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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 STRIKE 3 HOLDINGS, LLC,
12 Plaintiff,
13 v.
14 JOHN DOE, subscriber assigned IP
15 address 76.88.7.87,
16 Defendant.

Case No.: 18-cv-00235-BAS-BGS

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

[ECF NO. 4]

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20 Plaintiff Strike 3 Holdings, LLC's Ex Parte Application for Leave to Serve a Third
21 Party Subpoena Prior to a Rule 26(f) Conference (ECF No. 4) is **GRANTED**.

22 **I. BACKGROUND**

23 On January 31, 2018, Plaintiff Strike 3 Holdings, LLC ("Plaintiff") filed its
24 Complaint against John Doe subscriber assigned Internet Protocol ("IP") address
25 76.88.7.87 ("Doe Defendant") for copyright infringement. (ECF No. 1.) On February 13,
26 2018, Plaintiff filed an Ex Parte Application for Leave to Serve a Third Party Subpoena
27 Prior to a Rule 26(f) Conference to ascertain the identity of Doe Defendant. (ECF No. 4.)

28 In its Complaint, Plaintiff asserts that Doe Defendant is liable for direct copyright

1 infringement. (ECF No. 1 ¶¶ 34-39.¹) Plaintiff alleges it owns the copyrights for movies
2 it distributes through adult websites and DVD sales. (Id. ¶¶ 3, 13.) Plaintiff alleges Doe
3 Defendant used BitTorrent, a peer-to-peer file sharing system, to copy and distribute its
4 movies without consent. (Id. ¶¶ 4-5, 17-38.) To identify the IP address of the Doe
5 Defendant, Plaintiff hired forensic investigator IPP International U.G. (Id. ¶¶ 24-28.)

6 As it can only identify the Doe Defendant by the IP address used, Plaintiff requests
7 permission to serve a Federal Rule of Civil Procedure 45 subpoena on the Internet Service
8 Provider (“ISP”), Spectrum (Time Warner Cable), that issued the IP address to Doe
9 Defendant. (ECF No. 4-1 at 6-7.) The proposed subpoena only demands the name and
10 address of Doe Defendant, and Plaintiff indicates it will only use this information to
11 prosecute claims in the Complaint. (Id.)

12 Plaintiff claims good cause exists to grant the Ex Parte Application because:
13 (1) Plaintiff has identified Doe Defendant with sufficient specificity through geolocation
14 technology and forensic investigation; (2) Plaintiff has identified all previous steps taken
15 to locate Doe Defendant; (3) Plaintiff’s Complaint could withstand a motion to dismiss;
16 and (4) Plaintiff has established that there is a reasonable likelihood that Plaintiff can
17 identify the Doe Defendant and effectuate service. (See id. at 6-17.)

18 **II. STANDARD OF REVIEW**

19 **A. Cable Privacy Act**

20 The Cable Privacy Act prohibits a cable operator from disclosing “personally
21 identifiable information concerning any subscriber without the prior written or electronic
22 consent of the subscriber concerned.” 47 U.S.C. § 551(c)(1). However, a “cable operator
23 may disclose such information if the disclosure is . . . made pursuant to a court order
24 authorizing such disclosure, if the subscriber is notified of such order by the person to
25 whom the order is directed.” 47 U.S.C. § 551(c)(2)(B). A cable operator is “any person
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27
28 ¹ The Court cites to the blue CM/ECF-generated document and page numbers located at the top of each page.

1 or group of persons (A) who provides cable service over a cable system and directly or
2 through one or more affiliates owns a significant interest in such cable system, or (B) who
3 otherwise controls or is responsible for, through any arrangement, the management and
4 operation of such a cable system.” 47 U.S.C. § 522(5).

5 **B. Requests for Discovery Before Rule 26(f) Conference**

6 Unless a court order permits discovery, it is not allowed until the parties meet and
7 confer pursuant to Federal Rule of Civil Procedure 26(f). See Fed. R. Civ. P. 26(d)(1). To
8 determine if early discovery is warranted in a particular case, the court applies a “good
9 cause” test by weighing the need for discovery to further justice against the prejudice it
10 may cause the opposing party. *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273,
11 276 (N.D. Cal. 2002); see also *Strike 3 Holdings, LLC v. Doe*, No. 17CV2317 JAH (BLM),
12 2017 WL 6389848, at *1 (S.D. Cal. Dec. 14, 2017) (citing *Semitoool*, 208 F.R.D. at 274).

