

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**STRIKE 3 HOLDINGS, LLC,**

Plaintiff,

vs.

**JOHN DOE SUBSCRIBER ASSIGNED IP  
ADDRESS 98.248.99.184,**

Defendant.

CASE NO. 19-cv-03847-YGR

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

Re: Dkt. No. 7

Now before the Court is plaintiff Strike 3 Holdings, LLC's *Ex Parte* Application for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference. (Dkt. No. 7 ("Motion").) Because defendant John Doe subscriber assigned IP address 98.248.99.184 (herein "Doe defendant") has not been identified or served, no opposition has been filed. Having reviewed plaintiff's motion and all supporting documents, the Court **GRANTS** the motion for the reasons set forth below.

**I. BACKGROUND**

Plaintiff alleges that it is the owner of several "award winning, critically acclaimed adult motion pictures" distributed through its adult brands *Blacked*, *Blacked Raw*, *Tushy*, and *Vixen*. (Dkt. No. 1 ("Compl.") ¶¶ 2, 3.) The motion pictures are registered with the United States Copyright Office or have complete applications pending. (*Id.* ¶¶ 32, 33.)

On July 3, 2019, plaintiff filed a complaint against Doe defendant, who uses the IP address 98.248.99.184, alleging one claim for copyright infringement under the Copyright Act. (*Id.* ¶¶ 35–40.) Plaintiff alleges that Doe defendant has illegally infringed and distributed 65 of its copyrighted movies over the BitTorrent File Distribution Network for an extended period of time. (*Id.* ¶¶ 4, 24.) Plaintiff describes the BitTorrent network as a "system designed to quickly

1 who “attempted to hide this theft by infringing [p]laintiff’s content anonymously,” can be  
 2 identified by his or her Internet Service Provider (“ISP”), Comcast Cable Communications, LLC  
 3 (“Comcast Cable”), through his or her IP address 98.248.99.184. (*Id.* ¶ 5.)

4 On July 24, 2019, plaintiff filed the instant *ex parte* motion asking the Court for leave to  
 5 serve Comcast Cable with a subpoena under Federal Rule of Civil Procedure 45. (Motion at 2.)  
 6 Plaintiff states that the subpoena will be limited to demanding the name and address of the  
 7 individual(s) associated with Doe defendant’s IP address. (*Id.*)

## 8 II. LEGAL FRAMEWORK

9 A court may authorize early discovery before the Rule 26(f) conference for the parties’ and  
 10 witnesses’ convenience and in the interests of justice. Fed. R. Civ. P. 26(d). Courts within the  
 11 Ninth Circuit generally consider whether a plaintiff has shown “good cause” for early discovery.  
 12 *See, e.g., Strike 3 Holdings, LLC v. Doe*, No. 18CV232 GPC (BGS), 2018 WL 2329726, at \*2  
 13 (S.D. Cal. May 22, 2018); *Strike 3 Holdings, LLC v. Doe*, 18cv47-WQH (RBB), 2018 WL  
 14 1427002, at \*2 (S.D. Cal. Mar. 22, 2018); *Strike 3 Holdings, LLC v. Doe*, No. 17-CV-07051-LB,  
 15 2018 WL 357287, at \*2 (N.D. Cal. Jan. 10, 2018); *Io Grp., Inc. v. Does 1-65*, No. 10-4377 SC,  
 16 2010 WL 4055667, at \*1 (N.D. Cal. Oct. 15, 2010); *Semitool, Inc. v. Tokyo Electron Am., Inc.*,  
 17 208 F.R.D. 273, 275 (N.D. Cal. 2002). “Good cause may be found where the need for expedited  
 18 discovery, in consideration of the administration of justice, outweighs the prejudice to the  
 19 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 such that the court can determine that the defendant is a real  
 23 person who can be sued in federal court; (2) recounts the steps taken to locate and identify the  
 24 defendant; (3) demonstrates that the action can withstand a motion to dismiss; and (4) shows that  
 25 the discovery is reasonably likely to lead to identifying information that will permit service of  
 26 process. *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999).

27 “[W]here the identity of alleged defendants [is not] known prior to the filing of a complaint[,] the

1 unless it is clear that discovery would not uncover the identities, or that the complaint would be  
 2 dismissed on other grounds.” *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (some  
 3 modifications in original) (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)).

### 4 **III. DISCUSSION**

#### 5 **A. Whether Plaintiff Establishes Good Cause for Early Discovery**

6 The Court addresses the four *seescandy.com* factors in turn.

##### 7 *1. Identification of Doe Defendant with Sufficient Specificity*

8 First, plaintiff has the burden to identify Doe defendant with enough specificity to establish  
 9 that Doe defendant is a real person subject to the Court’s jurisdiction. “[A] plaintiff identifies Doe  
 10 defendants with sufficient specificity by providing the unique IP addresses assigned to an  
 11 individual defendant on the day of the allegedly infringing conduct, and by using ‘geolocation  
 12 technology’ to trace the IP address to a physical point of origin.” *808 Holdings, LLC v. Collective*  
 13 *of Dec. 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C D63C23C91*, No.  
 14 *12cv000186 MMA(RBB)*, 2012 WL 12884688, at \*4 (S.D. Cal. May 8, 2012).

