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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,  
  
Plaintiff,  
  
v.  
  
JOHN DOE subscriber assigned IP address  
70.95.33.145,  
  
Defendant.

Case No.: 20cv948-WQH (MSB)

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

On July 1, 2020, Plaintiff Strike 3 Holdings (“Plaintiff”) filed an Ex Parte Application for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference (“Ex Parte Application”). (ECF No. 3.) Plaintiff seeks to subpoena Defendant John Doe’s (“Defendant”) Internet Service Provider (“ISP”) Spectrum for “limited, immediate discovery . . . so that Plaintiff may learn Defendant’s identity [and] further investigate Defendant’s role in the infringement and effectuate service.” (ECF No. 3-1 at 7.) Because the Defendant has not been identified, no opposition or reply briefs have been filed. For the following reasons, the Ex Parte Application for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference is **GRANTED**.

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## I. BACKGROUND

1 Plaintiff purports to be the registered owner of certain copyrighted motion  
2 pictures. (ECF No. 1 at 1.) On May 21, 2020, Plaintiff filed a Complaint alleging that  
3 Defendant John Doe, an internet subscriber assigned Internet protocol (“IP”) address  
4 70.95.33.145, used the BitTorrent file distribution network to illegally download and  
5 distribute over forty of Plaintiff’s copyrighted works over an extended period of time.  
6 (Id. at 2.) Plaintiff alleges that it used its infringement detection system, VXN Scan, to  
7 discover that Defendant used the BitTorrent file network to illegally download and  
8 distribute Plaintiff’s copyrighted motion pictures. (ECF No. 3-2 at 20.)

9 Initially, Plaintiff moved to discover Defendant’s identity “utilizing a state court  
10 procedure in Florida where [Plaintiff’s] infringement detection servers are located.”  
11 (ECF No. 1 at 5.) However, “Defendant objected asserting that the action is more  
12 properly litigated in the federal court of his or her domicile.” (Id.) Plaintiff is amenable  
13 to litigating the matter in Federal Court and thus initiated this action pursuant to 28  
14 U.S.C. § 1331 and 28 U.S.C. § 1338. (Id. at 2.)

15 On July 1, 2020, Plaintiff filed the instant Ex Parte Application to seek leave to  
16 serve a subpoena pursuant to Federal Rule of Civil Procedure 45 on Defendant’s ISP,  
17 Spectrum. (ECF No. 3-1 at 8.) Plaintiff maintains that the Rule 45 subpoena “will only  
18 demand the true name and address of Defendant” and Plaintiff “will only use this  
19 information to prosecute the claims made in its Complaint.” (Id.) Plaintiff further claims  
20 that “[w]ithout this information, Plaintiff cannot serve Defendant nor pursue this  
21 lawsuit and protect its copyrights.” (Id.)

## II. LEGAL STANDARD

22 Generally, formal discovery is not permitted before the parties have conferred  
23 pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1). However,  
24 courts have made exceptions “in rare cases . . . permitting limited discovery to ensue  
25 after filing of the complaint to permit the plaintiff to learn the identifying facts  
26 necessary to permit service on the defendant.” Columbia Ins. Co. v. Seescandy.com, 185  
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1 F.R.D. 573, 577 (N.D. Cal. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.  
2 1980)). Courts in the Ninth Circuit apply a “good cause” standard to decide whether to  
3 permit early discovery. Semitool, Inc. v. Tokyo Elec. Am., Inc., 208 F.R.D. 273, 275-76  
4 (N.D. Cal. 2002). “Good cause” is established “where the need for expedited discovery,  
5 in consideration of the administration of justice, outweighs the prejudice to the  
6 responding party.” Id.

