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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 STRIKE 3 HOLDINGS, LLC,
12 Plaintiff,
13 v.
14 JOHN DOE subscriber assigned IP
15 address 68.8.86.210,
16 Defendant.

Case No.: 22-cv-1628-RBM-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 plaintiff Strike 3 Holdings, LLC’s Ex Parte Application for
19 Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference. Doc. No. 4. For
20 the reasons stated below, plaintiff’s application is **GRANTED**.

21 **I. BACKGROUND**

22 On October 20, 2022, plaintiff filed a Complaint against defendant John Doe
23 subscriber assigned IP address 68.8.86.210, asserting a claim for direct copyright
24 infringement. *See* Doc. No. 1. Plaintiff alleges it is the owner of certain adult-content
25 films that defendant is “stealing ... on a grand scale” by downloading these films and
26 distributing them to others without plaintiff’s authorization, permission, or consent. *Id.* at
27 ¶¶ 1-5, 51. Defendant’s identity is known to plaintiff only by defendant’s IP address:
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1 68.86.210. *Id.* at ¶ 13; Doc. No. 4-1 at 7.¹ Plaintiff therefore seeks the Court’s leave to
2 serve a subpoena pursuant to Fed. R. Civ. P. 45 on defendant’s internet service provider
3 (“ISP”), Cox Communications, to learn defendant’s identity. *Id.* at 7-8. Plaintiff asserts
4 that “[w]ithout this information,” it cannot serve defendant, “nor pursue this lawsuit and
5 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). “[I]n
9 rare cases,” however, “courts have made exceptions, permitting limited discovery to ensue
10 after filing of the complaint to permit the plaintiff to learn the identifying facts necessary
11 to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573,
12 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)).
13 Courts permit early discovery “where the need for expedited discovery, in consideration of
14 the administration of justice, outweighs the prejudice to the responding party.” *Semitool,*
15 *Inc. v. Tokyo Elec. Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (applying “the
16 conventional standard of good cause in evaluating [a] request for expedited discovery”).

17 The Ninth Circuit has held that when the defendant’s identity is unknown at the time
18 the complaint is filed, courts may grant a plaintiff leave to take early discovery to determine
19 the defendant’s identity “unless it is clear that discovery would not uncover the identit[y],
20 or that the complaint would be dismissed on other grounds.” *Gillespie*, 629 F.2d at 642.
21 “A district court’s decision to grant discovery to determine jurisdictional facts is a matter
22 of discretion.” *Columbia Ins. Co.*, 185 F.R.D. at 578 (citations omitted). “[T]o prevent
23 abuse of this extraordinary application of the discovery process and to ensure that the
24 plaintiff has standing,” the plaintiff must show “that an act giving rise to civil liability
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28 ¹ The Court uses the pagination assigned by the CM/ECF system.

1 actually occurred,” and that the requested discovery is specifically aimed at ... identifying
2 ... the person who committed the act. *Id.* at 579-80.

3 **III. DISCUSSION**

4 District Courts apply a three-factor test when considering motions for early
5 discovery to identify the defendant. *Columbia Ins. Co.*, 185 F.R.D. at 578-80. First, the
6 plaintiff should “identify the missing party with sufficient specificity such that the Court
7 can determine that defendant is a real person or entity who could be sued in federal court.”
8 *Id.* at 578. Second, the movant must describe “all previous steps taken to locate the elusive
9 defendant” to ensure that the plaintiff has made a good faith effort to identify and serve
10 process on the defendant. *Id.* at 579. Third, the plaintiff should establish that its suit against
11 the defendant could withstand a motion to dismiss. *Id.*

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

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

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

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

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

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

16 Plaintiff also bears the burden of establishing jurisdictional facts. *See 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. *See* Doc. No. 4-1 at 12-13; Doc.
20 No. 4-2 at 29. These facts sufficiently show "that it is likely that the [d]efendant is located
21 within the Southern District of California and is subject to the personal jurisdiction of the
22 Court." *Criminal Prods., Inc. v. Doe*, No. 16-cv-02353-DMS-MDD, 2016 WL 6070355,
23 at *3 (S.D. Cal. Oct. 17, 2016). The Court therefore finds plaintiff has shown it can likely
24 withstand a motion to dismiss for lack of personal jurisdiction.

25 The Court will also consider whether venue is proper in this District. Civil actions
26 for copyright infringement "may be instituted in the district in which defendant or his agent
27 resides or may be found." 28 U.S.C.A. § 1400(1). A defendant is "found" for venue
28 purposes where he is subject to personal jurisdiction. *Id.* (footnote omitted). Further,

1 plaintiff alleges venue is proper because defendant allegedly committed the infringing acts
2 complained of in this District. Doc. No. 1 at ¶ 11. The Court finds the Complaint could
3 likely withstand a motion to dismiss for improper venue.

4 Accordingly, having satisfied the burden of stating a claim, showing jurisdiction, and
5 showing venue, the Court finds plaintiff has adequately demonstrated the Complaint can
6 likely survive a motion to dismiss.

7 **ORDER**


8 For the reasons set forth above, plaintiff's *Ex Parte* Application is **GRANTED**. It is
9 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*
12 of defendant John Doe, based on the IP address listed in the Complaint:
13 68.8.86.210. The subpoena shall **not** seek defendant's telephone number,
14 email address, or Media Access Control (MAC) address, as this information
15 is not necessary for plaintiff to identify and serve defendant.
- 16 2. The return date of the subpoena must allow for at least forty-five (45) days
17 from service to production. If Cox Communications intends to move to quash
18 the subpoena, it must do so prior to the return date of the subpoena. If a motion
19 to quash or other customer challenge is brought, Cox Communications must
20 preserve the information sought by plaintiff pending resolution of the motion
21 or challenge.
- 22 3. Cox Communications shall have fourteen (14) calendar days after service of
23 the subpoena upon it to notify its subscriber that his/her identity has been
24 subpoenaed by plaintiff. The subscriber whose identity has been subpoenaed
25 shall have thirty (30) calendar days from the date of such
26 notice to challenge the disclosure to plaintiff by filing an appropriate pleading
27 with this Court contesting the subpoena.
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- 1 4. Plaintiff shall serve a copy of this Order with any subpoena served upon Cox
2 Communications pursuant to this Order. Cox Communications, in turn, must
3 provide a copy of this Order along with the required notice to the subscriber
4 whose identity is sought pursuant to this Order.
- 5 5. Plaintiff may use the information disclosed pursuant to the subpoena only in
6 pursuing this litigation.
- 7 6. No other discovery is authorized at this time.

8 **IT IS SO ORDERED.**

9 Dated: November 10, 2022



Hon. Karen S. Crawford
United States Magistrate Judge

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