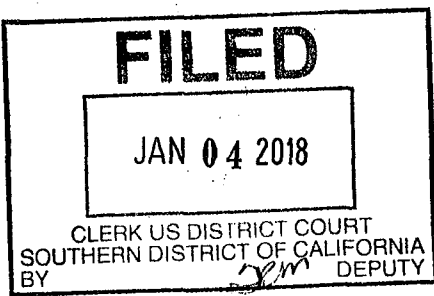


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP
address 76.167.199.146,

Defendant.

Case No.: 3:17-cv-02316-GPC-KSC

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

[Doc. No. 4]

Before the Court is plaintiff Strike 3 Holdings, LLC's *Ex Parte* Motion for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference. [Doc. No. 4.] Since defendant, John Doe, subscriber assigned IP address 76.167.199.146, has not been named or served, no opposition or reply briefs have been filed. For the reasons discussed below, the Court finds that plaintiff's motion must be **GRANTED**.

BACKGROUND

Plaintiff has filed a Complaint against defendant alleging a single cause of action for direct copyright infringement. [Doc. No. 1 at p. 2]. Plaintiff asserts that it is the registered copyright holder of the copyrights set forth in the "Copyright Report" attached to the Complaint. [Doc. No. 1, at p. 1; Doc. No. 1-3 ("Copyright Report")]. Plaintiff contends that defendant used the BitTorrent file distribution network to copy and distribute

1 plaintiff's copyrighted work through the Internet without its permission. [Doc. No. 1 at p.
2 5].

3 DISCUSSION

4 In the Ex Parte Motion, plaintiff seeks leave to serve limited, immediate discovery
5 on defendant's Internet Service Provider ("ISP"), Time Warner Cable (Spectrum), so that
6 plaintiff may learn defendant's true identity. [Doc. No. 4-1 at p. 2]. Specifically, plaintiff
7 seeks an order permitting it to serve a Rule 45 subpoena on Time Warner Cable to obtain
8 the name and address of the account holder assigned to defendant's Internet Protocol ("IP")
9 address. [*Id.*].

10 Generally, discovery is not permitted without a court order before the parties have
11 conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1). In
12 the Ninth Circuit, exceptions to requests for early discovery have generally been
13 disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). However, "situations
14 arise, such as the present, where the identity of alleged defendants will not be known prior
15 to the filing of a complaint. In such circumstances, the plaintiff should be given an
16 opportunity through discovery to identify the unknown defendants, unless it is clear that
17 discovery would not uncover the identities, or that the complaint would be dismissed on
18 other grounds." *Id.*

19 "[S]ome limiting principals should apply to the determination of whether discovery
20 to uncover the identity of a defendant is warranted." *Columbia Ins. Co. v. seescandy.com*,
21 185 F.R.D. 573, 578 (N.D. Cal. 1999). Such early discovery should be limited "to ensure
22 that this unusual procedure will only be employed in cases where the plaintiff has in good
23 faith exhausted traditional avenues for identifying a civil defendant pre-service" and to
24 "prevent use of this method to harass or intimidate." *Id.* First, "the plaintiff should identify
25 the missing party with sufficient specificity such that the Court can determine that
26 defendant is a real person or entity who could be sued in federal court." *Id.* Second, the
27 plaintiff "should identify all previous steps taken to locate the elusive defendant" to ensure
28 that the plaintiff has made a good faith effort to identify and serve process on the defendant.

1 *Id.* at 579. Third, the “plaintiff should establish to the Court’s satisfaction that plaintiff’s
2 suit against defendant could withstand a motion to dismiss.” *Id.* “Thus, plaintiff must
3 make some showing that an act giving rise to civil liability actually occurred and that the
4 discovery is aimed at revealing specific identifying features of the person or entity who
5 committed that act.” *Id.* at 580.

6 “Lastly, the plaintiff should file a request for discovery with the Court, along with a
7 statement of reasons justifying the specific discovery requested as well as identification of
8 a limited number of persons or entities on whom discovery process might be served and
9 for which there is a reasonable likelihood that the discovery process will lead to identifying
10 information about defendant that would make service of process possible.” *Id.*

11 **A. Identification of the Doe Defendant with Sufficient Specificity**

12 “Some district courts in the Ninth Circuit have determined that a plaintiff identifies
13 Doe defendants with sufficient specificity by providing the unique IP address assigned to
14 an individual defendant on the day of the alleged infringing conduct, and by using
15 ‘geolocation technology’ to trace the IP address to a physical point of origin.” *See, e.g.,*
16 *Malibu Media, LLC v. Does 1-19*, 2012 WL 2152061, at *3 (S.D. Cal. June 12, 2012), and
17 cases cited therein.

