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8   UNITED STATES DISTRICT COURT

9   FOR THE EASTERN DISTRICT OF CALIFORNIA

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11   MALIBU MEDIA, LLC,   No. 2:16-cv-1733-JAM-KJN

12   Plaintiff,

13   v.   ORDER

14   JOHN DOE SUBSCRIBER ASSIGNED
     IP ADDRESS 73.235.190.122,
15

16   Defendant.
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19   INTRODUCTION

20   In this action, plaintiff Malibu Media, LLC alleges that defendant John Doe, known to

21   plaintiff only by his IP address, infringed plaintiff's copyrights by using the BitTorrent File

22   Distribution Network. On October 11, 2016, the court granted plaintiff's *ex parte* motion to

23   conduct expedited discovery and serve a Rule 45 subpoena on defendant's internet service

24   provider ("ISP"), in this case Comcast, to obtain defendant's name and address. (ECF No. 9.)

25   Subsequently, on January 2, 2017, defendant appeared through counsel and filed a motion

26   to quash the subpoena on Comcast and/or for a stay of this action. (ECF No. 12.) Plaintiff has

27   opposed the motion, and defendant filed a reply brief. (ECF Nos. 14, 15.) At the March 2, 2017

28   hearing on the motion, attorney Henrik Mosesi appeared telephonically on behalf of plaintiff, and

1   attorney Robert Robinson appeared on behalf of defendant.

2   After carefully considering the court's record and the applicable law, the court DENIES

3   the motion.

4   DISCUSSION

5   Plaintiff commenced a large number of BitTorrent copyright infringement cases in this

6   district, which have since been related. On May 5, 2016, the court conducted a global hearing

7   with respect to plaintiff's *ex parte* motions to conduct expedited discovery that had been pending

8   in several of the related actions filed by plaintiff in the Sacramento division of this district. In

9   connection with those motions, plaintiff lodged with the court for initial *in camera* review a status

10 report addressing various questions/issues outlined in the court's April 8, 2016 order scheduling

11 the May 5, 2016 hearing, including *inter alia* plaintiff's ownership and management; an

12 explanation of plaintiff's process for detecting infringement, identifying infringers and their

13 location, and prioritizing prosecution of certain infringers; and plaintiff's litigation statistics.

14 Plaintiff also provided representative samples of plaintiff's settlement correspondence and

15 settlement agreements. The status report was subsequently filed on the court's public docket, and

16 the exhibits to the status report, which contain confidential settlement correspondence and

17 settlement agreements, were filed under seal.[1] At the May 5, 2016 hearing, plaintiff's sole owner,

18 Colette Pelisseir Field, appeared along with counsel and responded to further questioning by the

19 court. Following that hearing, on May 10, 2016, the court issued a comprehensive order granting

20 the motions to conduct expedited discovery in all of the related cases, subject to certain

21 restrictions identified in that order.

22   Subsequently, plaintiff commenced several new actions, including the instant action on

23 July 24, 2016, which were also ultimately related to the initial set of actions on August 4, 2016.

24 (ECF No. 5.) As noted above, on October 11, 2016, the court granted plaintiff's *ex parte* motion

25 to conduct expedited discovery and serve the subpoena at issue on Comcast. (ECF No. 9.) The

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27 [1] Those documents were filed on the court's docket in the first-filed case, <u>Malibu Media, LLC v.</u>
    <u>John Doe subscriber assigned IP address 108.206.113.196</u>, 2:15-cv-2701-JAM-KJN, ECF Nos.
28 11, 12.

1   court found, based on the showing made in plaintiff's motion, as well as plaintiff's

2   representations made in its status report filed in Malibu Media, LLC v. John Doe subscriber

3   assigned IP address 108.206.113.196, 2:15-cv-2701-JAM-KJN, ECF Nos. 11, 12, and verbally at

4   the May 5, 2016 hearing in that matter, that plaintiff had shown that good cause exists to conduct

5   the expedited discovery to identify and serve defendant John Doe. (Id.) The instant motion to

6   quash by defendant John Doe followed.

7   "On timely motion, the court for the district where compliance is required must quash or

8   modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to

9   comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of

10   privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to

11   undue burden." Fed. R. Civ. P. 45(d)(3)(A). Additionally, the court "may, on motion, quash or

12   modify the subpoena if it requires: (i) disclosing a trade secret or other confidential research,

13   development, or commercial information; or (ii) disclosing an unretained expert's opinion or

14   information that does not describe specific occurrences in dispute and results from the expert's

15   study that was not requested by a party." Fed. R. Civ. P. 45(d)(3)(B).

16   Defendant's motion to quash here does not argue that the subpoena should be quashed

17   based on any of the specific mandatory or permissive grounds outlined above. He identifies no

18   issue with respect to the timing or geographical area for compliance; nor does he contend that

19   disclosure of his name and address implicates privileged or protected matter sufficient to quash

20   the subpoena, or that it somehow involves an undue burden.[2] Additionally, he does not argue that

21   the subpoena requests trade secrets, protected commercial information, or certain expert

22   information. Instead, defendant appears to contend that plaintiff should not have been permitted

23   to issue the subpoena in the first place, because plaintiff's factual showing in support of the

24   requested expedited discovery is lacking and inaccurate. As such, defendant's motion to quash is

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26   [2] For the first time at the hearing, defendant's counsel suggested that disclosure of the information subpoenaed (defendant's name and address) implicates privileged or protected matter and

27   involves an undue burden. However, defendant's motion did not raise those arguments, or provide any legal authority and analysis in support of such arguments; nor did plaintiff have an

28   opportunity to respond. As such, the court declines to consider them.

