

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CELL FILM HOLDINGS, LLC,

Plaintiff,

v.

DOE - 174.68.74.64,

Defendant.

Case No.: 16cv2584-BEN (BLM)

**ORDER GRANTING EX PARTE MOTION
TO EXPEDITE DISCOVERY**

[ECF No. 4]

Currently before the Court is Plaintiff's October 17, 2016 "PLAINTIFF'S *EX PARTE* MOTION TO EXPEDITE DISCOVERY." 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 "is the registered copyright owner of the motion picture *Cell*." ECF No. 4-1 at 1. On October 17, 2016, Plaintiff filed a complaint against Doe 174.68.74.64 alleging direct copyright infringement. ECF No. 1 ("Comp."). Plaintiff alleges that Defendant has illegally infringed and distributed its copyrighted movie, *Cell*, over the internet. *Id.* at 4. Plaintiff further alleges that Defendant, who is "currently known only by their Internet Protocol ("IP") Address" infringed Plaintiff's copyright through the BitTorrent software on 50 occasions. *Id.* at 4-5. Plaintiff describes the BitTorrent network as a "peer-to-peer exchange of a large number of

1 copyrighted titles.” Id. at 5.

2 On October 17, 2016, Plaintiff filed the instant motion. ECF No. 4. Plaintiff seeks an
3 order from the Court allowing it to serve a subpoena to Defendant’s Internet Service Provider¹
4 (“ISP”) seeking Defendant’s true name and address pursuant to Federal Rule of Civil Procedure
5 45. ECF No. 4-1 at 3.

6 **DISCUSSION**

7 **A. The Cable Privacy Act**

8 The Cable Privacy Act generally prohibits cable operators from disclosing personally
9 identifiable information regarding subscribers without the prior written or electronic consent of
10 the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may disclose such information
11 if the disclosure is made pursuant to a court order and the cable operator provides the subscriber
12 with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable operator is defined as “any person
13 or group of persons (A) who provides cable service over a cable system and directly or through
14 one or more affiliates owns a significant interest in such cable system, or (B) who otherwise
15 controls or is responsible for, through any arrangement, the management and operation of such
16 a cable system.” 47 U.S.C. § 522(5). Accordingly, Plaintiff seeks an Order instructing Cox
17 Communications to produce documents and information sufficient to identify the user of the
18 specified IP address.

19 **B. Early Discovery**

20 A party may not seek discovery from any source before the Rule 26(f) conference unless that
21 party first obtains a stipulation or court order permitting early discovery. Fed. R. Civ. P. 26(d)(1).
22 Courts in the Ninth Circuit apply the “good cause” standard in deciding whether to permit early
23 discovery. Semitool, Inc. v. Tokyo Electron America, Inc., 208 F.R.D. 273, 274 (N.D. Cal. 2002)
24 (adopting the conventional standard of “good cause” in evaluating a request for expedited
25 discovery). Good cause exists “where the need for expedited discovery, in consideration of the
26 administration of justice, outweighs the prejudice to the responding party.” Id. at 276. Good

27
28 ¹ The ISP at issue is Cox Communications. ECF No. 4-1 at 2.

1 cause for expedited discovery has been found in cases involving claims of infringement and
2 unfair competition or in cases where the plaintiff seeks a preliminary injunction. Id. In
3 infringement cases, expedited discovery is frequently limited to allowing plaintiffs to identify Doe
4 defendants. See UMG Recordings, Inc. v. Doe, 2008 WL 4104207, at *3 (N.D. Cal. Sept. 4,
5 2008) (granting leave to take expedited discovery for documents that would reveal the identity
6 and contact information for each Doe defendant).

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

15 1. Identification of Missing Party with Sufficient Specificity

16 First, Plaintiff must identify the Doe defendant with sufficient specificity to enable the
17 Court to determine that the Doe defendant is a real person subject to the Court’s jurisdiction.
18 See Columbia Ins. Co., 185 F.R.D. at 578. Plaintiff has provided a declaration stating it retained
19 MaverickEye UG, Plaintiff’s investigators, to compile data relating to the IP address at issue. ECF
20 No. 4-3, Declaration of James S. Davis (“Davis Decl.”) at 3. MaverickEye UG determined that
21 the Doe IP address made available an infringing copy of Plaintiff’s motion picture on 50 occasions
22 between September 11, 2016 and September 14, 2016 and that the Doe IP address belonged
23 to Cox Communications and was accessed from a location in San Diego County, CA.² Id. at 5;
24 Comp., Exh. 2. Mr. Davis also entered the Doe IP address into three websites to determine
25

26 ² MaverickEye UG uses an investigative tool called MaverikMonitor, which determines the IP
27 address at the specific time of the observed instance of active distribution. Davis Decl. at 3-4
28 The IP address is then checked against the Maxmind geolocation database
(www.maxmind.com). Id. at 4.