13 The Ninth Circuit has held that when a defendant’s identity is unknown at the time
14 a complaint is filed, courts may grant a plaintiff leave to take early discovery to determine
15 the defendant’s identity “unless it is clear that discovery would not uncover the identit[y],
16 or that the complaint would be dismissed on other grounds.” *Gillespie v. Civiletti*, 629
17 F.2d 637, 642 (9th Cir. 1980). In determining whether to grant leave for early discovery
18 to ascertain a defendant’s identity, district courts consider: (1) whether the plaintiff can
19 “identify the missing party with sufficient specificity such that the defendant is a real
20 person or entity who could be sued in federal court”; (2) whether the plaintiff has described
21 “all previous steps taken to locate the elusive defendant”; (3) whether the “suit against
22 defendant could withstand a motion to dismiss”; and (4) whether the requested “discovery
23 process would lead to identifying information about [the] defendant that would make
24 service of process possible.” *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-
25 80 (N.D. Cal. 1999).

26 **III. DISCUSSION**

27 **A. Identification of Doe Defendant with Sufficient Specificity**

28 First, Plaintiff must identify Doe Defendant with sufficient specificity to enable the

1 Court to determine Doe Defendant is a real person, subject to the Court’s jurisdiction.
2 Columbia Ins., 185 F.R.D. at 578. To determine whether a doe defendant has been
3 identified with sufficient specificity, courts look to whether a plaintiff provided “the unique
4 IP address[] assigned to an individual defendant on the day of the allegedly infringing
5 conduct” and used “‘geolocation technology’ to trace the IP addresses to a physical point
6 of origin.” 808 Holdings, LLC v. Collective of Dec. 29, 2011 Sharing Hash
7 E37917C8EEB4585E6421358FF32F29C D63C23C91, No. 12CV00186 MMA (RBB),
8 2012 WL 12884688, at *4 (S.D. Cal. May 8, 2012) (citing OpenMind Sols., Inc. v. Does 1-
9 39, No. C-11-3311 MEJ, 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011). Identifying
10 the unique IP address and location of the IP address has been shown to meet the
11 requirement for identifying a doe defendant with sufficient specificity. Id.

12 Plaintiff alleges that between September 22, 2017 and December 3, 2017, Doe
13 Defendant infringed Plaintiff’s copyrighted work via the BitTorrent file distribution
14 network. (ECF No. 1 ¶¶ 23-30, 34-39; ECF No. 1-2.) Plaintiff retained IPP International
15 UG (“IPP”), a forensic investigation services company, to monitor the BitTorrent file
16 distribution network for copyrighted works and identify IP addresses used by infringers to
17 distribute copyrighted works within the network. (ECF No. 4-3 ¶ 4-5.) Plaintiff has
18 provided a declaration from IPP employee Tobias Fieser (ECF No. 4-3) who determined
19 the following: (1) IPP’s servers connected to an electronic device using IP address
20 76.88.7.87; (2) the IP address distributed to IPP’s servers “multiple pieces” of Plaintiff’s
21 copyrighted movies listed on Exhibit A to the Complaint; and (3) “reassembling the pieces
22 using a specialized BitTorrent client results in a fully playable digital movie.” Further,
23 Fieser states that files distributed by Doe Defendant’s IP address “have a unique identifier
24 of the Cryptographic Hash outlined on Exhibit A [to the Complaint]” and “IP address
25 76.88.7.87 is associated with significant long term BitTorrent use.” (ECF No. 4-3 ¶¶ 7-
26 12.)

27 Plaintiff claims that Doe Defendant’s IP address belongs to Spectrum (Time Warner
28 Cable) based on the identification of Maxmind Inc., an IP address geolocation technology

1 that numerous federal courts have found to be credible and reliable, and the American
2 Registry for Internet Numbers, “a nonprofit, member-based organization, responsible for
3 the management and distribution of IP addresses across most of North America.” (ECF
4 No. 4-1 at 11-12, 16-17; ECF No. 4-4 ¶ 11; ECF No. 1 ¶ 5.)

5 Further, Plaintiff alleges it traced the alleged Doe Defendant’s IP address to this
6 District using Maxmind. (ECF No. 4-1 at 12; ECF No. 1 ¶ 9 [“Plaintiff used IP address
7 geolocation technology by Maxmind Inc., an industry leading provider of IP address
8 intelligence and online fraud detection tools, to determine that Defendant’s IP address
9 traced to a physical address in this District.”].) Plaintiff emphasizes the reliability and
10 credibility of Maxmind’s geolocation technology. (See ECF No. 4-1 at 12; ECF No. 1 ¶ 9
11 [“Over 5,000 companies, along with United States federal and state law enforcement, use
12 Maxmind’s GeoIP data to locate Internet visitors, perform analytics, enforce digital rights,
13 and efficiently route Internet traffic.”].) Courts in this District have historically relied upon
14 Maxmind for making such determinations. See, e.g., Strike 3 Holdings, LLC v. Doe, No.
15 18CV47-WQH (RBB), 2018 WL 1427002, at *3 (S.D. Cal. Mar. 22, 2018); Criminal
16 Prods., Inc. v. Doe, No. 16-CV-2589 WQH (JLB), 2016 WL 6822186, at *3 (S.D. Cal.
17 Nov. 18, 2016) (“The Court concludes that based on the timing of the IP address tracing
18 efforts employed by Plaintiff’s investigator, the documented success of the Maxmind
19 geolocation service, and Plaintiff’s counsel’s efforts to independently verify the location
20 information provided by Plaintiff’s investigator, Plaintiff has met its evidentiary burden
21 [that jurisdiction is proper]”).

