

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 107.130.100.9,
Defendant.

Case No. 23-cv-05494-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 107.130.100.9, (“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.

Defendant Doe was named in the Complaint solely in connection with a specific Internet Protocol (“IP”) address. [Dkt. 1]. “An IP address is a ‘unique numerical address’ assigned to every computer and can serve as its identifying characteristic.” *United States v. Henderson*, 906 F.3d 1100, 1111 n.1 (9th Cir. 2018). An IP address is not a physical address but instead is a unique

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

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

28 documents from each subscriber and because the ISP knows which site IP address corresponds to

1 to which customers, it follows that an ISP's internal records should typically include information
2 sufficient to link a customer with the account corresponding to a particular IP address. *Id.*

3 Here, Strike 3 avers that it traced the IP address used by Defendant Doe's device to a physical
4 address in the Northern District of California using a geolocation tool developed by a vendor called
5 Maxmind, Inc. ("Maxmind"). [Dkt. 1 at ¶ 9; Dkt. 8 at 17]. Using Maxmind, Strike 3 avers that it
6 identified Defendant Doe in this case as a subscriber using assigned IP address 107.130.100.9. *See*
7 Dkt. 1 at ¶ 9; Dkt. 8 at 17. Further, Strike 3 alleges, from information obtained by Maxmind, that
8 AT&T Internet ("AT&T") is the ISP for and owner of the IP address which was allocated to
9 Defendant Doe as part of their subscription for internet service from AT&T. [Dkt. 8 at 9].

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

25 As a further part of its investigation, Strike 3 alleges it is the owner and operator of an
26 investigative technology tool called "VXN Scan." *Id.* at ¶ 28. Using VXN Scan, Strike 3 allegedly
27 established direct communication connections over the internet (using a "TCP/IP" (or Transmission
28 Control Protocol/Internet Protocol) connection) between Strike 3's investigators' computers and

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

14 Based on these foregoing allegations, on October 25, 2023, Strike 3 filed its Complaint
15 against Defendant Doe alleging copyright infringement under the Copyright Act. *See* Dkt. 1. On
16 November 9, 2023, Strike 3 filed the instant *ex parte* application requesting leave to serve AT&T
17 with a subpoena under Fed. R. Civ. P. 45. [Dkt. 8]. Strike 3 alleges that AT&T has the ability to
18 identify Defendant Doe through the IP address discovered by the investigation discussed herein,
19 because Maxmind’s geolocation service has identified AT&T as the owner of the IP address named
20 in the Complaint. *Id.* at 17. Strike 3 represents that the requested subpoena will be limited to seeking
21 from AT&T the name and physical address of the individual(s) having the account associated with
22 Defendant Doe’s IP address of 107.130.100.9. *Id.*

DISCUSSION

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

25 Pursuant to Rule 26(d)(1), a party may not seek discovery from any source prior to the
26 parties’ conference required by Rule 26(f). However, per Rule 26(d)(1), the Court has authority to
27 allow discovery prior to the Rule 26(f) conference and thus outside this timing limitation. *See also*
28 Fed. R. Civ. P. 26 advisory committee’s note (1992) (“Discovery can begin earlier if authorized

1 . by local rule, order, or stipulation. This will be appropriate in some cases[.]”).

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

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

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

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.