

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>1/2/2019</u>
--

-----X
 STRIKE 3 HOLDINGS, LLC,
 :
 :
 Plaintiff, :
 :
 -against- :
 :
 JOHN DOE, subscriber assigned IP address :
 24.104.252.172, :
 :
 Defendant. :
 -----X

18-CV-2648 (VEC)

MEMORANDUM
OPINION AND ORDER

VALERIE CAPRONI, United States District Judge:

Plaintiff Strike 3 Holdings, LLC has sued Defendant John Doe, who has been identified only by his alleged Internet Protocol (“IP”) address, 24.104.252.172, for direct copyright infringement pursuant to the Copyright Act, 17 U.S.C. § 101 *et seq.* See Compl., Dkt. 1. Defendant moves to quash a third-party subpoena that Plaintiff has served on Defendant’s Internet Service Provider (“ISP”) in order to obtain Defendant’s name and address. See Def.’s Notice of Mot., Dkt. 16. For the following reasons, Defendant’s motion to quash is DENIED.¹

BACKGROUND

Plaintiff holds the copyrights for numerous “adult motion pictures,” which Plaintiff distributes through subscription-based websites and DVDs. See Compl. ¶¶ 2, 13. Plaintiff alleges that Defendant has downloaded and distributed portions of at least 23 of Plaintiff’s motion pictures. See *id.* ¶¶ 4, 25, 36; Declaration of Tobias Fieser (“Fieser Decl.”), Dkt. 7, Ex. B, ¶ 7. Plaintiff alleges that these works are registered with the United States Copyright Office and that Defendant obtained and distributed them without Plaintiff’s authorization. See

¹ Plaintiff also moves for leave to file a sur-reply in further opposition to Defendant’s motion to quash. See Pl.’s Ltr. Mot. (Nov. 27, 2018), Dkt. 23. Because the Court would deny Defendant’s motion to quash regardless of Plaintiff’s sur-reply, the Court need not decide whether a sur-reply is appropriate.



Compl. ¶¶ 31, 37. According to Plaintiff, Defendant downloaded and distributed the works through the BitTorrent platform, a “peer-to-peer” system that enables users to transmit digital files directly to and from one another. *See id.* ¶¶ 4, 17, 23, 27.

Plaintiff has identified Defendant only through his IP address. *See id.* ¶ 5. Plaintiff alleges that its investigator, IPP International U.G. (“IPP”), established contact with Defendant’s IP address through the BitTorrent system and downloaded from that IP address several digital movie files. *See id.* ¶¶ 24–25; Fieser Decl. ¶¶ 7–9. One of Plaintiff’s employees subsequently viewed the downloaded movie files side-by-side with Plaintiff’s copyrighted movies and determined that the two sets of works were “identical, strikingly similar, or substantially similar.” Declaration of Susan B. Stalzer (“Stalzer Decl.”), Dkt. 7, Ex. D, ¶¶ 7–10. IPP also determined “through its ancillary worldwide BitTorrent surveillance program” that Defendant’s address “is associated with significant long-term BitTorrent use.” Fieser Decl. ¶ 12.

Because Plaintiff can identify Defendant only through his IP address, Plaintiff previously moved this Court for leave to subpoena Defendant’s name and address from his ISP in advance of a Rule 26(f) conference, pursuant to Federal Rule of Civil Procedure 26(d)(1). *See* Pl.’s Notice of Mot., Dkt. 6. The Court granted Plaintiff’s motion to serve the subpoena and imposed several conditions as part of a protective order. Those conditions include that: Defendant can proceed anonymously in this action as “John Doe” until the Court orders otherwise; Plaintiff may not initiate settlement discussions with Defendant prior to service of the Complaint; Plaintiff’s subpoena may seek only the name and address of Defendant (not Defendant’s telephone number or email address); and if Defendant moves to quash the subpoena, Defendant’s ISP may not disclose Defendant’s name and address to Plaintiff until the motion to quash is resolved. *See* Order (June 26, 2018), Dkt. 10.

Plaintiff served the subpoena on Defendant's ISP on June 29, 2018. *See* Reply Decl. of Randall L. Rasey ("Rasey Reply Decl."), Dkt. 21, Ex. K. On September 26, 2018, Defendant moved to quash the subpoena. *See* Def.'s Notice of Mot., Dkt. 16.

DISCUSSION

Federal Rule of Civil Procedure 45 allows a party to serve a subpoena for the production of documents and other information from a non-party. *See* Fed. R. Civ. P. 45(a)(1). Pursuant to Rule 45(d), the subpoena recipient may move to quash or modify the subpoena if the subpoena "(i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(i)–(iv). "[T]he burden of persuasion in a motion to quash a subpoena . . . is borne by the movant." *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48 (S.D.N.Y. 1996); *see also John Wiley & Sons, Inc. v. Doe Nos. 1–30*, 284 F.R.D. 185, 189 (S.D.N.Y. 2012). The same standards apply when a person other than the subpoena recipient moves to quash the subpoena. *See Malibu Media, LLC v. Doe*, No. 15-CV-3504, 2016 WL 4444799, at *5–6 (E.D.N.Y. Aug. 23, 2016) (collecting cases).

