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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 76.167.235.113,
16 Defendant.

Case No.: 3:18-cv-01362-LAB-NLS

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

[ECF No. 4]

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19 Before the Court is Plaintiff Strike 3 Holdings, LLC’s (“Plaintiff”) *Ex Parte*
20 Application for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference.
21 ECF No. 4. No defendant has been named or served, and so no opposition or reply briefs
22 have been filed. For the reasons discussed below, the Court **GRANTS** Plaintiff’s
23 application.

24 **I. Background**

25 Plaintiff alleges that it “is the owner of original, award winning motion pictures
26 featured on its brand’s subscription-based adult websites.” ECF No. 4 at 6. On June 20,
27 2018, Plaintiff filed a Complaint against “John Doe,” who allegedly is a subscriber of
28 “Spectrum (Time Warner Cable)” and assigned Internet Protocol (“IP”) address

1 76.167.235.113 (“Defendant”). ECF No. 1 at ¶ 5. Plaintiff alleges Defendant infringed
2 its copyrights by using the BitTorrent file distribution network. *Id.* at ¶ 24. Plaintiff
3 asserts Defendant downloaded, copied, and distributed numerous of Plaintiff’s
4 copyrighted works without authorization. *Id.* at ¶¶ 24, 26-33, 37, Ex. A to Compl.

5 Plaintiff seeks leave to conduct early discovery to learn the identity of the
6 subscriber of the IP address from the Internet Service Provider (“ISP”) who leased the
7 address. Specifically, Plaintiff seeks an order permitting it to serve a third party
8 subpoena under Federal Rule of Civil Procedure 45 on Spectrum that would require it to
9 supply the name and address of its subscriber to Plaintiff. ECF No. 4 at 7. Plaintiff does
10 not seek the telephone number or email address of the subscriber associated with
11 Defendant’s IP address. *Id.* (“This subpoena will only demand the true name and
12 address of Defendant.”).

13 **II. Legal Standard**

14 A party is generally not permitted to obtain discovery without a court order before
15 the parties have conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ.
16 P. 26(d)(1). However, courts make exceptions to allow limited discovery after a
17 complaint is filed to permit the plaintiff to learn the identifying information necessary to
18 serve the defendant. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D.
19 Cal. 1999). The Ninth Circuit has held that ““where the identity of the alleged
20 defendant[] [is] not [] known prior to the filing of a complaint[,] the plaintiff should be
21 given an opportunity through discovery to identify the unknown defendants, unless it is
22 clear that discovery would not uncover the identities, or that the complaint would be
23 dismissed on other grounds.”” *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir.
24 1999) (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). “A district
25 court’s decision to grant discovery to determine jurisdictional facts is a matter of
26 discretion.” *Columbia Ins.*, 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells Fargo*
27 *Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

1 A party who requests early or expedited discovery must make a showing of good
2 cause. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal.
3 2002) (applying “the conventional standard of good cause in evaluating Plaintiff’s
4 request for expedited discovery”). Good cause is established through a balancing test
5 “where the need for expedited discovery, in consideration of the administration of justice,
6 outweighs the prejudice to the responding party.” *Id.* at 276.

7 **III. Discussion**

8 Plaintiff contends that there is good cause for this Court to allow expedited
9 discovery. For the reasons stated below, the Court does find an adequate showing of good
10 cause.

11 To determine whether “good cause” exists to permit expedited discovery to
12 identify John Doe defendants, district courts in the Ninth Circuit consider whether the
13 plaintiff (1) “identif[ies] the missing party with sufficient specificity such that the Court
14 can determine that the defendant is a real person or entity who could be sued in federal
15 court”; (2) “identif[ies] all previous steps taken to locate the elusive defendant” to ensure
16 that plaintiff has made a good faith effort to identify the defendant; and (3) “establish[es]
17 to the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion
18 to dismiss.” *Columbia Ins.*, 185 F.R.D. at 578-80. Additionally, the plaintiff should
19 demonstrate the discovery will likely lead to identifying information that will permit
20 service of process. *Id.* at 580. These factors are considered to ensure the expedited
21 discovery procedure “will only be employed in cases where the plaintiff has in good faith
22 exhausted traditional avenues for identifying a civil defendant pre-service, and will
23 prevent use of this method to harass or intimidate.” *Id.*

24 **a. Identification of Missing Party with Sufficient Specificity**

25 To satisfy the first prong, Plaintiff must identify Defendant with enough specificity
26 to enable the Court to determine that Defendant is a real person or entity who would be
27 subject to the jurisdiction of this Court. *Columbia Ins.*, 185 F.R.D. at 578. District courts
28 in this circuit have determined “a plaintiff identifies Doe defendants with sufficient

1 specificity by providing the unique IP addresses assigned to an individual defendant on
2 the day of the allegedly infringing conduct, and by using ‘geolocation technology’ to
3 trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v. Collective of*
4 *December 29, 2011 Sharing Hash*, No. 12cv00186 MMA(RBB), 2012 WL 12884688, at
5 *4 (S.D. Cal. May 8, 2012); *see Openmind Solutions, Inc. v. Does 1-39*, No. C 11-3311
6 MEJ, 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (concluding that plaintiff
7 satisfied the first factor by identifying the defendants’ IP addresses and by tracing the IP
8 addresses to a point of origin within the State of California); *Pink Lotus Entm’t, LLC v.*
9 *Does 1-46*, No. C-11-02263, 2011 WL 2470986, at *3 (N.D. Cal. June 21, 2011) (same).
10 Other courts have concluded that merely identifying the IP addresses on the day of the
11 alleged infringement satisfies this factor. *808 Holdings*, 2012 WL 12884688, at *4
12 (citing cases).

