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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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10 STRIKE 3 HOLDINGS, LLC,

Case No.: 22cv828-JO (MSB)

11 Plaintiff,

**ORDER GRANTING PLAINTIFF'S EX  
PARTE APPLICATION FOR LEAVE TO  
SERVE A THIRD-PARTY SUBPOENA  
PRIOR TO A RULE 26(f) CONFERENCE  
[ECF No. 4]**

12 v.

13 JOHN DOE subscriber assigned IP address  
14 24.24.202.203,

15 Defendant.

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17 On June 21, 2022, Plaintiff Strike 3 Holdings, LLC ("Strike") filed an "Ex-Parte  
18 Application for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference"  
19 ("Ex Parte Application"). (ECF No. 4.) Plaintiff seeks to subpoena Defendant John Doe's  
20 Internet Service Provider ("ISP") Spectrum for "limited, immediate discovery . . . so that  
21 Plaintiff may learn Defendant's identity, further investigate Defendant's role in the  
22 infringement, and effectuate service." (ECF No. 4-1 at 1.) Because Defendant has not  
23 been identified, no opposition or reply briefs have been filed. For the following reasons,  
24 the Ex Parte Application is **GRANTED**.

25

**I. BACKGROUND**

26 Plaintiff owns the copyright to certain motion pictures. (ECF no. 4-1 at 1.) On June  
27 6, 2022, Plaintiff filed a Complaint alleging that Defendant John Doe, an internet  
28 subscriber assigned Internet protocol ("IP") address 24.24.202.203, has been using the

1 BitTorrent protocol to commit “rampant and wholesale copyright infringement” by  
2 downloading and distributing twenty-five of Plaintiff’s copyrighted works over an  
3 extended period of time. (ECF No. 1 at 2.) Plaintiff alleges it used its proprietary  
4 forensic software, VXN Scan, to discover that Defendant’s IP address was illegally  
5 distributing Plaintiff’s copyrighted motion pictures. (ECF No. 4-1 at 5; ECF No. 4-2 at 1.)

6 On June 21, 2022, Plaintiff filed the instant Ex Parte Application to seek leave to  
7 serve a subpoena pursuant to Federal Rule of Civil Procedure 45 on Defendant’s ISP,  
8 Spectrum. (ECF No. 4 at 1.) Plaintiff maintains that the Rule 45 subpoena “will only  
9 demand the true name and address of Defendant[,]” and Plaintiff “will only use this  
10 information to prosecute the claims made in its Complaint.” (ECF No. 4-1 at 2.) Plaintiff  
11 further claims that “[w]ithout this information, Plaintiff cannot serve Defendant nor  
12 pursue this lawsuit and protect its copyrights.” (*Id.*)

## 13 II. LEGAL STANDARD

14 Generally, formal discovery is not permitted before the parties have conferred  
15 pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1). Courts,  
16 however, have made exceptions “in rare cases . . . permitting limited discovery to ensue  
17 after filing of the complaint to permit the plaintiff to learn the identifying facts  
18 necessary to permit service on the defendant.” Columbia Ins. Co. v. Seescandy.com, 185  
19 F.R.D. 573, 577 (N.D. Cal. 1999). Courts in the Ninth Circuit apply a “good cause”  
20 standard to decide whether to permit early discovery. Semitool, Inc. v. Tokyo Electron  
21 Am., Inc., 208 F.R.D. 273, 275–76 (N.D. Cal. 2002). “Good cause” is established “where  
22 the need for expedited discovery, in consideration of the administration of justice,  
23 outweighs the prejudice to the responding party.” *Id.*

24 “[W]hen the defendants’ identities are unknown at the time the complaint is  
25 filed, courts may grant plaintiffs leave to take early discovery to determine the  
26 defendants’ identities ‘unless it is clear that discovery would not uncover the identities,  
27 or that the complaint would be dismissed on other grounds.’” 808 Holdings, LLC v.  
28 Collective of Dec. 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C

1 D63C23C91, Civil No. 12cv00186 MMA(RBB), 2012 WL 12884688, at \*3 (S.D. Cal. May 8,  
2 2012) (quoting Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)). “A district court’s  
3 decision to grant discovery to determine jurisdictional facts is a matter of discretion.”  
4 Columbia Ins. Co., 185 F.R.D. at 578.

