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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 104.2.85.73,
16 Defendant.

Case No.: 3:21-cv-01895-BAS-AHG

**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 *ex parte*
23 application.

24 **I. BACKGROUND**

25 On November 8, 2021, Plaintiff filed a Complaint against Defendant “John Doe,”
26 who is allegedly a subscriber of AT&T U-verse and assigned Internet Protocol (“IP”)
27 address 104.2.85.73. ECF No. 1 at ¶ 5. Plaintiff Strike 3 Holdings, LLC, is the owner of
28 numerous adult motion pictures, which Plaintiff distributes through adult websites and

1 DVDs. *Id.* at ¶¶ 2–3. Plaintiff asserts that Defendant is committing “rampant and wholesale
2 copyright infringement” by downloading, recording, and distributing copies of Plaintiff’s
3 copyrighted motion pictures without authorization through the use of the BitTorrent file
4 distribution network. *Id.* at ¶¶ 4, 18–30.

5 In the instant motion, Plaintiff seeks leave to conduct early discovery prior to the
6 mandated Rule 26(f) conference to learn Defendant’s identity. ECF No. 4. Specifically,
7 Plaintiff seeks an order permitting it to serve a third-party subpoena under Federal Rule of
8 Civil Procedure 45 on AT&T U-verse, the Internet Service Provider (“ISP”) who leased
9 the IP address belonging to Defendant John Doe, which would require AT&T U-verse to
10 supply the name and address of its subscriber to Plaintiff. ECF No. 4-1 at 7–8. Through
11 service of the third-party subpoena, Plaintiff seeks only “the true name and address of
12 Defendant.” *Id.* at 8. Additionally, Plaintiff represents to the Court that it will only use this
13 information to prosecute the claims made in its Complaint. *Id.*

14 **II. LEGAL STANDARD**

15 A party is generally not permitted to obtain discovery without a court order before
16 the parties have conferred pursuant to Federal Rule of Civil Procedure 26(f). FED. R. CIV.
17 P. 26(d)(1). However, courts make exceptions to allow limited discovery after a complaint
18 is filed to permit the plaintiff to learn the identifying information necessary to serve the
19 defendant. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999);
20 *see, e.g., UMG Recordings, Inc. v. Doe*, No. C-08-3999-RMW, 2008 WL 4104207, at *2
21 (N.D. Cal. Aug. 29, 2008) (noting, in an infringement case, that “a plaintiff cannot have a
22 discovery planning conference with an anonymous defendant[,]” thus, limited expedited
23 discovery would “permit the [plaintiff] to identify John Doe and serve the defendant,
24 permitting this case to go forward.”)

25 Consistent with this generally recognized exception to Rule 26(f), the Ninth Circuit
26 has held that ““where the identity of the alleged defendant[] [is] not [] known prior to the
27 filing of a complaint[,] the plaintiff should be given an opportunity through discovery to
28 identify the unknown defendants, unless it is clear that discovery would not uncover the

1 identities, or that the complaint would be dismissed on other grounds.” *Wakefield v.*
2 *Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting *Gillespie v. Civiletti*, 629 F.2d
3 637, 642 (9th Cir. 1980)).

4 A party who requests early or expedited discovery must make a showing of good
5 cause. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal.
6 2002) (applying “the conventional standard of good cause in evaluating Plaintiff’s request
7 for expedited discovery”). Good cause is established through a balancing test “where the
8 need for expedited discovery, in consideration of the administration of justice, outweighs
9 the prejudice to the responding party.” *Id.* at 276. To determine whether “good cause”
10 exists to permit expedited discovery to identify John Doe defendants, district courts in the
11 Ninth Circuit consider whether the plaintiff (1) “identif[ies] the missing party with
12 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”; (2) “identif[ies] all previous steps taken to
14 locate the elusive defendant” to ensure that plaintiff has made a good faith effort to identify
15 the defendant; and (3) “establish[es] to the Court’s satisfaction that plaintiff’s suit against
16 defendant could withstand a motion to dismiss.” *Columbia Ins.*, 185 F.R.D. at 578–80.
17 Additionally, the plaintiff should demonstrate the discovery will likely lead to identifying
18 information that will permit service of process. *Id.* at 580. These factors are considered to
19 ensure the expedited discovery procedure “will only be employed in cases where the
20 plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant
21 pre-service, and will prevent use of this method to harass or intimidate.” *Id.*

22 III. DISCUSSION

23 Plaintiff contends that there is good cause for this Court to allow expedited
24 discovery. ECF No. 4-1 at 11–18. For the reasons stated below, the Court agrees.

