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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 STRIKE 3 HOLDINGS, LLC,
11 Plaintiff,

Case No. 18-cv-00042-CAB-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 98.176.143.26,
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 in this case. For the reasons set forth below,
20 Plaintiff's Motion is **GRANTED**.

21 **I. BACKGROUND**

22 This is one of numerous cases filed by Plaintiff alleging copyright infringement by
23 a John Doe defendant through the use of the BitTorrent file-sharing system.¹ Plaintiff
24 alleges that it is the copyright owner of motion pictures distributed through adult content
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27 ¹ See, e.g., 17-cv-2302-MMA-JLB; 17-cv-2312-MMA-NLS; 17-cv-2313-AJB-JMA; 17-cv-2315-MMA-
28 AGS; 17-cv-2316-GPC-KSC; 17-cv-2317-JAH-BLM; 17-cv-2318-DMS-BLM; and 17-cv-2319-JAH-
BGS.

1 websites *Blacked*, *Tushy*, and *Vixen*. (ECF No. 4-1 at ¶ 3.) Plaintiff alleges that between
2 June 22, 2017 and November 15, 2017, the person or entity assigned Internet Protocol
3 (“IP”) address 98.176.143.26 illegally copied, downloaded, and/or distributed thirty-seven
4 of Plaintiff’s motion pictures through his, her, or its use of the online BitTorrent file
5 distribution network. (ECF No. 1 at ¶¶ 23–30; ECF No. 1-2 at 1–3.) On January 5, 2018,
6 Plaintiff commenced the instant action by filing a Complaint against Defendant “John Doe,
7 subscriber assigned IP address 98.176.143.26.” (ECF No. 1.) The Complaint alleges a
8 single claim of copyright infringement. (*Id.* at ¶¶ 34–39.)

9 Because Defendant used the Internet to commit the alleged infringement, Plaintiff
10 knows Defendant only by his, her, or its IP address, which Plaintiff believes was assigned
11 to Defendant by the Internet Service Provider (“ISP”) Cox Communications. (ECF No. 4
12 at 17.) In the present Motion, Plaintiff asserts that Cox Communications “is the only party
13 with the information necessary to identify Defendant by correlating the IP address with
14 John Doe’s identity.” (*Id.* at 7.) Accordingly, Plaintiff seeks leave to serve a Rule 45
15 subpoena on Cox Communications to obtain the name and address associated with IP
16 address 98.176.143.26. (*Id.*)

17 II. LEGAL STANDARDS

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

1 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406,
2 430 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 Plaintiff seeks an order allowing it to serve a Rule 45 subpoena on Cox
20 Communications before the parties have conducted a Rule 26(f) Conference so that
21 Plaintiff may obtain the true name and address of Defendant. (ECF No. 4 at 7.) For the
22 reasons set forth below, Plaintiff’s Motion is **GRANTED**.

23 A. Identification of Missing Party with Sufficient Specificity

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

1 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation
2 technology’ to trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v.*
3 *Collective of December 29, 2011 Sharing Hash*, No. 12-cv-00186 MMA (RBB), 2012 WL
4 12884688, at *4 (S.D. Cal. May 8, 2012) (citing *Openmind Solutions, Inc. v. Does 1–39*,
5 No. C-11-3311 MEJ, 2011 WL 4715200, at *5–6 (N.D. Cal. Oct. 7, 2011); *Pink Lotus*
6 *Entm’t, LLC v. Does 1–46*, No. C-11-02263 HRL, 2011 WL 2470986, at *6–7 (N.D. Cal.
7 June 21, 2011)).

