

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, Malibu Media, LLC v.
28 John Doe subscriber assigned IP address 108.206.113.196, 2:15-cv-2701-JAM-KJN, ECF Nos.
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
27 subpoenaed (defendant's name and address) implicates privileged or protected matter and
28 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
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 Daubert 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.
18 Assume Fieser works 5 hours per week for 52 weeks a year, this
19 computes to a total of 15,600 minutes of verification time. Given
20 that the average Malibu Media work is 20 minutes, and the average
21 case has approximately 20 alleged infringements, and in 2015
22 Malibu sued over 1000 defendants, the total amount of time needed
23 to verify the infringements by Mr. Fieser would have amounted to
24 400,000 minutes. The numbers 15,600 vs. 400,000 are not even in
25 the same ballpark and do not make sense.

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

1 identified by a unique hash value, and Mr. Fieser only needs to confirm each movie once, not
2 again and again in each suit.” (ECF No. 14 at 5.) In any event, defendant will have an adequate
3 opportunity to conduct discovery in an attempt to show that Mr. Fieser’s methods are somehow
4 deficient or improper. If such discovery is developed, it may well be fodder for cross-
5 examination at trial. Nevertheless, defendant’s rough and speculative calculations at this juncture
6 do not warrant reconsideration of the subpoena.⁴

7 Defendant also posits that Mr. Fieser improperly compares the video clips with the movies
8 posted on plaintiff’s website as opposed to the depository copies lodged with the Copyright
9 Office. However, defendant does not explain his basis for believing that the copies of the movies
10 posted on plaintiff’s website are somehow different from the copies lodged with the Copyright
11 Office. Furthermore, defendant does not elucidate how that argument impacts the analysis as to
12 whether the subpoena should be quashed, especially given that the court here is not concerned
13 with the ultimate merits of whether plaintiff has sufficiently proven infringement.

14 Defendant further suggests that Mr. Fieser is not licensed as a private investigator in
15 California, and that the court therefore should not accept his testimony. That argument borders
16 on the frivolous. Individuals provide evidence in court every day without necessarily being
17 licensed as private investigators. Significantly, defendant cites no legal authority for the
18 proposition that Mr. Fieser, a German resident, required a California private investigator license
19 to perform the type of work he did for plaintiff, or to provide evidence regarding such work in
20 court.

21 *Plaintiff’s Efforts To Protect Its Works*

22 Finally, defendant argues that plaintiff does not protect its works according to industry
23 media distribution standards, because it posts unencrypted files on its website and distributes such

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25 ⁴ Defendant’s careless use of statistics in his briefing certainly does not tend to lend significant
26 credibility to his arguments. For example, defendant states that the “gross data demonstrates that
27 the Malibu [sic] has a false positive rate of at least 80% or more (this is the number of cases
28 dismissed vs. the total number of cases).” (ECF No. 15 at 3) (emphasis in original). However, as
defendant is no doubt aware, cases are dismissed for various reasons, including settlement. As
such, it is disingenuous to argue that the 80% figure necessarily suggests that plaintiff identified
the wrong defendant in 80% of filed cases.

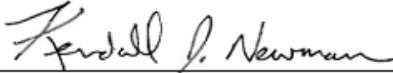
1 unencrypted files to affiliates, and also fails to send Digital Millennium Copyright Act
2 (“DMCA”) notices to infringers. Plaintiff disputes at least the latter, but even if true, defendant
3 provides no legal authority suggesting that such measures are required to prosecute a traditional
4 copyright infringement claim.

5 CONCLUSION

6 In sum, defendant’s motion does not provide sufficient grounds for the court to reconsider
7 its prior order authorizing expedited discovery in the form of the subpoena issued to Comcast.
8 Furthermore, defendant has provided no proper basis for a stay of this action pending a trial of the
9 above-mentioned Malibu Media action in the Northern District of California.⁵

10 Accordingly, IT IS HEREBY ORDERED that the motion to quash the subpoena to
11 Comcast or to stay the action (ECF No. 12) is DENIED.

12 Dated: March 3, 2017

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15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE
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26 ⁵ Significantly, at the hearing, defendant conceded that the trial scheduled in the Northern District
27 of California would be a jury trial, and not a bench trial with findings of fact and conclusions of
28 law prepared by a judge. As such, even assuming *arguendo* that Malibu Media lost in that trial, it
is far from clear that a judgment in the defendant’s favor in that case would be dispositive with
respect to the technology and methodology issues raised in this motion.