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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 STRIKE 3 HOLDINGS, INC.,
12 Plaintiff,
13 v.
14 JOHN DOE subscriber assigned IP
15 address 68.101.130.192,
16 Defendant.

Case No.: 21cv2115-JAH(KSC)

**ORDER GRANTING EX PARTE
APPLICATION FOR LEAVE TO
SERVE A THIRD-PARTY
SUBPOENA PRIOR TO A RULE
26(f) CONFERENCE**

[Doc. No. 4.]

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18 Before the Court is an *Ex Parte* Application for Leave to Serve a Third-Party
19 Subpoena Prior to a Rule 26(f) Conference filed by plaintiff Strike 3 Holdings, LLC.
20 Doc. No. 4. For the reasons stated below, the Court finds that plaintiff's application must
21 be GRANTED.

22 **I. BACKGROUND**

23 On December 21, 2021, plaintiff filed a Complaint against defendant John Doe
24 subscriber assigned IP address 68.101.130.192 ("defendant"), asserting a claim for direct
25 copyright infringement. See Doc. No. 1. Plaintiff alleges it is the owner of certain adult-
26 content films that defendant is "stealing ... on a grand scale" by downloading these films
27 and distributing them to others without plaintiff's authorization, permission, or consent.
28 *Id.* at ¶¶ 1-5, 51. Defendant's identity is known to plaintiff only by defendant's IP

1 address: 68.101.130.192. *Id.* at ¶ 13; Doc. No. 4-1 at 7. Plaintiff therefore seeks the
2 Court’s leave to serve a subpoena pursuant to Fed. R. Civ. P. 45 on defendant’s internet
3 service provider (“ISP”), Cox Communications, to learn defendant’s identity. *Id.* at 7.
4 Plaintiff asserts that “[w]ithout this information,” it cannot serve defendant, “nor pursue
5 this lawsuit and protect its copyrights.” *Id.* at 8.

6 ***II. LEGAL STANDARDS***

7 Generally, discovery is not permitted without a court order before the parties have
8 conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1).
9 “[I]n rare cases,” however, “courts have made exceptions, permitting limited discovery to
10 ensue after filing of the complaint to permit the plaintiff to learn the identifying facts
11 necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185
12 F.R.D. 573, 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th
13 Cir. 1980)). Courts permit early discovery “where the need for expedited discovery, in
14 consideration of the administration of justice, outweighs the prejudice to the responding
15 party.” *Semitool, Inc. v. Tokyo Elec. Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002)
16 (applying “the conventional standard of good cause in evaluating [a] request for
17 expedited discovery”).

18 The Ninth Circuit has held that when the defendant’s identity is unknown at the
19 time the complaint is filed, courts may grant a plaintiff leave to take early discovery to
20 determine the defendant’s identity “unless it is clear that discovery would not uncover the
21 identit[y], or that the complaint would be dismissed on other grounds.” *Gillespie*, 629
22 F.2d at 642. “A district court’s decision to grant discovery to determine jurisdictional
23 facts is a matter of discretion.” *Columbia Ins. Co.*, 185 F.R.D. at 578 (citations omitted).
24 “[T]o prevent abuse of this extraordinary application of the discovery process and to
25 ensure that the plaintiff has standing,” the plaintiff must show “that an act giving rise to
26 civil liability actually occurred,” and that the requested discovery is specifically aimed at
27 ... identifying ... the person who committed the act. *Id.* at 579-80.

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1 **III. DISCUSSION**

2 District Courts apply a three-factor test when considering motions for early
3 discovery to identify the defendant. *Id.* at 578-80. First, the plaintiff should “identify
4 the missing party with sufficient specificity such that the Court can determine that
5 defendant is a real person or entity who could be sued in federal court.” *Id.* at 578.
6 Second, the movant must describe “all previous steps taken to locate the elusive
7 defendant” to ensure that the plaintiff has made a good faith effort to identify and serve
8 process on the defendant. *Id.* at 579. Third, the plaintiff should establish that its suit
9 against the defendant could withstand a motion to dismiss. *Id.*

10 **A. Identification of Missing Parties with Sufficient Specificity.**

11 A plaintiff can satisfy its burden of identifying the missing party with specificity
12 by “identify[ing] the unique IP addresses” of the allegedly infringing individuals and then
13 “us[ing] geolocation technology to trace these IP addresses to a point of origin.” *Pink*
14 *Lotus Entm’t, LLC v. Does 1-46*, No. C-11-02263 HRL, 2011 WL 2470986, at 3 (N.D.
15 Cal. June 21, 2011). Here, plaintiff determined that Cox Communications provided the
16 subject IP address associated with defendant and used geolocation technology to trace the
17 IP address to an address located within this District. Doc. No. 4-1 at 12-13; Doc. No. 4-2
18 at 29-30. Plaintiff confirmed the information before filing its Complaint and again before
19 filing the instant ex parte application. Doc. No. 4-2 at 29-32. The Court finds plaintiff
20 has “sufficiently shown” that defendant is a “real person[] likely residing in California
21 who may be sued in this Court.” *Pink Lotus*, 2011 WL 2470986, at 3; *see also Malibu*
22 *Media, LLC v. Doe*, 319 F.R.D. 299, 305 (E.D. Cal. 2016) (finding that “IP address
23 identification is sufficient, at this stage, to indicate a real person used the network to
24 download the copyrighted files”).

