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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 STRIKE 3 HOLDINGS, LLC,  
11 Plaintiff,

Case No. 17-cv-02302-MMA-JLB

12 v.

**ORDER GRANTING PLAINTIFF'S  
EX PARTE APPLICATION FOR  
LEAVE TO SERVE A THIRD  
PARTY SUBPOENA PRIOR TO A  
RULE 26(F) CONFERENCE**

13 JOHN DOE, subscriber assigned IP  
14 address 68.8.146.252,  
15 Defendant.

**[ECF No. 4]**

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

21 **I. BACKGROUND**

22 This is one of numerous cases filed by Plaintiff alleging copyright infringement  
23 against a defendant using the BitTorrent file-sharing system.<sup>1</sup> Plaintiff is the copyright  
24 owner of motion pictures distributed through adult content websites *Blacked*, *Tushy*, and  
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27 <sup>1</sup> On November 14, 2017, Strike 3 holdings filed eight separate cases against John Does in this District:  
28 17-cv-2302-MMA-JLB; 17-cv-2312-MMA-NLS; 17-cv-2313-AJB-JMA; 17-cv-2315-MMA-AGS; 17-  
cv-2316-GPC-KSC; 17-cv-2317-JAH-BLM; 17-cv-2318-DMS-BLM; and 17-cv-2319-JAH-BGS.

1 *Vixen*. (ECF No. 4-2 at 3.) Plaintiff alleges that the person or entity assigned Internet  
2 Protocol (“IP”) address 68.8.146.252 has illegally copied, downloaded, and/or distributed  
3 thirty-nine of Plaintiff’s motion pictures through his, her, or its use of the online BitTorrent  
4 file distribution network. (ECF No. 1 at ¶ 4.) On November 14, 2017, Plaintiff commenced  
5 the instant action by filing a Complaint against Defendant “John Doe, subscriber assigned  
6 IP address 68.8.146.252.” (ECF No. 1.) The Complaint alleges a single claim of copyright  
7 infringement against Defendant. (*Id.* at ¶¶ 34-39.)

8 Because Defendant used the Internet to commit the alleged infringement, Plaintiff  
9 knows Defendant only by his, her, or its IP address, which Plaintiff believes was assigned  
10 to Defendant by the Internet Service Provider (“ISP”) Cox Communications. (ECF No. 4-  
11 1 at 6.) In the present Motion, Plaintiff asserts that Cox Communications “is the only party  
12 with the information necessary to identify Defendant by correlating the IP address with  
13 John Doe’s identity” and that “[w]ithout this information, Plaintiff cannot serve Defendant  
14 nor pursue this lawsuit and protect its copyrights.” (*Id.* at 6-7.) Accordingly, Plaintiff  
15 seeks leave to serve a Rule 45 subpoena on Cox Communications to obtain the name and  
16 address associated with IP address 68.8.146.252. (*Id.*)

## 17 **II. LEGAL STANDARDS**

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. 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 III. DISCUSSION

#### 19 A. Early Discovery

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

#### 24 1. Identification of Missing Party with Sufficient Specificity

25 For the Court to grant Plaintiff’s Motion, Plaintiff must first identify Defendant with  
26 enough specificity to enable the Court to determine Defendant is a real person or entity  
27 who would be subject to the jurisdiction of this Court. *See Columbia Ins. Co.*, 185 F.R.D.  
28 at 578. This Court has previously determined that “a plaintiff identifies Doe defendants

1 with sufficient specificity by providing the unique IP addresses assigned to an individual  
2 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation  
3 technology’ to trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v.*  
4 *Collective of December 29, 2011 Sharing Hash*, No. 12cv00186 MMA (RBB), 2012 WL  
5 12884688, at \*4 (S.D. Cal. May 8, 2012) (citing *Openmind Solutions, Inc. v. Does 1–39*,  
6 No. C-11-3311 MEJ, 2011 WL 4715200, at \*5–6 (N.D. Cal. Oct. 7, 2011); *Pink Lotus*  
7 *Entm’t, LLC v. Does 1–46*, No. C-11-02263 HRL, 2011 WL 2470986, at \*6–7 (N.D. Cal.  
8 June 21, 2011)).

9 In cases where it is unclear whether the subject IP address is “dynamic” or “static,”  
10 such as here, it matters when Plaintiff’s geolocation efforts were performed.<sup>2</sup> In the context  
11 of dynamic IP addresses, “a person using [a particular IP] address one month may not have  
12 been the same person using it the next.” *State v. Shields*, No. CR06352303, 2007 WL  
13 1828875, at \*6 (Conn. Sup. Ct. June 7, 2007). It is likely that the user of IP address  
14 68.8.146.252 is a residential user and that the IP address assigned by Cox Communications  
15 is dynamic.<sup>3</sup> Thus, if Plaintiff’s geolocation<sup>3</sup> efforts were performed in the temporal  
16 proximity to the offending downloads, they may be probative of the physical location of  
17 the subject IP subscriber. If not, the geolocation of the subject IP address may potentially  
18 be irrelevant.

