

United States District Court
Northern District of California

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
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

STRIKE 3 HOLDINGS, LLC,
Plaintiff,

v.

JOHN DOE SUBSCRIBER ASSIGNED IP
ADDRESS 136.24.50.239,
Defendant.

Case No. 3:21-cv-08611-LB

**ORDER GRANTING EX PARTE
APPLICATION FOR LEAVE TO
SERVE THIRD-PARTY SUBPOENA**

Re: ECF No. 8

INTRODUCTION

The plaintiff Strike 3 Holdings owns the copyrights for several adult motion pictures.¹ It alleges that someone — the Doe defendant here — who uses the IP address 136.24.50.239 infringed on those copyrights.² Despite its own efforts, Strike 3 has not been able to identify the individual associated with that IP address.³ Strike 3 now asks the court to let it serve a subpoena on non-party Webpass, the Doe defendant’s internet-service provider (ISP), to learn the Doe

¹ Appl. – ECF No. 8 at 9. Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

² Compl. – ECF No. 1 at 2 (¶¶ 4–5).

³ Appl. – ECF No. 8 at 10.

1 defendant's identity.⁴ Because Strike 3 has demonstrated that good cause exists to allow it to serve
2 a subpoena, the court grants the motion.

3 4 STATEMENT

5 Strike 3 is the owner of several adult motion pictures distributed through its adult brands
6 *Blacked, Tushy, Vixen, and Blacked Raw*.⁵ The motion pictures are registered with the United
7 States Copyright Office.⁶

8 The Doe defendant, who uses the Webpass-provided IP address 136.24.50.239, used the file
9 distribution network known as "BitTorrent" to illegally download and distribute Strike 3's
10 copyrighted movies.⁷ Through geolocation technology, Strike 3 has traced each download made to
11 the Doe defendant's IP address to a physical address in the Northern District of California.⁸ Using
12 a proprietary infringement detection system called "VXN Scan," Strike 3 established direct
13 "TCP/IP" connections with the defendant's IP address while the defendant was using BitTorrent.⁹
14 VXN Scan downloaded media files containing a digital copy of Strike 3's copyrighted movies
15 from the defendant.¹⁰ The "Info Hash" — the data that BitTorrent protocol uses to identify media
16 files across the BitTorrent network — confirmed that the files that VXN Scan downloaded were
17 downloaded from the defendant.¹¹ The defendant "has been recorded infringing 47 movies over an
18 extended period of time."¹² Strike 3 did not give the defendant authorization to distribute its
19
20
21

22 ⁴ See generally Appl. – ECF No. 8.

23 ⁵ Compl. – ECF No. 1 at 1–2 (¶¶ 2–3).

24 ⁶ *Id.* at 6 (¶ 46).

25 ⁷ *Id.* at 2 (¶¶ 4–5).

26 ⁸ *Id.* (¶ 9).

27 ⁹ *Id.* at 5 (¶ 30).

28 ¹⁰ *Id.* (¶¶ 31–32).

¹¹ *Id.* at 5–6 (¶ 36).

¹² *Id.* at 2 (¶ 4).

1 copyrighted movies.¹³ Strike 3 alleges that Webpass can identify the defendant through his or her
2 IP address.¹⁴

3 On November 4, 2021, Strike 3 filed a complaint against the Doe defendant alleging one claim
4 for copyright infringement under the Copyright Act.¹⁵ On November 10, 2021, Strike 3 filed an ex
5 parte application asking the court to allow it to serve Webpass with a subpoena under Federal Rule
6 of Civil Procedure 45.¹⁶ Strike 3 says that the subpoena will be limited to the name and address of
7 the individual/individuals associated with the Doe defendant's IP address.¹⁷

8

9 GOVERNING LAW

10 A court may authorize early discovery before the Rule 26(f) conference for the parties' and
11 witnesses' convenience and in the interests of justice. Fed. R. Civ. P. 26(d). Courts within the
12 Ninth Circuit generally consider whether a plaintiff has shown "good cause" for early discovery.
13 *See, e.g., IO Grp., Inc. v. Does 1–65*, No. 10-4377 SC, 2010 WL 4055667, at *2 (N.D. Cal. Oct.
14 15, 2010); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–77 (N.D. Cal. 2002);
15 *Tex. Guaranteed Student Loan Corp. v. Dhindsa*, No. 1:10-cv-00335-LJO-SKO, 2010 WL
16 2353520, at *2 (E.D. Cal. June 9, 2010); *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202
17 F.R.D. 612, 613–14 (D. Ariz. 2001) (collecting cases and standards). "Good cause may be found
18 where the need for expedited discovery, in consideration of the administration of justice,
19 outweighs the prejudice to the responding party." *Semitool*, 208 F.R.D. at 276.

