

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP
address 172.8.129.121,

Defendant.

Case No.: 16-cv-792-JAH-JLB

**ORDER DENYING PLAINTIFF’S EX
PARTE MOTION FOR LEAVE TO
SERVE A THIRD PARTY
SUBPOENA PRIOR TO A RULE
26(f) CONFERENCE**

[ECF No. 4]

Presently before the Court is Plaintiff’s *Ex Parte* Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference. (ECF No. 4.) No opposition was filed, as no defendant has been named or served. For the reasons set forth below, Plaintiff’s Motion is **DENIED**.

I. BACKGROUND

Plaintiff operates a subscription-based website, X-art.com, where it displays its copyrighted materials. (ECF No. 4-1 at 8.) Plaintiff asserts the person or entity assigned Internet Protocol (“IP”) address 172.8.129.121 has “habitually” infringed Plaintiff’s copyrighted works on the X-art.com website through his, her, or its use of the online BitTorrent file distribution network. (*Id.*)

1 On April 1, 2016, Plaintiff filed a Complaint against Defendant “JOHN DOE
2 subscriber assigned IP address 172.8.129.121.” (ECF No. 1.) The Complaint alleges direct
3 copyright infringement against Defendant and asserts Plaintiff is the registered copyright
4 holder of 53 works allegedly infringed by Defendant. (*Id.* at 5–7; Exh. B.) Plaintiff asserts
5 Defendant used the BitTorrent file distribution network to copy and distribute Plaintiff’s
6 copyrighted works without Plaintiff’s consent. (*Id.* at 5.)

7 Because Defendant used the Internet to commit the alleged copyright infringement,
8 Plaintiff knows Defendant only by his, her, or its IP address, which was assigned to
9 Defendant by his, her, or its Internet Service Provider (“ISP”), AT&T Internet Services.
10 (ECF No. 4-1 at 8.) In the present Motion, Plaintiff asserts ISPs “maintain internal logs
11 that record the date, time, and customer identity for each IP address assignment made by
12 that ISP” and thus AT&T Internet Services can use the above-listed IP address to identify
13 Defendant. (*Id.*) Accordingly, Plaintiff seeks leave of Court to conduct early discovery
14 and serve on AT&T Internet Services a Rule 45 subpoena seeking Defendant’s “true name
15 and address” so Plaintiff may serve Defendant and prosecute the claims made in its
16 Complaint. (*Id.*)

17 II. LEGAL STANDARDS

18 Generally, discovery is not permitted absent a court order before the parties have
19 conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed R. Civ. P. 26(d)(1).
20 “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to
21 ensue after filing of the complaint to permit the plaintiff to learn the identifying facts
22 necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185
23 F.R.D. 573, 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.3d 637, 642 (9th Cir.
24 1980)). Requests to conduct discovery prior to a Rule 26(f) conference are granted upon
25 a showing of good cause by the moving party, which may be found “where the need for
26 expedited discovery, in consideration of the administration of justice, outweighs the
27 prejudice to the responding party.” *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D.
28 273, 275–76 (N.D. Cal. 2002). With respect to Internet infringement cases, “courts

1 routinely find good cause exists to issue a Rule 45 subpoena to discover[] a Doe
 2 defendant's identity prior to a Rule 26(f) conference, where a plaintiff makes a *prima facie*
 3 showing of infringement, there is no other way to identify a Doe defendant, and there is a
 4 risk an ISP will destroy its logs prior to the conference.” *Bright Solutions for Dyslexia,*
 5 *Inc. v. Doe I*, 15-cv-1618-JSC, 2015 WL 5159125, at *1 (N.D. Cal. Sept. 2, 2015) (quoting
 6 *UMG Recordings, Inc. v. Doe*, C-08-1193-SBA, 2008 WL 4104207, at *4 (N.D. Cal. Sept.
 7 3, 2008)).

