

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

STRIKE 3 HOLDINGS, LLC,
Plaintiff,
v.
JOHN DOE SUBSCRIBER ASSIGNED IP
ADDRESS 99.103.198.213,
Defendant.

Case No. [23-cv-04951-PHK](#)

**ORDER (1) GRANTING STRIKE 3
HOLDINGS, LLC'S *EX PARTE*
APPLICATION FOR LEAVE TO
SERVE THIRD-PARTY SUBPOENA
AND (2) ISSUING PROTECTIVE
ORDER**

Re: Dkt. No. 8

Now before the Court is Plaintiff Strike 3 Holdings, LLC's ("Strike 3") *Ex Parte* Application for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference. [Dkt. 8]. Because Defendant John Doe, subscriber assigned IP address number 99.103.198.213, ("Defendant Doe") has not been identified or served, no opposition has been filed. Having reviewed Strike 3's application and all supporting documents, the Court **GRANTS** the *ex parte* application. Further, on the Court's own motion, the Court additionally **ISSUES** a limited Protective Order for the reasons set forth below.

BACKGROUND

Strike 3 alleges that it is the assignee of copyrights registered with the U.S. Copyright Office to certain adult motion pictures distributed through various adult websites and DVD sales. *See* Dkt. 1 at 1, 6. Strike 3 indicates it is a Delaware corporation located in Camden, Delaware. *Id.* at ¶ 12.

1 Protocol (“IP”) address. [Dkt. 1]. “An IP address is a ‘unique numerical address’ assigned to every
2 computer and can serve as its identifying characteristic.” *United States v. Henderson*, 906 F.3d
3 1109, 1111 n.1 (9th Cir. 2018). An IP address is not a physical address but instead is a unique
4 identifier for every computer or server connected to the Internet. *United States v. Forrester*, 512
5 F.3d 500, 510 n.5 (9th Cir. 2008). As is well-known, consumers and households connect their home
6 computers and other devices to the Internet by subscribing to such service through a vendor called
7 an internet service provider (“ISP”), often a cable company, telecommunications company, or other
8 similar service provider. *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545
9 U.S. 967, 974 (2005) (“The traditional means by which consumers in the United States access the
10 network of interconnected computers that make up the Internet is through ‘dial-up’ connections
11 provided over local telephone facilities. Using these connections, consumers access the Internet by
12 making calls with computer modems through the telephone wires owned by local phone companies.
13 Internet service providers (ISPs), in turn, link those calls to the Internet network, not only by
14 providing a physical connection, but also by offering consumers the ability to translate raw Internet
15 data into information they may both view on their personal computers and transmit to other
16 computers connected to the Internet.”) (citations omitted).

17 When a subscriber (or consumer) signs up for Internet service, the ISP assigns an IP address
18 to that subscriber – essentially renting out the IP address to the consumer for the duration of their
19 subscription service period. *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 575 (N.D. Cal.
20 1999) (“On the Internet, computers find each other by reference to Internet Protocol (IP) addresses,
21 which are a series of numbers that are used to specify the address of a particular machine connected
22 to the Internet. Domain names are alphanumeric strings that are associated with particular IP
23 addresses. Thus to find the computer at 129.99.135.66, a user might type in uscourts.gov, and would
24 never need to know the actual IP address.”). The consumer does not own the IP address – it is
25 controlled by the ISP and designated to subscribers as they sign up for service. *UMG Recordings,
26 Inc. v. Doe*, No. 08-cv-1193-SBA, 2008 WL 4104214, at *2 (N.D. Cal. Sept. 3, 2008) (“[W]hen an
27 ISP is given a defendant’s IP address and the date and time of infringement, it quickly and easily
28 can identify the name and address of a Defendant in the ISP’s subscriber database.”)

1 information is contained in the ISP’s subscriber activity log files.”) (citation omitted). Because the
2 ISP sends monthly or regular bills to the subscriber and has the original service application
3 documents from each subscriber, and because the ISP knows which of its IP addresses were assigned
4 to which customers, it follows that an ISP’s internal records should typically include information
5 sufficient to link a customer with the account corresponding to a particular IP address. *Id.*

6 Here, Strike 3 avers that it traced the IP address used by Defendant Doe’s device to a physical
7 address in the Northern District of California using a geolocation tool developed by a vendor called
8 Maxmind, Inc. (“Maxmind”). [Dkt. 1 at ¶ 9; Dkt. 8 at 17]. Using Maxmind, Strike 3 avers that it
9 identified Defendant Doe in this case as a subscriber using assigned IP address 99.103.198.213. *See*
10 Dkt. 1 at ¶ 9; Dkt. 8 at 17. Further, Strike 3 alleges, from information obtained by Maxmind, that
11 AT&T, Inc. (“AT&T”) is the ISP for and owner of the IP address to which Defendant Doe here
12 subscribes. *Id.*

13 Defendant Doe is accused of using an internet-connected device and a file distribution
14 network called BitTorrent to download and distribute, through the internet, copies of Strike 3’s
15 copyrighted motion pictures without license or authorization. *See* Dkt. 1 at ¶¶ 18–44. BitTorrent is
16 a protocol for sharing electronic files (such as digitized film files) directly between individuals’
17 internet-connected devices. *UMG Recordings*, 2008 WL 4104214 at *1 (“The Internet and peer-to-
18 peer (P2P) networks have spawned an illegal trade in copyrighted works. By downloading P2P
19 software, and logging onto a P2P network, an individual may upload (distribute) or download
20 (copy), without authorization, countless copyrighted music and video files to or from any other P2P
21 network user worldwide. [. . .] [S]imilar online media distribution systems emerged that have
22 attempted to capitalize on the growing illegal market that Napster fostered. These include Ares,
23 KaZaA, eDonkey, BitTorrent, DirectConnect, and Gnutella, among others.”) (citations and footnote
24 omitted). Strike 3 alleges that Defendant Doe used BitTorrent for “downloading Strike 3’s motion
25 pictures as well as distributing them to others[]” and “has been recorded infringing 56 movies over
26 an extended period of time.” *See* Dkt. 1 at ¶ 4.

