

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,  
Plaintiff,

v.

John Doe subscriber assigned IP address  
162.199.244.97,  
Defendant.

No. 2:18-cv-01663-MCE-GGH

ORDER

Plaintiff filed this complaint on June 7, 2018, ECF No. 1, alleging that it holds the copyright on various adult films, and that defendant is infringing on those copyrights by downloading Strike 3’s films and distributing them to others. *Id.* at ¶ 4. Further, since defendant downloads and distributes the films anonymously, plaintiff is only able to identify him or her by way of IP address through which the films are acquired and distributed. *Id.* at ¶ 5. Because the identity of defendant is not otherwise known, plaintiff has now has brought an ex parte application to engage in expedited discovery, Fed. R. Civ. P. 26 (f) (sic, Rule 26(d)(1)), in order to serve a third-party subpoena pursuant to Fed. R. Civ. P. 45 on defendant’s internet service provider, AT&T Inc. (AT&T U-verse), to acquire the true name and address of the defendant in this action. ECF No. 6. Plaintiff argues that without the subpoena for identifying information it

1 will be unable to serve the Complaint on defendant and will, therefore, be prevented from  
2 vindicating its copyright. Id. at 1:20-2:2.

### 3 *DISCUSSION*

#### 4 A. *Federal Rules of Civil Procedure 26(d) and (f)*

5 Rule 26(d) states that “[a] party may not seek discovery from any source before the parties  
6 have conferred as required by Rule 26(f), except in a proceeding excepted from initial disclosure  
7 under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.”

8 Rule 26(f) contemplates a pre-discovery conference between the parties to the suit in order to  
9 develop a discovery plan that will control throughout the litigation. Obviously, in the absence of  
10 knowledge of the actual party being sued, no discovery conference can be held; thus plaintiff  
11 seeks relief from that requirement from the court. Courts in the Ninth Circuit apply the “good  
12 cause” standard in deciding whether to permit early discovery. Semitool, Inc. v. Tokyo Electron  
13 America, Inc., 208 F.R.D. 273, 276 (N.D.Cal. 2002). “Good cause exists ‘where the need for  
14 expedited discovery, in consideration of the administration of justice, outweighs the prejudice to  
15 the responding party.’” Id. Good cause for expedited discovery has been found in cases  
16 involving claims of infringement and unfair competition. Id. In infringement cases, expedited  
17 discovery is frequently limited to allowing plaintiffs to identify Doe defendants. See UMG  
18 Recordings, Inc. v. Doe, 2008 WL 4104207, at \*3 (N.D. Cal. Sept. 4, 2008) (granting leave to  
19 take expedited discovery for documents that would reveal the identity and contact information for  
20 each Doe defendant). Strike 3 Holdings, LLC, 2018 W 1071711 \*1 (S.D.Cal. 2018).

#### 21 B. *Standard to be Applied in Determining to Issue the Requested Subpoena*

22 In Arista Records, LLC v. Doe 3, 604 F.3d 110, 119 (2nd Cir 2010), *citing* Sony Music  
23 Entm’t Inc. v. Does 1-40, 325 F.Supp.2d 556,565-565 (S.D.N.Y. 2004), the Second Circuit  
24 articulated a five point test to be applied in a situation such as this if defendant seeks to quash a  
25 subpoena: (1) prima facie claim of actionable harm; (2) the specificity of the discovery requests;  
26 (3) the absence of alternative means; (4) the need for subpoenaed information to advance the  
27 claim; and (5) defendant’s expectation of privacy. Although there is no appearing defendant as of  
28 yet, and hence, no motion to quash pending, the standard enunciated in Arista is useful in

1 determining whether to allow the requested subpoena at this time. Plaintiff here meets this test  
2 insofar as it has stated a prima facie claim by providing a list of downloads of its copyrighted  
3 films that had been downloaded to the subject IP address, seeks only discovery of the name and  
4 contact information for the party using that IP address, and has demonstrated that without  
5 identification of that party, it will be unable to proceed with its action to protect its copyright and  
6 will, therefore, be unable to advance its claim. To simply issue the order for expedited discovery  
7 requested here, however, raises a serious constitutional question of the IP address owner's  
8 reasonable expectation of privacy – the last element of the Arista test.

9 C. *The Need for Privacy Protection*

10 As the United States Supreme Court made clear in Griswold v. Connecticut, 381  
11 U.S. 479, 485 (1965), “specific guarantees in the Bill of Rights have penumbras formed by  
12 emanations from those guarantees that give them life and substance.” Griswold found a right to  
13 privacy emanating from several Amendments, notably the First, Third, Fourth, Fifth and  
14 Fourteenth. Privacy can encompass fundamental and traditional activities such as marriage,  
15 medical records, or more recently found rights such as commercial privacy. The right to privacy  
16 is, of course, balanced against other societal interests, especially in the litigation context. See  
17 Soto v. City of Concord, 162 F.R.D. 603, 618 (N.D. Cal. 1995) discussing production of medical  
18 records and citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977). This court believes that the  
19 limited privacy protection afforded under the Constitution must be considered for the person that  
20 will be identified by the procedure of serving the subpoena on an internet provider. Here, the  
21 assumption:

22 that the person who pays for Internet access at a given location is the same individual who  
23 allegedly downloaded a single sexually explicit film is tenuous, and one that has grown  
24 more so over time. An IP address provides only the location at which one of any number  
25 of computer devices may be deployed, much like a telephone number can be used for any  
number of telephones. As one introductory guide states:

26 If you only connect one computer to the Internet, that computer can use the  
27 address from your ISP. Many homes today, though, use routers to share a single  
28 Internet connection between multiple computers. Wireless routers have become  
especially popular in recent years, avoiding the need to run network cables  
between rooms. If you use a router to share an Internet connection, the router gets

1 the IP address issued directly from the ISP. Then, it creates and manages a subnet  
2 for all the computers connected to that router.

