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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP
address 76.252.239.158,

Defendant.

Case No.: 20cv2117 -TWR(LL)

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

[ECF No. 4]

Currently before the Court is Plaintiff’s November 12, 2020 “*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 adult motion pictures featured on its subscription-based adult websites.” ECF No. 4-1 at 8. On October 28, 2020, Plaintiff filed a complaint against John Doe subscriber assigned IP address 76.252.239.158 alleging copyright infringement. ECF No. 1 (“Compl.”). Plaintiff alleges that Defendant

1 has illegally infringed by downloading and distributing twenty-eight of its copyrighted
2 movies over the BitTorrent file distribution network for an extended period of time. Id. at
3 ¶¶ 1, 4. Plaintiff describes the BitTorrent network as a “system designed to quickly
4 distribute large files over the Internet.” Id. at ¶ 18. Plaintiff further alleges that Defendant,
5 who “attempted to hide this theft by infringing Plaintiff’s content anonymously,” can be
6 identified by his or her Internet Service Provider (“ISP”), AT&T U-verse, through his or
7 her IP address 76.252.239.158. Id. at ¶ 5.

8 On November 12, 2020, Plaintiff filed the instant motion. ECF No. 4. Plaintiff seeks
9 an order from the Court allowing it to serve a subpoena to Defendant’s ISP seeking
10 Defendant’s true name and address pursuant to Federal Rule of Civil Procedure 45 so that
11 Plaintiff may serve Defendant and prosecute the claims in its complaint. ECF No. 4-1 at 8-
12 9.

13 **II. LEGAL STANDARD**

14 **A. The Cable Privacy Act**

15 The Cable Privacy Act generally prohibits cable operators from disclosing
16 personally identifiable information regarding subscribers without the prior written or
17 electronic consent of the subscriber. 47 U.S.C. § 551(c)(1). However, a cable operator may
18 disclose such information if the disclosure is made pursuant to a court order and the cable
19 operator provides the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable
20 operator is defined as “any person or group of persons (A) who provides cable service over
21 a cable system and directly or through one or more affiliates owns a significant interest in
22 such cable system, or (B) who otherwise controls or is responsible for, through any
23 arrangement, the management and operation of such a cable system.” 47 U.S.C. § 522(5).

24 **B. Early Discovery**

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

1 Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002) (adopting the conventional standard of “good
2 cause” in evaluating a request for expedited discovery). Good cause exists “where the need
3 for expedited discovery, in consideration of the administration of justice, outweighs the
4 prejudice to the responding party.” Id. Good cause for expedited discovery has been found
5 in cases involving claims of infringement and unfair competition. Id. In infringement cases,
6 expedited discovery is frequently limited to allowing plaintiffs to identify Doe defendants.
7 See Cell Firm Holdings, LLC v. Doe-72.220.126.76, No. 16CV2234-BEN (BLM), 2016
8 WL 4793161, at *3 (S.D. Cal. Sept. 14, 2016) (granting motion for expedited discovery in
9 infringement case to obtain only the true name and address of the Doe defendant); Quad
10 Int’l, Inc. v. Does 1-6, No. 2:12-CV-2631 LKK KJN, 2013 WL 142865, at *4 (E.D. Cal.
11 Jan. 11, 2013) (granting motion for expedited discovery in infringement case to obtain Doe
12 defendant’s name and contact information); UMG Recordings, Inc. v. Doe, No. C-08-
13 03999 RMW, 2008 WL 4104207, at *3 (N.D. Cal. Sept. 4, 2008) (granting leave to take
14 expedited discovery in infringement case for documents that would reveal the identity and
15 contact information for each Doe defendant).

16 District courts in the Ninth Circuit apply a three-factor test for determining whether
17 good cause exists to allow for expedited discovery to identify certain defendants. Columbia
18 Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999). First, the plaintiff
19 should “identify the missing party with sufficient specificity such that the Court can
20 determine that the defendant is a real person or entity who could be sued in federal court.”
21 Id. at 578. Second, the plaintiff must describe “all previous steps taken to locate the elusive
22 defendant” to ensure that plaintiff has made a good faith effort to identify the defendant.
23 Id. at 579. Third, plaintiff should establish that its lawsuit could withstand a motion to
24 dismiss. Id.

