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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AF HOLDINGS LLC,

Plaintiff,

No. 2:12-cv-01063 JAM KJN

v.

JOHN DOE,

Defendant.

ORDER

Presently before the court is plaintiff's ex parte application for leave to conduct expedited discovery ("Application") pursuant to Federal Rule of Civil Procedure 26(d)(1).¹ Plaintiff seeks leave of court to serve a discovery subpoena on nonparty Internet Service Provider ("ISP") Bright House Networks, and if necessary serve subpoenas on other "intermediary ISPs," in order to obtain the true identity of defendant "John Doe," who is alleged to have infringed on plaintiff's copyrighted video entitled *Popular Demand*. (See generally Application, Dkt. No. 7; see also, e.g., Compl. ¶¶ 1, 3-4.). Because plaintiff did not request a hearing, and oral argument would not materially aid the resolution of the pending matter, the court resolves plaintiff's Application on the moving papers and record. See Fed. R. Civ. P. 78(b); E. Dist. Local

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(1) and 28 U.S.C. § 636(b)(1).

1 Rule 230(g). In consideration of the Application, and for the reasons stated below, the court
2 grants plaintiff's Application for leave to conduct limited early discovery and authorizes plaintiff
3 to serve nonparty subpoenas pursuant to Federal Rule of Civil Procedure 45 and in accordance
4 with the remainder of this order.

5 I. BACKGROUND

6 On April 23, 2012, plaintiff filed complaint against defendant "John Doe,"
7 asserting claims of copyright infringement, contributory infringement, and negligence in regards
8 to the copyrighted video entitled *Popular Demand* ("Video"). (See generally Compl.) Plaintiff
9 alleges that it is the "exclusive holder of the relevant rights" with respect to the Video.² (Id. ¶ 2.)

10 Plaintiff alleges that John Doe used an online peer-to-peer media distribution
11 system, a "BitTorrent" file sharing protocol, to download the Video and then distribute the Video
12 to numerous, unidentified third parties.³ (See Compl. ¶¶ 4, 22-24.) Plaintiff alleges that it does
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14 ² Plaintiff alleges that the Video is currently registered with the U.S. Copyright Office, and
15 that plaintiff "received the rights to the Video pursuant to an assignment agreement." (Compl. ¶ 19
16 & Exs. A-B.) Pursuant to 17 U.S.C. § 501(b), the "legal or beneficial owner of an exclusive right
17 under a copyright is entitled . . . to institute an action for any infringement of that particular right
18 committed while he or she is the owner of it." Accord Silvers v. Sony Pictures Entm't, Inc., 402
19 F.3d 881, 884 (9th Cir. 2005) (en banc).

18 ³ The complaint generally describes the mechanics of the BitTorrent protocol. (Compl. ¶¶ 8-
19 17; see also Hansmeier Decl. ¶¶ 8-13, Dkt. No. 7, Doc. No. 7-1.) A magistrate judge in the Northern
20 District of California summarized the BitTorrent protocol as follows:

20 In the BitTorrent vernacular, individual downloaders/distributors of
21 a particular file are called "peers." The group of peers involved in
22 downloading/distributing a particular file is called a "swarm." A server
23 which stores a list of peers in a swarm is called a "tracker." A computer
24 program that implements the BitTorrent protocol is called a BitTorrent
25 "client."

23 The BitTorrent protocol operates as follows. First, a user locates a
24 small "torrent" file. This file contains information about the files to be
25 shared and about the tracker, the computer that coordinates the file
26 distribution. Second, the user loads the torrent file into a BitTorrent client,
which automatically attempts to connect to the tracker listed in the torrent
file. Third, the tracker responds with a list of peers and the BitTorrent client
connects to those peers to begin downloading data from and distributing data

1 not know the actual name of John Doe at this time.⁴ (Id. ¶ 4.) However, through use of
2 investigators, plaintiff has identified evidence of John Doe’s alleged infringing activities, as well
3 as identifying information about John Doe. Plaintiff represents that it has identified John Doe by
4 the unique Internet Protocol (“IP”) address “174.134.190.54,” which corresponds with plaintiff’s
5 observation of John Doe’s alleged infringing activities on December 22, 2011, at 6:25 a.m.⁵ (See
6 id. ¶¶ 22-23; see also Hansmeier Decl. ¶¶ 27.) Additionally, plaintiff has determined that Bright
7 House Networks is the ISP that provided the above-referenced IP address to John Doe.
8 (Hansmeier Decl. ¶ 24, 28.)