13 Here, Plaintiff has provided the Court with sufficient specificity to meet its burden
14 of showing that the Defendant is a real person. In support of its identification of the
15 missing party, Plaintiff provides declarations and factual contentions. Specifically,
16 Plaintiff provides a declaration from Tobias Fieser, Plaintiff’s forensic investigator who
17 is an employee in the litigation support department of IPP International UG (“IPP”). IPP
18 provides forensic investigation services to copyright owners. ECF No. 4-2, ¶ 4. Mr.
19 Fieser testifies that IPP monitors the BitTorrent file distribution network to locate IP
20 addresses that are used to distribute Plaintiff’s copyrighted works without authorization.
21 *Id.* at ¶ 5. He reviewed IPP’s forensic activity logs and determined its servers connected
22 to an electronic device using IP address 76.167.235.113. *Id.* at ¶ 7. The IPP software
23 then determined that this IP address was distributing digital content, including “pieces of
24 Strike 3’s copyrighted movies listed on Exhibit A to Strike 3’s Complaint. [¶] Each
25 piece was recorded in a PCAP, which stands for ‘packet capture’ and is a forensically
26 sound interface for recording network traffic.” *Id.* at ¶¶ 7-8. Notably, such distribution
27 cannot occur without human intervention. ECF No. 4 at 12. Mr. Fieser further attests
28 that IPP’s software “verified that reassembling the pieces using a specialized BitTorrent

1 client results in a fully playable digital movie.” *Id.* at ¶ 9. Mr. Fieser testifies that a
2 digital file can be identified by a “Cryptographic Hash Value” and that IPP software
3 “determined the files being distributed by Defendant’s IP address have a unique identifier
4 of the Cryptographic Hash outlined on Exhibit A.” *Id.* at ¶ 10. Thus, Plaintiff has
5 sufficiently demonstrated that the alleged misconduct was conducted by a real person.

6 The factual contentions in Plaintiff’s Complaint also sufficiently trace the allegedly
7 offending IP address to this District. Plaintiff states that it “used IP address geolocation
8 technology by Maxmind Inc. (“Maxmind”), an industry-leading provider of IP address
9 intelligence and online fraud detection tools, to determine that Defendant’s IP address
10 traced to a physical address in this District.” ECF No. 1 at ¶ 9. Based on Exhibit A to
11 the Complaint, and the declaration of Phillip Pasquale, the dates of the alleged
12 infringement occurred as recently as May 2018. ECF No. 4-2 at ¶¶ 7-9. The Court is
13 therefore satisfied that any geolocation trace occurring between the dates of alleged
14 infringement and the date of the filing of the Complaint that traces the Defendant to this
15 District is likely to be accurate.

16 Accordingly, the Court concludes Plaintiff provided a sufficient showing that it
17 seeks to sue a real person subject to the Court’s jurisdiction. Likewise, if Plaintiff obtains
18 the identifying information from the ISP for the subscriber assigned the IP address at
19 issue, the information sought in the subpoena would likely enable Plaintiff to serve
20 Defendant. Therefore, the Court finds Plaintiff satisfied the “sufficient specificity”
21 threshold.

22 **b. Previous Attempts to Locate Defendant**

23 Next, Plaintiff is required to describe all steps taken to identify the Doe defendant
24 in a good faith effort to locate and serve them. Plaintiff states that it attempted to locate
25 Defendant by searching for Defendant’s IP address using online search engines. ECF
26 No. 4 at 14. Plaintiff also engaged in research to attempt to identify Defendant using
27 other means and extensively discussed this issue with its computer investigators and
28 cyber security consultants. *Id.* Despite its diligent efforts, Plaintiff was unable to

1 identify any means of obtaining the identity of Defendant other than through subpoenaing
2 the information from the ISP. *Id.*, *see also*, ECF No. 4-2 at ¶ 10. In light of this
3 information, the Court finds Plaintiff made a good faith effort to identify and locate
4 Defendant.

5 **c. Whether Plaintiff Can Withstand a Motion to Dismiss**

6 Finally, Plaintiff must establish it could survive a motion to dismiss. *See Columbia*
7 *Ins.*, 185 F.R.D. at 579; Fed. R. Civ. P. 12(b). To survive a motion to dismiss for failure
8 to state a claim upon which relief can be granted, “a complaint must contain sufficient
9 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
11 544, 570 (2007)). To present a prima facie case of copyright infringement, Plaintiff must
12 show: (1) ownership of a valid copyright; and (2) that Defendant violated the copyright
13 owner’s exclusive rights under the Copyright Act. *Range Road Music, Inc. v. East Coast*
14 *Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012). In addition, for direct infringement
15 Plaintiff is required to show causation by Defendant. *Perfect 10, Inc. v. Giganews, Inc.*,
16 847 F.3d 657, 666 (9th Cir. 2017).