1   more appropriately construed as a motion for reconsideration of the court's prior order

2   authorizing the requested expedited discovery.

3   Defendant seeks reconsideration based on three primary arguments: (1) the software and

4   methods used by plaintiff's investigators to detect infringement are inadequate; (2) the method

5   used by plaintiff's investigators to manually verify infringement lacks integrity; and (3) plaintiff

6   fails to protect its works according to industry media distribution standards. Each argument is

7   addressed separately below.

8   *Software/Methods Used To Detect Infringement*

9   Plaintiff's investigator, a company named Excipio, uses a certain forensics system called

10   NARS to detect infringement of plaintiff's copyrighted works. Defendant claims that NARS was

11   developed without the standard verification and validation processes in place for mission critical

12   software and samples a too small fraction of the file (typically 16KB out of a 100MB file) to

13   determine infringement. In support of that argument, defendant relies primarily on the expert

14   reports (see ECF Nos. 12-5, 12-6) of a software reliability expert, Dr. Kal Toth, and a Bittorrent

15   media distribution expert, Mr. Bradley Witteman, whom defendant intends to offer as experts in a

16   case apparently set for trial in late March 2017 in the Northern District of California. See Malibu

17   Media, LLC v. John Doe subscriber assigned IP address 76.126.99.126, 3:15-cv-4441-WHA.

18   The court has carefully reviewed the reports, but finds that they do not compel

19   reconsideration of the court's prior order authorizing the expedited discovery. To be sure, the

20   reports point to various alleged deficiencies in the software and methods used by Excipio as

21   found by those experts. At the hearing, defendant's counsel also emphasized that the software

22   and methods used by Excipio fail to adequately demonstrate that defendant downloaded a

23   complete copy of plaintiff's copyrighted work(s). However, plaintiff's own computer forensics

24   expert and a former computer crimes detective, Patrick Paige, purportedly tested and verified the

25   accuracy of Excipio's software. (ECF No. 7-3.) Additionally, plaintiff cites numerous cases in

26   which courts accepted the accuracy of Excipio's software and methods for purposes of permitting

27   expedited discovery. (ECF No. 14 at 3-4.) See, e.g., Malibu Media, LLC v. Doe, 2016 WL

28   4444799, at **7, 12 (E.D.N.Y. Aug. 23, 2016) (concluding, after conducting a full evidentiary

1   hearing, that Excipio's senior assistant architect "offered credible testimony regarding the

2   methods that Excipio used on behalf of Malibu Media in identifying the Doe Defendant's IP

3   address as an infringer of its copyrighted material," and denying motion to quash subpoena).

4   In short, a battle of the experts (or as defendant alludes to, a full <u>Daubert</u> analysis) at this

5   early stage of the case is inappropriate. It may or may not be that defendant could ultimately

6   show that the Excipio software and methods are flawed and incapable of proving copyright

7   infringement. That question is for another day, and the court expresses no definitive opinion

8   regarding the matter at this time. However, at this preliminary juncture, plaintiff has sufficiently

9   demonstrated the reliability of the Excipio software and methods to support issuance of the

10 subpoena.[3]

11   *Method Used to Verify Infringement*

12   Plaintiff also apparently uses the services of Tobias Fieser, an employee of IPP

13 International UG in Germany, to verify the infringements by manually comparing video clips to

14 plaintiff's videos.

15   Defendant contends that Mr. Fieser does not spend sufficient time on the project to

16 properly verify the infringements:

17   Tobias Fieser verifies infringements for 3-5 hours per week.
                Assume Fieser works 5 hours per week for 52 weeks a year, this
18   computes to a total of 15,600 minutes of verification time. Given
                that the average Malibu Media work is 20 minutes, and the average
19   case has approximately 20 alleged infringements, and in 2015
                Malibu sued over 1000 defendants, the total amount of time needed
20   to verify the infringements by Mr. Fieser would have amounted to
                400,000 minutes. The numbers 15,600 vs. 400,000 are not even in
21   the same ballpark and do not make sense.

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23 (ECF No. 12-1 at 5.) Plaintiff counters that defendant's calculation "ignores that each movie is

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25 [3] In his reply brief, defendant also raises questions as to the accuracy of plaintiff's geolocation
    technology. Because defendant failed to raise the issue in his motion, and raises it for the first
26 time on reply, the court declines to consider it. Nevertheless, even if the court reached the issue,
    it would find that plaintiff has made a satisfactory preliminary showing in its global status report
27 that the geolocation technology used is reasonably reliable, at least for purposes of issuing the
    subpoena. See <u>Malibu Media, LLC v. John Doe subscriber assigned IP address 108.206.113.196</u>,
28 2:15-cv-2701-JAM-KJN, ECF No. 11.

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