9 On May 3, 2012, plaintiff filed the pending Application in order to discover John
10 Doe’s actual name so that plaintiff may name him in an amended complaint and serve process.
11 (See Application at 4 (“Without knowing [John Doe’s] identity, Plaintiff will have no means to
12 name and serve anyone with process.”).) Plaintiff seeks leave of court to serve a Rule 45
13 subpoena on Bright House Networks in order to learn the actual name of John Doe.
14 Additionally, plaintiff asserts that certain ISPs lease or otherwise allocate certain IP addresses to
15 unrelated ISPs, and that the absence of a direct relationship, such as a contractual relationship,

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17 to the other peers in the swarm. When the download is complete, the
18 BitTorrent client continues distributing data to the peers in the swarm until
19 the user manually disconnects from the swarm or the BitTorrent client
20 otherwise does the same.

21 Diabolic Video Prods., Inc. v. Does 1-2099, No. 10-CV-5865-PSG, 2011 WL 3100404, at *1-2
22 (N.D. Cal. May 31, 2011) (unpublished).

23 ⁴ The use of “Doe” defendants is generally disfavored. Gillespie v. Civiletti, 629 F.2d 637,
24 642 (9th Cir. 1980). However, a plaintiff should be given an opportunity through discovery to
25 identify such defendants where the identities of those defendants are not be known prior to the filing
26 of a complaint, “unless it is clear that discovery would not uncover the identities, or that the
complaint would be dismissed on other grounds.” Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
1980).

⁵ Plaintiff’s complaint alleges that plaintiff used “geolocation technology to trace [John
Doe’s] IP address . . . to a point of origin within the State of California.” (Compl. ¶ 6.) Plaintiff also
alleges that it identified a unique file “hash” identifier associated with the particular BitTorrent
swarm: “6C10F2DCFF52961B876AA592183103BAC958E989.” (Id. ¶ 24.)

1 between the “lessor ISP” and the end-user deprives the lessor ISP of the ability to identify alleged
2 infringers like John Doe. (Application at 2; Hansmeier Decl. ¶ 30.) Accordingly, plaintiff also
3 seeks leave to serve Rule 45 subpoenas on “lessee” ISPs to the extent that Bright House
4 Networks is a lessor ISP that cannot identify John Doe. (See Application at 2; Hansmeier Decl.
5 ¶ 30; Proposed Order at 1-2, Dkt. No. 7, Doc. No. 7-2.)

6 No status (pretrial scheduling) conference has been set in this case. (See Order
7 Requiring Joint Status Report at 2, Dkt. No. 5.) It is highly unlikely that a discovery conference
8 pursuant to Federal Rule of Civil Procedure 26(f) has taken place given plaintiff’s representation
9 that it does not presently know John Doe’s actual name.

10 II. LEGAL STANDARDS

11 Federal Rule of Civil Procedure 26(d)(1) provides: “A party may not seek
12 discovery from any source before the parties have conferred as required by Rule 26(f), except in a
13 proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these
14 rules, by stipulation, *or by court order*” (emphasis added). District courts within the Ninth
15 Circuit have permitted expedited discovery prior to the Rule 26(f) conference upon a showing of
16 “good cause.” See, e.g., In re Countrywide Fin. Corp. Derivative Litig., 542 F. Supp. 2d 1160,
17 1179 (C.D. Cal. 2008) (citing Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273 (N.D.
18 Cal. 2002)); accord Am. LegalNet, Inc. v. Davis, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009).
19 “Good cause exists where the need for expedited discovery, in consideration of the
20 administration of justice, outweighs the prejudice to the responding party.” In re Countrywide
21 Fin. Corp. Derivative Litig., 542 F. Supp. 2d at 1179 (citation and quotation marks omitted).

