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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,

Plaintiff,

v.

JOHN DOE subscriber assigned IP address
23.126.155.167,

Defendant.

Case No.: 21cv1897-TWR (MSB)

**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]**

On November 17, 2021, Plaintiff Strike 3 Holdings, LLC (“Strike 3”) 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. 4.) Plaintiff seeks to subpoena Defendant John Doe’s Internet Service Provider (“ISP”) AT&T U-verse for “limited, immediate discovery . . . so that Plaintiff may learn Defendant’s identity, further investigate Defendant’s role in the infringement, and effectuate service.” (ECF No. 4-1 at 7–8.) Because Defendant has not been identified, no opposition or reply briefs have been filed. For the following reasons, the Ex Parte Application is **GRANTED**.

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1 **I. BACKGROUND**

2 Plaintiff owns the copyright to certain motion pictures. (ECF No. 1 at 7–8.) On
3 November 8, 2021, Plaintiff filed a Complaint alleging that Defendant John Doe, an
4 internet subscriber assigned Internet protocol (“IP”) address 23.126.155.167, is using
5 the BitTorrent protocol to commit “rampant and wholesale copyright infringement” by
6 downloading and distributing twenty-four of Plaintiff’s copyrighted works over an
7 extended period of time. (Id. at 1–2.) Plaintiff alleges it used its proprietary forensic
8 software, VXN Scan, to discover that Defendant’s IP address was illegally distributing
9 Plaintiff’s copyrighted motion pictures. (Id. at 5–7; ECF No. 4-2 at 19–20.)

10 On November 17, 2021, Plaintiff filed the instant Ex Parte Application to seek
11 leave to serve a subpoena pursuant to Federal Rule of Civil Procedure 45 on Defendant’s
12 ISP, AT&T U-verse. (ECF No. 4-1 at 7–8.) Plaintiff maintains that the Rule 45 subpoena
13 “will only demand the true name and address of Defendant[,]” and Plaintiff “will only
14 use this information to prosecute the claims made in its Complaint.” (Id. at 8.) Plaintiff
15 further claims that “[w]ithout this information, Plaintiff cannot serve Defendant nor
16 pursue this lawsuit and protect its copyrights.” (Id.)

17 **II. LEGAL STANDARD**

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

1 “[W]hen the defendants’ identities are unknown at the time the complaint is
2 filed, courts may grant plaintiffs leave to take early discovery to determine the
3 defendants’ identities ‘unless it is clear that discovery would not uncover the identities,
4 or that the complaint would be dismissed on other grounds.’” 808 Holdings, LLC v.
5 Collective of Dec. 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C
6 D63C23C91, Civil No. 12cv00186 MMA(RBB), 2012 WL 12884688, at *3 (S.D. Cal. May 8,
7 2012) (quoting Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)). “A district court’s
8 decision to grant discovery to determine jurisdictional facts is a matter of discretion.”
9 Columbia Ins. Co., 185 F.R.D. at 578.

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

22 In addition to satisfying all three factors, plaintiff should provide “reasons
23 justifying the specific discovery requested [and] identification of a limited number of
24 persons or entities on whom discovery process might be served and for which there is a
25 reasonable likelihood that the discovery process will lead to identifying information
26 about defendant that would make service of process possible.” Columbia Ins. Co., 185
27 F.R.D. at 580; see also Gillespie, 629 F.2d at 642 (explaining that early discovery is
28 precluded if it is not likely to provide the identity of the defendant). These safeguards

1 are intended to ensure that early discovery “will only be employed in cases where the
2 plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant
3 pre-service, and will prevent the use of this method to harass or intimidate.” Columbia
4 Ins. Co., 185 F.R.D. at 578.

