to Cox Communications and that Plaintiff employed certain
13 geolocation technology to locate that IP address within the Southern District of California.
14 (ECF No. 6-4 at ¶¶ 11–24.) Specifically, Mr. Davis declares that Plaintiff’s investigators,
15 MaverikEye UG, checks the location of infringing IP addresses against the Maxmind
16 geolocation database at “the specific time of the observed instance” of the infringing
17 activity. (*Id.* at ¶ 15.) Plaintiff’s counsel declares further that the Maxmind geolocation
18 service “is about 95% accurate in the U.S.” and “is used by local and federal law
19 enforcement agencies as best practice for IP Address Geolocation in order to determine
20 which locality/agency has proper jurisdiction.” (*Id.* at ¶¶ 18–19.) In addition, Plaintiff’s
21 counsel asserts that after he receives geolocation information from MaverikEye UG, he
22 verifies the location of an IP address by entering the address into three websites that contain
23 a function for locating IP addresses. (*Id.* at ¶ 22.) With respect to IP address 72.197.111.62,
24 MaverikEye UG and the three geolocation websites employed by Plaintiff’s counsel all
25 traced the IP address to San Diego County. (*Id.* at ¶ 23.)

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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 The Court concludes that based on the timing of the IP address tracing efforts
2 employed by Plaintiff's investigator, the documented success of the Maxmind geolocation
3 service, and Plaintiff's counsel's efforts to independently verify the location information
4 provided by Plaintiff's investigator, Plaintiff has met its evidentiary burden of showing that
5 IP address 72.197.111.62 likely resolves to a physical address located in this District.

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

7 For the Court to grant Plaintiff's Motion, Plaintiff must next identify all of the steps
8 it took to locate Defendant to ensure the Court it made a good faith effort to identify and
9 serve process on Defendant. *See Columbia Ins. Co.*, 185 F.R.D. at 579. The Court
10 concludes that Plaintiff has met this burden. Plaintiff retained a private Internet forensic
11 investigator, MaverikEye UG, to monitor the BitTorrent file distribution network for the
12 presence of Plaintiff's copyrighted works and to identify the IP addresses of devices that
13 are found distributing Plaintiff's copyrighted works. (ECF No. 6-4 at ¶ 12.) Through
14 MaverikEye UG, Plaintiff has been able to identify much about the subscriber of IP address
15 72.197.111.62, such as his, her, or its ISP, general location, and software used to commit
16 the allegedly infringing acts. (*Id.* at ¶¶ 12–15.) Based on the above, the Court is satisfied
17 that Plaintiff has made a good faith effort to locate Defendant and that Plaintiff cannot, on
18 its own, locate Defendant with any greater specificity than it already has. Accordingly, the
19 Court finds Plaintiff has sufficiently satisfied the second prong of the Ninth Circuit's "good
20 cause" test.

21 **3. Whether Plaintiff's Suit Can Withstand a Motion to Dismiss**

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

25 Plaintiff's Complaint alleges a single cause of action against Defendant: copyright
26 infringement. (ECF No. 1 at 8–9.) To prove a claim of direct copyright infringement, a
27 plaintiff "must show: (1) ownership of a valid copyright; and (2) that the defendant violated
28 the copyright owner's exclusive rights under the Copyright Act." *Ellison v. Robertson*,

1 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a) (2003)). Here, Plaintiff
2 purports to be the exclusive owner of the copyrighted work at issue. (*Id.* at ¶¶ 7–8; ECF
3 No. 1-4.) In addition, Plaintiff alleges that “Defendant, without the permission or consent
4 of [Plaintiff], copied and distributed plaintiff’s motion picture through a public BitTorrent
5 network.” (ECF No. 1 at ¶ 36.) Accordingly, the Court finds Plaintiff has alleged the
6 *prima facie* elements of direct copyright infringement and its suit against Defendant would
7 likely withstand a motion to dismiss.

8 **4. Specific Discovery Request**

9 Finally, for the Court to grant Plaintiff’s Motion, Plaintiff “should file a request for
10 discovery with the Court.” *Columbia Ins. Co.*, 185 F.R.D. at 580 (citing *Gillespie*, 629
11 F.2d at 642). Although Plaintiff did not provide the Court with a proposed subpoena,
12 Plaintiff has provided the Court with sufficient information regarding its requested
13 discovery by stating in its Motion that it will seek from Cox Communications only the
14 name and address of the subscriber of IP address 72.197.111.62.

15 **B. The Cable Privacy Act**

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

23 **IV. CONCLUSION**

24 For the reasons set forth above, the Court finds good cause exists to allow Plaintiff
25 to serve a Rule 45 subpoena upon Cox Communications at this time. Accordingly,
26 Plaintiff’s Motion is **GRANTED** as follows:

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1 1. Plaintiff may serve on Cox Communications a subpoena, pursuant to and
2 compliant with the procedures of Federal Rule of Civil Procedure 45, seeking only the
3 **name and address** of the subscriber assigned IP address 72.197.111.62 for the relevant
4 time period. Plaintiff shall not seek from Cox Communications any other personally
5 identifiable information about the subscriber;

6 2. Plaintiff's subpoena to Cox Communications must provide a minimum of 45
7 calendar days' notice before any production responsive to the subpoena shall be made to
8 Plaintiff;

9 3. At the time Plaintiff serves its subpoena on Cox Communications, Plaintiff
10 shall also serve on Cox Communications a copy of this Order;

11 4. Within 14 calendar days after service of the subpoena, Cox Communications
12 shall notify the subscriber assigned IP address 72.197.111.62 that his, her, or its identity
13 has been subpoenaed by Plaintiff **and** shall provide the subscriber a copy of this Order with
14 the required notice;

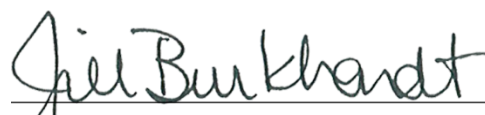
15 5. The subscriber whose identity has been subpoenaed shall have 30 calendar
16 days from the date of such notice to challenge Cox Communications' disclosure of his, her,
17 or its name and address by filing an appropriate pleading with this Court contesting the
18 subpoena;

19 6. If Cox Communications seeks to modify or quash the subpoena, it shall do so
20 as provided by Federal Rule of Civil Procedure 45(d)(3); and

21 7. In the event a motion to quash, modify, or otherwise challenge the subpoena
22 is brought properly before the Court, Cox Communications shall preserve the information
23 sought by the subpoena pending the resolution of any such motion.

24 **IT IS SO ORDERED.**

25 Dated: November 18, 2016

26 
27 Hon. Jill L. Burkhardt
28 United States Magistrate Judge