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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 STRIKE 3 HOLDINGS, LLC,

7 Plaintiff,

8 v.

9 JOHN DOE (73.225.38.130),

10 Defendant.

C17-1731 TSZ

ORDER

11 THIS MATTER comes before the Court on defendant John Doe’s motion for
12 summary judgment, docket no. 174. Having reviewed all papers filed in support of, and
13 in opposition to, the motion, including plaintiff’s supplemental response, docket no. 183,
14 and defendant’s supplemental reply, docket no. 185, which were permitted by Minute
15 Order entered September 19, 2019, docket no. 182, the Court enters the following order.

16 **Background**

17 Plaintiff Strike 3 Holdings, LLC (“Strike 3”), a purveyor of pornographic motion
18 pictures, which are distributed through the websites *Blacked*, *Tushy*, and *Vixen* and on
19 digital versatile discs (“DVDs”), commenced this copyright infringement action against
20 defendant John Doe in November 2017. *See* Compl. (docket no. 1). Strike 3 sought
21 leave to serve a subpoena duces tecum on an Internet Service Provider (“ISP”) for
22 purposes of obtaining John Doe’s identity as the subscriber associated with Internet
23 Protocol (“IP”) address 73.225.38.130. *See* Pla.’s Mot. (docket no. 4). In support of this

1 request, Strike 3 submitted four declarations, two of which are relevant to the issues
 2 raised in John Doe’s pending motion for summary judgment, namely (i) the declaration
 3 of Tobias Fieser, an employee of IPP International UG (“IPP”), a German company that
 4 provides forensic investigation services to copyright owners, see Fieser Decl. at ¶¶ 3-4
 5 (docket no. 4-3), and (ii) the declaration of Susan Stalzer, an individual who works for
 6 Strike 3, see Stalzer Decl. at ¶ 3 (docket no. 4-5).

7 In his declaration dated November 21, 2017, Fieser indicated that he had reviewed
 8 “IPP’s forensic activity records” and had “determined that IPP’s forensic servers [had]
 9 connected to an electronic device using IP Address 73.225.38.130.” See Fieser Decl. at
 10 ¶ 7 (docket no. 4-3). According to Fieser, this IP address was “documented distributing
 11 to IPP’s servers multiple pieces of Strike 3’s copyrighted movies listed on Exhibit A to
 12 Strike 3’s Complaint.” Id. Exhibit A to the Complaint lists 80 items in a spreadsheet
 13 format with columns labeled “Work,” “Hash,” “Site,” “UTC,” “Published,” “CRO App.
 14 File Date,” and “CRO Number.” Ex. A to Compl. (docket no. 1 at 9-13). The Complaint
 15 does not define UTC or CRO, but these acronyms appear to mean, respectively,
 16 coordinated universal time and Copyright Office, and the term “App.” seems to be an
 17 abbreviation for application. The first five rows of the spreadsheet are reproduced in
 18 Figure 1.

Work	Hash	Site	UTC	Published	CRO App. File Date	CRO Number
1	1BC8C1ADCAA75C3EC9408C8CCBF5147863205E6C	Tushy	09/05/2017 10:40:33	09/03/2017	09/10/2017	PA0002052851
2	0326E8923C58852725F5A7857833A4CD3E715289	Tushy	05/15/2017 04:40:00	05/06/2017	06/15/2017	15389210313
3	039F4779148D3E374D990283A83AC46A0219DAE9	Vixen	05/12/2017 06:25:29	04/19/2017	06/15/2017	15389210409
4	0CDEB18021838E8E2A694A7D16D9A45366CFABB6	Blacked	08/08/2017 21:54:29	08/08/2017	08/17/2017	15732904191
5	1487A26EAAAD70318258AB9F506506A8F293533A	Blacked	05/21/2017 18:02:17	05/05/2017	06/15/2017	PA0002037591

23 Fig. 1: Excerpt of Exhibit A to Complaint (docket no. 1 at 9).

1 The Complaint alleges that the “cryptographic hash value” of a **piece** of a file (or
2 “piece hash”) serves as that piece’s “unique digital fingerprint.” Compl. at ¶ 21 (docket
3 no. 1); *see also* Am. Compl. at ¶ 22 (docket no. 43). The Complaint further states that an
4 entire digital media **file** also has a unique “cryptographic hash value” (or “file hash”) that
5 identifies the file (or movie); after all pieces comprising a digital file are downloaded, the
6 software at issue, known as BitTorrent,¹ uses the “file hash” to confirm that the file is
7 “complete and accurate.” Compl. at ¶ 22 (docket no. 1); *see also* Am. Compl. at ¶ 23
8 (docket no. 43). Neither the Complaint nor the Amended Complaint make clear whether
9 the sequence of letters and numbers appearing under the column in Exhibit A labeled
10 “Hash” are “piece hash” or “file hash” values.

