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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

QUAD INTERNATIONAL, INC.,

Plaintiff,

v.

JOHN DOE,
IP address 98.192.184.147,

Defendant.

CASE NO. 1:12-cv-02050-AWI-SKO

**ORDER GRANTING PLAINTIFF'S
RENEWED EX PARTE
APPLICATION FOR LEAVE TO
TAKE EXPEDITED DISCOVERY**

(Doc. No. 13)

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I. INTRODUCTION

On November 19, 2012, the Court issued an order denying without prejudice Plaintiff Quad International Inc.'s ("Plaintiff") ex parte application for leave to take expedited discovery. (Doc. 7.) Thereafter, the case was transferred from the Sacramento division to the Fresno division of the U.S. District Court for the Eastern District of California. On January 8, 2013, Plaintiff filed a renewed ex parte application for leave to take expedited discovery. (Doc. 13.) For the reasons set forth below, Plaintiff's motion is GRANTED.

II. BACKGROUND

On October 23, 2012, Plaintiff filed a complaint alleging copyright infringement, negligence, and contributory infringement of the adult entertainment video, "ScoreHD-Tokyo Pick-up" (the

1 "Video") against a single defendant, identified as "John Doe." In the course of monitoring Internet-
2 based infringement of its copyrighted content, Plaintiff's agents allegedly observed unlawful
3 reproduction and distribution of the Video via the BitTorrent file transfer protocol by defendant John
4 Doe. Although Plaintiff does not know the actual identity of the defendant John Doe, Plaintiff's
5 agents have identified defendant John Doe by an IP address, 98.192.184.147, and the date and time
6 of the alleged unlawful activity. (Complaint ("Cmplt."), ¶¶ 1-2, 6.)

7 According to Plaintiff, only the Internet Service Provider, ("ISP") who issued the IP address
8 connected with the unauthorized activity has the ability to identify the Doe defendant. Plaintiff
9 asserts that it has identified Comcast Cable Communications LLC as the ISP who issued the IP
10 address connected with the unauthorized activity. Plaintiff contends that ISPs only retain the
11 identifying information for a limited period of time, for as little as months or even weeks before
12 potentially permanently erasing the information. Thus, Plaintiff seeks an order granting expedited
13 discovery to serve a Rule 45 subpoena on Comcast Cable Communications LLC to determine the
14 identity of the Doe defendant, thereby permitting Plaintiff to amend its complaint to state the true
15 name of the defendant and serve the defendant with process.

16 III. DISCUSSION

17 A. Legal Standard

18 Generally, a party may not conduct discovery before the parties have met and conferred
19 pursuant to Federal Rule of Civil Procedure 26(f). However, a court may authorize early discovery
20 "for the parties' and witnesses' convenience and in the interests of justice." Fed. R. P. 26(d)(2). The
21 moving party must show good cause for the early discovery. *See Semitool, Inc. v. Tokyo Electron*
22 *Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). "Good cause may be found where the need for
23 expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the
24 responding party." *Id.*

25 The Ninth Circuit has held that when a defendant's identity is unknown at the time the
26 complaint is filed, a court may grant the plaintiff leave to take early discovery to determine the
27 defendant's identity "unless it is clear that discovery would not uncover the identit[y], or that the
28

1 complaint would be dismissed on other grounds." *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.
2 1980).

3 District courts have further developed the *Gillespie* standard where the unknown defendants
4 are anonymous internet users, taking into account the First Amendment concerns involved. *See*
5 *SaleHoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1213-17 (W.D. Wash. 2010). In *Columbia*
6 *Ins. Co. v. seescandy.com*, 185 F.R.D 573, 578 (N.D. Cal. 1999), the district court discussed the
7 issues involved:

8 With the rise of the Internet has come the ability to commit certain tortious acts, such
9 as defamation, copyright infringement, and trademark infringement, entirely on-line.
10 The tortfeasor can act pseudonymously or anonymously and may give fictitious or
11 incomplete identifying information. Parties who have been injured by these acts are
likely to find themselves chasing the tortfeasor from Internet Service Provider ("ISP")
to ISP, [footnote omitted] with little or no hope of actually discovering the identity
of the tortfeasor.

