

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

STRIKE 3 HOLDINGS, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP address  
75.80.183.104,

Defendant.

Case No.: 18cv991-LAB (BLM)

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

**[ECF No. 4]**

Currently before the Court is Plaintiff’s June 28, 2018 “Ex Parte Application for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference.” 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.

**I. BACKGROUND**

Plaintiff alleges that it “is the owner of original, award winning motion pictures featured on its subscription-based adult website.” ECF No. 4-1 at 6; see also ECF No. 4-2, Declaration of Greg Lansky in Support of Plaintiff’s Application (“Lansky Decl.”), ¶¶ 3, 32. On May 17, 2018, Plaintiff filed a complaint against John Doe 75.80.183.104 alleging copyright infringement. ECF No. 1 (“Compl.”). Plaintiff alleges that Defendant has illegally infringed by downloading and

1 distributing forty-two of its copyrighted movies over the BitTorrent File Distribution Network for  
2 an extended period of time. Id. at 2, 4. Plaintiff describes the BitTorrent network as a “system  
3 designed to quickly distribute large files over the Internet.” Id. at 4. Plaintiff further alleges  
4 that Defendant, who “attempted to hide this theft by infringing Plaintiff’s content anonymously”  
5 can be identified by his or her Internet Service Provider (“ISP”), Spectrum (“Time Warner  
6 Cable”), through his or her IP address 75.80.183.104. Id. at 2.

7 On June 28, 2018, Plaintiff filed the instant motion. ECF No. 4. Plaintiff seeks an order  
8 from the Court allowing it to serve a subpoena to Defendant’s ISP seeking Defendant’s true  
9 name and address pursuant to Federal Rule of Civil Procedure 45. ECF No. 4-1 at 7.

## 10 **II. DISCUSSION**

### 11 **A. The Cable Privacy Act**

12 The Cable Privacy Act generally prohibits cable operators from disclosing personally  
13 identifiable information regarding subscribers without the prior written or electronic consent of  
14 the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may disclose such information  
15 if the disclosure is made pursuant to a court order and the cable operator provides the subscriber  
16 with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable operator is defined as “any person  
17 or group of persons (A) who provides cable service over a cable system and directly or through  
18 one or more affiliates owns a significant interest in such cable system, or (B) who otherwise  
19 controls or is responsible for, through any arrangement, the management and operation of such  
20 a cable system.” 47 U.S.C. § 522(5). Accordingly, Plaintiff seeks an order instructing Time  
21 Warner Cable to produce documents and information sufficient to identify the user of the  
22 specified IP address. See ECF No. 4-1 at 17.

### 23 **B. Early Discovery**

24 A party may not seek discovery from any source before the Rule 26(f) conference unless  
25 that party first obtains a stipulation or court order permitting early discovery.  
26 Fed. R. Civ. P. 26(d)(1). Courts in the Ninth Circuit apply the “good cause” standard in deciding  
27 whether to permit early discovery. Semitool, Inc. v. Tokyo Electron America, Inc.,  
28 208 F.R.D. 273, 276 (N.D. Cal. 2002) (adopting the conventional standard of “good cause” in

1 evaluating a request for expedited discovery). Good cause exists “where the need for expedited  
2 discovery, in consideration of the administration of justice, outweighs the prejudice to the  
3 responding party.” Id. Good cause for expedited discovery has been found in cases involving  
4 claims of infringement and unfair competition. Id. In infringement cases, expedited discovery  
5 is frequently limited to allowing plaintiffs to identify Doe defendants. See UMG Recordings, Inc.  
6 v. Doe, 2008 WL 4104207, at \*3 (N.D. Cal. Sept. 4, 2008) (granting leave to take expedited  
7 discovery for documents that would reveal the identity and contact information for Doe  
8 defendant).

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

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

18 First, Plaintiff must identify the Doe defendant with sufficient specificity to enable the  
19 Court to determine that the Doe defendant is a real person subject to the Court’s jurisdiction.  
20 Id. at 578. “Some district courts in the Ninth Circuit have determined that a plaintiff identifies  
21 Doe defendants with sufficient specificity by providing the unique IP addresses assigned to an  
22 individual defendant on the day of the allegedly infringing conduct, and by using ‘geolocation  
23 technology’ to trace the IP addresses to a physical point of origin.” 808 Holdings, LLC v.  
24 Collective of Dec. 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C D63C23C91,  
25 No. 12cv00186 MMA(RBB), 2012 WL 12884688, at \*4 (S.D. Cal. May 8, 2012); see e.g.,  
26 OpenMind Sols., Inc. v. Does 1-39, No. C 11-3311 MEJ, 2011 WL 4715200, at \*2 (N.D. Cal.  
27 Oct. 7, 2011) (finding plaintiff met its burden to identify the Doe defendants with sufficient  
28 specificity by identifying the unique IP addresses of individuals engaged in BitTorrent protocol

1 and using geolocation technology to trace the IP addresses to a point of origin within the state  
2 of California); Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL, 2011 WL 2470986, at  
3 \*3 (N.D. Cal. June 21, 2011) (same). "Others have found that merely identifying the IP  
4 addresses assigned to the defendants on the day of the purported infringement is sufficient to  
5 satisfy the first factor." 808 Holdings, LLC, 2012 WL 12884688, at \*4; see e.g., First Time  
6 Videos, LLC v. Does, No. C 11-01675 LB, 2011 WL 1431619, at \*2 (N.D. Cal. Apr. 14, 2011)  
7 ("First, First Time Videos has identified the Doe defendants with sufficient specificity by  
8 submitting a chart listing each of the defendants by the IP address assigned to them on the day  
9 it alleges the particular defendant engaged in the infringing conduct.").