8 In cases where it is unclear whether the subject IP address is “dynamic” or “static,”
9 such as here, it matters when Plaintiff’s geolocation efforts were performed.² In the context
10 of dynamic IP addresses, “a person using [a particular IP] address one month may not have
11 been the same person using it the next.” *State v. Shields*, No. CR06352303, 2007 WL
12 1828875, at *6 (Conn. Sup. Ct. June 7, 2007). It is likely that the user of IP address
13 98.176.143.26 is a residential user and that the IP address assigned by Cox
14 Communications is dynamic.³ Thus, if Plaintiff’s geolocation efforts were performed close
15 in time to the offending downloads, they may be probative of the physical location of the
16 subject IP subscriber. If not, the geolocation of the subject IP address may be irrelevant.

17 Here, the Court concludes that the instant Motion sufficiently demonstrates that
18 Defendant is likely subject to the Court’s jurisdiction. Plaintiff attaches to its Complaint a
19 table reflecting that the user of IP address 98.176.143.26 engaged in allegedly infringing
20 activity between June 22, 2017 and November 15, 2017. (ECF No. 1-2 at 1–3.) In addition,
21 Plaintiff attaches to its Motion the declaration of Tobias Fieser, an employee of IPP
22 International UG (IPP), a forensic investigation services company. (ECF No. 4-2.) Fieser
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25 ² “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)).

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

1 declares that IPP connected to an electronic device using IP address 98.176.143.26, which
2 was observed distributing multiple pieces of Strike 3 Holding’s motion pictures. (*Id.* at ¶
3 7.) Fieser also declares that, according to IPP’s ancillary surveillance program, IP address
4 98.176.143.26 is associated with significant and long-term BitTorrent use. (*Id.* at ¶ 12.)

5 Plaintiff’s Motion asserts that the IP address 98.176.143.26 belongs to Cox
6 Communications and that Plaintiff employed Maxmind’s geolocation technology to locate
7 that IP address within the Southern District of California. (ECF No. 4 at 7, 13.) Plaintiff’s
8 Motion argues that this Court has accepted Maxmind’s geolocation findings for the purpose
9 of allowing expedited discovery and that federal law enforcement relies on Maxmind for
10 its cyber investigations. (*Id.* at 13) (citing *Criminal Prods., Inc. v. Doe-72.192.163.220*,
11 No. 16-CV-2589 WQH (JLB), 2016 WL 6822186, at *3 (S.D. Cal. Nov. 18, 2016)). At
12 the Court’s request, Plaintiff filed a Supplemental Declaration of Emilie Kennedy, an
13 employee of Plaintiff, addressing when the device associated with IP address
14 98.176.143.26 was tracked to this district. (ECF No. 6.) Kennedy declares that IP address
15 98.176.143.26 was automatically inserted into Maxmind’s Geolocation Database on
16 September 6, 2017, after Plaintiff first received infringement data from IPP,⁴ and Maxmind
17 traced the IP address location to Vista, CA. (ECF No. 6-1 at ¶ 4.) Kennedy also declares
18 that as of February 2, 2018, Maxmind’s Geolocation Database continues to trace IP address
19 98.176.143.26 to a location in this district. (*Id.* at ¶ 5.)⁵

20 The Court concludes that based on the timing of the IP address tracing efforts
21 employed by Plaintiff, the documented success of the Maxmind geolocation service, and
22 the continued tracing of the IP address to this district, Plaintiff has met its evidentiary
23 burden of showing that IP address 98.176.143.26 likely relates to a physical address located
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26 ⁴ The Court notes that the table attached to Plaintiff’s complaint references alleged infringement as early
as June 22, 2017. (ECF No. 1-2 at 1–3.)

27 ⁵ On February 2, 2018, IP address 98.176.143.26 was identified as located in San Marcos, CA, which is
28 approximately seven miles from its original location in Vista, CA. (*Id.*) Both locations are within this
district.

1 in this district.