25 a. Identification of Missing Party with Sufficient Specificity

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

1 in this circuit have determined “a plaintiff identifies Doe defendants with sufficient
2 specificity by providing the unique IP addresses assigned to an individual defendant on the
3 day of the allegedly infringing conduct, and by using ‘geolocation technology’ to trace the
4 IP addresses to a physical point of origin.” *808 Holdings, LLC v. Collective of December*
5 *29, 2011 Sharing Hash*, No. 12cv186 MMA-RBB, 2012 WL 12884688, at *4 (S.D. Cal.
6 May 4, 2012); *see Openmind Solutions, Inc. v. Does 1-39*, No. C-11-3311-MEJ, 2011 WL
7 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (concluding that plaintiff satisfied the first factor
8 by identifying the defendants’ IP addresses and by tracing the IP addresses to a point of
9 origin within the State of California); *Pink Lotus Entm’t, LLC v. Does 1-46*, No. C-11-
10 02263, 2011 WL 2470986, at *3 (N.D. Cal. June 21, 2011) (same). Other courts have
11 concluded that merely identifying the IP addresses on the day of the alleged infringement
12 satisfies this factor. *808 Holdings*, 2012 WL 12884688, at *4 (collecting cases).

13 Here, Plaintiff has identified the Doe Defendant with sufficient specificity. First, in
14 support of the present motion, Plaintiff provided a Declaration by David Williamson, an
15 independent contractor hired by Plaintiff as an Information Systems and Management
16 Consultant ECF No. 4-2 at 2–15 (“Ex. A”). In that role, Mr. Williamson testifies he
17 “oversaw the design, development, and overall creation of the infringement detection
18 system called VXN Scan[,] which [Plaintiff] both owns and uses to identify the IP
19 addresses used by individuals infringing Plaintiff’s movies via the BitTorrent protocol.”
20 Ex. A at ¶ 40. Mr. Williamson’s Declaration explains the VXN Scan system in detail, which
21 involves, in part, the development of a proprietary BitTorrent client that emulates the
22 behavior of a standard BitTorrent client by repeatedly downloading data pieces from peers
23 within the BitTorrent network that are distributing Plaintiff’s movies. *Id.* at ¶¶ 52–55.
24 Mr. Williamson testifies that another component of the VXN Scan system is the PCAP¹
25 Recorder / Capture Card, which is able to record the IP addresses connecting to the
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28 ¹ PCAP stands for “Packet Capture.” Ex. A at ¶ 58.

1 Proprietary Client and sending the infringed copies of Plaintiff’s movies to the Proprietary
2 Client through the BitTorrent network. *Id.* at ¶¶ 57–59. Not only does a PCAP contain the
3 IP addresses used in the network transaction, it also records the port number and BitTorrent
4 client used to accomplish each transaction, and the “Info Hash” associated with the
5 infringing computer file, which reflects the metadata of the particular underlying .torrent
6 file being shared without authorization. *Id.* at ¶¶ 61–62. The PCAP Capture Card records
7 PCAPs in real time and is able to record perfect copies of every network packet received
8 by the Proprietary Client. *Id.* at ¶ 65. Although this Order touches only on two of the
9 components of the VXN Scan system, Mr. Williamson’s 81-paragraph Declaration sets
10 forth additional in-depth details of all five components of the system, providing the Court
11 a thorough understanding of how the system reliably pinpoints the IP addresses used by
12 individuals infringing Plaintiff’s movies and verifies the infringement.

13 Second, Plaintiff also provided a declaration by Patrick Paige, a computer forensics
14 expert retained by Plaintiff to analyze and retain forensic evidence captured by the VXN
15 Scan system. ECF No. 4-2 at 17–22 (“Ex. B”). Mr. Paige explains that VXN Scan recorded
16 numerous BitTorrent computer transactions with IP address 104.2.85.73 in the form of
17 PCAPs, and that he reviewed the PCAP to confirm that it evidences a recorded transaction
18 with that IP address on October 12, 2021 at 01:31:19 UTC involving the IP address
19 uploading a piece or pieces of a file corresponding to the hash value that is unique to one
20 of Plaintiff’s movies. Ex. B. at ¶¶ 13–19, 26.

21 Third, Plaintiff provided a declaration by Susan Stalzer, one of Plaintiff’s employees
22 who verified that each digital file that the Proprietary Client received through its
23 transactions with IP address 104.2.85.73 is a copy of one of Plaintiff’s copyrighted works,
24 by viewing the unauthorized motion pictures corresponding with the file hashes side-by-
25 side with Plaintiff’s original movies. ECF No. 4-2 at 24–26 (“Ex. C”); *see also* ECF No.
26 1-2 (Exhibit A to the Complaint, listing the hash values of the 70 torrent files received by
27 the Proprietary Client from the IP address 104.2.85.73). Mr. Paige testified that based on
28 his experience in similar cases, Defendant’s ISP, AT&T U-Verse, is the only entity that

1 can correlate the IP address 104.2.85.73 to its subscriber to pinpoint Defendant’s identity.
2 Ex. B at ¶ 28.