1 the location of the IP address and the websites' geolocation trackers confirmed that the Doe IP
2 address traced to San Diego County.³ Davis Decl. at 5. Because Plaintiff has provided the Court
3 with the unique IP address and the dates and times of connection, the name of the ISP and/or
4 cable operator that provided Internet access for the user of the identified IP address, and used
5 geolocation technology, the Court finds that Plaintiff has made a satisfactory showing that Doe
6 174.68.74.64 is a real person or entity behind the alleged infringing conduct who would be
7 subject to suit in federal court.

8 2. Previous Attempts to Locate Defendant

9 Second, Plaintiff must describe all prior attempts it has made to identify the Doe
10 defendant in a good faith effort to locate and serve them. See Columbia Ins. Co., 185 F.R.D. at
11 579. Plaintiff retained an investigator to identify the IP address of BitTorrent users who were
12 allegedly reproducing Plaintiff's copyrighted material. See Davis Decl. Although Plaintiff's
13 investigator obtained Defendant's IP address, "Plaintiff has no means to readily identify the Doe
14 defendant as a named individual." ECF No. 4-1 at 7. Only Cox Communications can correlate
15 the IP address to a specific individual at a given date and time. See id. The Court therefore
16 finds that Plaintiff has made a good faith effort to identify and locate the Doe defendant.

17 3. Whether Plaintiff Can Withstand a Motion to Dismiss

18 "[A] plaintiff who claims copyright infringement must show: (1) ownership of a valid
19 copyright; and (2) that the defendant violated the copyright owner's exclusive rights under the
20 Copyright Act." Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citations omitted).

21
22 ³ "Some district courts in the Ninth Circuit have determined that a plaintiff identifies Doe
23 defendants with sufficient specificity by providing the unique IP address assigned to an individual
24 defendant on the da[te] of the alleged infringing conduct, and by using 'geolocation technology'
25 to trace the IP address to a physical point of origin." See Malibu Media, LLC v. Does 1-19, 2012
26 WL 2152061, at *3 (S.D. Cal. June 12, 2012) (citing Openmind Solutions, Inc. v. Does 1-39,
27 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011); Pink Lotus Entm't v. Does 1-46, 2011 WL
28 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
1-149, 2011 WL 3607666, at *2 (N.D. Cal. Aug. 15, 2011)). Here, Plaintiff has done both. See
Comp.

1 To prove a claim of direct copyright infringement, "a plaintiff must show that he owns the
2 copyright and that the defendant himself violated one or more of the plaintiff's exclusive rights
3 under the Copyright Act." Id. (citation omitted).

4 Plaintiff provides evidence that it is the exclusive rights holder of the copyrighted works
5 at issue. See Comp. at 3, Exh. 1 ("Certificate of Registration"). Plaintiff alleges that between
6 September 11, 2016 and September 14, 2016, Defendant infringed Plaintiff's copyrighted work
7 by using the BitTorrent file distribution network. See Comp. at 5, Exh. 2. Plaintiff further alleges
8 that it did not permit or consent to Defendant's copying or distribution of this work. See Comp.
9 at 9, ECF No. 4-1 at 8. Accordingly, Plaintiff has alleged the prima facie elements of direct
10 copyright infringement and could withstand a motion to dismiss. See Columbia Ins. Co., 185
11 F.R.D. at 579-80.

12 **CONCLUSION**

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

15 1. Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45, on Cox
16 Communications that seeks only the true name and address of Doe 174.68.74.64. Plaintiff may
17 not subpoena additional information;

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

20 3. Within fourteen (14) calendar days after service of the subpoena, Cox
21 Communications shall notify the subscriber that its identity has been subpoenaed by Plaintiff.
22 The subscriber whose identity has been subpoenaed shall have thirty (30) calendar days from
23 the date of such notice to challenge the disclosure by filing an appropriate pleading with this
24 Court contesting the subpoena;

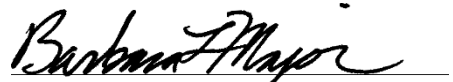
25 4. If Cox Communications wishes to move to quash the subpoena, it shall do so
26 before the return date of the subpoena. The return date of the subpoena must allow for at least
27 forty-five (45) days from service to production. If a motion to quash or other customer challenge
28 is brought, Cox Communications shall preserve the information sought by Plaintiff in the

1 subpoena pending resolution of such motion or challenge; and

2 5. Plaintiff shall serve a copy of this Order with any subpoena obtained and served
3 pursuant to this Order to Cox Communications. Cox Communications, in turn, must provide a
4 copy of this Order along with the required notice to the subscriber whose identity is sought
5 pursuant to this Order.

6 **IT IS SO ORDERED.**

7
8 Dated: 11/3/2016


9 Hon. Barbara L. Major
10 United States Magistrate Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28