25 **III. DISCUSSION**

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

27 For the Court to grant Plaintiff’s motion, Plaintiff must first identify the Doe
28 defendant with sufficient specificity to enable the Court to determine that the Doe

1 defendant is a real person subject to the Court’s jurisdiction. Id. at 578. “Some district
2 courts in the Ninth Circuit have determined that a plaintiff identifies Doe defendants with
3 sufficient specificity by providing the unique IP addresses assigned to an individual
4 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation
5 technology’ to trace the IP addresses to a physical point of origin.” 808 Holdings, LLC v.
6 Collective of Dec. 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C
7 D63C23C91, No. 12CV00186 MMA (RBB), 2012 WL 12884688, at *4 (S.D. Cal. May 8,
8 2012); see e.g., OpenMind Sols., Inc. v. Does 1-39, No. C 11-3311 MEJ, 2011 WL
9 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (finding plaintiff met its burden to identify the Doe
10 defendants with sufficient specificity by identifying the unique IP addresses of individuals
11 engaged in BitTorrent protocol and using geolocation technology to trace the IP addresses
12 to a point of origin within the state of California); Pink Lotus Entm't, LLC v. Does 1-46,
13 No. C-11-02263 HRL, 2011 WL 2470986, at *3 (N.D. Cal. June 21, 2011) (same). Others
14 have found that merely identifying the IP addresses assigned to the defendants on the day
15 of the purported infringement is sufficient to satisfy the first factor.” 808 Holdings, LLC,
16 2012 WL 12884688, at *4; see e.g., First Time Videos, LLC v. Does, No. C 11-01675 LB,
17 2011 WL 1431619, at *2 (N.D. Cal. Apr. 14, 2011) (“First, First Time Videos has identified
18 the Doe defendants with sufficient specificity by submitting a chart listing each of the
19 defendants by the IP address assigned to them on the day it alleges the particular defendant
20 engaged in the infringing conduct.”). This Court finds the first standard persuasive.

21 Here, Plaintiff has provided a declaration from David Williamson, an information
22 and systems management consultant, currently employed as Plaintiff’s Chief Technology
23 Officer. ECF No. 4-2, Declaration of David Williamson (“Williamson Decl.”), ¶¶ 11–12.
24 Mr. Williamson states that he “oversaw the design, development, and overall creation of
25 the infringement detection system called VXN Scan,” which Plaintiff owns and uses to
26 “identify the IP addresses used by individuals infringing Plaintiff’s movies via the
27 BitTorrent protocol.” Id. ¶ 40. Mr. Williamson explains the VXN Scan system in detail,
28 which involves, in part, a proprietary BitTorrent client that emulates the behavior of a

1 standard BitTorrent client by repeatedly downloading data pieces from peers within a
2 BitTorrent network that are distributing Plaintiff’s movies. Id. ¶¶ 52–55. Mr. Williamson
3 states that other components of VXN Scan retrieve and store identical copies of every
4 network packet that is sent and received by the proprietary BitTorrent client, which
5 includes the IP address, date and time of the network transaction, the port number and
6 BitTorrent client used to accomplish the network transaction. Id. ¶¶ 57–66. It also includes
7 the “Info Hash” associated with the infringing computer file, which reflects the metadata
8 of the underlying .torrent file being shared without authorization. Id. ¶ 62. Mr. Williamson
9 further explains that VXN Scan also extracts infringing transaction data from each packet
10 capture (“PCAP”)¹, connects with Maxmind geolocation database to determine the ISP that
11 assigned a particular IP address as well as the city and state the IP address traces to, and
12 summarizes the extracted infringing transaction data in a tabular format. Id. ¶¶ 74–79.

13 Plaintiff also provides the declaration of Patrick Paige, a computer forensics expert
14 retained by Plaintiff to analyze and retain forensic evidence captured by its VXN Scan
15 system. ECF No. 4-2, Declaration of Patrick Paige (“Paige Decl.”), ¶¶ 3–9, 12. Mr. Paige
16 states that he reviewed a PCAP from Plaintiff containing information related to a
17 transaction that occurred on September 10, 2020 involving IP address 76.252.239.158. Id.
18 ¶ 16. Mr. Paige attests that in reviewing the PCAP, he was able to confirm that the PCAP
19 is evidence of a recorded transaction with 76.252.239.158 on September 10, 2020 and it
20 correlates to a movie owned by Plaintiff. Id. ¶¶ 18–19.

21 Next, Plaintiff provided a declaration from Emilie Kennedy, Plaintiff’s in-house
22 general counsel, in which Ms. Kennedy states that Plaintiff inputted IP address
23 76.252.239.158 into Maxmind’s Geolocation Database prior to filing its complaint and
24 prior to filing the instant motion, and both times, IP address 76.252.239.158 traced to a
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28 ¹ “A PCAP is a computer file containing captured or recorded data transmitted between
network devices.” Williamson Decl. ¶ 58.

1 location in San Diego, California.² ECF No. 4-2, Declaration of Emilie Kennedy
2 (“Kennedy Decl.”), ¶¶ 6–7.