20 In evaluating whether a plaintiff establishes good cause to learn the identity of a Doe
21 defendant through early discovery, courts examine whether the plaintiff: (1) identifies the Doe
22 defendant with sufficient specificity that the court can determine that the defendant is a real person
23 who can be sued in federal court, (2) recounts the steps taken to locate and identify the defendant,

24

25 ¹³ Compl. – ECF No. 1 at 6 (¶ 44).

26 ¹⁴ *Id.* at 2 (¶ 5).

27 ¹⁵ *Id.* at 6–7 (¶¶ 48–52).

28 ¹⁶ Appl. – ECF No. 8 at 10.

¹⁷ *Id.*

1 (3) demonstrates that the action can withstand a motion to dismiss, and (4) shows that the
 2 discovery is reasonably likely to lead to identifying information that will permit service of process.
 3 *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999) (citations omitted).
 4 “[W]here the identity of alleged defendants [is not] known prior to the filing of a complaint[,] the
 5 plaintiff should be given an opportunity through discovery to identify the unknown defendants,
 6 unless it is clear that discovery would not uncover the identities, or that the complaint would be
 7 dismissed on other grounds.” *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999)
 8 (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)).

10 ANALYSIS

11 1. Strike 3 Establishes Good Cause for Early Discovery

12 Strike 3 has made a sufficient showing under each of the four *seescandy* factors listed above to
 13 establish good cause to permit it to engage in early discovery to identify the Doe defendant.

14 First, Strike 3 has identified the Doe defendant with sufficient specificity that the court can
 15 determine that he or she is a real person who can be sued in federal court. It alleges that the Doe
 16 defendant downloaded Strike 3’s copyrighted adult motion pictures and distributed them over the
 17 BitTorrent network.¹⁸ To download the movie, the Doe defendant had to direct his or her
 18 BitTorrent client to download the media file.¹⁹ These facts indicate that the Doe defendant is an
 19 identifiable adult who likely is the primary subscriber of the IP address or someone who resides
 20 with and is known to the subscriber. Strike 3 also has traced each download made to the Doe
 21 defendant’s IP address to the Northern District of California, thus giving the court jurisdiction
 22 over the defendant and Strike 3’s federal claim.²⁰

23 Second, Strike 3 has recounted the steps taken to locate and identify the Doe defendant. The
 24 Doe defendant downloaded and distributed Strike 3’s movies through his or her IP address, and

26 _____
 27 ¹⁸ Compl. – ECF No. 1 at 2 (¶ 4).

¹⁹ Appl. – ECF No. 8 at 16.

²⁰ Compl. – ECF No. 1 at 2 (¶ 4).

1 his or her IP address was traced to this district.²¹ The IP address is not sufficient for Strike 3 to
 2 identify the Doe defendant.²²

3 Third, Strike 3 has demonstrated that its copyright claim could withstand a motion to dismiss.
 4 A plaintiff “must satisfy two requirements to present a prima facie case of direct infringement:
 5 (1) [he or she] must show ownership of the allegedly infringed material and (2) [he or she] must
 6 demonstrate that the alleged infringers violate at least one exclusive right granted to copyright
 7 holders under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th
 8 Cir. 2007) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)); *see*
 9 17 U.S.C. § 501(a). Under Section 106, a copyright holder has the exclusive rights to reproduce,
 10 distribute, publicly display, perform, and create derivative works of the copyrighted work. Direct
 11 copyright infringement does not require intent or any particular state of mind. *Fox Broad. Co., Inc.*
 12 *v. Dish Network, LLC*, 905 F. Supp. 2d 1088, 1098–99 (C.D. Cal. 2012); *Religious Tech. Ctr. v.*
 13 *Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995). Strike 3 alleges
 14 that it holds the copyrights for the adult motion pictures that the Doe defendant downloaded (and
 15 thus copied) and distributed the movies without its permission.²³ Strike 3 has sufficiently alleged a
 16 prima facie claim for copyright infringement.

17 Fourth, Strike 3 has shown that the discovery it seeks is reasonably likely to lead to identifying
 18 information that will permit service of process on the Doe defendant. Strike 3 alleges that the Doe
 19 Defendant’s ISP, Webpass can identify the Doe defendant through his or her IP address.²⁴

20 21 **2. Protective Order**

22 “[U]nder Rule 26(c), the Court may *sua sponte* grant a protective order for good cause
 23 shown.” *McCoy v. Sw. Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D. Cal. 2002). The court issues
 24

25
26 ²¹ Compl. – ECF No. 1 at 2 (¶¶ 9–10).

27 ²² Appl. – ECF No. 8 at 14.

28 ²³ Compl. – ECF No. 1 at 6 (¶¶ 44, 46).

²⁴ Compl. – ECF No. 1 at 6 (¶¶ 44, 46).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.