25 **B. Previous Attempts to Locate Defendant.**

26 Next, plaintiff must identify all previous steps taken to identify the Doe defendant
27 in a good faith effort to locate and serve it. *Columbia Ins. Co.*, 185 F.R.D. at 579.
28 Plaintiff reports it attempted to correlate defendant’s IP address to defendant by using

1 web search tools, conducted research on other methods of identifying and locating
2 defendant, and consulted with computer investigators and cyber security consultants.
3 Doc. No. 4-1 at 14. Despite these efforts, plaintiff has been unable to identify defendant
4 and represents it cannot do so without the requested discovery. *Id.* Accordingly, the
5 Court finds that plaintiff has made a good-faith effort to identify and locate defendant
6 before filing the instant application.

7 **C. Ability to Withstand a Motion to Dismiss.**

8 Plaintiff's Complaint alleges a single cause of action against defendant for direct
9 copyright infringement. Doc. No. 1 at ¶¶ 48-53. Plaintiff alleges it owns the subject
10 intellectual property, which defendant copied and distributed without plaintiff's
11 authorization, permission, or consent. Doc. No. 4-1 at 16; Doc. No. 1 at ¶ 51. The Court
12 finds plaintiff has alleged a prima facie case of direct copyright infringement against
13 defendant that would likely withstand a motion to dismiss for failure to state a claim. *See*
14 *Malibu Media*, 319 F.R.D. at 305 (finding, on similar facts, that adult-entertainment
15 company had established a prima facie claim for copyright infringement).

16 Plaintiff also bears the burden of establishing jurisdictional facts. *Columbia Ins.*
17 *Co.*, 185 F.R.D. at 578 (citation omitted). Plaintiff, using geolocation technology, traced
18 defendant's IP address to a point of origin within this District before filing its Complaint
19 and again before filing the instant ex parte application. Doc. No. 4-1 at 12-13; Doc. No.
20 4-2 at 29-30. These facts are sufficient to show "that it is likely that the [d]efendant is
21 located within the Southern District of California and is subject to the personal
22 jurisdiction of the Court." *Criminal Prods., Inc. v. Doe*, No. 16-cv-02353-DMS-MDD,
23 2016 WL 6070355, at 3 (S.D. Cal. Oct. 17, 2016). The Court therefore finds plaintiff has
24 alleged enough facts to show it can likely withstand a motion to dismiss for lack of
25 personal jurisdiction.

26 For the same reason, venue appears proper. Civil actions for copyright
27 infringement "may be instituted in the district in which defendant or his agent resides or
28 may be found." 28 U.S.C.A. § 1400(1). A defendant is "found" for venue purposes

1 where he is subject to personal jurisdiction. *Id.* (footnote omitted). Further, plaintiff
2 alleges venue is proper because defendant allegedly committed the infringing acts
3 complained of in this District. Doc. No. 1 at ¶ 11. The Court finds that the Complaint
4 could likely withstand a motion to dismiss for improper venue.

5 Accordingly, the Court finds that plaintiff has adequately demonstrated that the
6 Complaint can likely survive a motion to dismiss.

7 Conclusion

8 For the reasons set forth above, plaintiff's *Ex Parte* Application is GRANTED. It
9 is hereby further ORDERED that:

10 1. Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45 upon Cox
11 Communications for the sole purpose of obtaining the name and address only of
12 defendant John Doe, based on the IP address listed in the Complaint: 68.101.130.192.
13 The subpoena shall not seek defendant's telephone number, email address, or Media
14 Access Control (MAC) address, as this information is not necessary for plaintiff to
15 identify and serve defendant.

16 2. The return date of the subpoena must allow for at least thirty (30) days from
17 service to production. If Cox Communications intends to move to quash the subpoena, it
18 must do so prior to the return date of the subpoena. If a motion to quash or other
19 customer challenge is brought, Cox Communications must preserve the information
20 sought by plaintiff pending resolution of the motion or challenge.

21 3. Cox Communications shall have fourteen (14) calendar days after service of
22 the subpoena upon it to notify its subscriber that his/her identity has been subpoenaed by
23 plaintiff. The subscriber whose identity has been subpoenaed shall have thirty (30)
24 calendar days from the date of such
25 notice to challenge the disclosure to plaintiff by filing an appropriate pleading with this
26 Court contesting the subpoena.

27 4. Plaintiff shall serve a copy of this Order with any subpoena served upon Cox
28 Communications pursuant to this Order. Cox Communications, in turn, must

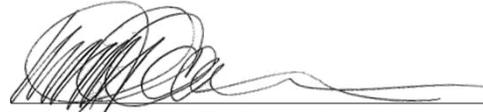
1 provide a copy of this Order along with the required notice to the subscriber whose
2 identity is sought pursuant to this Order.

3 5. Plaintiff may use the information disclosed pursuant to the subpoena only in
4 pursuing this litigation.

5 6. No other discovery is authorized at this time.

6 IT IS SO ORDERED.

7 Dated: March 23, 2022



Hon. Karen S. Crawford
United States Magistrate Judge

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