19 Here, the Court concludes that the instant Motion sufficiently demonstrates that  
20 Defendant is likely subject to the Court’s jurisdiction. Plaintiff attaches to its Complaint a  
21 table reflecting that the user of IP address 68.8.146.252 engaged in allegedly infringing  
22 activity from June 6, 2017, through October 16, 2017. (ECF No. 1-2 at 1-3.) In addition,  
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25 <sup>2</sup> “Static IP addresses are addresses which remain set for a specific user. Dynamic IP addresses are  
26 randomly assigned to internet users and change frequently. Consequently, for dynamic IP addresses, a  
27 single IP address may be re-assigned to many different computers in a short period of time.” *Call of the*  
28 *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)).

<sup>3</sup> “Most consumer IP addresses are ‘dynamic’ as opposed to ‘static.’” *Call of the Wild Movie*, 770 F.  
Supp. 2d at 356.

1 Plaintiff attaches to its Motion the declaration of Tobias Fieser, an employee of IPP  
2 International UG (IPP), a forensic investigation services company. (ECF No. 4-2.) Fieser  
3 declares that IPP connected to an electronic device using IP address 68.8.146.252, which  
4 was observed distributing multiple pieces of Strike 3 Holding’s motion pictures. (*Id.* at ¶  
5 7.) Fieser also declares that according to its ancillary surveillance program, IPP confirmed  
6 that IP address 68.8.146.252 is associated with significant and long-term BitTorrent use.  
7 (*Id.* at ¶ 12.)

8 Plaintiff’s Motion asserts that the IP address 68.8.146.252 belongs to Cox  
9 Communications and that Plaintiff employed Maxmind’s geolocation technology to locate  
10 that IP address within the Southern District of California. (ECF No. 4-1 at 7, 11.)  
11 Plaintiff’s Motion argues that this Court has accepted Maxmind’s geolocation findings for  
12 the purpose of allowing expedited discovery and that federal law enforcement relies on  
13 Maxmind for its cyber investigations. (*Id.* at 12) (citing *Criminal Prods., Inc. v. Doe-*  
14 *72.192.163.220*, No. 16-CV-2589 WQH (JLB), 2016 WL 6822186, at \*3 (S.D. Cal. Nov.  
15 18, 2016)). At the Court’s request, Plaintiff filed a Supplemental Declaration of Emilie  
16 Kennedy, an employee of Plaintiff, addressing when the device associated with IP address  
17 68.8.146.252 was tracked to this district. (ECF No. 6.) Kennedy declares that IP address  
18 68.8.146.252 was automatically inserted into Maxmind’s Geolocation Database on  
19 September 5, 2017 after Plaintiff first received infringement data from IPP<sup>4</sup> and Maxmind  
20 traced the IP address location to San Diego, CA. (ECF No. 6-1 at ¶ 4.) Kennedy also  
21 declares that as of December 12, 2017, Maxmind’s Geolocation Database continues to  
22 trace IP address 68.8.146.252 to a location in San Diego, CA. (*Id.* at ¶ 5.)

23 The Court concludes that based on the timing of the IP address tracing efforts  
24 employed by Plaintiff, the documented success of the Maxmind geolocation service, and  
25 the continued tracing of the IP address to San Diego, CA, Plaintiff has met its evidentiary  
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28 <sup>4</sup> The Court notes that the table attached to Plaintiff’s complaint references alleged infringement as early  
as June 6, 2017. (ECF No. 1-2 at 1.)

1 burden of showing that IP address 68.8.146.252 likely relates to a physical address located  
2 in this district.

### 3 **2. Previous Attempts To Locate Defendant**

4 For the Court to grant Plaintiff's Motion, Plaintiff must next identify all of the steps  
5 it took to locate Defendant to ensure the Court it made a good faith effort to identify and  
6 serve process on Defendant. *See Columbia Ins. Co.*, 185 F.R.D. at 579. The Court  
7 concludes that Plaintiff has met this burden. Plaintiff retained a forensic investigation  
8 services company, IPP, to monitor the BitTorrent file distribution network for the presence  
9 of Plaintiff's copyrighted works and to identify the IP addresses of devices that are found  
10 distributing Plaintiff's copyrighted works. (ECF No. 4-2 at ¶¶ 4-5.) Through IPP, Plaintiff  
11 has been able to identify much about the subscriber of IP address 68.8.146.252, such as  
12 his, her, or its ISP and software used to commit the allegedly infringing acts. (*Id.* at ¶¶ 7-  
13 10.) Plaintiff also retained a cyber-security firm, 7 River Systems, LLC, which declares,  
14 based on its experience in similar cases, that Defendant's ISP is the only entity that can  
15 correlate the IP address to its subscriber and identify Defendant as the person assigned the  
16 IP address 68.8.146.252 during the time of the alleged infringement. (*Id.* at ¶ 10.) Based  
17 on the above, the Court is satisfied that Plaintiff has made a good faith effort to locate  
18 Defendant and that Plaintiff cannot, on its own, locate Defendant with any greater  
19 specificity than it already has. Accordingly, the Court finds Plaintiff has sufficiently  
20 satisfied the second prong of the Ninth Circuit's "good 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 ¶¶ 34-39.) To prove a claim of direct copyright infringement,  
27 a plaintiff "must show: (1) ownership of a valid copyright; and (2) that the defendant  
28 violated the copyright owner's exclusive rights under the Copyright Act." *Ellison v.*