5 District Courts in the Ninth Circuit typically apply a three-factor test when  
6 considering motions for early discovery to identify Doe defendants. Id. at 578–80. First,  
7 the moving party should be able to “identify the missing party with sufficient specificity  
8 [] that the Court can determine that [the] defendant is a real person or entity who could  
9 be sued in federal court.” Id. at 578. Second, the movant “should identify all previous  
10 steps taken to locate the elusive defendant” to ensure “that [the movant has made] a  
11 good faith effort to comply with the requirements of the service of process and  
12 specifically identifying defendants.” Id. at 579. Third, the plaintiff “should establish to  
13 the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion  
14 to dismiss.” Id.; see also Gillespie, 629 F.2d at 642 (stating early discovery to identify  
15 unknown defendants should be permitted unless the complaint would be dismissed on  
16 other grounds).

17 In addition to satisfying all three factors, plaintiff should provide “reasons  
18 justifying the specific discovery requested [and] identification of a limited number of  
19 persons or entities on whom discovery process might be served and for which there is a  
20 reasonable likelihood that the discovery process will lead to identifying information  
21 about defendant that would make service of process possible.” Columbia Ins. Co., 185  
22 F.R.D. at 580; see also Gillespie, 629 F.2d at 642 (explaining that early discovery is  
23 precluded if it is not likely to provide the identity of the defendant). These safeguards  
24 are intended to ensure that early discovery “will only be employed in cases where the  
25 plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant  
26 pre-service, and will prevent the use of this method to harass or intimidate.” Columbia  
27 Ins. Co., 185 F.R.D. at 578.

### III. ANALYSIS

1  
2 Plaintiff seeks leave to serve a subpoena pursuant to Federal Rule of Civil  
3 Procedure 45 on Defendant's ISP Spectrum. (ECF No. 4-1 at 7.) The Cable Privacy Act  
4 prohibits a cable operator from disclosing "personally identifiable information  
5 concerning any subscriber without the prior written or electronic consent of the  
6 subscriber concerned[.]" 47 U.S.C. § 551(c)(1). A cable operator, however, may disclose  
7 the information if the disclosure is made pursuant to a court order and the cable  
8 operator notifies the subscriber of the order. 47 U.S.C. § 551(c)(2)(B). A cable operator  
9 is "any person or group of persons" who "provides cable service over a cable system and  
10 directly or through one or more affiliates owns a significant interest in such cable  
11 system," or "otherwise controls or is responsible for, through any arrangement, the  
12 management and operation of such a cable system." 47 U.S.C. § 522(5).

13 Spectrum is a cable operator, and the information Plaintiff seeks falls within the  
14 exception to the Cable Privacy Act's disclosure prohibition. See 47 U.S.C. §551(c)(2)(B).  
15 Accordingly, if Plaintiff satisfies the multi-factor test used by district courts to determine  
16 whether early discovery is warranted, Defendant's ISP may disclose the requested  
17 information pursuant to this Court's order.

#### 18 **A. Plaintiff Has Identified Defendant with Sufficient Specificity**

19 Plaintiff must identify Defendant with enough specificity to allow the Court to  
20 determine that Defendant is a real person or entity, subject to the jurisdiction of this  
21 Court. See Columbia Ins. Co., 185 F.R.D. at 578. "[A] plaintiff identifies Doe defendants  
22 with sufficient specificity by providing the unique IP addresses assigned to an individual  
23 defendant on the day of the allegedly infringing conduct, and by using 'geolocation  
24 technology' to trace the IP addresses to a physical point of origin." 808 Holdings, LLC,  
25 2012 WL 12884688, at \*4.

