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6 UNITED STATES DISTRICT COURT
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8 SOUTHERN DISTRICT OF CALIFORNIA

9 STRIKE 3 HOLDINGS, LLC,
10 Plaintiff,

11 v.

12 JOHN DOE, subscriber assigned IP
13 address 66.27.124.79,
14 Defendant.

Case No. 18-cv-01352-MMA-JLB

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

[ECF No. 5]

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16 Presently before the Court is Plaintiff's *Ex Parte* Application for Leave to Serve a
17 Third Party Subpoena Prior to a Rule 26(f) Conference. (ECF No. 5.) No opposition was
18 filed as no defendant has been named or served in this case. For the reasons set forth below,
19 Plaintiff's Motion is **GRANTED**.

20
21 **I. BACKGROUND**

22 Plaintiff alleges copyright infringement claims against a John Doe defendant. (ECF
23 No. 1.) Plaintiff alleges that it is the copyright owner of motion pictures distributed through
24 adult content websites *Blacked*, *Tushy*, *Blacked Raw*, and *Vixen*. (ECF No. 1 at ¶¶ 2–3,
25 32.) Plaintiff alleges that between December 19, 2017 and May 13, 2018, the person or
26 entity assigned Internet Protocol ("IP") address 66.27.124.79 illegally copied, downloaded,
27 and/or distributed Plaintiff's motion pictures through his, her, or its use of the online
28 BitTorrent file distribution network. (ECF No. 1 at ¶¶ 24–30; ECF No. 1-2 at 1–4.) On

1 June 20, 2018, Plaintiff commenced the instant action by filing a Complaint against
2 Defendant “John Doe, subscriber assigned IP address 66.27.124.79.” (ECF No. 1.) The
3 Complaint alleges a single claim of copyright infringement. (*Id.* at ¶¶ 35–40.)

4 Because Defendant used the Internet to commit the alleged infringement, Plaintiff
5 knows Defendant only by his, her, or its IP address, which Plaintiff believes was assigned
6 to Defendant by the Internet Service Provider (“ISP”) Spectrum (Time Warner) Cable.
7 (ECF No. 5-1 at 17.) In the present Motion, Plaintiff asserts that Time Warner is the owner
8 of Defendant’s IP address, and thus, a party with the information necessary to identify
9 Defendant by correlating the IP address with Defendant’s identity. (*Id.*) Accordingly,
10 Plaintiff seeks leave to serve a Rule 45 subpoena on Time Warner to obtain the name and
11 address associated with IP address 66.27.124.79. (*Id.*)

12 II. LEGAL STANDARDS

13 Discovery is not permitted before the parties have conferred pursuant to Federal Rule
14 of Civil Procedure 26(f) unless authorized by court order. Fed R. Civ. P. 26(d)(1).
15 “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to
16 ensue after filing of the complaint to permit the plaintiff to learn the identifying facts
17 necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185
18 F.R.D. 573, 577 (N.D. Cal. 1999). Requests to conduct discovery prior to a Rule 26(f)
19 conference are granted upon a showing of good cause by the moving party, which may be
20 found “where the need for expedited discovery, in consideration of the administration of
21 justice, outweighs the prejudice to the responding party.” *Semitool, Inc. v. Tokyo Electron*
22 *Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal. 2002). “A district court’s decision to grant
23 discovery to determine jurisdictional facts is a matter of discretion.” *Columbia Ins. Co.*,
24 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406,
25 430 n.24 (9th Cir. 1977)).

26 District courts in the Ninth Circuit apply a three-factor test for determining whether
27 good cause exists to allow for expedited discovery to identify Doe defendants. *See*
28 *Columbia Ins. Co.*, 185 F.R.D. at 578–80. “First, the plaintiff should identify the missing

1 party with sufficient specificity such that the Court can determine that defendant is a real
2 person or entity who could be sued in federal court.” *Id.* at 578. Second, the plaintiff
3 “should identify all previous steps taken to locate the elusive defendant” to ensure that the
4 plaintiff has made a good faith effort to identify and serve process on the defendant. *Id.* at
5 579. Third, the plaintiff “should establish to the Court’s satisfaction that plaintiff’s suit
6 against defendant could withstand a motion to dismiss.” *Id.* (citing *Gillespie*, 629 F.2d at
7 642). Further, the plaintiff “should file a request for discovery with the Court, along with
8 a statement of reasons justifying the specific discovery requested as well as identification
9 of a limited number of persons or entities on whom discovery process might be served and
10 for which there is a reasonable likelihood that the discovery process will lead to identifying
11 information about defendant that would make service of process possible.” *Id.* at 580
12 (citing *Gillespie*, 629 F.2d at 642).