27 As a further part of its investigation, Strike 3 alleges it is the owner and operator of an

28 investigating technology tool called “VXN Scan.” *Id.* at ¶ 28. Using VXN Scan, Strike 3 alleges it

1 established direct communication connections over the internet (using a “TCP/IP” (or Transmission
2 Control Protocol/Internet Protocol) connection) between Strike 3’s investigators’ computers and
3 Defendant Doe’s device (which was connected to the internet at the IP address named in the
4 Complaint) during a time period when Defendant Doe’s device was connected to the internet and
5 was using BitTorrent. *Id.* at ¶ 30. According to the Complaint, VXN Scan searches for and obtains
6 “.torrent” files from the target device and then downloads complete copies of the digital media files
7 that correlate to those “.torrent” files to determine whether those downloaded files are infringing
8 copies of one of Strike 3’s copyrighted works. *Id.* at ¶¶ 25–33. Strike 3 further alleges that VXN
9 Scan used metadata called the “Info Hash” value from a .torrent file downloaded from Defendant
10 Doe’s device to download a portion of the same digital media file directly from Defendant Doe’s
11 device via the BitTorrent network (thus essentially emulating the distribution of digital film files
12 from Defendant Doe to another BitTorrent user via the internet). *Id.* at ¶ 36. A comparison of the
13 digital media files apparently revealed that Defendant Doe downloaded and distributed copies of
14 portions of Strike 3’s copyrighted works without authorization. *Id.* at ¶¶ 35–44.

15 Based on these forgoing allegations, on September 26, 2023, Strike 3 filed its Complaint
16 against Defendant Doe alleging copyright infringement under the Copyright Act. *See* Dkt. 1. On
17 October 18, 2023, Strike 3 filed the instant *ex parte* application requesting leave to serve AT&T
18 with a subpoena under Fed. R. Civ. P. 45. [Dkt. 8]. Strike 3 represents that the requested subpoena
19 will be limited to seeking from AT&T the name and physical address of the individual(s) having the
20 account associated with Defendant Doe’s IP address of 99.103.198.213. *Id.*

21 DISCUSSION

22 I. LEAVE TO SERVE AN EARLY, LIMITED SUBPOENA ON AT&T.

23 Pursuant to Rule 26(d)(1), a party may not seek discovery from any source prior to the
24 parties’ conference required by Rule 26(f). However, per Rule 26(d)(1), the Court has authority to
25 allow discovery prior to the Rule 26(f) conference and thus outside this timing limitation. *See also*
26 Fed. R. Civ. P. 26 advisory committee’s note (1993) (“Discovery can begin earlier if authorized . . .
27 by local rule, order, or stipulation. This will be appropriate in some cases[.]”)

28

1 The Court may authorize early discovery before the Rule 26(f) conference if the requesting
2 party establishes “good cause” for the early discovery. *Semitool, Inc. v. Tokyo Electron Am. Inc.*,
3 208 F.R.D. 273, 276 (N.D. Cal. 2002). “Good cause may be found where the need for expedited
4 discovery, in consideration of the administration of justice, outweighs prejudice to the responding
5 party.” *Id.*

6 As with all discovery matters, “Rule 26 vests the trial judge with broad discretion to tailor
7 discovery narrowly and to dictate the sequence of discovery.” *Crawford-El v. Britton*, 523 U.S.
8 574, 598 (1998). “And the court may also set the timing and sequence of discovery.” *Id.* at 599
9 (citing Fed. R. Civ. P. 26(d)). Thus, the decision whether or not to grant early discovery under Rule
10 26(d) is within the Court’s discretion. *Quinn v. Anvil Corp.*, 620 F.3d 1005, 1015 (9th Cir. 2010)
11 (“We review district court rulings on discovery matters for abuse of discretion.”). Further, a
12 decision to deny early discovery under Rule 26(d) “will not be disturbed except upon the clearest
13 showing that denial of discovery results in actual and substantial prejudice to the complaining
14 litigant.” *Med Vets, Inc. v. VIP Petcare Holdings, Inc.*, 811 F. App’x 422, 424 (9th Cir. 2020)
15 (quoting *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)). In evaluating a motion for expedited
16 discovery, the District Court in *Med Vets* considered the following factors to determine whether
17 good cause exists to justify the requested early discovery: (1) whether a preliminary injunction is
18 pending; (2) the breadth of the discovery request; (3) the purpose for requesting the expedited
19 discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance
20 of the typical discovery process the request was made. *Med Vets, Inc. v. VIP Petcare Holdings,*
21 *Inc.*, No. 18-CV-02054-MMC, [Dkt. 45] at *3 (N.D. Cal. Nov. 28, 2018) (quoting *Rovio Ent. Ltd.*
22 *v. Royal Plush Toys, Inc.*, 907 F. Supp. 1086, 1099 (N.D. Cal. 2012)). The Ninth Circuit affirmed
23 the District Court’s decision on the request for expedited discovery. *Med Vets*, 811 F. App’x at 424.

24 A request for early discovery, such as the instant *ex parte* application, may arise particularly
25 in a case involving alleged wrongful conduct in connection with use of the internet. As discussed
26 by precedent:

27 With the rise of the Internet has come the ability to commit certain tortious acts,
28 such as defamation, copyright infringement, and trademark infringement, entirely

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