22 III. DISCUSSION

23 Here, plaintiff seeks permission to conduct limited early discovery and serve
24 Rule 45 subpoenas on ISPs that may very well be able to assist plaintiff in identifying the true
25 identity of John Doe. District courts within the Ninth Circuit have regularly found good cause
26 supporting early or expedited discovery in cases where the plaintiff alleged copyright

1 infringement accomplished through distribution of the work over a peer-to-peer network, and
2 where the plaintiff only named Doe defendants and sought early discovery to obtain the identities
3 and contact information of the alleged infringers from associated ISPs. See, e.g., Berlin Media
4 Art E.K. v. Does 1 through 146, No. S-11-2039 KJM GGH, 2011 WL 4056167, at *2 (E.D. Cal.
5 Sept. 12, 2011) (unpublished) (granting leave to conduct expedited discovery in the form of
6 Rule 45 subpoenas seeking “information sufficient to identify each Doe defendant by name,
7 current and permanent address, telephone number, and e-mail address”); UMG Recordings, Inc.
8 v. Doe, No. C 08-1193 SBA, 2008 WL 4104214, at *4-5 (N.D. Cal. Sept. 3, 2008) (unpublished)
9 (granting leave to conduct expedited discovery in the form of Rule 45 subpoenas seeking
10 “documents that identify Defendant, including the name, current (and permanent) address and
11 telephone number, e-mail address, and Media Access Control addresses for Defendant” John
12 Doe); Arista Records LLC v. Does 1-43, No. 07cv2357-LAB (POR), 2007 WL 4538697, at *1-2
13 (S.D. Cal. Dec. 20, 2007) (granting leave to conduct expedited discovery in the form of Rule 45
14 subpoenas seeking documents that would reveal each Doe defendant’s “true name, current and
15 permanent addresses and telephone numbers, e-mail addresses, and Media Access Control
16 addresses.”).

17 For example, in Arista Records LLC, the plaintiffs alleged that unidentified
18 defendants used an online media distribution system to download and distribute plaintiffs’
19 copyrighted works to the public without permission. Arista Records LLC, 2007 WL 4538697, at
20 *1. Because the plaintiffs were only able to identify each defendant by a unique IP address
21 assigned to that defendant, plaintiffs filed an ex parte application seeking leave to immediately
22 serve discovery on a nonparty ISPs to identify the Doe defendants’ true identities. Id. The
23 district court found good cause to allow expedited discovery on the basis of the plaintiffs’ prima
24 facie showing of infringement, the risk that the ISP would not long preserve the information
25 sought, the narrow tailoring of the requests to the minimum amount of information needed to
26 identify the defendants without prejudicing their rights, and the fact that the expedited discovery

1 would substantially contribute to moving the case forward. Id. The court further noted that,
2 without such discovery, plaintiffs could not identify the Doe defendants and would not be able to
3 pursue their lawsuit to protect their copyrighted works. Id.

4 Here, the undersigned finds that good cause supports permitting plaintiff to
5 conduct limited early discovery in order to discover John Doe's actual identity and contact
6 information.⁶ First, plaintiff has persuasively argued that it cannot identify John Doe without
7 limited early discovery and, therefore cannot name John Doe or serve him with process. Second,
8 plaintiff plainly cannot conduct a Rule 26(f) conference without knowing John Doe's real name
9 and contact information. Third, plaintiff's representations presently support that the IP address
10 that plaintiff identified is associated with a particular individual and that the discovery sought
11 will facilitate identification of, and service of process on, John Doe. Fourth, plaintiff's
12 investigative technician has declared that some ISPs store subscriber information associated with
13 particular IP addresses for as little as months or weeks, which supports permitting expedited
14 discovery.⁷ (Hansmeier Decl. ¶ 29.) The undersigned also finds, at least on the present record,
15 that there is little risk of material prejudice to John Doe or the ISPs if the ISPs are served with
16 Rule 45 subpoenas that require the ISPs to provide the actual name and contact information of
17 one of its customers. Finally, John Doe and each ISP may move to quash the subpoena or seek a
18 protective order.