11 Based on Fieser’s declaration, however, the reasonable inference to be drawn is
12 that the “Hash” sequences listed in Exhibit A to the Complaint are “file hash,” and not
13 “piece hash,” values. In his declaration, Fieser reported that IPP’s software “analyzed
14 each BitTorrent ‘piece’ distributed by Defendant’s IP Address” and “verified that
15 reassembling the pieces using a specialized BitTorrent client results in a fully playable
16 digital movie.” Fieser Decl. at ¶ 9 (docket no. 4-3). Fieser further asserted that IPP’s
17 software “determined that the **files** being distributed by Defendant’s IP Address have a
18 unique identifier of the Cryptographic Hash outlined on Exhibit A.” *Id.* at ¶ 10 (emphasis

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21 ¹ BitTorrent is a peer-to-peer file-sharing program. *See Patrick Collins, Inc. v. Does 1-28*, 2013
22 WL 359759 at *1 (E.D. Mich. Jan. 29, 2013). BitTorrent users (or peers) access the Internet
23 through ISPs and request particular files. *See id.* at *3. Peers who are members of a “swarm”
engage with each other through the BitTorrent system, simultaneously downloading and
uploading pieces of a desired file. *See id.* at *1 & *3.

1 added). In other words, each of the values listed under “Hash” in Exhibit A is a “file
2 hash.”

3 This conclusion is consistent with the averments in Stalzer’s declaration dated
4 November 20, 2017. According to Stalzer, to perform her task of verifying that copyright
5 infringement had occurred, she was provided with “the infringing motion picture file for
6 each of the **file** hashes listed on Exhibit A to Strike 3’s Complaint,” and she “viewed each
7 of the unauthorized motion pictures corresponding to the **file** hashes side by side with
8 Strike 3’s motion pictures, as published on the *Blacked*, *Tushy*, and/or *Vixen* websites
9 and enumerated on Exhibit A by their United States Copyright Office identification
10 numbers.” Stalzer Decl. at ¶¶ 7-9 (docket no. 4-5) (emphasis added).

11 Strike 3’s success in obtaining permission to serve a Rule 45 subpoena on the ISP,
12 which eventually supplied the information necessary to effect service on John Doe, was
13 due primarily to Fieser’s and Stalzer’s declarations. See Order (docket no. 5). Strike 3
14 later dismissed its copyright infringement claim against John Doe, but by then, John Doe
15 had asserted counterclaims, one of which remains pending, namely for a declaration of
16 non-infringement. See Order (docket no. 167). John Doe now seeks summary judgment
17 on his declaratory judgment counterclaim, as well as attorney’s fees and costs pursuant to
18 17 U.S.C. § 505, which vests the Court with discretion to award attorney’s fees and costs
19 to the prevailing party in an action brought under the Copyright Act.

20 At the time John Doe filed his dispositive motion, four discovery motions were
21 pending. In one of these motions, docket no. 125, Strike 3 sought to compel John Doe to
22 produce two computer hard drives. In light of the issues raised in John Doe’s dispositive
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1 motion, the Court partially granted Strike 3’s motion to compel and, with respect to one
2 of the hard drives (Serial No. 9VP05TWX), allowed Strike 3’s expert to examine, with
3 certain restrictions, the copy that had been made for forensic purposes (the “imaged” hard
4 drive). See Minute Order at ¶ 1 & n.1 (docket no. 182). The scope of Strike 3’s expert’s
5 review was limited to searching the “imaged” hard drive for existing and deleted files
6 matching the hash values set forth in Exhibit A to the Complaint. Id. If such files were
7 discovered, Strike 3’s expert was authorized to copy and/or otherwise make a record
8 concerning the presence of those materials. Id. at ¶ 1. Strike 3 never asked the Court to
9 broaden or modify the terms of the Minute Order entered on September 19, 2019, docket
10 no. 182, which dealt with *inter alia* Strike 3’s motion to compel production of John Doe’s
11 hard drives.