7 District courts in the Ninth Circuit have held that “when the defendants’ identities  
8 are unknown at the time the complaint is filed, courts may grant plaintiffs leave to take  
9 early discovery to determine the defendants’ identities ‘unless it is clear that discovery  
10 would not uncover the identities, or that the complaint would be dismissed on other  
11 grounds.’” 808 Holdings, LLC v. Collective of Dec. 29, 2011 Sharing Hash  
12 E37917C8EEB4585E6421358FF32F29C D63C23C91, No. 12CV00186 MMA(RBB), 2012  
13 WL 12884688 (S.D. Cal. May 8, 2012) (citing Gillespie, 629 F.2d at 642). “A district  
14 court’s decision to grant discovery to determine jurisdictional facts is a matter of  
15 discretion.” Columbia Ins. Co., 185 F.R.D. at 578 (citing Wells Fargo & Co. v. Wells Fargo  
16 Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

17 The Ninth Circuit typically applies a three-factor test when considering motions  
18 for early discovery to identify Doe defendants. Columbia Ins. Co., 185 F.R.D. at 578-80.  
19 First, plaintiffs should be able to “identify the missing party with sufficient specificity []  
20 that the Court can determine that [the] defendant is a real person or entity who could  
21 be sued in federal court.” Id. at 578. Second, plaintiffs “should identify all previous  
22 steps taken to locate the elusive defendant” to ensure “that [the movant has made] a  
23 good faith effort to comply with the requirements of the service of process and  
24 specifically identifying defendants.” Id. at 579. Third, the moving party “should  
25 establish to the Court’s satisfaction that plaintiff’s suit against defendant could  
26 withstand a motion to dismiss.” Id.; see Gillespie, 629 F.2d at 642 (stating early  
27 discovery to identify unknown defendants should be permitted unless the complaint  
28 would be dismissed on other grounds). In addition to satisfying all three factors,

1 plaintiffs should include “reasons justifying the specific discovery requested [and]  
2 identification of a limited number of persons or entities on whom discovery process  
3 might be served and for which there is a reasonable likelihood that the discovery  
4 process will lead to identifying information about defendant that would make service of  
5 process possible.” Columbia Ins. Co., 185 F.R.D. at 580; see Gillespie, 629 F.2d at 642  
6 (explaining that early discovery is precluded if it is not likely to provide the identity of  
7 the defendant.). These safeguards are intended to ensure that early discovery “will only  
8 be employed in cases where the plaintiff has in good faith exhausted traditional avenues  
9 for identifying a civil defendant pre-service, and will prevent the use of this method to  
10 harass or intimidate.” Id. at 578.

### 11 III. ANALYSIS

#### 12 A. Identification of Defendant with Sufficient Specificity

13 For the Court to grant Plaintiff’s Ex Parte Application, Plaintiff must first identify  
14 Defendant with enough specificity to allow the Court to determine that Defendant is a  
15 real person who could be subject to the jurisdiction of this Court. See Columbia Ins.,  
16 185 F.R.D. at 578. Courts in the Ninth Circuit have held that “a plaintiff identifies Doe  
17 defendants with sufficient specificity by providing the unique IP addresses assigned to  
18 an individual defendant on the day of the allegedly infringing conduct, and by using  
19 ‘geolocation technology’ to trace the IP addresses to a physical point of origin.” 808  
20 Holdings, LLC, 2012 WL 12884688, at \*4 (quoting Openmind Solutions, Inc. v. Does 1-39,  
21 No. C 11-3311 MEJ, 2011 WL 4715200 (N.D. Cal. Oct. 7, 2011); Pink Lotus Entm’t, LLC v.  
22 Does 1-46, No. C-11-02263 HRL, 2011 WL 2470986 (N.D. Cal. June 21, 2011)). Therefore,  
23 in order for Plaintiff to identify Defendant with sufficient specificity, it is critical that  
24 Plaintiff identify that there is an actual human involved in the downloading and sharing  
25 of Plaintiff’s allegedly infringed works.