18 In support of the Motion, plaintiff submitted several declarations in support of its
19 request for early discovery. Plaintiff submitted the Declaration of Tobias Fieser, who is
20 employed by IPP International UG (“IPP”), a forensic investigation services corporation.
21 [Doc. No. 4-2, Exh. B at p. 2]. According to Mr. Fieser, IPP monitors the BitTorrent file
22 distribution network for the presence of plaintiff’s copyrighted works. [*Id.*]. By reviewing
23 IPP’s forensic activity logs, Mr. Fieser declares that IPP’s forensic servers connected to a
24 device using defendant’s IP address and later “was documented distributing to IPP’s
25 servers multiple pieces of Strike 3’s copyrighted movies.” [*Id.*].

26 Second, the Declaration of John S. Pasquale, a senior project manager with 7 River
27 Systems, LLC a cybersecurity firm specializing in, *inter alia*, the “the protection of secured
28

1 information transmitted across networks,” who has had significant experience in solving
2 computer crime cases, states in part as follows:

3 10. Based on my experience in similar cases, Defendant’s ISP Time
4 Warner Cable is the only entity that can correlate the IP address to its
5 subscriber and identify Defendant as the person assigned the IP address
6 76.167.199.146 during the time of the alleged infringement. Indeed, a
7 subpoena to an ISP is consistently used by civil plaintiffs and law
8 enforcement to identify a subscriber of an IP address.

9 [Doc. No. 4-2, Exh. C at p. 1].

10 Third, plaintiff’s Complaint also traces the alleged offending IP address to this
11 district. Plaintiff states that it used “IP address geolocation technology by Maxmind Inc.,
12 an industry-leading provider of IP address intelligence and online fraud detection tools, to
13 determine that defendant’s IP address traced to a physical address in this District.” [Doc.
14 No. 1 at p. 2]. *See e.g., Criminal Prods., Inc. v. Doe*, 2016 WL 6822186 (S.D. Cal. Nov.
15 18, 2016) (“The Court concludes that based on the timing of the IP address tracing efforts
16 employed by plaintiff’s investigator, the documented success of the Maxmind geolocation
17 services, and plaintiff’s counsel’s efforts to independently verify the location information
18 provided by plaintiff’s investigator, plaintiff has met its evidentiary burden [that
19 jurisdiction is proper]”).

20 Based on this evidence and information, the Court finds that plaintiff has satisfied
21 the “sufficient specificity” threshold. Plaintiff has provided the Court with information
22 about infringing activity tied to defendant’s IP address, specific date and times for such
23 activity, and sufficient reassurance that it seeks to sue a real person subject to the Court’s
24 jurisdiction.

25 **B. Ability to Withstand a Motion to Dismiss**

26 Plaintiff has also made a showing that its Complaint against defendant could
27 withstand a motion to dismiss. “Under the Copyright Act of 1976 (‘the Act’) a plaintiff
28 may not ‘institute []’ an action in federal district court ‘until registration of the copyright
claim has been made in accordance with this title.’ 17 U.S.C. § 411(a).” *Berry v. Penguin*

1 *Group (USA), Inc.*, 448 F.Supp.2d 1202, 1202 (W.D. Wash. 2006). The Complaint alleges
2 that plaintiff is the “registered owner” of the Copyrights in Suit. [Doc. No. 1, at p. 6;
3 Copyright Report].

4 Under Federal Rule of Civil Procedure 12(b), a case can be dismissed for lack of
5 subject matter jurisdiction or for failure to state a claim upon which relief can be granted.
6 Fed.R.Civ.P. 12(b)(1), 12(b)(6). As applied herein, the Complaint correctly alleges subject
7 matter jurisdiction pursuant to Title 28, United Code, Sections 1331 (federal question) and
8 1338 (copyrights).