Defendant's primary ground for quashing Plaintiff's subpoena is that Plaintiff has not "alleged a sufficient link between Defendant and the IP address at issue." Def.'s Mem. of Law, Dkt. 18, at 9 (quoting *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.225.38.130*, No. 17-CV-01731, Minute Order (W.D. Wash. June 6, 2018)). Specifically, Defendant argues that other individuals could have used his IP address to download Plaintiff's copyrighted movies without Defendant's knowledge and that Plaintiff has offered no allegations to exclude this possibility. *See id.* Thus, Defendant argues, because Plaintiff has failed to state a

plausible claim for relief that would withstand a motion to dismiss, Plaintiff's subpoena should be quashed. *See id.* at 9–10.

Defendant's arguments are not appropriately considered at this juncture. It is well-established that "the merits of [a party's] case are not relevant to the issue of whether [the party's] subpoena is valid and enforceable." *Achte/Neunte Boll Kino Beteiligungs GmbH & Co. v. Does 1–4577*, 736 F. Supp. 2d 212, 215–16 (D.D.C. 2010); *see also Handbook of Fed. Civ. Disc. & Disclosure* § 1:30 (4th ed. 2018) ("[D]iscovery should not be denied because it relates to a claim or defense that is being challenged as insufficient."); *Voltage Pictures, LLC v. Does 1–5000*, 818 F. Supp. 2d 28, 35 (D.D.C. 2011) ("A general denial of liability . . . is not a basis for quashing" a subpoena). Rather, a subpoena may seek any information that is "relevant to [a] party's claim or defense," regardless of the merits of those claims or defenses. Fed. R. Civ. P. 26(b)(1); *see also Warnke v. CVS Corp.*, 265 F.R.D. 64, 66 (E.D.N.Y. 2010); *During v. City Univ. of New York*, No. 05-CV-6992, 2006 WL 2192843, at *2 (S.D.N.Y. Aug. 1, 2006); 9 *Moore's Federal Practice: Civil* § 45.03 (2018). Put differently, a subpoena may seek information on "any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case." *Liberty Mut. Ins. Co. v. Kohler Co.*, No. 08-CV-867, 2010 WL 1930270, at *1 (E.D.N.Y. May 11, 2010) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also MacCartney v. O'Dell*, No. 14-CV-3925, 2018 WL 5023947, at *2 (S.D.N.Y. Oct. 17, 2018) ("It is well-established within this Circuit that the rule of discovery will be satisfied if there is 'any possibility' that the information sought to be obtained may be relevant to the subject matter of the action." (quoting *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991))); 6 *Moore's Federal Practice: Civil* § 26.42

("[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on claims and defenses of the parties.").

Applying these principles, Plaintiff's subpoena clearly seeks relevant information. First, obtaining Defendant's name and address will enable Plaintiff to serve Defendant with the Complaint and a summons. That, in turn, will allow Defendant to file a motion to dismiss, if he chooses, in which he can raise the arguments that he attempts to raise here. *See* Fed. R. Civ. P. 12(b)(6). Additionally, obtaining Defendant's name and address will allow Plaintiff to investigate whether individuals other than Defendant had access to Defendant's IP address. As another court in this District stated when addressing a similar argument:

To be sure, there is a "risk of false positives," in that [Plaintiff] cannot say with *certainty* that Defendant was the infringer, but identifying Defendant is a necessary step in making that determination. And as other courts have recognized, Defendant will be free to argue that he was not the actual infringer at "the appropriate time" in this litigation.

Malibu Media, LLC v. Doe, No. 15-CV-3147, 2016 WL 5478433, at *4 (S.D.N.Y. Sept. 29, 2016) (citations omitted) (quoting *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012), and *Malibu Media, LLC v. Doe*, No. 15-CV-2624, 2015 WL 6116620, at *4 (S.D.N.Y. Oct. 16, 2015)). Following this reasoning, district courts in this Circuit have repeatedly allowed copyright holders to subpoena ISPs to obtain the identity of the subscriber of an IP address associated with infringing activity. *See, e.g., id.* at *4; *Malibu Media, LLC v. Doe*, No. 14-CV-4808, 2016 WL 4574677, at *6 (E.D.N.Y. Sept. 1, 2016) ("[W]hether Defendant ultimately has meritorious defenses to Plaintiff's claims is not relevant for purposes of the instant motion to quash or Plaintiff's ability to obtain the discovery sought in the . . . Subpoena." (collecting cases)); *Malibu Media, LLC v. Doe*, No. 15-CV-3504, 2016 WL 4444799, at *8 (E.D.N.Y. Aug. 23, 2016) ("[T]he possibility that a third party downloaded and distributed the copyrighted works, as opposed to the Internet subscriber himself, does not preclude a finding that

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.