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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,  
  
Plaintiff,  
  
v.  
  
JOHN DOE subscriber assigned IP  
address 98.176.36.179,  
  
Defendant.

Case No.: 23-cv-1784-BAS-BGS

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

**[ECF NO. 3]**

For the reasons set forth below, Plaintiff Strike 3 Holdings, LLC’s *Ex Parte* Application for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference is **GRANTED**.

**I. BACKGROUND**

On September 27, 2023, Strike 3 Holdings, LLC (“Plaintiff”) filed its Complaint against Defendant John Doe subscriber assigned Internet Protocol (“IP”) address 98.176.36.179 (“Doe Defendant”) for copyright infringement. (Compl. [ECF No. 1].) On October 17, 2023, Plaintiff filed an *Ex Parte* Application seeking leave to serve a third-party subpoena to ascertain the identity of the Doe Defendant. (*Ex Parte* Appl. [ECF No.

1 3-1].<sup>1</sup>)

2 In its Complaint, Plaintiff asserts that Defendant is liable for direct copyright  
3 infringement. (Compl. ¶¶ 48-53.) Plaintiff alleges that it owns the copyrights for movies  
4 it distributes through adult websites and DVD sales. (*Id.* ¶¶ 3, 14.) Plaintiff alleges Doe  
5 Defendant used BitTorrent, a peer-to-peer file sharing system, to copy and distribute its  
6 movies without consent. (*Id.* ¶¶ 18-47.) As discussed further below, to identify the IP  
7 address that was illegally distributing its works, Plaintiff utilized its proprietary forensic  
8 software, VXN Scan (“VXN”). (*Id.* ¶¶ 28-44.)

9 As it can only identify the Doe Defendant by the IP address used, Plaintiff requests  
10 permission to serve a Federal Rule of Civil Procedure 45 subpoena on the Internet  
11 Service Provider (“ISP”), Cox Communications, that issued the IP address to Doe  
12 Defendant. (*Ex Parte* Appl. [ECF No. 3-1] at 7-8, 17.) The proposed subpoena only  
13 demands the name and address of Doe Defendant, and Plaintiff indicates it will only use  
14 this information to prosecute claims in the Complaint. (*Id.* at 8.)

15 Plaintiff claims good cause exists to grant the *Ex Parte* Application because:  
16 (1) Plaintiff has identified Doe Defendant with sufficient specificity through geolocation  
17 technology and forensic investigation; (2) Plaintiff has identified all previous steps taken  
18 to locate Doe Defendant; (3) Plaintiff’s Complaint could withstand a motion to dismiss;  
19 and (4) Plaintiff has established that there is a reasonable likelihood that Plaintiff can  
20 identify the Doe Defendant and effectuate service. (*Id.* at 11-17.)

## 21 **II. STANDARD OF REVIEW**

22 Absent a court order, discovery is generally not allowed prior to the parties’  
23 Federal Rule of Civil Procedure 26(f) conference. *See* Fed. R. Civ. P. 26(d)(1). Early  
24 discovery to identify a defendant may be warranted given “a plaintiff cannot have a  
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27 <sup>1</sup> The Court cites Plaintiff’s Memorandum of Points and Authorities in Support of  
28 Plaintiff’s *Ex Parte* Application (ECF No. 3-1), with page cites to the numbers affixed by  
the Court’s Case Management/Electronic Case Filing (“CM/ECF”) system.

1 discovery planning conference with an anonymous defendant.” *UMG Recordings, Inc. v.*  
2 *Doe*, No. C-08-03999-RMW, 2008 WL 4104207, at \*2 (N.D. Cal. Sept. 4, 2008). To  
3 determine if early discovery is warranted in a particular case, the court applies a “good  
4 cause” test by weighing the need for discovery to further the administration of justice  
5 against the prejudice it may cause the opposing party. *Semitool, Inc. v. Tokyo Electron*  
6 *Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *see also Strike 3 Holdings, LLC v. Doe*,  
7 No. 17cv2317-JAH (BLM), 2017 WL 6389848, at \*1 (S.D. Cal. Dec. 14, 2017) (citing  
8 *Semitool*, 208 F.R.D. at 274).

