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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 70.179.11.5,
16 Defendants.

Case No.: 22cv293-BAS (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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18 Before the Court is Plaintiff Strike 3 Holdings, LLC’s (“Plaintiff”) *Ex Parte*
19 Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference.
20 ECF No. 4. No Defendant has been named or served, and so no opposition or reply briefs
21 have been filed. For the reasons discussed below, the Court **GRANTS** Plaintiff’s motion.

22 **I. Background**

23 On March 4, 2020, Plaintiff filed this Complaint against “John Doe,” who is
24 allegedly a subscriber of Cox Communications and assigned Internet Protocol (“IP”)
25 address 70.179.11.5 (“Defendant”). ECF No. 1, ¶ 5. Plaintiff Strike 3 Holdings, LLC, is
26 the owner of numerous adult motion pictures, which Plaintiff distributes through adult
27 websites and DVDs. *Id.* at ¶¶ 2–3. Plaintiff alleges Defendant infringed its copyrights by
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1 using the BitTorrent file distribution network, one of the most common peer-to-peer file
2 sharing systems used to distribute data such as digital movie files. *Id.* at ¶¶ 18-47.
3 Plaintiff alleges Defendant downloaded, copied, and distributed several of Plaintiff’s
4 works without authorization. *Id.*; *see also id.*, Ex. A.

5 In this instant motion, Plaintiff seeks leave to conduct early discovery prior to the
6 mandated Rule 26(f) conference to learn the identity of the subscriber of the IP address
7 from the Internet Service Provider (“ISP”) who leased the address. ECF No. 4.
8 Specifically, Plaintiff seeks an order permitting it to serve a third-party subpoena under
9 Federal Rule of Civil Procedure 45 on Cox Communications that would require it 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
13 this 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
18 complaint is filed to permit the plaintiff to learn the identifying information necessary to
19 serve the defendant. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D.
20 Cal. 1999); *see, e.g., UMG Recordings, Inc. v. Doe*, No. C-08-3999-RMW, 2008 WL
21 4104207, at *2 (N.D. Cal. Aug. 29, 2008) (noting, in an infringement case, that “a
22 plaintiff cannot have a discovery planning conference with an anonymous defendant[,]”
23 thus, limited expedited discovery would “permit the [plaintiff] to identify John Doe and
24 serve the defendant, permitting this case to go forward”). Consistent with this generally
25 recognized exception to Rule 26(f), the Ninth Circuit has held that ““where the identity of
26 the alleged defendant[] [is] not [] known prior to the filing of a complaint[,] the plaintiff
27 should be given an opportunity through discovery to identify the unknown defendants,
28 unless it is clear that discovery would not uncover the identities, or that the complaint

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

3 A party who requests early or expedited discovery must make a showing of good
4 cause. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal.
5 2002) (applying “the conventional standard of good cause in evaluating Plaintiff’s
6 request for expedited discovery”). Good cause is established through a balancing test
7 “where the need for expedited discovery, in consideration of the administration of justice,
8 outweighs the prejudice to the responding party.” *Id.* at 276. To determine whether
9 “good cause” exists to permit expedited discovery to identify John Doe defendants,
10 district courts in the Ninth Circuit consider whether the plaintiff (1) “identif[ies] the
11 missing party with sufficient specificity such that the Court can determine that the
12 defendant is a real person or entity who could be sued in federal court”; (2) “identif[ies]
13 all previous steps taken to locate the elusive defendant” to ensure that plaintiff has made
14 a good faith effort to identify the defendant; and (3) “establish[es] to the Court’s
15 satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss.”
16 *Columbia Ins.*, 185 F.R.D. at 578–80. Additionally, the plaintiff should demonstrate the
17 discovery will likely lead to identifying information that will permit service of process.
18 *Id.* at 580. These factors are considered to ensure the expedited discovery procedure
19 “will only be employed in cases where the plaintiff has in good faith exhausted traditional
20 avenues for identifying a civil defendant pre-service, and will prevent use of this method
21 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. 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
3 the day of the allegedly infringing conduct, and by using ‘geolocation technology’ to
4 trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v. Collective of*
5 *December 29, 2011 Sharing Hash*, No. 12cv186 MMA-RBB, 2012 WL 12884688, at *4
6 (S.D. Cal. May 4, 2012); *see Openmind Solutions, Inc. v. Does 1-39*, No. C-11-3311-
7 MEJ, 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (concluding that plaintiff
8 satisfied the first factor by identifying the defendants’ IP addresses and by tracing the IP
9 addresses to a point of origin within the State of California); *Pink Lotus Entm’t, LLC v.*
10 *Does 1-46*, No. C-11-02263, 2011 WL 2470986, at *3 (N.D. Cal. June 21, 2011) (same).
11 Other courts have concluded that merely identifying the IP addresses on the day of the
12 alleged infringement satisfies this factor. *808 Holdings*, 2012 WL 12884688, at *4
13 (collecting cases).