12 In such cases the traditional reluctance for permitting filings against John Doe
13 defendants or fictitious names and the traditional enforcement of strict compliance
14 with service requirements should be tempered by the need to provide injured parties
15 with [a] forum in which they may seek redress for grievances. However, this need
16 must be balanced against the legitimate and valuable right to participate in online
17 forums anonymously or pseudonymously. People are permitted to interact
18 pseudonymously and anonymously with each other so long as those acts are not in
19 violation of the law. This ability to speak one's mind without the burden of the other
party knowing all the facts about one's identity can foster open communication and
robust debate. Furthermore, it permits persons to obtain information relevant to a
sensitive or intimate condition without fear of embarrassment. People who have
committed no wrong should be able to participate online without fear that someone
who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain
the power of the court's order to discover their identity.

20 The *Columbia* court, therefore, fashioned a four-part test predicated on the *Gillespie* standard
21 set forth by the Ninth Circuit to determine whether early discovery was warranted whereby the
22 moving party must: "(1) identify the defendant with enough specificity to allow the Court to
23 determine whether the defendant is a real person or entity who could be sued in federal court;
24 (2) recount the steps taken to locate the defendant; (3) show that its action could survive a motion
25 to dismiss; and (4) file a request for discovery with the Court identifying the persons or entities on
26 whom discovery process might be served and for which there is a reasonable likelihood that the
27 discovery process will lead to identifying information." *SBO Pictures, Inc. v. Does 1-3036*, No. 11-
28 4220 SC, 2011 WL 6002620, at *2 (N.D. Cal. Nov. 30, 2011) (summarizing test set forth in

1 *Columbia*, 185 F.R.D. at 578-90). In the context of parties seeking discovery in alleged online
2 piracy, the court must balance "the need to provide injured parties with [a] forum in which they may
3 seek redress for grievances" against "the legitimate and valuable right [of Internet users] to
4 participate in online forums anonymously or pseudonymously . . . without fear that someone who
5 wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the
6 court's order to discovery their identities." *Columbia*, 185 F.R.D. at 578.

7 Other courts, however, have imposed a more stringent test at the third factor – that the
8 plaintiff "submit evidence sufficient to defeat summary judgment" or "make a prima facie
9 evidentiary showing." *SaleHoo Grp.* 722 F. Supp. 2d at 1216 (finding the prima facie standard
10 appropriate). The district courts in this circuit that have applied the original *Columbia* four-part test
11 are persuasive; the Court will not apply the more stringent standard. Thus, the Court analyzes
12 Plaintiff's motion under *Columbia's* four-part test below.

13 **B. Application of Four-Part *Columbia* Test**

14 **1. Identification of Missing Party With Sufficient Specificity**

15 First, Plaintiff must identify the Doe defendant with enough specificity to enable the Court
16 to determine that the defendant is a real person or entity who would be subject to the jurisdiction of
17 this Court. *Columbia*, 185 F.R.D. at 578; *see also Malibu Media, LLC v. John Does 1 through 16*,
18 No. 12-cv-1847-AJB (DHB), 2012 WL 3809128, at * 3 (S.D. Cal. Sept. 4, 2012). Several district
19 courts have found that a plaintiff has sufficiently identified a Doe defendant by providing the unique
20 IP address assigned to an individual defendant on the day of the allegedly infringing conduct, and
21 by using "geolocation technology" to trace the IP address to a physical point of origin. *Malibu*
22 *Media, LLC*, 2012 WL 3809128, at * 3; *808 Holdings, LLC v. Collective of December 29, 2011*,
23 *Sharing Hash E37917C8EEB4545E6432358FF32F29CD63C23C91 ("808 Holdings")*, No. 12-cv-
24 186-MMA (RBB), 2012 WL 1648838, at * 4 (S.D. Cal. May 4, 2012); *OpenMind Solutions, Inc. v.*
25 *Does 1-39*, No. C-11-3311 MEJ, 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011). Other district
26 courts have concluded that merely identifying the IP addresses assigned to the defendants on the day
27 of the purported infringement is sufficient to satisfy the first factor. *See MCGIP, LLC v. Does 1-149*,

1 No. C-11-02331 LB, 2011 WL 3607666, at *2 (N.D. Cal. Aug. 15, 2011); *First Time Videos LLC*
2 *v. Does 1-37*, No. C-11-01675 LB, 2011 WL 1431619, at *2 (N.D. Cal. Apr. 14, 2011).

3 Here, Plaintiff has provided the unique IP address corresponding to the Doe defendant on the
4 date and time of the purportedly infringing activity, as well as the city and state in which the IP
5 address is located. (Doc. 1, ¶ 6; Doc. 13, 3:27-4:3.) Consequently, Plaintiff has identified the Doe
6 defendant with sufficient specificity. *OpenMind Solutions*, 2011 WL 4715200, at *2 (finding the
7 plaintiff 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).