9         The Ninth Circuit has held that when a defendant’s identity is unknown at the time  
10 a complaint is filed, courts may grant a plaintiff leave to take early discovery to  
11 determine the defendant’s identity “unless it is clear that discovery would not uncover the  
12 identit[y], or that the complaint would be dismissed on other grounds.” *Gillespie v.*  
13 *Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). In determining whether to grant leave for  
14 early discovery to ascertain a defendant’s identity, district courts consider: (1) whether  
15 the plaintiff can “identify the missing party with sufficient specificity such that the Court  
16 can determine that defendant is a real person or entity who could be sued in federal  
17 court”; (2) whether the plaintiff has described “all previous steps taken to locate the  
18 elusive defendant”; (3) whether the “suit against defendant could withstand a motion to  
19 dismiss”; and (4) whether there “is a reasonable likelihood that the [requested] discovery  
20 process will lead to identifying information about defendant that would make service of  
21 process possible.” *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D.  
22 Cal. 1999).

### 23 **III. DISCUSSION**

#### 24 **A. Identification of the Doe Defendant with Sufficient Specificity**

25         Plaintiff has identified the Doe Defendant with sufficient specificity to enable the  
26 Court to determine if Doe Defendant is a real person, subject to the Court’s jurisdiction.  
27 *Columbia Ins.*, 185 F.R.D. at 578; *see also Distinct Media Ltd. v. Doe Defendants 1-50*,  
28 Case No. 15-cv-3312 NC, 2015 WL 13389609, \*2 (N.D. Cal. Sept. 29, 2015). To

1 determine whether a doe defendant has been identified with sufficient specificity, courts  
2 look to whether a plaintiff provided “the unique IP address[ ] assigned to an individual  
3 defendant on the day of the allegedly infringing conduct” and used “‘geolocation  
4 technology’ to trace the IP addresses to a physical point of origin.” *808 Holdings, LLC v.*  
5 *Collective of Dec. 29, 2011 Sharing Hash*, Case No. 12cv00186 MMA (RBB), 2012 WL  
6 12884688, at \*4 (S.D. Cal. May 8, 2012). Identifying the unique IP address and location  
7 of the IP address has been shown to meet the requirement for identifying a doe defendant  
8 with sufficient specificity. *Id.* (citing cases).

9 Here, Plaintiff has submitted several declarations in support of its request to serve  
10 a Rule 45 subpoena: David Williamson, Plaintiff’s Chief Technology Officer (*Ex Parte*  
11 Appl. Ex. A [ECF No. 3-2 at 1-15] (“Williamson Decl.”); Patrick Paige of Computer  
12 Forensics, LLC, retained to analyze forensic evidence captured by Plaintiff’s  
13 infringement detection system (*Id.* Ex. B [ECF No. 3-2 at 16-22] (“Paige Decl.”); Susan  
14 B. Stalzer, an employee of Plaintiff that verifies infringing files are identical or strikingly  
15 similar to Plaintiff’s works (*Id.* Ex. C [ECF No. 3-2 at 23-26] (“Stalzer Decl.”); and  
16 Emilie Kennedy, Plaintiff’s in-house General Counsel who verifies the infringing IP  
17 address traces to San Diego (*Id.* Ex. D [ECF No. 3-2 at 27-32] (“Kennedy Decl.”).

18 Mr. Williamson’s declaration explains that he “oversaw the design, development,  
19 and overall creation of the infringement detection system called VNX Scan[,] which  
20 [Plaintiff] both owns and uses to identify the IP addresses used by individuals infringing  
21 Plaintiff’s movies via the BitTorrent protocol.” (Williamson Decl. ¶ 40.) One part of the  
22 VNX Scan system involves the development of a proprietary BitTorrent client that  
23 emulates the behavior of a standard BitTorrent client by repeatedly downloading data  
24 pieces from peers within the BitTorrent network that are distributing Plaintiff’s movies.  
25 (*Id.* ¶¶ 52–55.) Mr. Williamson’s declaration also explains that another component of the  
26 VNX Scan system is the Packet Capture (“PCAP”) Recorder that uses a PCAP Capture  
27 Card, which can record the IP addresses connecting to the Proprietary Client and sending  
28 the infringed copies of Plaintiff’s work to the Proprietary Client through the BitTorrent

1 network. (*Id.* ¶¶ 57–59.) A PCAP contains the IP addresses used in the network  
2 transaction, the port number and BitTorrent client used to accomplish each transaction,  
3 and the “Info Hash” associated with the infringing computer file, which identifies the  
4 data that was shared in the recorded transaction as part of the specific digital media file,  
5 *i.e.*, an infringing copy of Plaintiff’s copyrighted works. (*Id.* ¶¶ 61–62.) The PCAP  
6 Capture Card records perfect copies of every network packet received by the Proprietary  
7 Client. (*Id.* ¶ 65.)<sup>2</sup>