26 First, Plaintiff submitted the Declaration of David Williamson, an Information  
27 Systems and Management Consultant, wherein Mr. Williamson claims that he used  
28 Plaintiff’s infringement detection system, VXN Scan, to identify IP addresses that

1 infringe upon Plaintiff's movies through the BitTorrent protocol. (ECF No. 3-2 at 9.)  
2 Further, the BitTorrent functions that Plaintiff accuses Defendant of using require  
3 human operation. See Christopher Civil, Mass Copyright Infringement Litigation: Of  
4 Trolls, Pornography, Settlement and Joinder, 30 Syracuse J. Sci. & Tech. L. 2, 12 (2014)  
5 ("BitTorrent transfers do not involve a centralized server that hosts or transfers the data  
6 files in question. Instead, BitTorrent involves users interacting directly with other users  
7 to upload and download the content."). Therefore, it becomes clear that an actual  
8 human was involved in the downloading and sharing of Plaintiff's allegedly infringed  
9 works.

10 Second, Plaintiff submitted the Declaration of Patrick Paige, a managing member  
11 at Computer Forensics, LLC, wherein Mr. Paige contends that he utilized Packet Capture  
12 ("PCAP") and VXN Scan to connect Defendant's IP address to the alleged "piece of an  
13 infringing copy of Plaintiff's works . . . ." (ECF No. 3-2 at 21.) Mr. Paige further asserts  
14 that "[t]he PCAP contains a record data concerning that transaction, including, but not  
15 limited to, the [IP] Addresses used in the network transaction, the date and time of the  
16 network transaction, the port number used to accomplish each network transaction,  
17 and the Info Hash value that the VXN Scan used as the subject of its request for data."  
18 (Id.) Mr. Paige contends that the contents of the PCAP confirm that the infringing  
19 activity connected to the "IP address 70.95.33.143 was initiated at 02/05/2020 12:49:23  
20 UTC." (Id.) Mr. Paige concludes that "the PCAP evidence shows that within that  
21 transaction, IP address 70.95.33.145 uploaded a piece or pieces of a file corresponded  
22 to hash value [representing Plaintiff's works] to VXN Scan." (Id.) This date and time  
23 correspond with the date and time one of Plaintiff's works were allegedly illegally  
24 downloaded according to Exhibit A of Plaintiff's Complaint. (ECF No. 1-2 at 1.)

25 In addition, Plaintiff submitted the Declaration of Emilie Kennedy, Plaintiff's in-  
26 house General counsel, wherein Ms. Kennedy asserts geolocation was done by an  
27 unspecified person to identify the location of Defendant on three separate occasions.  
28 (ECF No. 3-2 at 30.) On the first occasion, Ms. Kennedy asserts "[a]fter [Plaintiff]

1 received infringement data from VXN Scan identifying IP address 70.95.33.145 as  
2 infringing its works, the IP address was automatically inputted into Maxmind's  
3 Geolocation Database . . . on August 6, 2019 . . . ." (Id.) Ms. Kennedy contends that "the  
4 Maxmind Database, a geolocation technology, [was used] to trace Defendant's IP  
5 address to a geographic area within this Court's jurisdiction. (Id.) On the second  
6 occasion, Ms. Kennedy claims "[p]rior to filing its Complaint, Strike 3 again inputted IP  
7 address 70.95.33.145 into the Maxmind Database and confirmed that IP address  
8 70.95.33.145 continued to trace to this District." (Id.) On the final occasion, Ms.  
9 Kennedy asserts "before filing this declaration, [Plaintiff] inputted IP address  
10 70.95.33.145 again into the Maxmind Database and confirmed that it traces to San  
11 Diego, California." (Id.) Attached as Exhibit 1 to Ms. Kennedy's Declaration is a chart  
12 reflecting the results of the third and final Maxmind Database search, showing that the  
13 IP address alleged to be involved in the illegal downloads and confirms the location of  
14 San Diego, CA. (Id. at 33.)

15 Plaintiff has provided sufficient information about infringing activity tied to  
16 Defendant's unique IP address, the specific date and time associated with the activity,  
17 the name of the ISP for the user of the IP address, and the location of the activity.  
18 Therefore, Plaintiff has demonstrated with sufficient specificity that Defendant is a real  
19 person or entity that falls within the jurisdiction of this court. See Criminal Prods., Inc. v.  
20 Doe-72.192.163.220, No. 16-CV-2589 WQH (JLB), 2016 WL 6822186, at \*3 (S.D. Cal. Nov.  
21 18, 2016) (holding the sufficient specificity threshold is satisfied when the IP address  
22 identified by Maxmind geolocation services identifies a physical location within the  
23 court's jurisdiction.).