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20 ⁶ Although of no material impact on the pending Application, the undersigned notes that
21 other magistrate judges of this court have granted plaintiff herein leave to serve Rule 45 subpoenas
22 on an identified ISP and intermediary ISPs in order to identify a single Doe defendant in other cases
23 who allegedly infringed on plaintiff's copyrights to *Popular Demand* by use of a BitTorrent protocol.
24 See generally AF Holdings LLC v. John Doe, IP Address 71.195.119.40, No. CIV S-12-1067 KJM
CKD, 2012 WL 1657828 (E.D. Cal. May 10, 2012) (unpublished); AF Holdings LLC v. Doe, Civ.
No. S-12-1064 JAM GGH, 2012 WL 1642048 (E.D. Cal. May 9, 2012) (unpublished); AF Holdings
LLC v. Doe, Civ. No. S-12-1078 GEB GGH, 2012 WL 1610185 (E.D. Cal. May 8, 2012)
(unpublished).

25 ⁷ Plaintiff's technician's statements about ISPs' data retention policies is rather speculative
26 and, therefore, of little value. It appears that plaintiff did not make an effort to obtain information
about Bright House Network's data retention policy.

1 In short, good cause supports permitting plaintiff to conduct limited, expedited
2 discovery. The minimal risk of prejudice to John Doe, Bright House Networks, or the
3 intermediary ISPs, if any, does not outweigh plaintiff's need for the discovery sought.

4 IV. CONCLUSION

5 For the foregoing reasons, IT IS HEREBY ORDERED that:

6 1. Plaintiff's ex parte application to conduct expedited discovery (Dkt. No. 7)
7 is granted.

8 2. Plaintiff may immediately serve a subpoena pursuant to Federal Rule of
9 Civil Procedure 45 on Bright House Networks to identify the name and contact information for
10 the John Doe defendant who is associated with IP address 174.134.190.54, and may also serve
11 such subpoenas on any "intermediary" or "lessee" ISP that is identified as a result of the
12 subpoena served on Bright House Networks as providing defendant John Doe with Internet
13 services at IP address 174.134.190.54. Such subpoenas shall be limited in scope and may only
14 seek the following information about defendant John Doe: name, address, telephone number, and
15 e-mail address. A copy of this order shall be attached to any such subpoena.

16 3. Bright House Networks, and any other ISP subpoenaed pursuant to this
17 order, shall in turn serve a copy of the subpoena and a copy of this order on the subscriber,
18 defendant John Doe, within 14 days from the date of service of the subpoena on the ISP. An ISP
19 may serve the subscriber using any reasonable means, including written notice sent to the
20 subscriber's last known address, transmitted either by first-class mail or via overnight service.

21 4. Any ISP that is served with a subpoena pursuant to this order shall confer
22 with plaintiff before assessing any charge in advance of providing the information requested in
23 the subpoena. Any ISP that elects to charge for the costs of production shall provide plaintiff
24 with a billing summary and cost reports.

25 5. Nothing in this order precludes any of the ISPs or defendant John Doe
26 from challenging the subpoenas consistent with the Federal Rules of Civil Procedure and this


1 court's Local Rules. However, any such challenge, such as a motion to quash the subpoena or a
2 motion for a protective order, shall be filed before the return date of the subject subpoena, and
3 the return date shall be no earlier than 30 days from the date of service of the subpoena on the
4 ISP.

5 6. If an ISP or the subscriber files a motion to quash or a motion for a
6 protective order, the ISP shall preserve the information sought by the subpoena pending
7 resolution of such a motion.

8 7. Any information disclosed to plaintiff by any ISP may only be used by
9 plaintiff for the purpose of protecting its rights under the Copyright Act, 17 U.S.C. §§ 101 et
10 seq., and other rights stated in the complaint.

11 IT IS SO ORDERED.

12 DATED: May 22, 2012

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15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE
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