8 Mr. Paige’s declaration explains that the VXN Scan recorded numerous BitTorrent  
9 computer transactions with IP address 98.176.36.179 in the form of PCAPs. (Paige Decl.  
10 ¶¶ 13–16.) Mr. Paige then reviewed the PCAP to confirm that it evidences a recorded  
11 transaction with that IP address on September 17, 2023, at 06:00:32 UTC involving the  
12 IP address uploading a piece or pieces of a file corresponding to a specific hash value to  
13 VXN Scan. (*Id.* ¶¶ 16–18.) He then explains that based on his experience in similar cases,  
14 Defendant’s ISP is the only entity that can correlate the identified IP address to its  
15 subscriber to pinpoint Defendant’s identity. (*Id.* ¶ 28.)

16 Ms. Stalzer’s declaration explains that she was provided the digital media files  
17 identified using the VXN Scan’s Torrent Collector and Downloader, she compared them  
18 side-by-side with Plaintiff’s original movies, and she verified they are copies of one of  
19 Plaintiff’s copyrighted works. (Stalzer Decl. ¶¶ 7-11.) And finally, Ms. Kennedy’s  
20 declaration explain that Plaintiff used Maxmind’s Geolocation Database to trace the  
21 infringing IP address to San Diego, California, within this Court’s jurisdiction, prior to  
22 Plaintiff filing its complaint and prior to the filing of her declaration. (Kennedy Decl. ¶¶  
23 4-7.) Exhibit 1, attached to the Kennedy Declaration, indicates the ISP for 98.176.36.179  
24 is Cox Communications. (*Id.*, Ex. 1.)

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28 <sup>2</sup> Mr. Williamson’s declaration sets forth additional in-depth details regarding all  
components of the system.

1 Plaintiff has identified the missing party with such “sufficient specificity” so as to  
2 assure the Court that the Doe Defendant is real, subject to the Court’s jurisdiction, and  
3 able to be sued. *Columbia Ins.*, 185 F.R.D. at 578.

4 **B. Previous Steps Taken to Locate Doe Defendant**

5 Plaintiff has sufficiently described all prior attempts it has made to identify Doe  
6 Defendant. *Id.* at 579. This element is aimed at ensuring that “plaintiffs make a good faith  
7 effort to comply with the requirements of service of process and specifically identify  
8 defendants.” *Id.* In addition to the efforts described above to trace the infringing activity  
9 to the IP address, Plaintiff has asserted that it has searched for Doe Defendant’s IP  
10 address “on various web search tools [and] review[ed] numerous sources of authority,”  
11 including technology guides and agency websites, but has not been able to identify  
12 Defendant. (*Ex Parte Appl.* at 14.) Further, Plaintiff has “discussed the issue at length  
13 with computer investigators and cyber security consultants [and] does not know how else  
14 it could possibly enforce its copyrights from illegal piracy over the Internet.” (*Id.*)  
15 Therefore, the Court finds that Plaintiff has made a good faith effort to identify the Doe  
16 Defendant.

17 **C. Ability to Withstand a Motion to Dismiss**

18 Plaintiff has also demonstrated that its claim could withstand a motion to dismiss.  
19 This requires Plaintiff to “make some showing that an act giving rise to civil liability  
20 actually occurred and that the discovery is aimed at revealing specific identifying features  
21 of the person or entity who committed that act.” *Columbia Ins.*, 185 F.R.D. at 580.

22 A claim may be dismissed pursuant to Rule 12(b) for lack of subject matter  
23 jurisdiction or for failure to state a claim. Fed. R. Civ. P. 12(b)(1), 12(b)(6). To prevail on  
24 a copyright infringement claim, Plaintiff must show: “(1) ownership of a valid copyright;  
25 and (2) that the defendant violated the copyright owner’s exclusive rights under the  
26 Copyright Act.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17  
27 U.S.C. § 501(a)); *see also Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir.  
28 2017). “Direct infringement requires the plaintiff to show causation (also referred to as

1 ‘volitional conduct’) by the defendant.” *Perfect 10*, 847 F.3d at 666.