10 Here, Plaintiff has provided a declaration from Tobias Fieser, an employee of IPP  
11 International UG ("IPP"), a company it hired that "monitors the BitTorrent file distribution  
12 network for the presence of copyrighted works" and uses software that "identifies Internet  
13 Protocol ('IP') addresses that are being used by infringers to distribute copyrighted works within  
14 the BitTorrent File Distribution Network" to compile data relating to the IP address at issue.  
15 ECF No. 4-2, Declaration of Tobias Fieser ("Fieser Decl."), ¶¶ 3-7. Mr. Fieser states that IPP  
16 determined that John Doe's IP address (75.80.183.104) distributed multiple pieces of Plaintiff's  
17 copyrighted movies (listed in Exhibit A to the complaint) and that the address "is associated with  
18 significant long term BitTorrent use." Id. ¶¶ 7, 12. He also states that the movie pieces were  
19 recorded in a packet capture ("PCAP"), a "forensically sound interface for recording network  
20 traffic" that records the time which correlates to assignment logs maintained by ISPs in the  
21 United States to track which IP address is assigned to which customer at any given time.  
22 Id. ¶ 8. Mr. Fieser explains that digital files can be identified by their Cryptographic Hash Values  
23 and that IPP was able to determine that the files being distributed by Defendant's IP address  
24 "have a unique identifier of the Cryptographic Hash outlined on Exhibit A [to Plaintiff's  
25 complaint]." Id. ¶ 10.

26 Plaintiff also provided a declaration from Emilie Kennedy, Plaintiff's in-house counsel, in  
27 which Ms. Kennedy states that she is tasked with working with Plaintiff's investigators to monitor  
28 infringement of its motion pictures, "and in coordination with [its] outside counsel," identifying

1 IP addresses “that are extensively infringing [its] content.” ECF No. 4-2, Declaration of Emilie  
2 Kennedy (“Kennedy Decl.”), ¶¶ 2-4. Ms. Kennedy states that she referenced Defendant’s IP  
3 address against an IP geolocation database maintained and updated by Maxmind, “an industry-  
4 leading provider of IP address intelligence and online fraud detection tools,” to determine both  
5 the ISP of the Defendant and that Defendant’s IP address traced to a city inside this District.  
6 Id. ¶¶ 6-8. Ms. Kennedy also states that Maxmind’s geolocation tracing service is “99.8%  
7 accurate on a country level, 90% accurate on a state level, [and] 87% accurate on a city level  
8 for the U.S. within a 50 kilometer radius.” Id. ¶ 10. Ms. Kennedy attests that Plaintiff “first  
9 inserted Defendant’s IP address into Maxmind’s Geolocation Database in early September 2017”  
10 and learned that it traced to a location in San Diego, California. Id. ¶11. Ms. Kennedy further  
11 states that each time Plaintiff received additional data from IPP, it used Maxmind’s database to  
12 confirm that Defendant’s IP address traced to San Diego, including additional checks on  
13 May 17, 2018 and June 28, 2018. Id. ¶¶ 12, 13, 15.

14 Furthermore, Plaintiff provided the declaration of Susan B. Stalzer, an employee of  
15 Plaintiff who reviews the content of its motion pictures and was tasked with reviewing contents  
16 of the infringing files identified in Exhibit A to the complaint and comparing them to Plaintiff’s  
17 original work. ECF No. 4-2, Declaration of Susan B. Stalzer (“Stalzer Decl.”), ¶¶ 3, 7-10. Ms.  
18 Stalzer states that she also “used American Registry for Internet Numbers (‘ARIN’) to confirm  
19 that the ISP Time Warner Cable did own Defendant’s IP address at the time of the infringements  
20 [as listed in Exhibit A], and hence has the relevant information to identify Doe Defendant.”  
21 Id. ¶ 11. The dates of the alleged infringing activity in Exhibit A range from April 30, 2017  
22 through March 31, 2018. ECF No. 1-2 at 2-4.

23 Because Plaintiff has provided the Court with the unique IP address and the dates and  
24 times of connection, the name of the ISP and/or cable operator that provided Internet access  
25 for the user of the identified IP address, and used Maxmind geolocation technology, the Court  
26 finds that Plaintiff has made a sufficient showing that Doe 75.80.183.104 likely resolves to a real  
27 person or entity with a physical address in this District. See 808 Holdings, LLC, 2012 WL  
28 12884688, at \*4.