14 Here, Plaintiff has identified the Doe Defendant with sufficient specificity. First,
15 in support of the present motion, Plaintiff provided a Declaration by David Williamson,
16 an independent contractor hired by Plaintiff as an Information Systems and Management
17 Consultant ECF No. 4-2 at 2-15 (“Ex. A”). In that role, Mr. Williamson testifies he
18 “oversaw the design, development, and overall creation of the infringement detection
19 system called VXN Scan[,] which [Plaintiff] both owns and uses to identify the IP
20 addresses used by individuals infringing Plaintiff’s movies via the BitTorrent protocol.”
21 *Id.* at ¶ 40. Mr. Williamson’s Declaration explains the VXN Scan system in detail, which
22 involves, in part, the development of a proprietary BitTorrent client that emulates the
23 behavior of a standard BitTorrent client by repeatedly downloading data pieces from
24 peers within the BitTorrent network that are distributing Plaintiff’s movies. *Id.* at ¶¶ 52–
25 55. Mr. Williamson testifies that another component of the VXN Scan system is the
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1 PCAP¹ Recorder / Capture Card, which is able to record the IP addresses connecting to
2 the Proprietary Client and send the infringed copies of Plaintiff’s movies to the
3 Proprietary Client through the BitTorrent network. *Id.* at ¶¶ 57–59. Not only does a
4 PCAP contain the IP addresses used in the network transaction, it also records the port
5 number and BitTorrent client used to accomplish each transaction, and the “Info Hash”
6 associated with the infringing computer file, which reflects the metadata of the particular
7 underlying .torrent file being shared without authorization. *Id.* at ¶¶ 61–62. The PCAP
8 Capture Card records PCAPs in real time and is able to record perfect copies of every
9 network packet received by the Proprietary Client. *Id.* at ¶ 65.

10 Second, Plaintiff also provided a declaration by Patrick Paige, a computer forensics
11 expert retained by Plaintiff to analyze and retain forensic evidence captured by the VXN
12 Scan system. ECF No. 4-2 at 17–22 (“Ex. B”). Mr. Paige explains that VXN Scan
13 recorded numerous BitTorrent computer transactions with IP address 70.179.11.5 in the
14 form of PCAPs, and that he reviewed the PCAP to confirm that it evidences a recorded
15 transaction with that IP address on January 23, 2022 at 23:45:49 UTC involving the IP
16 address uploading a piece or pieces of a file corresponding to the hash value that is
17 unique to one of Plaintiff’s movies. *Id.* at ¶¶ 13–19.

18 Third, Plaintiff provided a declaration by Susan Stalzer, one of Plaintiff’s
19 employees who verified that each digital file that the Proprietary Client received through
20 its transactions with IP address 70.179.11.5 is a copy of one of Plaintiff’s copyrighted
21 works, by viewing the unauthorized motion pictures corresponding with the file hashes
22 side-by-side with Plaintiff’s original movies. ECF No. 4-2 at 24–26 (“Ex. C”); *see also*
23 ECF No. 1-2 (Exhibit A to the Complaint, listing the hash values of the 33 torrent files
24 received by the Proprietary Client from the IP address 70.179.11.5). Mr. Paige testified
25 that based on his experience in similar cases, Defendant’s ISP, Cox Communications, is
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28 ¹ PCAP stands for “Packet Capture.” *Id.* at ¶ 58.