2 Here, Plaintiff’s Complaint alleges subject matter jurisdiction under 28 U.S.C.  
3 § 1331 (federal question) and 28 U.S.C. § 1338 (jurisdiction over copyright actions).  
4 (Compl. ¶ 7.) Further, Plaintiff provides evidence that it is the exclusive rights holder of  
5 the copyrighted works at issue. (*See* Compl., Ex. A.)<sup>3</sup> Plaintiff alleges that Defendant  
6 infringed Plaintiff’s copyrighted work via the BitTorrent file distribution network.  
7 (Compl. ¶¶ 4, 41-46 & Ex. A.) Plaintiff also alleges that it did not permit or consent to  
8 Doe Defendant’s copying or distribution of this work. (*Id.* ¶ 51.) Accordingly, Plaintiff  
9 has alleged the prima facie elements of direct copyright infringement and could withstand  
10 a motion to dismiss for failure to state a claim. *See Columbia Ins.*, 185 F.R.D. at 579-80.  
11 Additionally, the Court finds the Complaint could withstand a challenge based on  
12 personal jurisdiction or venue. As discussed at length above, Plaintiff has traced the  
13 infringing conduct to this district.

14 **D. Requested Discovery Will Lead to Identifying Information**

15 Finally, Plaintiff has satisfied the last element required in *Columbia Insurance* by  
16 demonstrating the requested discovery will lead to identifying information about Doe  
17 Defendant that would make service of process possible. *Columbia Ins.*, 185 F.R.D. at  
18 580. As explained above, Plaintiff’s investigation has revealed a unique IP address and  
19 based on Maxmind’s geolocation, Plaintiff has identified Cox Communications as the  
20 owner. (*Ex Parte* Appl. at 17.) Because the only entity able to correlate an IP address to a  
21 specific individual is the ISP, Cox Communications, the requested Rule 45 subpoena  
22 would lead to information making service of process possible.

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26 <sup>3</sup> Exhibit A is a chart containing United States Copyright Office registration information,  
27 including registration numbers. In its Complaint, Plaintiff states that it “owns the  
28 copyrights to the Works and the Works have been registered with the United States  
Copyright Office.” (Compl. ¶¶ 42-46.)

1 **IV. CONCLUSION AND ORDER**

2 The *Ex Parte* Application (ECF No. 3) is **GRANTED**. Accordingly, **IT IS**  
3 **HEREBY ORDERED** that:

4 1. Plaintiff may serve Cox Communications with a Rule 45 subpoena  
5 commanding the ISP to provide Plaintiff with the true name and address of the subscriber  
6 assigned the IP address 98.176.36.179. Plaintiff may not subpoena additional information  
7 about the subscriber and Plaintiff may only use the disclosed information to protect its  
8 copyrights in pursuing this litigation.

9 2. Plaintiff shall attach a copy of this Order to any Rule 45 subpoena issued  
10 pursuant to this Order and the ISP must also provide a copy of this Order along with the  
11 required notice to the subscriber whose identity is sought.

12 3. Within **fourteen (14) calendar days** after the service of the subpoena, the  
13 ISP shall notify the subscriber that their identity has been subpoenaed by Plaintiff.

14 4. The subscriber whose identity has been subpoenaed shall have **thirty (30)**  
15 **calendar days** from the date of such notice to seek a protective order or challenge the  
16 disclosure by filing an appropriate pleading with this Court contesting the subpoena. The  
17 subscriber may proceed anonymously as a Doe Defendant until the Court orders  
18 otherwise.<sup>4</sup>

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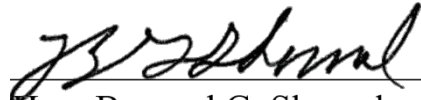
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28 <sup>4</sup> Plaintiff's *Ex Parte* Application specifically states that Plaintiff is not opposed and "in fact welcomes" allowing Defendant to proceed anonymously. (*Ex Parte* Appl. at 18.)



1           5.     If the ISP wishes to move to quash the subpoena, it shall do so before the  
2 return date of the subpoena. The return date of the subpoena must allow for **forty-five**  
3 **(45) calendar days** from service to production. If a motion to quash or other customer  
4 challenge is brought, the ISP shall preserve the information sought by Plaintiff in the  
5 subpoena pending resolution of such motion or challenge.

6           **IT IS SO ORDERED.**

7 Dated: November 29, 2023

8   
9 Hon. Bernard G. Skomal  
United States Magistrate Judge

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