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

3 For the Court to grant Plaintiff’s Motion, Plaintiff must next identify all of the steps
4 it took to locate Defendant to ensure the Court it made a good faith effort to identify and
5 serve process on Defendant. *See Columbia Ins. Co.*, 185 F.R.D. at 579. The Court
6 concludes that Plaintiff has met this burden. Plaintiff retained a forensic investigation
7 services company, IPP, to monitor the BitTorrent file distribution network for the presence
8 of Plaintiff’s copyrighted works and to identify the IP addresses of devices that are found
9 distributing Plaintiff’s copyrighted works. (ECF No. 4-2 at ¶¶ 4–5.) Through IPP, Plaintiff
10 has been able to identify much about the subscriber of IP address 98.176.143.26, such as
11 his, her, or its ISP and the software used to commit the allegedly infringing acts. (*Id.* at ¶¶
12 7–10.) Plaintiff asserts that Defendant’s ISP is the only entity that can correlate the IP
13 address to its subscriber and identify Defendant as the person assigned the IP address
14 98.176.143.26 during the time of the alleged infringement. (ECF No. 4 at 7.) Based on
15 the above, the Court is satisfied that Plaintiff has made a good faith effort to locate
16 Defendant and that Plaintiff cannot, on its own, locate Defendant with any greater
17 specificity than it already has. Accordingly, the Court finds Plaintiff has sufficiently
18 satisfied the second prong of the “good cause” test.

19 **C. Whether Plaintiff’s Suit Can Withstand a Motion to Dismiss**

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

23 Plaintiff’s Complaint alleges a single cause of action against Defendant: copyright
24 infringement. (ECF No. 1 at ¶¶ 34–39.) To prove a claim of direct copyright infringement,
25 a plaintiff “must show: (1) ownership of a valid copyright; and (2) that the defendant
26 violated the copyright owner’s exclusive rights under the Copyright Act.” *Ellison v.*
27 *Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a) (2003)). Here,
28 Plaintiff purports to be the owner of the thirty-seven copyrighted works at issue, and asserts

1 that every work has been registered with the United States Copyright Office or has a
2 pending copyright registration application. (ECF No. 1 at ¶¶ 2, 31, 32; ECF No. 4 at 16
3 (citing *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010).)
4 Plaintiff alleges that “Defendant used the BitTorrent file network to illegally download and
5 distribute Plaintiff’s copyrighted motion pictures.” (ECF No. 1 at ¶ 23.) IPP declares that
6 it observed the device using IP address 98.176.143.26 distributing multiple pieces of Strike
7 3 Holding’s motion pictures, and when assembled, the distributed pieces constitute a fully
8 playable digital movie. (ECF No. 4-2 at ¶¶ 7–10.) Plaintiff has verified that each digital
9 file is a copy of Strike 3’s motion pictures. (ECF No. 4-3 at ¶¶ 7–10.) IPP also declares
10 that this IP address is associated with significant and long-term BitTorrent use. (ECF No.
11 4-2 at ¶ 12.) Accordingly, the Court finds Plaintiff has alleged the *prima facie* elements of
12 direct copyright infringement and its suit against Defendant would likely withstand a
13 motion to dismiss.

14 **D. Specific Discovery Request**

15 Finally, for the Court to grant Plaintiff’s Motion, Plaintiff “should file a request for
16 discovery with the Court.” *Columbia Ins. Co.*, 185 F.R.D. at 580 (citing *Gillespie*, 629
17 F.2d at 642). Although Plaintiff did not provide the Court with a proposed subpoena,
18 Plaintiff has provided the Court with sufficient information regarding its requested
19 discovery by stating in its Motion that it will seek from Cox Communications only the
20 name and address of the subscriber of IP address 98.176.143.26. (ECF No. 4 at 18.)

21 **E. Additional Considerations**

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

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

4 III. CONCLUSION

5 For the reasons set forth above, the Court finds good cause to allow Plaintiff to serve
6 a Rule 45 subpoena upon Cox Communications at this time. Accordingly, Plaintiff's
7 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 98.176.143.26 for the relevant
11 time period of the alleged infringement. Plaintiff shall not seek from Cox Communications
12 any other personally identifiable 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 98.176.143.26 that his,
20 her, or its identity has been subpoenaed by Plaintiff **and** shall provide the subscriber a copy
21 of 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: February 9, 2018

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