26 In support of its Ex Parte Application, Plaintiff submitted the Declaration of David  
27 Williamson, an Information Systems and Management Consultant. (See ECF No. 4-2 at  
28 2-15.) Mr. Williamson uses Plaintiff's infringement detection system, VXN Scan, to

1 identify the IP addresses used by individuals infringing Plaintiff's movies through the  
2 BitTorrent protocol. (Id. at 8-14.) Further, although the BitTorrent protocol contains  
3 some default and automatic functions, the functions that Plaintiff accuses Defendant of  
4 using require human operation. See Christopher Civil, Mass Copyright Infringement  
5 Litigation: Of Trolls, Pornography, Settlement and Joinder, 30 Syracuse J. Sci. & Tech. L.  
6 2, 12 (2014) ("BitTorrent transfers do not involve a centralized server that hosts or  
7 transfers the data files in question. Instead, BitTorrent involves users interacting  
8 directly with other users to upload and download the content."). Accordingly, Plaintiff  
9 has established that an actual human was involved in the downloading and sharing of  
10 Plaintiff's allegedly infringed works.

11 Plaintiff also submitted the Declaration of Patrick Paige, a Managing Member at  
12 Computer Forensics, LLC, where Mr. Paige contends that he utilized Packet Capture  
13 ("PCAP"), "a computer file containing captured or recorded data transmitted between  
14 network devices," and VXN Scan to connect Defendant's IP address to the alleged "piece  
15 of an infringing copy of Plaintiff's works." (ECF No. 4-2 at 18-20.) According to Mr.  
16 Paige, "[t]he PCAP contains a record data concerning that transaction, including, but not  
17 limited to, the [IP] Addresses used in the network transaction, the date and time of the  
18 network transaction, the port number used to accomplish each network transaction,  
19 and the Info Hash value that the VXN Scan used as the subject of its request for data."  
20 (Id.) Mr. Paige contends that the contents of the PCAP confirm that the infringing  
21 activity connected to the IP address 24.24.202.203 was initiated on May 1, 2022, at  
22 13:33:33 UTC. (Id.) Mr. Paige concludes that "IP address 24.24202.203 engaged in a  
23 transaction that included the transmission of a piece or pieces of a file" corresponding  
24 to hash value representing Plaintiff's works. (Id. at 22.) This date and time correspond  
25 with the date and time when one of Plaintiff's works were allegedly illegally  
26 downloaded according to Exhibit A of Plaintiff's Complaint. (Id.)

27 In addition, Plaintiff submitted the Declaration of Emilie Kennedy, Plaintiff's in-  
28 house General Counsel, in which Ms. Kennedy asserts geolocation was done by an

1 unspecified person to identify the location of Defendant on three separate occasions.  
2 (ECF No. 4-2 at 29.) First, “[a]fter [Plaintiff] received infringement data from VXN Scan  
3 identifying IP address 24.24.202.203 as infringing its works, the IP address was  
4 automatically inputted into Maxmind’s Geolocation Database” on May 26, 2022. (Id.)  
5 Based on this search, Ms. Kennedy contends that “Maxmind determined that the IP  
6 address traced to a location in San Diego, California, which is within this Court’s  
7 jurisdiction.” (Id.) Defendant’s IP address was subsequently input by Plaintiff into  
8 Maxmind’s Database prior to the filing of Plaintiff’s Complaint, and prior to the filing of  
9 the instant Ex Parte Application. (Id.) On both occasions the IP address linked to  
10 Defendant, 24.24.202.203, traced to this district.<sup>1</sup>

11 Plaintiff has provided sufficient information about infringing activity tied to  
12 Defendant’s unique IP address, the specific date and time associated with the activity,  
13 and the location of the activity. Therefore, Plaintiff has demonstrated with sufficient  
14 specificity that Defendant is a real person or entity, likely subject to the jurisdiction of  
15 this Court. See Crim. Prods., Inc. v. Doe-72.192.163.220, Case No. 16-cv-2589 WQH  
16 (JLB), 2016 WL 6822186, at \*3 (S.D. Cal. Nov. 18, 2016) (holding that the sufficient  
17 specificity threshold is satisfied when the IP address identified by Maxmind geolocation  
18 services identifies a physical location within the court’s jurisdiction).