5 III. ANALYSIS

6 Plaintiff seeks leave to serve a subpoena pursuant to Federal Rule of Civil
7 Procedure 45 on Defendant’s ISP, AT&T U-verse. (ECF No. 4-1 at 8.) The Cable Privacy
8 Act generally prohibits a cable operator from disclosing “personally identifiable
9 information concerning any subscriber without the prior written or electronic consent of
10 the subscriber concerned[.]” 47 U.S.C. § 551(c)(1). A cable operator, however, may
11 disclose the information if the disclosure is made pursuant to a court order and the
12 cable operator notifies the subscriber of the order. 47 U.S.C. § 551(c)(2)(B). A cable
13 operator is “any person or group of persons” who “provides cable service over a cable
14 system and directly or through one or more affiliates owns a significant interest in such
15 cable system,” or “otherwise controls or is responsible for, through any arrangement,
16 the management and operation of such a cable system.” 47 U.S.C. § 522(5). AT&T U-
17 verse is a cable operator, and the information Plaintiff seeks falls within the exception to
18 the Cable Privacy Act’s disclosure prohibition. See 47 U.S.C. §551(c)(2)(B). Accordingly,
19 if Plaintiff satisfies the multi-factor test used by district courts to determine whether
20 early discovery is warranted, Doe defendants’ ISP may disclose the requested
21 information pursuant to this Court’s order.

22 A. Plaintiff Has Identified Defendant with Sufficient Specificity

23 Plaintiff must identify Defendant with enough specificity to allow the Court to
24 determine that Defendant is a real person or entity, subject to the jurisdiction of this
25 Court. See Columbia Ins. Co., 185 F.R.D. at 578. Courts in the Ninth Circuit have
26 determined that “a plaintiff identifies Doe defendants with sufficient specificity by
27 providing the unique IP addresses assigned to an individual defendant on the day of the
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1 allegedly infringing conduct, and by using ‘geolocation technology’ to trace the IP
2 addresses to a physical point of origin.” 808 Holdings, LLC, 2012 WL 12884688, at *4.

3 In support of its Ex Parte Application, Plaintiff submitted the Declaration of David
4 Williamson, an Information Systems and Management Consultant. (See ECF No. 4-2.)
5 Mr. Williamson uses Plaintiff’s infringement detection system, VXN Scan, to identify the
6 IP addresses used by individuals infringing Plaintiff’s movies through the BitTorrent
7 protocol. (Id. at 8.) Further, although the BitTorrent protocol contains some default
8 and automatic functions, the functions that Plaintiff accuses Defendant of using require
9 human operation. (See id. at 9); see also Christopher Civil, Mass Copyright Infringement
10 Litigation: Of Trolls, Pornography, Settlement and Joinder, 30 Syracuse J. Sci. & Tech. L.
11 2, 12 (2014) (“BitTorrent transfers do not involve a centralized server that hosts or
12 transfers the data files in question. Instead, BitTorrent involves users interacting
13 directly with other users to upload and download the content.”). Accordingly, Plaintiff
14 has established that an actual human was involved in the downloading and sharing of
15 Plaintiff’s allegedly infringed works.

16 Plaintiff also submitted the Declaration of Patrick Paige, a managing member at
17 Computer Forensics, LLC, where Mr. Paige contends that he utilized Packet Capture
18 (“PCAP”), “a computer file containing captured or recorded data transmitted between
19 network devices[,]” and VXN Scan to connect Defendant’s IP address to the alleged
20 “piece of an infringing copy of Plaintiff’s works.” (ECF No. 4-2 at 20; see also id. at 18.)
21 According to Mr. Paige, “[t]he PCAP contains a record data concerning that transaction,
22 including, but not limited to, the Internet Protocol (IP) Addresses used in the network
23 transaction, the date and time of the network transaction, the port number used to
24 accomplish each network transaction, and the Info Hash value that the VXN Scan used
25 as the subject of its request for data.” (Id. at 20.) Mr. Paige contends that the contents
26 of the PCAP confirm that the infringing activity connected to the IP address
27 23.126.155.167 was initiated on October 14, 2021, at 15:42:12 UTC. (Id.) Mr. Paige
28 concludes that “the PCAP evidence shows that within that transaction, IP address

1 23.126.155.167 uploaded a piece or pieces of a file corresponded to hash value
2 [representing Plaintiff’s works] to VXN Scan.” (Id.) This date and time correspond with
3 the date and time when one of Plaintiff’s works was allegedly illegally downloaded
4 according to Exhibit A of Plaintiff’s Complaint. (ECF No. 1-2 at 1.)