13 **III. DISCUSSION**

14 Plaintiff seeks an order allowing it to serve a Rule 45 subpoena on Time Warner
15 before the parties have conducted a Rule 26(f) Conference so that Plaintiff may obtain the
16 true name and address of Defendant. (ECF No. 5-1 at 17.) For the reasons set forth below,
17 Plaintiff’s Motion is **GRANTED**.

18 **A. Identification of Missing Party with Sufficient Specificity**

19 For the Court to grant Plaintiff’s Motion, Plaintiff must first identify Defendant with
20 enough specificity to enable the Court to determine Defendant is a real person or entity
21 who would be subject to the jurisdiction of this Court. *See Columbia Ins. Co.*, 185 F.R.D.
22 at 578. This Court has previously determined that “a plaintiff identifies Doe defendants
23 with sufficient specificity by providing the unique IP addresses assigned to an individual
24 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation
25 technology’ to trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v.*
26 *Collective of December 29, 2011 Sharing Hash*, No. 12-cv-00186 MMA (RBB), 2012 WL
27 12884688, at *4 (S.D. Cal. May 8, 2012) (citing *Openmind Solutions, Inc. v. Does 1–39*,
28 No. C-11-3311 MEJ, 2011 WL 4715200, at *5–6 (N.D. Cal. Oct. 7, 2011); *Pink Lotus*

1 *Entm't, LLC v. Does 1-46*, No. C-11-02263 HRL, 2011 WL 2470986, at *6-7 (N.D. Cal.
2 June 21, 2011)).

3 In cases where it is unclear whether the subject IP address is “dynamic” or “static,”
4 such as here, it matters when Plaintiff’s geolocation efforts were performed.¹ In the context
5 of dynamic IP addresses, “a person using [a particular IP] address one month may not have
6 been the same person using it the next.” *State v. Shields*, No. CR06352303, 2007 WL
7 1828875, at *6 (Conn. Sup. Ct. June 7, 2007). It is likely that the user of IP address
8 66.27.124.79 is a residential user and that the IP address assigned by Time Warner is
9 dynamic.² Thus, if Plaintiff’s geolocation efforts were performed close in time to the
10 offending downloads, they may be probative of the physical location of the subject IP
11 subscriber. If not, the geolocation of the subject IP address may be irrelevant.

12 Here, the instant Motion sufficiently demonstrates that Defendant is likely subject
13 to the Court’s jurisdiction. Plaintiff attaches to its Complaint a table reflecting that the user
14 of IP address 66.27.124.79 engaged in allegedly infringing activity between December 19,
15 2017 and May 13, 2018. (ECF No. 1-2 at 1-4.) Plaintiff attaches to its Motion the
16 declaration of Tobias Fieser, an employee of IPP International UG (IPP), a forensic
17 investigation services company. (ECF No. 5-2.) Fieser declares that IPP connected to an
18 electronic device using IP address 66.27.124.79, which was observed distributing multiple
19 pieces of Strike 3 Holding’s motion pictures. (*Id.* at ¶ 7.) Fieser also declares that,
20 according to IPP’s ancillary surveillance program, IP address 66.27.124.79 is associated
21 with significant and long-term BitTorrent use. (*Id.* at ¶ 12.) Plaintiff further asserts that
22 its independent forensic expert, Philip Pasquale, confirmed that Defendant’s IP address
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25 ¹ “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)).

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

1 was involved in an infringing transaction on May 13, 2018. (ECF No. 5-1 at 6; ECF No.
2 5-2 at 15.) In addition, Plaintiff asserts that the IP address 66.27.124.79 belongs to Time
3 Warner and that Plaintiff employed Maxmind's geolocation technology to locate that IP
4 address within the Southern District of California. (ECF No. 5-1 at 6, 12.) Strike 3
5 employee Emilie Kennedy declares that Defendant's IP address was traced to Del Mar, CA
6 using the Maxmind Geolocation Database in early December 2017, on July 23, 2018, and
7 again on August 8, 2018. (ECF No. 8-1 at 2.)