17 Here, Plaintiff provides evidence that it is the exclusive rights holder of the
18 copyrighted Works at issue. *See* ECF No. 1 at 6, ECF No. 1-2, Exh. A.¹ Plaintiff also
19 submits the declaration of Susan B. Stalzer, an employee of Strike 3 Holdings, who
20 attests IPP provided her with the files correlating to the hashes identified in Exhibit A to
21 the Complaint. ECF No 4-2 at ¶¶ 3, 8. She compared the provided files with Strike 3’s
22 Works and attests the Works are “identical, strikingly similar or substantially similar” to
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24
25 ¹ Exhibit A contains a chart containing United States Copyrighted Office registration information,
26 including registration numbers or application numbers for those works where registration is still
27 pending. Plaintiff states that it “owns the copyrights to the Works and the Works have either been
28 registered with the United States Copyright Office or have pending copyright registrations.” ECF No. 1
at 6. For Plaintiff’s Works that are still pending registration, a complete application, fees, and deposit
materials for copyright registration have been received by the Copyright Office in compliance with the
Copyright Act, 17 U.S.C. §§ 101, et seq.

1 Strike 3's original copyrighted Works. *Id.* at ¶¶ 9-10. Plaintiff also alleges Defendant
2 used BitTorrent to copy and distribute the copyrighted works without authorization. ECF
3 No. 1 at ¶¶ 37-38. Thus, Plaintiff has sufficiently presented a sufficient showing of
4 copyright infringement. Additionally, Plaintiff has alleged sufficient facts to show it can
5 withstand a motion to dismiss for lack of personal jurisdiction and withstand a motion for
6 improper venue because Defendant's IP address was traced to a location in this District.
7 ECF No. 1 at ¶¶ 7-10. Subject matter jurisdiction is also satisfied pursuant to 28 U.S.C.
8 §§ 1331, 1338. Accordingly, the Court concludes Plaintiff has alleged a sufficient
9 showing that would likely withstand a motion to dismiss.

10 Therefore, for the reasons stated above, the Court finds Plaintiff has made a
11 sufficient showing of good cause for early discovery.

12 **IV. Conclusion**

13 For good cause shown, the Court **GRANTS** Plaintiff's *ex parte* application for
14 leave to serve a subpoena prior to a Rule 26(f) conference. However, the Court is
15 cognizant of the potential embarrassment of being identified in this type of case and
16 "shares the growing concern about unscrupulous tactics used by certain plaintiffs,
17 especially in the adult film industry, to shake down the owners of IP addresses." *Malibu*
18 *Media, LLC v. Does 1-5*, No. 12 Civ. 2950(JPO), 2012 WL 2001968, at *1 (S.D.N.Y.
19 June 1, 2012). In light of these concerns and Plaintiff's invitation for the Court to issue a
20 protective order establishing procedural safeguards, the Court **ORDERS** as follows:


- 21 1. Plaintiff shall attach a copy of this Order to any subpoena.
- 22 2. Plaintiff may serve the ISP with a Rule 45 subpoena commanding the ISP to
23 provide Plaintiff with **only** the true name and address of the Defendant to
24 whom the ISP assigned an IP address as set forth on Exhibit A to the
25 Complaint. The ISP is **not** to release the Defendant's telephone number or
26 email address.
- 27 3. Within fourteen (14) calendar days after service of the subpoena, the ISP
28 shall notify the subscriber that his or her identity has been subpoenaed by

1 Plaintiff. The ISP must also provide a copy of this Order along with the
2 required notice to the subscriber whose identity is sought pursuant to this
3 Order.

- 4 4. The subscriber whose identity has been subpoenaed shall have thirty (30)
5 calendar days from the date of such notice to challenge the disclosure of his
6 or her name and contact information by filing an appropriate pleading with
7 this Court contesting the subpoena. A subscriber who moves to quash or
8 modify the subpoena may proceed anonymously as “John Doe,” and shall
9 remain anonymous until the Court orders that the identifying information
10 may be released.
- 11 5. If the ISP wishes to move to quash the subpoena, it shall do so before the
12 return date of the subpoena. The return date of the subpoena must allow for
13 at least forty-five (45) days from service to production. If a motion to quash
14 or other challenge is brought, the ISP shall preserve the information sought
15 by Plaintiff in the subpoena pending resolution of such motion or challenge.
- 16 6. Plaintiff may only use the information disclosed in response to a Rule 45
17 subpoena served on the ISP for the purpose of protecting and enforcing
18 Plaintiff’s rights as set forth in its Complaint. If Defendant wishes to
19 proceed anonymously, Plaintiff may not release any identifying information
20 without a court order allowing the release of the information.

21 **IT IS SO ORDERED.**

22 Dated: August 6, 2018

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24 Hon. Nita L. Stormes
25 United States Magistrate Judge
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