New Jersey Federal Court Shuts Door on Strike 3 Litigation

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A recent New Jersey federal court decision denying Strike 3 the right to expedited discovery highlights a recent departure from the status quo of allowing Strike 3 to subpoena Internet Service Providers (“ISP”) such as Comcast, Verizon, and Optimum, in order to discover the identity of the individual subscriber of a certain Internet Protocol (“IP”) address that Strike 3 alleges was used to illegally download its copyrighted adult movies using the file sharing platform BitTorrent. This is good news for those who find themselves caught in the well-oiled litigation machine created by Strike 3 and Malibu Media.

**Strike 3 and copyright infringement lawsuits nationwide**

Strike 3, an adult film studio, has found notoriety as a “copyright troll” for using lawsuits to get settlements from individuals accused of copyright infringement. Using IT spies to track downloads of its copyrighted adult movies on BitTorrent, Strike 3 brings lawsuits against IP addresses associated with the illegal downloading of its copyrighted movies. Relying on relaxed pleading standards and the protections afforded under the Copyright Act, Strike 3 files suit against John Does and uses the legal process to obtain permission from the court to subpoena the relevant ISP to obtain the name of the individual IP subscriber who pays the ISP for internet access and network services.

Historically, Strike 3’s requests for pre-answer discovery (i.e. subpoenaing the ISPs) have been routinely granted with little deviation.

Once the ISP receives the subpoena, it immediately sends a letter the individual subscriber to inform him/her of the subpoena and the ISP’s obligation to disclose the subscriber’s name and address on the return date of the subpoena. At that point, panic sets in and the individual subscribers, guilty or not, immediately hire attorneys and seek to get rid of the case as fast possible. As is no surprise, these prospective individual defendants who are usually married and have kids do not want to be named in or associated with a lawsuit alleging illegal downloading of pornographic materials. Accordingly, most of these cases settle after a subpoena is issued to the ISP. Almost never is Strike 3’s complaint amended to name an individual defendant. But this process has raised concerns that this is a money-making scheme rather than a legitimate lawsuit to protect copyrighted material. In one instance, two attorneys were sentenced to jail for their part in gathering more than $6 million in settlements.

**Recent denial of Strike 3’s discovery request**

The impact of these lawsuits is increasingly widespread. In 2019, in combination with Malibu Media, the two companies made up almost half of the copyright infringement lawsuits in the US. The growing requests have prompted more scrutiny in a New Jersey case, with the court acting diligently in its effort to determine whether Strike 3’s subpoena request was allowable and went so far as to hold hearings and take testimony rather than simply grant the request pro forma.

Ultimately, the court denied the request based on a weighing of factors. Among the most important, the judge cited an earlier case in which Strike 3 had incorrectly identified the internet service subscriber associated with the targeted IP address. The opinion goes on to state “Strike 3’s subpoenas are misleading and create too great of an opportunity for misidentification.” The court was simply not convinced that Strike 3 had mustered enough
evidence to link the unidentified IP subscriber with the alleged illegal downloading of Strike 3’s videos despite Strike 3’s identification of the IP address that was used for the downloads.

Additionally, it was noted that simply because past requests were granted, the court “see[s] no reason why it should be consciously wrong today because [it] was unconsciously wrong yesterday.”

The New Jersey court joins a growing number of courts to have denied similar expedited discovery requests. Another denial in Washington D.C. seems to represent a shift in judges’ tolerance for Strike 3 cases and those that take a closer look at the actual merits of Strike 3’s claims. While these decisions give prospective individual defendants hope, they also represent the minority and it is important to keep in mind that the majority of courts and judges continue to grant Strike 3’s subpoena requests.

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