#### 24 **B. Good Faith Efforts to Identify Defendant**

25 For the Court to grant Plaintiff's Ex Parte Application, Plaintiff must also  
26 demonstrate that it has taken previous steps to locate and serve the Defendant. See  
27 Columbia Ins. Co., 185 F.R.D. at 579. Although Plaintiff maintains that it attempted to  
28 identify Defendant by searching Defendant's IP address "on various web search tools,

1 including basic search engines like <http://www.google.com>,” Plaintiff does not submit  
2 evidence supporting this claim. (See ECF No. 3-1 at 14.) However, as aforementioned in  
3 Ms. Kennedy’s Declaration, Plaintiff did take substantial steps to locate the Defendant’s  
4 IP address, and identify Defendant’s ISP. (ECF No. 3-2 at 30.) Despite these efforts,  
5 Plaintiff was unable to correlate the IP address to Defendant’s identity. Plaintiff  
6 maintains that it has been “unable to identify any other way to go about obtaining the  
7 identities of its infringers and does not know how else it could possibly enforce its  
8 copyrights from illegal piracy over the Internet.” (ECF No. 3-1 at 14.) The Court  
9 therefore finds that Plaintiff made a good faith effort to identify, locate, and serve the  
10 Defendant. See Malibu Media, LLC v. John Does 1 through 6, No. 12-CV-1355-LAB DHB,  
11 2012 WL 4471538, at \*3 (S.D. Cal. Sept. 26, 2012) (finding the plaintiff’s efforts to  
12 identify Doe defendant were sufficient because “there is no other way for [p]laintiff to  
13 obtain [d]efendants’ identities, except by serving a subpoena on [d]efendants’ ISPs  
14 demanding it.”); see also, e.g., Digital Sin, Inc. v. Does 1-5698, No. C 11-04397 LB, 2011  
15 WL 5362068, at \*2 (N.D. Cal. Nov. 4, 2011) (finding the plaintiff’s attempts to identify  
16 and locate the defendant sufficient when the plaintiff “investigated and collected data  
17 on unauthorized distribution of copies of the [alleged infringed work] on BitTorrent-  
18 based peer-to-peer network”).

### 19 **C. Whether Suit Could Withstand a Motion to Dismiss**

20 For the Court to grant Plaintiff’s Ex Parte Application, Plaintiff must also show that  
21 the complaint could withstand a motion to dismiss. See Columbia Ins. Co., 185 F.R.D. at  
22 579. A suit may be dismissed pursuant to Rule 12(b) on several bases. Of all the bases  
23 that bear dismissal, those relevant here are lack of subject matter jurisdiction, lack of  
24 personal jurisdiction, and failure to state a claim. Fed. R. Civ. P. 12(b)(1), (2), (6).  
25 Plaintiff’s Complaint alleges that “[t]his Court has subject matter jurisdiction over this  
26 action pursuant to 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 1338 (jurisdiction  
27 over copyright actions).” (ECF No. 1 at 2.)  
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1 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure  
2 tests the sufficiency of the allegations in the Complaint. Navarro v. Block, 250 F.3d 729,  
3 732 (9th Cir. 2001). To allege a copyright infringement claim, Plaintiff must (1) “show  
4 ownership of the allegedly infringed material” and (2) “demonstrate that the alleged  
5 infringers violate at least one exclusive right granted to copyright holders under 17  
6 U.S.C. § 106.” A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001).  
7 Plaintiff alleges it owns over forty copyrighted works that are the subject of this suit and  
8 claims that the works “are registered with the United States Copyright Office.” (ECF No.  
9 1 at 7.) Plaintiff also alleges that Defendant “used the BitTorrent file network to illegally  
10 download and distribute Plaintiff’s copyrighted motion pictures.” (Id. at 5.) With these  
11 allegations, Plaintiff sufficiently sets forth facts demonstrating the required ownership  
12 and infringement. Assuming these allegations are true, they state a claim on which  
13 relief can be granted. See A&M Records, Inc., 239 F.3d at 1013-14 (finding plaintiffs  
14 sufficiently demonstrated ownership and infringement by showing Napster allowed its  
15 users to download copyrighted music, up to 70% of which was owned or administered  
16 by the plaintiffs); see also Malibu Media, LLC v. Doe, No. 16CV1916-GPC(JMA), 2016 WL  
17 6216183, at \*2 (S.D. Cal. Oct. 25, 2016) (holding plaintiff has alleged a prima facie case  
18 of copyright infringement against defendant by alleging that plaintiff owns 12  
19 copyrighted movies at issue and that defendant infringed plaintiff’s copyrights by  
20 copying and distributing plaintiff’s movies through the BitTorrent network without  
21 plaintiff’s permission). Therefore, Plaintiff has sufficiently alleged a prima facie claim of  
22 copyright infringement that will likely withstand a motion to dismiss based on subject  
23 matter jurisdiction or failure to state claim.