22 Based on the evidence and information discussed above, Plaintiff has identified the
23 unique IP address, location, and time associated with the infringing activity of the alleged
24 Doe Defendant. Therefore, Plaintiff has identified Doe Defendant with such “sufficient
25 specificity” so as to assure the Court that the Defendant is real, subject to the Court’s
26 jurisdiction, and able to be sued. *Columbia Ins.*, 185 F.R.D. at 578.

27 **B. Previous Steps Taken to Locate Defendant**

28 Second, Plaintiff must describe all prior attempts it has made to identify Doe

1 Defendant in a good faith effort to locate Doe Defendant and serve process. *Columbia Ins.*,
2 185 F.R.D. at 579.

3 Here, Plaintiff has asserted that it has searched for Doe Defendant’s IP address using
4 various internet search tools; reviewed numerous legislative reports, agency websites, and
5 informational technology guides; and hired cyber security consultants and investigators.
6 (ECF No. 4-1 at 13.) Plaintiff retained forensic investigation services company IPP to
7 identify IP addresses used to distribute its copyrighted works via the BitTorrent file
8 distribution network. (ECF No. 4-3 ¶¶4-5, 7.) Despite obtaining Doe Defendant’s IP
9 address, Plaintiff is unable to correlate the IP address to its subscriber and has “been unable
10 to identify any other way to go about obtaining the identities of its infringers and does not
11 know how else it could possibly enforce its copyrights.” (ECF No. 4-1 at 13; see ECF No
12 4-4 ¶ 11 [verifying Spectrum (Time Warner) “own[ed] Defendant’s IP address at the time
13 of the infringements, and hence has the relevant information to identify Doe Defendant.”].)
14 Therefore, the Court finds that Plaintiff has made a good faith effort to identify and locate
15 Doe Defendant.

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

17 Third, Plaintiff must demonstrate that its claim could withstand a motion to dismiss.
18 This requires Plaintiff to “make some showing that an act giving rise to civil liability
19 actually occurred and that the discovery is aimed at revealing specific identifying features
20 of the person or entity who committed that act.” *Columbia Ins.*, 185 F.R.D. at 580.

21 A claim may be dismissed pursuant to Rule 12(b) of the Federal Rules of Civil
22 Procedure for lack of subject matter jurisdiction or for failure to state a claim. See Fed. R.
23 Civ. P. 12(b)(1), 12(b)(6). Plaintiff’s Complaint states the “Court has subject matter
24 jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); and 28 U.S.C.
25 § 1338 (jurisdiction over copyright actions)[,]” and alleges a cause of action for direct
26 copyright infringement. (ECF No. 1 ¶¶ 6-7, 34-39.) To prevail on a copyright infringement
27 claim, 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)).

2 Here, Plaintiff provides evidence that it is the exclusive rights holder of the
3 copyrighted works at issue. (See ECF No. 1-2.) Plaintiff asserts ownership over the sixty-
4 six copyrighted works that are the subject of this suit and claims that the works “have either
5 been registered with the United States Copyright Office or have pending copyright
6 registrations.” (ECF No. 1 ¶¶ 31-32, 35; ECF No. 1-2.) It maintains that for the works
7 “that are still pending registration, a complete application, fees, and deposit materials for
8 copyright registration have been received by the Copyright Office in compliance with the
9 Copyright Act, 17 U.S.C. §§ 101, et seq.” (ECF No. 1 ¶ 32.)

10 Further, Plaintiff alleges that between September 22, 2017 and December 3, 2017,
11 Doe Defendant infringed Plaintiff’s copyrighted work via the BitTorrent file distribution
12 network. (ECF No. 1 ¶¶ 23-30, 34-39; ECF No. 1-2.) Plaintiff also alleges that it did not
13 permit or consent to Doe Defendant’s copying or distribution of this work. (ECF No. 1
14 ¶ 37.) Plaintiff provides evidence that the device using the IP address 76.88.7.87
15 distributed multiple pieces of Plaintiff’s copyrighted motion pictures, and the distributed
16 pieces, when assembled, constitute a “fully playable digital movie.” (ECF No. 4-3 ¶¶ 7-
17 9.) Additionally, Plaintiff has verified that each digital file is a copy of its motion pictures.
18 (See ECF No. 4-4 ¶¶ 7-10.) Accordingly, Plaintiff has alleged the prima facie elements of
19 direct copyright infringement and could withstand a motion to dismiss for failure lack of
20 subject matter jurisdiction or a failure to state a claim. See *Columbia Ins.*, 185 F.R.D. at
21 579-80.