5 In addition, Plaintiff submitted the Declaration of Emilie Kennedy, Plaintiff’s in-
6 house General Counsel, in which Ms. Kennedy asserts geolocation was done by an
7 unspecified person to identify the location of Defendant on three separate occasions.
8 (ECF No. 4-2 at 28–29.) On the first occasion, “[a]fter [Plaintiff] received infringement
9 data from VXN Scan identifying IP address 23.126.155.167 as infringing its works, the IP
10 address was automatically inputted into Maxmind’s Geolocation Database . . . on
11 October 22, 2021.” (Id. at 29.) Based on this search, Ms. Kennedy contends that
12 “Maxmind determined that the IP address traced to a location in San Diego, California,
13 which is within this Court’s jurisdiction.” (Id.) Further, Plaintiff inputted Defendant’s IP
14 address into Maxmind’s Database before the filing of Plaintiff’s Complaint, and prior to
15 the filing of the instant Ex Parte Application. (Id.) On both occasions the IP address
16 linked to Defendant, 23.126.155.167, traced to this district.¹

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

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27 ¹ 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 32–33.)

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

2 Plaintiff must also demonstrate that it has taken previous steps to locate and
3 serve the Defendant. See Columbia Ins. Co., 185 F.R.D. at 579. Although Plaintiff
4 maintains it diligently attempted to identify Defendant by searching for Defendant’s IP
5 address “on various web search tools, including basic search engines like
6 www.google.com,” Plaintiff does not submit evidence supporting this claim. (ECF No. 4-
7 1 at 14.) However, Ms. Kennedy’s Declaration and the MaxMind results attached as
8 Exhibit 1 indicate that Plaintiff took substantial steps to locate Defendant’s IP address
9 and identify Defendant’s ISP. (ECF No. 4-2 at 28–32.) Despite these efforts, Plaintiff was
10 unable to correlate the IP address to Defendant’s identity.

11 Plaintiff maintains that it has been “unable to identify any other way to go about
12 obtaining the identities of its infringers and does not know how else it could possibly
13 enforce its copyrights from illegal piracy over the Internet.” (ECF No. 4-1 at 14.) The
14 Court therefore finds that Plaintiff has made a good faith effort to identify, locate, and
15 serve the Defendant. See Malibu Media, LLC v. John Does 1 through 6, Civil No. 12–cv–
16 1355–LAB (DHB), 2012 WL 4471538, at *3 (S.D. Cal. Sept. 26, 2012) (finding the
17 plaintiff’s efforts to identify Doe defendant were sufficient because “there is no other
18 way for [p]laintiff to obtain [d]efendants’ identities, except by serving a subpoena on
19 [d]efendants’ ISPs demanding it”); see also Digital Sin, Inc. v. Does 1-5698, No. C 11-
20 04397 LB, 2011 WL 5362068, at *2 (N.D. Cal. Nov. 4, 2011) (finding the plaintiff’s
21 attempts to identify and locate the defendant sufficient when the plaintiff “investigated
22 and collected data on unauthorized distribution of copies of the [alleged infringed work]
23 on BitTorrent-based peer-to-peer networks”).

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

25 Plaintiff must further show that the Complaint in this case could withstand a
26 motion to dismiss. See Columbia Ins. Co., 185 F.R.D. at 579. A suit may be dismissed
27 pursuant to Rule 12(b) on several bases. Of all the bases that bear dismissal, those
28 relevant here are lack of subject matter jurisdiction, lack of personal jurisdiction, and

1 failure to state a claim. Fed. R. Civ. P. 12(b)(1), (2), (6). As to both subject matter and
2 personal jurisdiction, Plaintiff has alleged facts sufficient to survive a motion to dismiss.
3 For subject matter jurisdiction, Plaintiff’s Complaint alleges that “[t]his Court has subject
4 matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); and
5 28 U.S.C. § 1338 (jurisdiction over copyright actions).” (ECF No. 1 at 2.) On the issue of
6 personal jurisdiction, Plaintiff maintains it used geolocation technology to determine
7 that Defendant’s IP address correlates to a physical address in San Diego, CA, which falls
8 within the jurisdiction of the Southern District of California. (Id. at 2–3.)