8 District courts in the Ninth Circuit apply a three-factor test for determining whether
 9 good cause exists to allow for expedited discovery to identify Doe defendants. *Columbia*
 10 *Ins. Co.*, 185 F.R.D. at 578–80. “First, the plaintiff should identify the missing party with
 11 sufficient specificity such that the Court can determine that defendant is a real person or
 12 entity who could be sued in federal court.” *Id.* at 578. Second, the plaintiff “should identify
 13 all previous steps taken to locate the elusive defendant” to ensure the plaintiff has made a
 14 good faith effort to identify and serve process on the defendant. *Id.* at 579. Third, the
 15 plaintiff “should establish to the Court’s satisfaction that plaintiff’s suit against defendant
 16 could withstand a motion to dismiss.” *Id.* (citing *Gillespie*, 629 F.2d at 642).

17 III. DISCUSSION

18 Plaintiff seeks an order allowing it to serve a Rule 45 subpoena on AT&T Internet
 19 Services before the parties conduct a Rule 26(f) Conference in this case so Plaintiff may
 20 obtain the true name and address of Defendant to “serve Defendant” and “pursue this
 21 lawsuit to protect its valuable copyrights.” (ECF No. 4-1 at 8.) For the reasons set forth
 22 below, Plaintiff’s Motion is **DENIED**.

23 For the Court to grant Plaintiff’s Motion, Plaintiff must first identify Defendant with
 24 enough specificity to enable the Court to determine Defendant is a real person or entity
 25 who would be subject to the jurisdiction of this Court. *See Columbia Ins. Co.*, 185 F.R.D.
 26 at 578. This court has previously determined that “a plaintiff identifies Doe defendants
 27 with sufficient specificity by providing the unique IP addresses assigned to an individual
 28 defendant on the day of the allegedly infringing conduct, and by using ‘geolocation

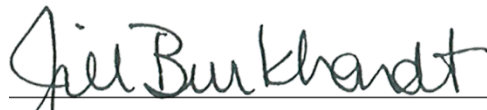
1 technology' to trace the IP addresses to a physical point of origin." *808 Holdings, LLC v.*
 2 *Collective of December 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C*
 3 *D63C23C91*, 2012 WL 1648838, at *4 (S.D. Cal. May 4, 2012) (citing *Openmind*
 4 *Solutions, Inc. v. Does 1–39*, No. C-11-3311 MEJ, 2011 WL 4715200, at *2 (N.D. Cal.
 5 Oct. 7, 2011); *Pink Lotus Entm't, LLC v. Does 1–46*, No. C-11-02263 HRL, 2011 WL
 6 2470986, at *3 (N.D. Cal. June 21, 2011)).

7 Here, the Court finds Plaintiff's Motion has failed to identify Defendant with
 8 sufficient specificity to enable the Court to determine Defendant would be subject to the
 9 jurisdiction of this Court. Plaintiff alleges in its Complaint that the location of Defendant's
 10 IP address was pinpointed using "proven IP address geolocation technology which has
 11 consistently worked in similar cases to ensure that the Defendant's acts of copyright
 12 infringement occurred using an Internet Protocol address ("IP address") traced to a
 13 physical address located within this District" (ECF No. 1 at 2; ECF No. 1-2 at 1); however,
 14 the allegation that Defendant's IP address likely traces to a physical address in this District
 15 is not supported in any declaration filed in support of the present Motion. Accordingly, no
 16 evidentiary support was provided to show that Defendant's IP address likely resolves to a
 17 physical address located in this District, and this Court cannot rely on Plaintiff's
 18 unsupported assertions regarding the use and accuracy of the geolocation technology
 19 Plaintiff employed. As no reliable evidence was presented to support the allegation that
 20 Defendant is subject to this Court's jurisdiction, the instant Motion must fail.

21 IV. CONCLUSION

22 For the reason set forth above, Plaintiff's Ex Parte Motion for Leave to Serve a Third
 23 Party Subpoena Prior to Rule 26(f) Conference (ECF No. 4) is **DENIED**.

24 Dated: May 18, 2016

25 
 26 Hon. Jill L. Burkhardt
 27 United States Magistrate Judge
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