22 A case can also be dismissed for lack of personal jurisdiction over a defendant or for
23 improper venue. See Fed. R. Civ. P. 12(b)(2), 12(b)(3). To survive a motion to dismiss
24 for lack of personal jurisdiction the plaintiff need only make a prima facie showing of
25 jurisdictional facts.” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). A court has
26 personal jurisdiction over any person residing in the forum state. *Brayton v. Purcell LLP*
27 *v. Recordon & Recordon*, 361 F. Supp. 2d 1135, 1138 (N.D. Cal. 2005) (citing generally
28 *Pennoyer v. Neff*, 95 U.S. 714 (1877)). Venue in copyright infringement suits is proper in

1 the district in which the defendant . . . resides or may be found.” 28 U.S.C. § 1400 (a).

2 Here, Plaintiff alleges it used geolocation technology to determine that Doe
3 Defendant’s “IP address traced to a physical address in this District”, that “a substantial
4 part of the events or omissions giving rise to the claims occurred in this District”, and Doe
5 Defendant resides in this District. (ECF No. 1 ¶¶8-10; ECF No. 4-1 at 11-14.) Therefore,
6 Plaintiff has established the prima facie requirements of personal jurisdiction and venue
7 and is likely to withstand a motion to dismiss for lack of personal jurisdiction or improper
8 venue.

9 **D. Requested Discovery Will Lead to Identifying Information**

10 Finally, Plaintiff is required to demonstrate that the requested discovery will lead to
11 identifying information about Doe Defendant that would make service of process possible.
12 See *Columbia Ins.*, 185 F.R.D. at 580. As explained above, Plaintiff’s investigation has
13 revealed a unique IP address, 76.88.7.87. (See ECF No. 4-1 at 11-13.) Due to the fact that
14 the only entity able to correlate an IP address to a specific individual is the ISP, Spectrum
15 (Time Warner Cable) (see *id.* at 13-14), the requested Rule 45 subpoena would lead to
16 information making physical service of process possible.

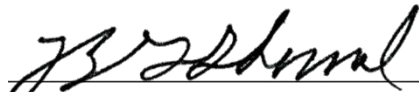
17 **IV. CONCLUSION AND ORDER THEREON**

18 Plaintiff has met its burden of showing good cause and the Ex Parte Application
19 (ECF No. 4) is **GRANTED**. Accordingly, **IT IS HEREBY ORDERED** that:

- 20 1. Plaintiff may serve Spectrum (Time Warner Cable) with a Rule 45 subpoena
21 commanding the ISP to provide Plaintiff with the true name and address of the
22 subscriber assigned the IP address 76.88.7.87. Plaintiff may not subpoena
23 additional information about the subscriber.
- 24 2. Plaintiff may only use the disclosed information to protect its copyrights in
25 pursuing this litigation.
- 26 3. Within **fourteen (14) calendar days** after the service of the subpoena, Spectrum
27 (Time Warner Cable) shall notify the subscriber assigned the IP address
28 76.88.7.87 that his, her, or its identity has been subpoenaed by Plaintiff.

- 1 4. The subscriber whose identity has been subpoenaed shall have **thirty (30)**
2 **calendar days** from the date of the notice to seek a protective order or challenge
3 the disclosure of his, her, or its name and address by filing an appropriate
4 pleading with this Court contesting the subpoena.
- 5 5. If Spectrum (Time Warner Cable) wishes to move to quash the subpoena, it shall
6 do so before the return date of the subpoena. The return date of the subpoena
7 must allow for **forty-five (45) calendar days** from service to production. If a
8 motion to quash or other customer challenge is brought, Spectrum (Time Warner
9 Cable) shall preserve the information sought by Plaintiff in the subpoena pending
10 resolution of such motion or challenge.
- 11 6. Plaintiff shall serve a copy of this Order with any subpoena obtained and served
12 pursuant to this Order to Spectrum (Time Warner Cable).
- 13 7. Spectrum (Time Warner Cable) in turn, must provide a copy of this Order along
14 with the required notice to the subscriber whose identity is sought pursuant to
15 this Order.
- 16 8. No other discovery is authorized at this time.

17 Dated: May 7, 2018

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19 Hon. Bernard G. Skomal
20 United States Magistrate Judge
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