3 Thus, it is no more likely that the subscriber to an IP address carried out a particular  
4 computer function—here the purported illegal downloading of a single pornographic  
5 film—than to say an individual who pays the telephone bill made a specific telephone call.

6 In re BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. 80, 84 (E.D.N.Y. 2012);  
7 see also Manny Film LLC v. Doe Subscriber Assigned IP Address 50.166-88-98, 98 F.Supp.3d  
8 693, 695 (D.N.J. 2015), *quoting* Malibu Media, LLC, 2014 WL 229295 \*8-9 (D.N.J. 2014):

9 [D]iscovering the identity of the internet subscriber may not equate to discovering the  
10 identity of the infringing party. Establishing that the person identified by discovery is the  
11 person who infringed upon the copyright will likely require additional proofs beyond the  
12 fact that the individual is listed as the subscriber on the account from which the infringing  
13 activity originated. *See* Modern Woman, 696 LLC, 2013 WL 707908, at \*5 n. 4 (noting  
14 that, by permitting discovery of the personally identifiable information, the court did not  
15 permit plaintiff to rely solely on that discovery to prove that the subscriber committed the  
16 acts alleged in the complaint); Next Phase Distribution, 284 F.R.D. at 172 (noting the  
17 “high likelihood” that the requested discovery could lead to “false positives” as to the  
18 identity of the alleged infringer.)

19 Finally, consideration must be given to the fact that this particular case, focused on the  
20 theft of pornographic films, would have a different effect on an individual wrongly identified as a  
21 defendant that would occur with a run of the mill copyright infringement accusation. Here, the  
22 wrongly named defendant would likely feel exposed to embarrassment and reputational damage  
23 in the community at large before he or she could engage counsel and litigate the issue of mistaken  
24 identity through a motion to quash. Also, the possibility exists of being forced into a settlement  
25 to avoid the effects of such “exposure.” *See* In re BitTorrent, *supra*, 296 F.R.D. at 90.

#### 26 *CONCLUSION*

27 In light of the foregoing IT IS HEREBY ORDERED that:

28 1. Plaintiff’s Ex Parte Application for Leave to Service Third Party Subpoena Prior  
to a Rule 26(f) Conference is GRANTED to the degree that it may engage in limited expedited  
discovery to establish the identity of the owner of the IP address identified in the Complaint by  
serving a subpoena on the ISP provider of the above-captioned IP address;

2. The ISP shall be served with a subpoena seeking only on the true name and

1 address of the person or entity to whom the ISP is assigned;

2 3. Once plaintiff has obtained the actual identity of the person or entity associated  
3 with the IP address captioned herein, it may serve on that person or entity a copy of this Order; no  
4 formal service of process shall be permitted absent further order of this court;

5 4. The parties, both plaintiff and the potential defendant, are hereby invited to attend  
6 an informal chambers conference before the undersigned at the Eastern District of California,  
7 Federal District Court, 501 I Street, Sacramento, CA 95814, 13th floor on for the following  
8 purposes:

9 a. A discussion of the potential to enter into a settlement;

10 b. In the absence of an agreed settlement, to establish a procedure to further protect  
11 the identity of the defendant, if warranted;

12 c. To set a schedule that will allow the defendant an opportunity to file a motion to  
13 quash the subpoena if there are true and adequate grounds therefor;

14 d. Procedures for service of process or waiver thereof.

15 5. The parties are advised that attendance at such a conference is voluntary and will  
16 not itself constitute a waiver of service of the Complaint, or result in a finding of “appearance” in  
17 the litigation, unless the case is resolved at the conference and a settlement is placed on the record  
18 of the court, or the potential defendant agrees to waive service.

19 6. Plaintiff shall notify the court, by a status statement filed no later than 45 days  
20 from the date of this Order, that the foregoing service of this Order has been effected, and  
21 whether defendant has acceded to attendance at the informal chambers conference, without  
22 identifying the defendant other than by listing the defendant as a John or Jane Doe at the specific  
23 IP address captioned above, after which the court will, if appropriate, schedule such a conference;

24 7. A decision by the person identified as the owner of the within- captioned IP  
25 address not to attend the above-described informal conference will lead to an order substituting  
26 the now identified defendant by name, permitting ordinary service of process, and  
27 commencement of the litigation.

28 8. Plaintiff is cautioned that, until permission is given by the court, it is not to reveal

1 the identity of the defendant in or out of court.

2 9. Nothing in this Order would preclude plaintiff and defendant from reaching a  
3 settlement without court participation before any informal conference is held or formal service of  
4 process is effected.

5 **IT IS SO ORDERED.**

6 Dated: August 16, 2018

7 /s/ Gregory G. Hollows  
8 UNITED STATES MAGISTRATE JUDGE  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28