19 **B. Plaintiff Made a Good Faith Effort to Identify Defendant**

20 Plaintiff must also demonstrate that it has taken previous steps to locate and  
21 serve the Defendant. See Columbia Ins. Co., 185 F.R.D. at 579. Plaintiff maintains it  
22 diligently attempted to identify Defendant by searching for Defendant’s IP address “on  
23 various web search tools, including basic search engines like www.google.com,” but  
24 does not submit evidence supporting this claim. (ECF No. 4-1 at 14.) It further  
25 conducted its own research to identify Defendant by additional authority, including  
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27 <sup>1</sup> Attached as Exhibit 1 to Ms. Kennedy’s Declaration is a chart reflecting the results of the third and  
28 final MaxMind Database search, showing the IP address alleged to be involved in the illegal downloads  
and confirming that the location traces to San Diego, CA. (ECF No. 4-2 at 32.)

1 “legislative reports, agency websites, information technology guides, governing case  
2 law, etc.” (Id.) Despite these efforts, Plaintiff was unable to identify Defendant’s  
3 identity from the IP address. The Court therefore finds that Plaintiff has made a good  
4 faith effort to identify, locate, and serve Defendant. See Malibu Media, LLC v. John Does  
5 1 through 6, Civil No. 12–cv–1355–LAB (DHB), 2012 WL 4471538, at \*3 (S.D. Cal. Sept.  
6 26, 2012) (finding plaintiff’s efforts to identify Doe defendant’s identity were sufficient  
7 where “there is no other way for Plaintiff to obtain Defendants’ identities, except by  
8 serving a subpoena on Defendants’ ISPs demanding it”); see also Digital Sin, Inc. v. Does  
9 1-5698, No. C 11-04397 LB, 2011 WL 5362068, at \*2 (N.D. Cal. Nov. 4, 2011) (finding  
10 plaintiff’s attempts to identify and locate defendant sufficient, where the plaintiff  
11 “investigated and collected data on unauthorized distribution of copies of the [alleged  
12 infringed work] on BitTorrent-based peer-to-peer networks”).

13 **C. Plaintiff’s Suit Could Withstand a Motion to Dismiss**

14 Plaintiff must further show that the Complaint could withstand a motion to  
15 dismiss. See Columbia Ins. Co., 185 F.R.D. at 579. Of all the bases that bear dismissal,  
16 those relevant here are lack of subject matter jurisdiction, lack of personal jurisdiction,  
17 and failure to state a claim. Fed. R. Civ. P. 12(b)(1), (2), (6). As to both subject matter  
18 and personal jurisdiction, Plaintiff has alleged sufficient facts to survive a motion to  
19 dismiss. For subject matter jurisdiction, Plaintiff’s Complaint alleges that “[t]his Court  
20 has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
21 question); and 28 U.S.C § 1338 (jurisdiction over copyright actions).” (ECF No. 1 at 2.)  
22 Regarding personal jurisdiction, Plaintiff has identified Defendant’s IP address  
23 associated with the alleged infringing downloading and copying, and traced it to a  
24 physical address in San Diego, California. (Id.) This location is within the geographical  
25 boundaries of this district.

26 Lastly, a suit may be dismissed pursuant to Rule 12(b) for “failure to state a  
27 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Plaintiff’s Complaint  
28 alleges a single cause of action against Defendant for direct copyright infringement. (ECF

1 No. 1 at 7-9). To allege a claim for direct copyright infringement, a plaintiff must show:  
2 “(1) ownership of a valid copyright; and (2) that the defendant violated the copyright  
3 owner’s exclusive rights under the Copyright Act.” Ellison v. Robertson, 357 F.3d 1072,  
4 1076 (9th Cir. 2004). “In addition, direct infringement requires the plaintiff to show  
5 causation (also referred to as ‘volitional conduct’) by the defendant.” Perfect 10, Inc. v.  
6 Giganews, Inc., 847 F.3d 657, 666 (9th Cir. 2017).