3 Finally, Plaintiff provides a declaration by Emilie Kennedy, Plaintiff’s in-house
4 General Counsel. ECF No. 4-2 at 28–30 (“Ex. D”). Ms. Kennedy explains that after
5 Plaintiff received infringement data from VXN Scan identifying IP address 104.2.85.73 as
6 infringing its works, the IP address was automatically input into Maxmind’s Geolocation
7 Database on October 22, 2021 at 14:00:51 UTC, which traced the IP address location to
8 Rancho Santa Fe, California, within this Court’s jurisdiction. Ex. D. at ¶¶ 4–5. Plaintiff has
9 since repeated the trace through the Geolocation Database twice more, prior to filing the
10 Complaint and prior to filing the present Motion, confirming the IP address continues to
11 trace to San Diego and this District. *Id.* at ¶¶ 6–7. The Court is satisfied that these multiple
12 geolocation traces over the course of two months indicating that the Defendant is located
13 in this District are reliably accurate.

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

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

21 Next, Plaintiff is required to describe all steps taken to identify the Doe defendant in
22 a good-faith effort to locate and serve them. Plaintiff states that it attempted to locate
23 Defendant by searching for Defendant’s IP address using online search engines and other
24 web search tools. ECF No. 4-1 at 14. Plaintiff also reviewed numerous sources of authority
25 such as legislative reports, agency websites, informational technology guides, etc.
26 regarding whether it is possible to identify such a defendant by other means, and
27 extensively discussed this issue with its computer investigators and cyber security
28 consultants. *Id.* Despite these diligent efforts, Plaintiff was unable to identify any means of

1 obtaining the identity of Defendant other than through subpoenaing the information from
2 the ISP. *Id.*; *see also* Ex. B at ¶ 28. Thus, the Court finds Plaintiff has shown it has made a
3 good-faith effort to identify and locate Defendant before resorting to filing the instant
4 motion.

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

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

17 Here, Plaintiff’s Complaint clearly alleges that Plaintiff owns a valid copyright in
18 the works at issue, which are registered with the United States Copyright Office. *See* ECF
19 No. 1 at ¶¶ 43, 46, 49.² And again, Ms. Stalzer attests that she reviewed the files correlating
20 to the hashes identified in Exhibit A to the Complaint and confirmed that they are
21 “identical, strikingly similar or substantially similar” to Strike 3’s original copyrighted
22 Works. Ex. C at ¶¶ 7–11; ECF No. 1 at ¶¶ 34–35. Plaintiff’s Complaint also alleges
23 Defendant used BitTorrent to copy and distribute the copyrighted works without
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26 ² Exhibit A to the Complaint, which shows the hash values of the purportedly infringing
27 movies downloaded from the IP address 104.2.85.73, also contains the United States
28 Copyright Office registration information of the works that correspond with those hash
files. ECF No. 1-2.

1 authorization, and that the infringement was continuous and ongoing. ECF No. 1 at ¶¶ 4,
2 19–30, 33, 33–36, 44–46. Thus, Plaintiff’s Complaint has stated a claim for copyright
3 infringement against the Doe Defendant sufficient to survive a motion to dismiss.
4 Additionally, Plaintiff has alleged sufficient facts to show it could withstand a motion to
5 dismiss for lack of personal jurisdiction or a motion for improper venue, because
6 Defendant’s IP address was traced to a location in this District. Accordingly, the Court
7 concludes Plaintiff has met the third prong necessary to establish good cause for granting
8 early discovery.

9 **IV. CONCLUSION**

10 For the reasons set forth above, and for good cause shown, the Court **GRANTS**
11 Plaintiff’s *ex parte* application for leave to serve a subpoena prior to a Rule 26(f)
12 conference. ECF No. 4. However, the Court is cognizant of the potential embarrassment of
13 being identified in this type of case and “shares the growing concern about unscrupulous
14 tactics used by certain plaintiffs, especially in the adult film industry, to shake down the
15 owners of IP addresses.” *Malibu Media, LLC v. Does 1-5*, No. 12-Civ-2950-JPO, 2012 WL
16 2001968, at *1 (S.D.N.Y. June 1, 2012). Anticipating and sharing these concerns, Plaintiff
17 invites the Court to issue a protective order establishing procedural safeguards if the Court
18 finds such procedures appropriate. ECF No. 4-1 at 18. Accordingly, the Court **ORDERS**
19 as follows:

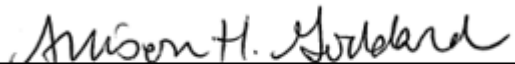
- 20 1. Plaintiff shall attach a copy of this Order to any subpoena.
- 21 2. Plaintiff may serve the ISP with a Rule 45 subpoena commanding the ISP to
22 provide Plaintiff with **only** the true name and address of the Defendant to
23 whom the ISP assigned an IP address as set forth on Exhibit A to the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

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

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21 **IT IS SO ORDERED.**

22 Dated: November 18, 2021

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25 Honorable Allison H. Goddard
26 United States Magistrate Judge
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