24 In order to prevail on any claim, a case must also withstand a motion to dismiss  
25 for lack of personal jurisdiction over a defendant. See Fed. R. Civ. P. 12(b)(2). To  
26 withstand a motion to dismiss for lack of personal jurisdiction, Plaintiff must make a  
27 “prima facie showing of jurisdictional facts.” Ballard v. Savage, 65 F.3d 1495, 1498 (9th  
28 Cir. 1995). Plaintiff maintains that it used geolocation technology to determine that



1 Defendant's IP address correlates to a physical address in San Diego, CA which falls  
2 within the jurisdiction of the Southern District of California. (ECF No. 1 at 3.) Therefore,  
3 Plaintiff has accordingly alleged jurisdictional facts that are likely to withstand a motion  
4 to dismiss for lack of personal jurisdiction.

5 Based on the foregoing, the Court does not find any reason that Plaintiff's claims  
6 would be dismissed.

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

8 Finally, Plaintiff is required to demonstrate that "there is a reasonable likelihood  
9 that the discovery process will lead to identifying information about defendant that  
10 would make service of process possible." Columbia Ins. Co., 185 F.R.D. at 580. As  
11 discussed above, Plaintiff's forensic investigation uncovered the unique IP address  
12 70.95.33.145. (ECF No. 3-2 at 21.) Further, Plaintiff claims to have utilized the American  
13 Registry for Internet Numbers to determine that the ISP Spectrum owned Defendant's  
14 IP address at the time of the infringement. (Id. at 27.) Spectrum is the only entity that  
15 may correlate Defendant's IP address to the IP address owner's true identity. (Id. at 26.)  
16 Therefore, if Spectrum provides Plaintiff with Defendant's name and address, Plaintiff  
17 will likely lead to information making it possible to effectuate service on Defendant.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court **GRANTS** the Ex Parte Application for Leave  
20 to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference [ECF No. 3] as follows:

- 21 1. Plaintiff may serve a subpoena pursuant to Federal Rule of Civil Procedure  
22 45 on Spectrum, seeking only the name and address of the subscriber assigned to the IP  
23 address 70.95.33.145. Plaintiff may not subpoena additional information about the  
24 subscriber;
- 25 2. Plaintiff may only use the disclosed information to protect its copyrights in  
26 the instant litigation;
- 27 3. Within fourteen (14) calendar days after service of the subpoena, Spectrum  
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1 shall notify the subscriber assigned the IP address 70.95.33.145 that his, her, or its  
2 identity has been subpoenaed by Plaintiff;

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

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

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

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

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

17 **IT IS SO ORDERED.**

18 Dated: July 24, 2020

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21 Honorable Michael S. Berg  
22 United States Magistrate Judge  
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