7 Plaintiff alleges that it is the copyright owner of the adult motion pictures that are  
8 the subject of this suit. (ECF No. 1 at 7.) Plaintiff also alleges Defendant used the  
9 BitTorrent file network to illegally download and distribute Plaintiff’s copyrighted  
10 motion pictures without authorization, permission, or consent. (Id.) Assuming  
11 Plaintiff’s allegations are true, they state a claim on which relief can be granted. See  
12 A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1013–14 (9th Cir. 2001) (finding  
13 plaintiffs sufficiently demonstrated ownership and infringement by showing Napster  
14 allowed its users to download copyrighted music, and more than seventy percent of  
15 which was owned or administered by the plaintiffs); see also Malibu Media, LLC v. Doe,  
16 Case No. 16CV1916-GPC(JMA), 2016 WL 6216183, at \*2 (S.D. Cal. Oct. 25, 2016) (holding  
17 plaintiff alleged a prima facie case of copyright infringement by alleging that plaintiff  
18 owned twelve copyrighted movies at issue, and that defendant infringed plaintiff’s  
19 copyrights by copying and distributing plaintiff’s movies through the BitTorrent network  
20 without plaintiff’s permission). Therefore, Plaintiff has sufficiently alleged a prima facie  
21 claim of copyright infringement which could withstand a motion to dismiss.

22 **D. Whether Requested Discovery Will Lead to Identifying Information**

23 Lastly, the Plaintiff must prove that the requested discovery is likely to lead to  
24 identifying information. Columbia Ins. Co., 185 F.R.D. at 580. As discussed above,  
25 Plaintiff’s forensic investigation directly connected Defendant’s IP address  
26 24.24.202.203 to the alleged infringements, and the only entity that can identify  
27 Defendant based on this information is Spectrum. (ECF No. 4-2 at 20-22.) Accordingly,  
28



1 if Spectrum provides Plaintiff with Defendant's name and address, this will likely lead to  
2 information making it possible for Plaintiff to effectuate service on Defendant.

#### 3 IV. CONCLUSION

4 For the foregoing reasons, the Court finds that Plaintiff has demonstrated good  
5 cause to conduct early discovery and **GRANTS** the Ex Parte Application for Leave to  
6 Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference [ECF No. 4] as follows:

7 1. Plaintiff may serve a subpoena pursuant to Federal Rule of Civil Procedure  
8 45 on Spectrum, seeking only the name and address of the subscriber assigned to the IP  
9 address 24.24.202.203. Plaintiff may not subpoena additional information about the  
10 subscriber;

11 2. Plaintiff may only use the disclosed information to protect its copyrights in  
12 the instant litigation;

13 3. Within fourteen (14) calendar days after service of the subpoena, Spectrum  
14 shall notify the subscriber assigned the IP address 24.24.202.203 that his, her, or its  
15 identity has been subpoenaed by Plaintiff;

16 4. The subscriber whose identity has been subpoenaed shall have thirty (30)  
17 calendar days from the date of the notice to challenge the disclosure of his, her, or its  
18 name and address by filing an appropriate pleading with this Court contesting the  
19 subpoena;

20 5. If Spectrum wishes to move to quash the subpoena, it shall do so before  
21 the return date of the subpoena. The return date of the subpoena must allow for at  
22 least forty-five (45) days from service to production. If a motion to quash or other  
23 customer challenge is brought, Spectrum shall preserve the information sought by  
24 Plaintiff in the subpoena pending resolution of the motion or challenge;

25 6. Plaintiff shall serve a copy of this Order with any subpoena obtained and  
26 served to Spectrum pursuant to this Order;

27 7. Spectrum must provide a copy of this Order along with the required notice  
28 to the subscriber whose identity is sought pursuant to this Order.

1 8. No other discovery is authorized at this time.

2 **IT IS SO ORDERED.**

3 Dated: July 26, 2022

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5 Honorable Michael S. Berg  
6 United States Magistrate Judge  
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