3 Finally, Plaintiff provided a declaration from Susan B. Stalzer, an employee of
4 Plaintiff who reviews the content of its motion pictures and who was tasked with reviewing
5 contents of the infringing files identified in Exhibit A to the complaint and comparing them
6 to Plaintiff’s original works to confirm they were identical, strikingly similar or
7 substantially similar. ECF No. 4-2, Declaration of Susan B. Stalzer, (“Stalzer Decl.”), ¶¶
8 3, 7–10. Ms. Stalzer also states that she used “American Registry for Internet Numbers
9 (‘ARIN’) to confirm that the ISP AT&T U-verse did own Defendant’s IP address at the
10 time of the infringements, and hence has the relevant information to identify Doe
11 Defendant.” *Id.* ¶ 12. The dates of the alleged infringing activity in Exhibit A range from
12 April 4, 2019 through September 10, 2020. ECF No 1-2.

13 Because Plaintiff has provided the Court with the unique IP address and the dates
14 and times of connection plus the methodology for obtaining them, the name of the ISP
15 and/or cable operator that provided internet access for the user of the identified IP address,
16 and used Maxmind geolocation technology to trace the IP address to this District at or close
17 to the time of the infringement and prior to filing the complaint and this motion, the Court
18 finds that Plaintiff has made a sufficient showing that Doe Defendant with IP address
19 76.252.239.158 likely resolves to a real person or entity with a physical address in this
20 District. *See Criminal Prods., Inc. v. Doe-72.192.163.220*, No. 16-CV-2589 WQH (JLB),
21 2016 WL 6822186, at *2–3 (S.D. Cal. Nov. 18, 2016); *808 Holdings, LLC*, 2012 WL
22 12884688, at *4.

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

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26 ² The Court notes that Mr. Williamson stated that the VXN Scan system connects with the
27 Maxmind database automatically to add the ISP that assigned the IP address, as well as the
28 city and state it traces to, to a tabular output of infringing transaction data. Williamson
Decl. ¶¶ 74–79. The VXN Scan system thus appears to trace the IP address to a city and
state at or close to the time of infringement.

1 Second, Plaintiff must describe all prior attempts it has made to identify the Doe
2 defendant in a good faith effort to locate and serve them. See Columbia Ins. Co., 185 F.R.D.
3 at 579. Plaintiff states that it “diligently attempted to correlate Defendant’s IP address to
4 Defendant by searching for Defendant’s IP address” on various internet search tools; by
5 reviewing sources of authority such as legislative reports and informational technology
6 guides for other means of identification; and by consulting with computer investigators and
7 cyber security experts. ECF No. 4-1 at 15. Plaintiff states that despite these efforts, it is
8 unable to obtain the identity of the alleged infringer because although publicly available
9 data enables Plaintiff to identify the ISP, city, and state associated with an IP address, it
10 does not allow Plaintiff to obtain the name of the subscriber. Id. Plaintiff further states that
11 Defendant’s IP address is “assigned to Defendant by his or her [ISP], which is the only
12 party with the information necessary to identify Defendant by correlating the IP address
13 with John Doe’s identity.” Id. at 8; Paige Decl. ¶ 22. Based on the above, the Court finds
14 that Plaintiff has made a good faith effort to identify and locate the Doe defendant.

15 **C. Whether Plaintiff Can Withstand a Motion to Dismiss**

16 “[P]laintiff must make some showing that an act giving rise to civil liability actually
17 occurred and that the [pre-service] discovery is aimed at revealing specific identifying
18 features of the person or entity who committed that act.” Columbia Ins. Co. v.
19 seescandy.com, 185 F.R.D. 573, 580 (N.D. Cal. 1999). “[A] plaintiff who claims copyright
20 infringement must show: (1) ownership of a valid copyright; and (2) that the defendant
21 violated the copyright owner’s exclusive rights under the Copyright Act.” Ellison v.
22 Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citations omitted). “To prove a claim of
23 direct copyright infringement, a plaintiff must show that he owns the copyright and that
24 the defendant himself violated one or more of the plaintiff’s exclusive rights under the
25 Copyright Act.” Id. (citation omitted).

26 Plaintiff states that it is the exclusive rights holder of the copyrighted works at issue
27 and that they are registered with the United States Copyright Office. See ECF No. 4-1 at
28 17; Compl. at ¶¶ 1-3, 31-33; ECF No. 1-2 (Exhibit A); Williamson Decl. ¶ 13; Stalzer Decl.

¶¶ 7–10. Plaintiff alleges that between April 4, 2019 and September 10, 2020, Defendant infringed Plaintiff’s copyrighted works by downloading, copying, and distributing Plaintiff’s works using the BitTorrent file distribution network. See ECF No. 4-1 at 17; Compl. at ¶ 38; ECF No. 1-2. Plaintiff further alleges that it did not authorize, permit, or consent to Defendant’s copying or distributing its works. ECF No. 4-1 at 17; Compl. at ¶¶ 35-37. Accordingly, Plaintiff has alleged the prima facie elements of direct copyright infringement and could withstand a motion to dismiss. See Ellison, 357 F.3d at 1076; Columbia Ins. Co., 185 F.R.D. at 579–80.