1 the only entity that can correlate the IP address 70.179.11.5 to its subscriber to pinpoint
2 Defendant’s identity. 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 70.179.11.5
6 as infringing its works, the IP address was automatically input into Maxmind’s
7 Geolocation Database on February 24, 2022, which traced the IP address location to
8 Poway, California, within this Court’s jurisdiction. *Id.* at ¶¶ 4–5. Plaintiff has since
9 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 this District. *Id.* at ¶¶ 6–7. The Court is satisfied that these multiple geolocation
12 traces indicating that the Defendant is located in this District are reliably accurate.

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

19 **b. Previous Attempts to Locate Defendants**

20 Next, Plaintiff must describe all previous steps taken to locate the Defendant to
21 ensure that Plaintiff made a good faith effort to identify the Defendant. Here, Plaintiff
22 states that it diligently attempted to locate Defendant by searching for Defendant’s IP
23 address using online search engines. ECF No. 4-1 at 14. Plaintiff also states it engaged
24 in diligent research to attempt to identify Defendant using other means, and also
25 extensively discussed this issue with its computer investigators and cyber security
26 consultants. *Id.* Plaintiff states that despite its diligent efforts, it is unable to identify any
27 means of obtaining the identity of the Defendant other than through subpoenaing the
28 information from the ISP. *Id.*; *see also* Ex. B at ¶ 28 (“Based on my experience in

1 similar cases, Defendant’s ISP Cox Communications is the only entity that can correlate
2 the IP address to the subscriber”). Thus, the Court finds Plaintiff has shown it has
3 made a good-faith effort to identify and locate Defendant before resorting to filing the
4 instant motion.

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

6 Finally, Plaintiff must establish it could survive a motion to dismiss. *See* FED. R.
7 Civ. P. 12(b); *Columbia Ins.*, 185 F.R.D. at 579. To survive a motion to dismiss for
8 failure to state a claim upon which relief can be granted, “a complaint must contain
9 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
10 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
11 550 U.S. 544, 570 (2007)). To present a prima facie case of copyright infringement,
12 Plaintiff must show: (1) ownership of a valid copyright; and (2) that Defendant violated
13 the copyright owner’s exclusive rights under the Copyright Act. *Range Road Music, Inc.*
14 *v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012). In addition, for direct
15 infringement Plaintiff is required to show causation by Defendant. *Perfect 10, Inc. v.*
16 *Giganews, Inc.*, 847 F.3d 657, 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*
19 ECF No. 1 at ¶¶ 43, 46, 49.² Furthermore, Ms. Stalzer attests that she reviewed the files
20 correlating to the hashes identified in Exhibit A to the Complaint and confirmed that they
21 are “identical, strikingly similar or substantially similar” to Strike 3’s original
22 copyrighted Works. Ex. C at ¶¶ 7–11; ECF No. 1 at ¶¶ 34–35. Plaintiff’s Complaint also
23 alleges 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 70.179.11.5, 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 18–27, 34–37, 45–46. 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. However, the Court is cognizant of the potential embarrassment of being
13 identified in this type of case and “shares the growing concern about unscrupulous tactics
14 used by certain plaintiffs, especially in the adult film industry, to shake down the owners
15 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,
17 Plaintiff invites the Court to issue a protective order establishing procedural safeguards if
18 the Court finds such procedures appropriate. ECF No. 4-1 at 18. Accordingly, the Court
19 **ORDERS** 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
27 shall notify the subscriber that his or her identity has been subpoenaed by
28 Plaintiff. The ISP must also provide a copy of this Order along with the

1 required notice to the subscriber whose identity is sought pursuant to this
2 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
9 can 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
18 proceed anonymously, Plaintiff may not release any identifying information
19 without a court order allowing the release of the information.

20 **IT IS SO ORDERED.**

21 Dated: April 5, 2022

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