9 In order to state a viable claim for copyright infringement, a plaintiff must allege:
10 (1) ownership of a valid copyright, and (2) a violation by the defendant of the copyright
11 owner’s exclusive rights under the Copyright Act. *Ellison v. Robertson*, 357 F.3d 1072,
12 1076 (9th Cir. 2004); 17 U.S.C. § 501(a). Here, the Complaint alleges that plaintiff is the
13 owner of the Copyrights-in-Suit and that defendant’s IP address copied and distributed
14 plaintiff’s copyrighted materials using the BitTorrent file distribution network without
15 plaintiff’s permission or consent. [Doc. No. 1 at p. 5-6]. Thus, plaintiff has alleged facts
16 that could withstand a motion to dismiss for failure to state a claim.

17 Under Federal Rule of Civil Procedure 12(b), a case can be dismissed for lack of
18 personal jurisdiction over a defendant or for improper venue. Fed.R.Civ.P. 12(b)(2)&(3).
19 To avoid a defendant’s motion to dismiss under Federal Rule 12(b)(2) for lack of personal
20 jurisdiction, a plaintiff need only make a *prima facie* showing of jurisdiction by presenting
21 facts that, if true, would support a finding of personal jurisdiction over the defendant.
22 *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Personal jurisdiction can be
23 established over a person who resides in the forum state. *Brayton Purcell LLP v. Recordon*
24 *& Recordon*, 361 F.Supp.2d 1135, 1138 (N.D. Cal. 2005). In copyright infringement
25 actions, venue is proper “in the district in which the defendant . . . resides or may be found.”
26 28 U.S.C. § 1400(a).

27 In the Complaint, plaintiff asserts that this Court has jurisdiction over the Doe
28 defendant because the alleged acts of infringement were traced to an IP address that is

1 located in this State and this District. [Doc. No. 1, at p. 2]. It is further alleged that venue
2 is proper in this District because the alleged acts of infringement occurred in this District
3 and the defendant resides or may be found here. [*Id.*]. Therefore, plaintiff has stated facts
4 that are likely to withstand a motion to dismiss for lack of jurisdiction or improper venue.

5 Finally, the Court must consider the requirements of the Cable Privacy Act, 47
6 U.S.C. § 551. The Act generally prohibits cable operators from disclosing personally
7 identifiable information regarding subscribers without the prior written or electronic
8 consent of the subscriber. 47 U.S.C. § 551(c)(1). A cable operator, however, may disclose
9 such information if the disclosure is made pursuant to a court order, and the cable operator
10 provides the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). Therefore, the
11 information plaintiff seeks pursuant to a subpoena falls within an exception to the
12 prohibition on disclosure within the Act.

13 **CONCLUSION**

14 For the reasons set forth above, plaintiff's Ex Parte Motion for Leave to Serve a
15 Third Party Subpoena is **GRANTED**, as follows:

16 1. Plaintiff may serve a subpoena on defendant's ISP, Time Warner Cable
17 (Spectrum), seeking the name and address only of the subscriber assigned to the IP address
18 identified in the Complaint for the time periods of the alleged infringing activity outlined
19 in Attachments 1 and 2 to plaintiff's Complaint.

20 2. The subpoena must provide a minimum of **forty-five (45) days**' notice before
21 any production and shall be limited to one category of documents identifying the particular
22 subscriber identified in Exhibits A-D attached to plaintiff's Motion. The requested
23 information shall be limited to the name and address of the subscriber during the time
24 period of the alleged infringing activity referenced in Doc. No. 1-2, attached to the
25 Complaint as Exhibit A. Time Warner Cable (Spectrum) may seek a protective order if it
26 determines there is a legitimate basis for doing so.

27 ///


28 ///

1 3. Time Warner Cable (Spectrum) shall have **fourteen (14) calendar days** after
2 service of the subpoena to notify the subscriber that his or her identity has been subpoenaed
3 by plaintiff. The subscriber whose identity has been subpoenaed shall then have
4 **thirty (30) calendar days** from the date of the notice to seek a protective order or file any
5 other responsive pleading.

6 4. Plaintiff shall serve a copy of this Order with any subpoena obtained and
7 served pursuant to this Order to Time Warner Cable (Spectrum). Time Warner Cable
8 (Spectrum), in turn, must provide a copy of this Order along with the required notice to the
9 subscriber whose identity is sought pursuant to this Order. No other discovery is authorized
10 at this time.

11 **IT IS SO ORDERED.**

12 Dated: January 4, 2018



Hon. Karen S. Crawford
United States Magistrate Judge