IV. CONCLUSION

Once Plaintiff learns the subscriber’s identity, it cannot rely on a bare allegation that he or she is the registered subscriber of an IP address associated with infringing activity to state a plausible claim for direct or contributory copyright infringement. Cobbler Nevada, LLC v. Gonzales, 901 F.3d 1142, 1144 (9th Cir. 2018); Strike 3 Holdings, LLC v. Doe 70.95.181.51, No. 19-CV-73-WQH-WVG, 2019 WL 777416, at *3 (S.D. Cal. Feb. 21, 2019). However, at this point in the litigation, Plaintiff has made an adequate showing of the need to subpoena Defendant’s ISP. See Glacier Films (USA), Inc. v. Turchin, 896 F.3d 1033, 1036 (9th Cir. 2018) (observing that the district court’s case management order permitting “limited discovery from an Internet Service Provider to establish a potential infringer’s identity” was part of a “practical solution” to manage a large number of peer-to-peer copyright infringement cases); Strike 3 Holdings, LLC v. Doe, No. 218CV02637MCECKD, 2019 WL 935390, at *4–5 (E.D. Cal. Feb. 26, 2019); Strike 3 Holdings, LLC v. Doe 70.95.181.51, 2019 WL 777416 at *3. Thus, finding good cause, the Court **GRANTS** Plaintiff’s motion for expedited discovery and **ORDERS** the following:

1. Plaintiff may serve a subpoena pursuant to Federal Rule of Civil Procedure 45 on AT&T U-verse that seeks only the true name and address of the subscriber assigned IP address 76.252.239.158 during the time period of the allegedly infringing conduct described in Plaintiff’s complaint. Plaintiff shall not subpoena additional information.

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

3 3. Within fourteen calendar days after service of the subpoena, AT&T U-verse
4 shall notify the subscriber that his or her identifying information has been subpoenaed by
5 Plaintiff. The subscriber whose identity has been subpoenaed shall have thirty calendar
6 days from the date of such notice to challenge the disclosure by filing an appropriate
7 pleading with this Court contesting the subpoena.

8 4. If AT&T U-verse wishes to move to quash the subpoena, it shall do so before
9 the return date of the subpoena. The return date of the subpoena must allow for at least
10 forty-five days from service to production. If a motion to quash or other customer challenge
11 is brought, AT&T U-verse shall preserve the information sought by Plaintiff in the
12 subpoena pending resolution of such motion or challenge.

13 5. Plaintiff shall serve a copy of this Order with any subpoena obtained and
14 served pursuant to this Order to AT&T U-verse. AT&T U-verse, in turn, must provide a
15 copy of this Order along with the required notice to the subscriber whose identity is sought
16 pursuant to this Order.

17 6. Once Plaintiff learns the identity of the subscriber(s), Plaintiff shall provide a
18 copy of this Order to that person or those persons when Plaintiff first makes contact with
19 the subscriber regarding this case. At that same time, Plaintiff shall also provide the
20 subscriber(s) a copy of the Ninth Circuit's opinion in Cobbler Nevada, LLC v. Gonzales,
21 901 F.3d 1142 (9th Cir. 2018). Once both have been provided to the subscriber(s), counsel
22 for Plaintiff shall immediately file a declaration that confirms these have been provided to
23 the subscriber.

24 7. Plaintiff and AT&T U-verse shall henceforth refer to the subscriber as
25 “John/Jane Doe” and shall redact and omit from all future filings all information that
26 identifies the subscriber personally. Such identifying information includes the subscriber's
27 name and address, unless and until the subscriber becomes a defendant in the above-
28 captioned case. Plaintiff and AT&T U-verse shall refer to the subscriber generically in any

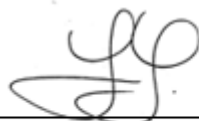
1 filings and attach—under seal—a separate exhibit that includes the subscriber's identifying
2 information.³

3 8. The subscriber may initially proceed anonymously as “John/Jane Doe” until
4 such time that there is sufficient proof before the Court that the subscriber is connected
5 with the alleged infringement.

6 9. Plaintiff may not engage in any settlement discussions with the subscriber
7 unless and until the subscriber has been served with the Complaint and the documents set
8 forth in paragraph (6) above.

9 **IT IS SO ORDERED.**

10 Dated: December 8, 2020



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12 _____
13 Honorable Linda Lopez
14 United States Magistrate Judge
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27 ³ Before filing any document under seal, the parties shall follow and abide by applicable
28 law, including Civil Local Rule 79.2, Section 2.j. of the Electronic Case Filing
Administrative Policies and Procedures, and chambers rules.