8 The Court concludes that based on the timing of the IP address tracing efforts
9 employed by Plaintiff, the documented success of the Maxmind geolocation service, *see*
10 *Criminal Prods., Inc. v. Doe-72.192.163.220*, No. 16-CV-2589 WQH (JLB), 2016 WL
11 6822186, at *3 (S.D. Cal. Nov. 18, 2016), and the continued tracing of the IP address to
12 this district, Plaintiff has met its evidentiary burden of showing that IP address
13 66.27.124.79 likely relates to a physical address located in this district.

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

15 For the Court to grant Plaintiff's Motion, Plaintiff must next identify all of the steps
16 it took to locate Defendant to ensure the Court it made a good faith effort to identify and
17 serve process on Defendant. *See Columbia Ins. Co.*, 185 F.R.D. at 579. The Court
18 concludes that Plaintiff has met this burden. Plaintiff retained a forensic investigation
19 services company, IPP, to monitor the BitTorrent file distribution network for the presence
20 of Plaintiff's copyrighted works and to identify the IP addresses of devices that are found
21 distributing Plaintiff's copyrighted works. (ECF No. 5-2 at 11–12.) Through IPP, Plaintiff
22 has been able to identify much about the subscriber of IP address 66.27.124.79, such as
23 his, her, or its ISP and the software used to commit the allegedly infringing acts. (*Id.* at
24 11–12, 15.) Plaintiff asserts that Defendant's ISP is the only entity that can correlate the
25 IP address to its subscriber and identify Defendant as the person assigned the IP address
26 66.27.124.79 during the time of the alleged infringement. (*Id.* at 15.) Based on the above,
27 the Court is satisfied that Plaintiff has made a good faith effort to locate Defendant and that
28 Plaintiff cannot, on its own, locate Defendant with any greater specificity than it already

1 has. Accordingly, the Court finds Plaintiff has sufficiently satisfied the second prong of
2 the “good cause” test.

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

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

7 Plaintiff’s Complaint alleges a single cause of action against Defendant: copyright
8 infringement. (ECF No. 1 at ¶¶ 35–40.) To prove a claim of direct copyright infringement,
9 a plaintiff “must show: (1) ownership of a valid copyright; and (2) that the defendant
10 violated the copyright owner’s exclusive rights under the Copyright Act.” *Ellison v.*
11 *Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a) (2003)). “In
12 addition, direct infringement requires the plaintiff to show causation (also referred to as
13 ‘volitional conduct’) by the defendant.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657,
14 666 (9th Cir. 2017) (citing *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060,
15 1067 (9th Cir. 2013)). Here, Plaintiff purports to be the owner of the thirty-seven
16 copyrighted works at issue, and asserts that every work has been registered with the United
17 States Copyright Office or has a pending copyright registration application. (ECF No. 1 at
18 ¶¶ 2, 32, 33; ECF No. 5-1 at 16.) Plaintiff alleges that “Defendant used the BitTorrent file
19 network to illegally download and distribute Plaintiff’s copyrighted motion pictures.”
20 (ECF No. 1 at ¶ 24.) IPP declares that it observed the device using IP address 66.27.124.79
21 distributing multiple pieces of Strike 3 Holding’s motion pictures, and when assembled,
22 the distributed pieces constitute a fully playable digital movie. (ECF No. 5-2 at 12.)
23 Plaintiff has verified that each digital file is a copy of Strike 3’s motion pictures. (*Id.* at
24 19–20.) IPP also declares that this IP address is associated with significant and long-term
25 BitTorrent use. (*Id.* at 12.) Lastly, Plaintiff alleges that “[a]t no point in time did Plaintiff
26 authorize, permit or consent to Defendant’s distribution of its Works, expressly or
27 otherwise.” (ECF No. 1 at ¶ 38.) Accordingly, the Court finds Plaintiff has alleged the
28 *prima facie* elements of direct copyright infringement and its suit against Defendant would

1 likely withstand a motion to dismiss.