15 Plaintiff has provided a declaration stating that it retained IPP International UG (“IPP”), a  
 16 company that “monitors the BitTorrent file distribution network for the presence of copyrighted  
 17 works” and uses software to “identif[y] Internet Protocol (‘IP’) addresses that are being used by  
 18 infringers to distribute copyrighted works within the BitTorrent File Distribution Network” to  
 19 compile data relating to the IP address at issue. (Dkt. No. 7-1, Ex. B at ECF 9-11, Declaration of  
 20 Tobias Fieser ISO Plaintiff’s *Ex Parte* Application (“Fieser Decl.”) ¶ 5.) IPP determined that Doe  
 21 defendant’s IP address, 98.248.99.184, distributed multiple pieces of plaintiff’s copyrighted  
 22 movies (*see* Dkt. No. 1-1) and that the address “is associated with significant long term BitTorrent  
 23 use.” (Fieser Decl. ¶ 12.) The movie pieces were recorded in a “packet capture” (“PCAP”), a  
 24 forensically sound interface for recording network traffic that records the time which correlates to  
 25 assignment logs maintained by ISPs in the United States to track which IP address is assigned to  
 26 which customer at any given time. (*Id.* ¶ 8.) Mr. Fieser explains that digital files can be identified  
 27 by their “Cryptographic Hash Value[s]” and that IPP was able to determine that the files being

1 outlined on Exhibit A [to plaintiff's complaint]." (*Id.* ¶ 10.)

2 Plaintiff also retained Philip Pasquale, a tech advisor with 7 River Systems, LLC, a  
3 "Maryland based cyber security firm specializing in network security, data breaches, and the  
4 protection of secured information transmitted across networks." (Dkt. No. 7-1, Ex. C at ECF 13-  
5 15, Declaration of Philip Pasquale ISO Plaintiff's *Ex Parte* Application ("Pasquale Decl.") ¶ 3.)  
6 Mr. Pasquale was retained to "analyze and retain forensic evidence captured by [IPP]." (*Id.* ¶ 6.)  
7 He used a program named Wireshark to view the contents of the PCAP provided by IPP and  
8 confirmed that IPP recorded a transaction with IP address 98.248.99.184 on May 14, 2019 at  
9 12:22:20 UTC. (*Id.* ¶¶ 8, 9.) Mr. Pasquale notes that based on his experience, "[Doe]  
10 [d]efendant's ISP Comcast Cable is the only entity that can correlate the IP address to its  
11 subscriber and identify [Doe] [d]efendant as the person assigned the IP address 98.248.99.184  
12 during the time of the alleged infringement." (*Id.* ¶ 10.)

13 In its complaint, plaintiff further explains that it used "IP address geolocation by Maxmind  
14 Inc. ('Maxmind'), an industry-leading provider of IP address intelligence and online fraud  
15 detection tools, to determine that [Doe] [d]efendant's IP address traced to a physical address in  
16 this District." (Compl. ¶ 9.)

17 Because plaintiff has provided the Court with the unique IP address and the dates and  
18 times of connection, the name of the ISP that provided Internet access for the user of the identified  
19 IP address, and used geolocation technology, the Court finds that plaintiff has made a satisfactory  
20 showing that Doe defendant is a real person behind the alleged infringing conduct who would be  
21 subject to suit in federal court.

## 22 2. *Previous Steps Taken to Locate and Identify Doe Defendant*

23 To obtain leave to take early discovery, plaintiff is also required to describe the steps taken  
24 to locate and identify Doe defendant. Plaintiff searched for Doe defendant's IP address using  
25 "various web search tools" and reviewed numerous sources such as "legislative reports, agency  
26 websites, informational technology guides, governing case law, etc." (Motion at 10-11.) Plaintiff  
27 also retained an investigator to identify the IP address of BitTorrent users who were allegedly

1 Pasquale Decl.) Although plaintiff's investigator obtained Doe defendant's IP address, "Comcast  
2 Cable is the only entity that can correlate the IP address to its subscriber and identify [Doe]  
3 [d]efendant as the person assigned the IP address 98.248.99.184." (Pasquale Decl. ¶ 10.) The  
4 Court therefore finds that plaintiff has made a good faith effort to locate and identify Doe  
5 defendant.

### 6 3. *Ability to Withstand a Motion to Dismiss*

7 Plaintiff must also show that its copyright claim could withstand a motion to dismiss. A  
8 plaintiff "must satisfy two requirements to present a prima facie case of direct infringement: (1)  
9 [he or she] must show ownership of the allegedly infringed material and (2) [he or she] must  
10 demonstrate that the alleged infringers violate at least one exclusive right granted to copyright  
11 holders under 17 U.S.C. § 106." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th  
12 Cir. 2007) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)); *see*  
13 *also* 17 U.S.C. § 501(a). Under Section 106, a copyright holder has the exclusive rights to  
14 reproduce, distribute, publicly display, perform, and create derivative works of the copyrighted  
15 work. Direct copyright infringement does not require intent or any particular state of mind. *Fox*  
16 *Broad. Co. Inc. v. Dish Network, LLC*, 905 F. Supp. 2d 1088, 1098–99 (C.D. Cal. 2012); *Religious*  
17 *Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

18 Plaintiff alleges that it holds the copyrights for the adult motion pictures that Doe  
19 defendant downloaded (and thus copied) and distributed without plaintiff's permission. (Compl.  
20 ¶¶ 36–38.) Accordingly, plaintiff has sufficiently alleged a prima facie claim for direct copyright  
21 infringement and could withstand a motion to dismiss.

### 22 4. *Whether Requested Discovery Will Lead to Identifying Information*

23 Finally, plaintiff is required to demonstrate that the discovery it seeks is reasonably likely  
24 to lead to identifying information that will permit service of process on Doe defendant. As  
25 explained above, plaintiff's investigation has revealed a unique IP address. Because the only  
26 entity able to correlate the IP address to a specific individual is Comcast Cable, the requested Rule  
27 45 subpoena would lead to information making physical service of process possible.

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