1           2. Previous Attempts to Locate Defendant

2           Second, Plaintiff must describe all prior attempts it has made to identify the Doe  
3 defendant in a good faith effort to locate and serve them. See Columbia Ins. Co., 185 F.R.D. at  
4 579. Plaintiff states that it “diligently attempted to correlate Defendant’s IP address to  
5 Defendant by searching for Defendant’s IP address” on various internet search tools; by  
6 researching sources of authority such as legislative reports and informational technology guides  
7 for other means of identification; and by consulting with computer investigators and cyber  
8 security experts. ECF No. 4-1 at 13-14. Plaintiff states that despite these efforts, it is unable to  
9 obtain the identity of the alleged infringer because Defendant’s IP address is “assigned to  
10 Defendant by his or her [ISP], which is the only party with the information necessary to identify  
11 Defendant by correlating the IP address with John Doe’s identity.” See id. at 6, 14. Plaintiff  
12 also provides a declaration from Philip Pasquale, a tech advisor with a cyber security firm, in  
13 which Mr. Pasquale states that “[b]ased on [his] experience in similar cases, Defendant’s ISP  
14 Time Warner Cable is the only entity that can correlate the IP address to its subscriber and  
15 identify Defendant as the person assigned the IP address 75.80.183.104 during the time of the  
16 alleged infringement.” ECF No. 4-2, Declaration of Philip Pasquale (“Pasquale Decl.”), ¶¶ 3, 10.  
17 Based on the above, the Court finds that Plaintiff has made a good faith effort to identify and  
18 locate the Doe defendant.

19           3. Whether Plaintiff Can Withstand a Motion to Dismiss

20            “[A] plaintiff who claims copyright infringement must show: (1) ownership of a valid  
21 copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the  
22 Copyright Act.” Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citations omitted).  
23 “To prove a claim of direct copyright infringement, a plaintiff must show that he owns the  
24 copyright and that the defendant himself violated one or more of the plaintiff’s exclusive rights  
25 under the Copyright Act.” Id. (citation omitted).

26 ///

27 ///

28 ///

1 Plaintiff provides evidence that it is the exclusive rights holder of the copyrighted works  
2 at issue. See ECF No. 1-2 at 2-4 (“Exhibit A”)<sup>1</sup>; Lansky Decl. ¶ 3; Stalzer Decl. ¶¶ 7-10. Plaintiff  
3 alleges that between April 30, 2017 and March 31, 2018, Defendant infringed Plaintiff’s  
4 copyrighted work by copying and distributing “the constituent elements of Plaintiff’s [w]orks” by  
5 using the BitTorrent file distribution network. See Compl. at 6; ECF No. 1-2 at 2-4. Plaintiff  
6 further alleges that it did not authorize, permit or consent to Defendant’s copying or distributing  
7 this work. Compl. at 6-7. Accordingly, Plaintiff has alleged the prima facie elements of direct  
8 copyright infringement and could withstand a motion to dismiss. See Ellison, 357 F.3d at 1076;  
9 Columbia Ins. Co., 185 F.R.D. at 379-80.

### 10 **III. CONCLUSION**

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

13 1. Plaintiff may serve a subpoena pursuant to Federal Rule of Civil Procedure 45, on  
14 Time Warner Cable (Spectrum) that seeks only the true name and address of the subscriber  
15 assigned IP address 75.80.183.104. Plaintiff shall not subpoena additional information;

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

18 3. Within fourteen (14) calendar days after service of the subpoena, Time Warner  
19 Cable (Spectrum) shall notify the subscriber that his or her identity has been subpoenaed by  
20 Plaintiff. The subscriber whose identity has been subpoenaed shall have thirty (30) calendar  
21 days from the date of such notice to challenge the disclosure by filing an appropriate pleading  
22 with this Court contesting the subpoena;

23 4. If Time Warner Cable (Spectrum) wishes to move to quash the subpoena, it shall  
24 do so before the return date of the subpoena. The return date of the subpoena must allow for  
25

---


26 <sup>1</sup> Plaintiff states in its complaint that Exhibit A consists of a table containing United States  
27 Copyright Office registration information, including registration numbers or application numbers  
28 for those works where registration is still pending before the Copyright Office in compliance with  
the Copyright Act, 17 U.S.C. §§ 101, et seq. Compl. at 6.

1 at least forty-five (45) days from service to production. If a motion to quash or other customer  
2 challenge is brought, Time Warner Cable (Spectrum) shall preserve the information sought by  
3 Plaintiff in the subpoena pending resolution of such motion or challenge; and

4 5. Plaintiff shall serve a copy of this Order with any subpoena obtained and served  
5 pursuant to this Order to Time Warner Cable (Spectrum). Time Warner Cable (Spectrum), in  
6 turn, must provide a copy of this Order along with the required notice to the subscriber whose  
7 identity is sought pursuant to this Order.

8 **IT IS SO ORDERED.**

9 Dated: 7/2/2018

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