2 **D. Specific Discovery Request**

3 Finally, for the Court to grant Plaintiff's Motion, Plaintiff "should file a request for
4 discovery with the Court." *Columbia Ins. Co.*, 185 F.R.D. at 580 (citing *Gillespie*, 629
5 F.2d at 642). Although Plaintiff did not provide the Court with a proposed subpoena,
6 Plaintiff has provided the Court with sufficient information regarding its requested
7 discovery by stating in its Motion that it will seek from Time Warner only the name and
8 address of the subscriber of IP address 66.27.124.79. (ECF No. 5-1 at 17.)

9 **E. Additional Considerations**

10 This Court shares the concern noted by other courts in this district of "unscrupulous
11 tactics [being] used by certain plaintiffs, especially in the adult film industry, to shake down
12 the owners of IP addresses' to exact quick and quiet settlements from possibly innocent
13 defendants who pay out only to avoid potential embarrassment." *Strike 3 Holdings, LLC*
14 *v. John Doe*, No. 17-cv-2312-MMA-NLS (S.D. Cal. Dec. 7, 2017) (citing *Malibu Media,*
15 *LLC v. Does 1-5*, 2012 U.S. Dist. LEXIS 77469, *1 (S.D.N.Y. June 1, 2012)).
16 Accordingly, the Court issues an order establishing procedural safeguards to protect the
17 privacy of Defendant. *See e.g., Malibu Media v. Doe*, 2014 U.S. Dist. Lexis 79595, *5
18 (M.D. Fla. Apr. 10, 2014) (imposing conditions and citing cases that do the same); *see also*
19 *Malibu Media, LLC v. Doe*, 2016 U.S. Dist. LEXIS 35534, *17 (E.D. Cal. Mar. 18, 2016).

20 **III. CONCLUSION**

21 For the reasons set forth above, the Court finds good cause to allow Plaintiff to serve
22 a Rule 45 subpoena upon Time Warner at this time. Accordingly, Plaintiff's Motion is
23 **GRANTED** as follows:

24 1. Plaintiff may serve on Time Warner a subpoena, pursuant to and compliant
25 with the procedures of Federal Rule of Civil Procedure 45, seeking only the **name and**
26 **address** of the subscriber assigned IP address 66.27.124.79 for the relevant time period of
27 the alleged infringement. Plaintiff shall not seek from Time Warner any other personally
28 identifiable information about the subscriber;

1 2. Plaintiff's subpoena to Time Warner must provide a minimum of forty-five
2 (45) calendar days' notice before any production responsive to the subpoena shall be made
3 to Plaintiff;

4 3. At the time Plaintiff serves its subpoena on Time Warner, Plaintiff shall also
5 serve on Time Warner a copy of this Order;

6 4. Within fourteen (14) calendar days after service of the subpoena, Time
7 Warner shall notify the subscriber assigned IP address 66.27.124.79 that his, her, or its
8 identity has been subpoenaed by Plaintiff **and** shall provide the subscriber a copy of this
9 Order with the required notice;

10 5. The subscriber whose identity has been subpoenaed shall have thirty (30)
11 calendar days from the date of such notice to challenge Time Warner' disclosure of his,
12 her, or its name and address by filing an appropriate pleading with this Court contesting
13 the subpoena;

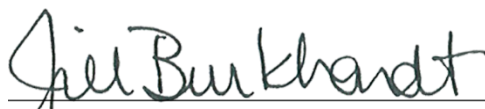
14 6. If Time Warner seeks to modify or quash the subpoena, it shall do so as
15 provided by Federal Rule of Civil Procedure 45(d)(3);

16 7. In the event a motion to quash, modify, or otherwise challenge the subpoena
17 is brought properly before the Court, Time Warner shall preserve the information sought
18 by the subpoena pending the resolution of any such motion; and

19 8. Plaintiff may only use the information disclosed in response to a Rule 45
20 subpoena served on Time Warner for the purpose of protecting and enforcing Plaintiff's
21 rights as set forth in its Complaint. If the Defendant wishes to proceed anonymously,
22 Plaintiff may not release any identifying information without a court order allowing the
23 release of the information.

24 **IT IS SO ORDERED.**

25 Dated: August 10, 2018

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Hon. Jill L. Burkhardt
United States Magistrate Judge