1 *Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a) (2003)). Here,  
2 Plaintiff purports to be the owner of the thirty-nine copyrighted works at issue, and asserts  
3 that every work has been registered with the United States Copyright Office or has a  
4 pending copyright registration application. (ECF No. 1 at ¶¶ 1, 4, 6; ECF No. 4-1 at 15  
5 (citing *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010).) In  
6 addition, Plaintiff alleges that “Defendant used the BitTorrent file network to illegally  
7 download and distribute Plaintiff’s copyrighted motion pictures.” (*Id.* at ¶ 23.) IPP  
8 declares that it observed the device using IP address 68.8.146.252 distributing multiple  
9 pieces of Strike 3 Holding’s motion pictures, and states that the IP address is associated  
10 with significant and long-term BitTorrent use. (ECF No. 4-2 at ¶¶ 7, 12.) Accordingly,  
11 the Court finds Plaintiff has alleged the *prima facie* elements of direct copyright  
12 infringement and its 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 Cox Communications only the  
19 name and address of the subscriber of IP address 68.8.146.252.

#### 20 **B. Additional Considerations**

21 This Court shares the concern noted by the Honorable Nita L. Stormes in the parallel  
22 case *Strike 3 Holdings, LLC v. John Doe*, No. 17-cv-2312-MMA-NLS (S.D. Cal. Dec. 7,  
23 2017) regarding the risk of “unscrupulous tactics [being] used by certain plaintiffs,  
24 especially in the adult film industry, to shake down the owners of IP addresses’ to exact  
25 quick and quiet settlements from possibly innocent defendants who pay out only to avoid  
26 potential embarrassment.” (citing *Malibu Media, LLC v. Does 1-5*, 2012 U.S. Dist. LEXIS  
27 77469, \*1 (S.D.N.Y. June 1, 2012)). Accordingly, the Court issues an order establishing  
28 procedural safeguards to protect the privacy and interests of the Defendant. *See e.g.*,

1 *Malibu Media v. Doe*, 2014 U.S. Dist. Lexis 79595, \*5 (M.D. Fla. Apr. 10, 2014) (imposing  
2 conditions and citing cases that do the same); *see also Malibu Media, LLC v. Doe*, 2016  
3 U.S. Dist. LEXIS 35534, \*17 (E.D. Cal. Mar. 18, 2016).

#### 4 IV. CONCLUSION

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

8 1. Plaintiff may serve on Cox Communications a subpoena, pursuant to and  
9 compliant with the procedures of Federal Rule of Civil Procedure 45, seeking only the  
10 **name and address** of the subscriber assigned IP address 68.8.146.252 for the relevant time  
11 period. Plaintiff shall not seek from Cox Communications any other personally identifiable  
12 information about the subscriber;

13 2. Plaintiff's subpoena to Cox Communications must provide a minimum of  
14 forty-five (45) calendar days' notice before any production responsive to the subpoena  
15 shall be made to Plaintiff;

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

18 4. Within fourteen (14) calendar days after service of the subpoena, Cox  
19 Communications shall notify the subscriber assigned IP address 68.8.146.252 that his, her,  
20 or its identity has been subpoenaed by Plaintiff **and** shall provide the subscriber a copy of  
21 this Order with the required notice;

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

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

28 7. In the event a motion to quash, modify, or otherwise challenge the subpoena




1 is brought properly before the Court, Cox Communications shall preserve the information  
2 sought by the subpoena pending the resolution of any such motion; and

3 8. Plaintiff may only use the information disclosed in response to a Rule 45  
4 subpoena served on Cox Communications for the purpose of protecting and enforcing  
5 Plaintiff's rights as set forth in its Complaint. If the Defendant wishes to proceed  
6 anonymously, Plaintiff may not release any identifying information without a court order  
7 allowing the release of the information.

8 **IT IS SO ORDERED.**

9 Dated: December 15, 2017

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11 Hon. Jill L. Burkhardt  
12 United States Magistrate Judge  
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