9 **2. Plaintiff's Previous Attempts to Locate Defendants**

10 Plaintiff is next required to describe all prior steps taken to identify the Doe defendant in a
11 good faith effort to locate and serve him or her. *See Columbia*, 185 F.R.D. at 579. In support of its
12 original motion for leave to take expedited discovery (Doc. 6), Plaintiff filed the declaration of Peter
13 Hansmeier (Doc. 6-1) who described the efforts that were made to learn the IP address of the Doe
14 defendant. Mr. Hansmeier maintains that, although he was able to observe the infringing activities
15 of Doe defendant through the BitTorrent software, the system does not allow him to access John
16 Doe's computer to obtain identifying personal information. (Doc. 6-1, Hansmeier Decl., ¶ 21.) Due
17 in part to the anonymous nature of the BitTorrent distribution systems used by John Doe, the true
18 name, street address, telephone number, and email address of John Doe remains unknown. (Doc.
19 6-1, Hansmeier Decl., ¶ 21.) Mr. Hansmeier maintains that this information can only be obtained
20 from John Doe's ISP. (Doc. 6-1, Hansmeier Decl., ¶ 28.) Without expedited discovery as to John
21 Doe's ISP, Plaintiff asserts it has no means of serving John Doe with the complaint and summons
22 in this case and no means of protecting its creative content from ongoing infringement.

23 Based upon the declaration of Mr. Hansmeier, it appears that Plaintiff has obtained and
24 investigated the available data related to the alleged infringement in a good faith effort to located the
25 Doe defendant. *See Digital Sin, Inc. v. Does 1-5698*, No. C 11-04397 LB, 2011 WL 5362068, at *2
26 (N.D. Cal. Nov. 5, 2011). This factor is satisfied.

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1 **3. Plaintiff's Ability to Withstand a Motion to Dismiss**

2 To be entitled to early discovery, the plaintiff must demonstrate that its complaint can likely
3 withstand a motion to dismiss. *Columbia*, 185 F.R.D. at 579; *808 Holdings*, 2012 WL 1648838, at
4 * 5. While Plaintiff asserts that, as a matter of law, there is no requirement that it make a showing
5 of the court's personal jurisdiction over Doe defendant or establish that venue is proper, courts
6 routinely consider issues of personal jurisdiction and venue in applying the Ninth Circuit's holding
7 in *Gillespie* in the context of motions for early discovery such as this. *See, eg., Malibu Media, LLC*,
8 2012 WL 3809128, at *3; *808 Holdings*, 2012 WL 1648838, at * 4. Nevertheless, Plaintiff is not
9 required to *prove* that the Court has personal jurisdiction over Doe defendant or definitively establish
10 that venue is proper, only that it is *likely* that Plaintiff could withstand a motion to dismiss on those
11 or other grounds.

12 **a. Plaintiff's Ability to State a Claim Upon Which Relief can be Granted**

13 Generally, to show copyright infringement, a plaintiff must establish the following:
14 (1) ownership of a valid copyright, and (2) that the defendant violated the copyright owner's
15 exclusive rights under the Copyright Act. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004);
16 17 U.S.C. § 501(a).

17 Here, Plaintiff alleges that it is the exclusive rights holder with respect to BitTorrent-based
18 reproduction and distribution of the Video, which is currently registered in the United States
19 Copyright Office. (Doc. 1, Cmplt. ¶¶ 18-19.) Plaintiff also alleges that Doe defendant, using IP
20 address 98.192.184.147, without Plaintiff's authorization or license, intentionally downloaded a
21 torrent file particular to Plaintiff's Video, purposefully downloaded that torrent file into his BitTorrent
22 client, entered a Bit Torrent swarm particular to Plaintiff's Video, and reproduced and distributed the
23 Video to numerous third parties. (Doc. 1, Cmplt., ¶ 19.) This is sufficient to state a *prima facie*
24 claim for copyright infringement that can likely withstand a motion to dismiss for failure to state a
25 claim.