9 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure
10 tests the sufficiency of the allegations in the Complaint. Navarro v. Block, 250 F.3d 729,
11 732 (9th Cir. 2001). Plaintiff’s Complaint alleges a single cause of action against
12 Defendant for direct copyright infringement. (ECF No. 1 at 7–8.) To allege a claim for
13 direct copyright infringement, a plaintiff “must show: (1) ownership of a valid copyright;
14 and (2) that the defendant violated the copyright owner’s exclusive rights under the
15 Copyright Act.” Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004). “In addition,
16 direct infringement requires the plaintiff to show causation (also referred to as
17 ‘volitional conduct’) by the defendant.” Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 657,
18 666 (9th Cir. 2017).

19 Plaintiff alleges it owns the copyrights to the works that are the subject of this suit
20 and claims that the works “have been registered with the United States Copyright
21 Office.” (ECF No. 1 at 7.) Plaintiff also alleges that Defendant “used the BitTorrent file
22 network to illegally download and distribute Plaintiff’s copyrighted motion pictures” and
23 did so “without authorization.” (Id. at 5, 7.) Assuming Plaintiff’s allegations are true,
24 they state a claim on which relief can be granted. See A&M Recs., Inc. v. Napster, Inc.,
25 239 F.3d 1004, 1013-14 (9th Cir. 2001) (finding plaintiffs sufficiently demonstrated
26 ownership and infringement by showing Napster allowed its users to download
27 copyrighted music, up to seventy percent of which was owned or administered by the
28 plaintiffs); see also Malibu Media, LLC v. Doe, Case No. 16CV1916-GPC(JMA), 2016 WL

1 6216183, at *2 (S.D. Cal. Oct. 25, 2016) (holding plaintiff alleged a prima facie case of
2 copyright infringement against defendant by alleging that plaintiff owned twelve
3 copyrighted movies at-issue, and that defendant infringed plaintiff's copyrights by
4 copying and distributing plaintiff's movies through the BitTorrent network without
5 plaintiff's permission). Therefore, Plaintiff has sufficiently alleged a prima facie claim of
6 copyright infringement, and its Complaint will likely withstand a motion to dismiss.

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 23.126.155.167. (ECF No. 4-2 at 20.) Further, Plaintiff submits the declaration of Susan
13 B. Stalzer, who, among other things, states that she used the American Registry for
14 Internet Numbers to determine that the ISP AT&T U-verse owned Defendant's IP
15 address at the time of the infringement. (Id. at 24, 26.) Based on his experience in
16 similar cases, Mr. Paige explains that "AT&T U-verse is the only entity that can
17 correlate" Defendant's IP address to the IP address owner's identity. (Id. at 22.)
18 Accordingly, if AT&T U-verse provides Plaintiff with Defendant's name and address, this
19 will likely lead to information making it possible for Plaintiff to effectuate service on
20 Defendant.

21 **IV. CONCLUSION**

22 For the foregoing reasons, the Court **GRANTS** the Ex Parte Application for Leave
23 to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference [ECF No. 4] as follows:

24 1. Plaintiff may serve a subpoena pursuant to Federal Rule of Civil
25 Procedure 45 on AT&T U-verse, seeking only the name and address of the subscriber
26 assigned to the IP address 23.126.155.167. Plaintiff may not subpoena additional
27 information about the subscriber;

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

3 3. Within fourteen (14) calendar days after service of the subpoena, AT&T U-
4 verse shall notify the subscriber assigned the IP address 23.126.155.167 that his, her, or
5 its identity has been subpoenaed by Plaintiff;

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

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

15 6. Plaintiff shall serve a copy of this Order with any subpoena obtained and
16 served to AT&T U-verse pursuant to this Order;

17 7. AT&T U-verse must provide a copy of this Order along with the required
18 notice to the subscriber whose identity is sought pursuant to this Order.

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

20 **IT IS SO ORDERED.**

21 Dated: November 23, 2021

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24 Honorable Michael S. Berg
25 United States Magistrate Judge
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