26 **b. Plaintiff's Allegations of Personal Jurisdiction**

27 Plaintiff bears the burden of establishing jurisdictional facts. *See Columbia*, 185 F.R.D. at
28 578. In the complaint, Plaintiff alleges that this Court has personal jurisdiction over Doe defendant

1 because he or she either resides in or committed copyright infringement in the State of California and
2 that Plaintiff used geolocation technology to trace the IP address of Defendant to a point of origin
3 within the State of California. (Doc. 1, Cmplt., ¶ 6.) In Plaintiff's renewed motion for expedited
4 discovery, it maintains that its agents entered the IP address associated with the Defendant into a
5 geolocation database, and the IP address could be traced to a location inside this district, specifically
6 in Fresno, California. (Doc. 13, 3:26-4:8.)

7 Therefore, at this early stage of the litigation, it appears Plaintiff has alleged sufficient facts
8 to show it can likely withstand a motion to dismiss for lack of personal jurisdiction pursuant to
9 Federal Rule 12(b)(2) because the Doe defendant has an IP address that was traced to a location
10 within this district. *See Malibu Media, LLC*, 2012 WL 3809128, at *4; *808 Holdings*, 2012 WL
11 1648838, at *5.

12 **c. Plaintiff's Allegations of Venue**

13 The proper venue for infringement of copyright suits is not determined by the general
14 provision governing suits in the federal district courts, but is governed by the specific venue
15 provision of the Copyright Act. 28 U.S.C. § 1400(a). Section 1400(a) provides that "[c]ivil actions,
16 suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in
17 mask works or designs may be instituted in the district in which the defendant or his agent resides
18 or may be found." Section 1400(a) has been interpreted by the Ninth Circuit to allow venue in any
19 judicial district in which the defendant would be amenable to personal jurisdiction if the district were
20 a separate state. *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)
21 (internal quotation marks and citations omitted).

22 In its complaint, Plaintiff alleges that venue is properly founded in this judicial district
23 because the Doe defendant resides in this District, may be found in this District, or a substantial part
24 of the events giving rise to the claims in this action occurred within this District. (Doc. 1, Cmplt.
25 ¶ 7.) In its renewed motion for expedited discovery, Plaintiff maintains that the IP address associated
26 with Doe defendant is located in Fresno, California, which is a location within this division of this
27 district. (Doc. 13, 3:23-4:8.) As Doe defendant appears to have an IP address that is located within
28 this district, it is likely that Plaintiff will be able to survive a motion to dismiss for improper venue

1 under Federal Rule of Civil Procedure 12(b)(3). *See Malibu Media, LLC*, 2012 WL 3809128, at *4-
2 5.

3 **4. Whether there is a Reasonable Likelihood of Being Able to Identify Defendant**

4 The fourth factor examines whether Plaintiff has demonstrated that there is a reasonable
5 likelihood that the discovery it requests will lead to the identification of the Doe defendant such that
6 it may effect service of process. *Columbia*, 185 F.R.d. at 580. Plaintiff asserts that the key to
7 locating Defendant is through the IP address associated with the alleged activity on BitTorrent.
8 Specifically, Plaintiff asserts that, because ISPs assign a unique IP address to each subscriber and
9 retain subscriber activity records regarding the IP address assigned, the information sought in the
10 subpoena will enable Plaintiff to serve Defendant and proceed in this case. This is a sufficient
11 showing to satisfy this factor. *See OpenMind Solutions, Inc.*, 2011 WL 4715200, at *5.

12 **C. Cable Privacy Act**

13 It is also necessary to consider the requirements of the Cable Privacy Act, 47 U.S.C. § 551.
14 In general, the Act prohibits cable operators from disclosing personally identifiable information
15 regarding subscribers without the prior written or electronic consent of the subscriber. 47 U.S.C.
16 § 551(c)(1). A cable operator, however, may disclose this information if the disclosure is made
17 pursuant to a court order and the cable operator provides the subscriber with notice of the order.
18 47 U.S.C. § 551(c)(2)(B). The ISP that Plaintiff intends to subpoena is a cable operator within the
19 meaning of the Act.

20 **IV. CONCLUSION AND ORDER**

21 For the reasons set forth above, IT IS HEREBY ORDERED that:

- 22 1. Plaintiff's motion for leave to take expedited discovery is GRANTED;
- 23 2. Plaintiff is permitted to serve a subpoena on the ISP identified in Plaintiff's Ex Parte
24 Application for Leave to Take Expedited Discovery or any other entity identified as
25 a provider of Internet services to John Doe in response to a subpoena, seeking the
26 true name and address of that individual with the IP address located in this judicial
27 district as set forth in Plaintiff's Application. **The subscriber's name and address**
28 **are sufficient for Plaintiff to be able to identify and serve the Doe defendant;**