12 Instead, in its supplemental response to John Doe’s summary judgment motion,
13 Strike 3 complains that its expert could not conduct a meaningful examination of the
14 “imaged” hard drive without violating the provisions of the September 2019 Minute
15 Order, and he therefore did not perform any analysis. Strike 3 now repudiates Fieser’s
16 and Stalzer’s declarations and asserts that the “Hash” sequences listed in Exhibit A are
17 “Info Hashes,” which are merely “the data that the BitTorrent protocol uses to identify
18 and locate the desired file . . . across the BitTorrent network.” Pla.’s Supp. Resp. at 2-3
19 (docket no. 183). Strike 3 contends that “the only way to search Defendant’s hard drive
20 for the Exhibit A Hashes” would be “to view every .torrent file on Defendant’s hard drive
21 to determine if it matched the Exhibit A hashes.” Id. at 3-4. Rather than seek any relief
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1 from the restrictions imposed by the Court, Strike 3 has chosen to forego examination of
2 the “imaged” hard drive.

3 In support of its decision, Strike 3 offers the declaration of Patrick Paige, a
4 member of Computer Forensic, LLC, who has been retained by Strike 3 as a computer
5 forensics expert. See Paige Decl. at ¶ 1 (docket no. 184).² Paige explains that an “Info
6 Hash” is a “value of specific data contained within a .torrent file,” which “the BitTorrent
7 protocol uses to identify and locate the desired file.” Id. at ¶ 10. In other words, the
8 “Info Hash” is not the actual motion picture that John Doe is accused of infringing, but
9 merely the means by which the BitTorrent program can find the motion picture among
10 the files of all of the computers connected to the BitTorrent network. Thus, even if Paige
11 were allowed to look within each .torrent file on the “imaged” hard drive for the “Hash”
12 sequences listed in Exhibit A to the Complaint, he would not discover any actual motion
13 pictures, but rather just the information needed for the BitTorrent system to find the
14 pornographic films, perhaps on other individuals’ devices. Given this clarification from
15 Strike 3, the Court is satisfied that no purpose would be served by permitting Strike 3 to
16 engage in any further discovery in this matter.

17 In support of his summary judgment motion, John Doe has provided the report
18 of his expert Michael Yasumoto, who holds a Master of Science degree in computer
19 science from the George Washington University. See Yasumoto Report at § II, Ex. 10 to
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21 ² John Doe’s motion, see Supp. Reply at 3-4 (docket no. 185), to strike Paige’s declaration, as
22 well as Strike 3’s supplemental response, is DENIED.

1 Edmondson Decl. (docket no. 175-10). In his report, Yasumoto summarized his analysis
2 as follows:

3 I created a forensically sound image of the hard drive listed in Table 1
4 [*i.e.*, Seagate Model ST3750528AS, Serial No. 9VP05TWX] Using
5 XWF [X-Ways Forensics Version 19.8 SR3], I searched for all video files
6 including deleted files recovered from unallocated space. I conducted file
7 carving, which looks for signatures of certain file types to detect data that
8 may be hidden inside another file or located in unallocated space such as
9 deleted files. The smallest video file referenced in Exhibit A of the
10 [Amended C]omplaint is approximately 187 MBs in size. . . . [Plaintiff’s
11 videos] appear to have an introduction and concluding animation featuring
12 the name of either Tushy, Vixen, or Blacked. I reviewed all recovered and
13 existing video files over 100 MBs in size to determine if any of the video
14 files were Plaintiff’s copyrighted works. None of the videos examined
15 appear to be Plaintiff’s work based on content and the lack of any Tushy,
16 Vixen, or Blacked animated titles. I also compared the SHA1 hash, which
17 acts as a fingerprint for computer files, and none of the videos examined on
18 defendant’s computer were a hash match for the videos listed in [Exhibit A
19 to the Amended Complaint].³

20 Yasumoto Report at § IV (docket no. 175-10).⁴ Yasumoto’s opinion to a “reasonable
21 degree of scientific certainty” that the motion pictures listed in Exhibit A to the Amended
22 Complaint are not on the “imaged” hard drive, *see id.* at § V, is strong circumstantial
23 evidence that John Doe did not download (or upload) Strike 3’s copyrighted works.

18 ³ Exhibit A to the Amended Complaint is similar to, but differs slightly from, Exhibit A to the
19 Complaint. Exhibit A to the Amended Complaint, docket no. 43-1, contains 87 rows of “Hash”
20 values and accompanying data, 80 of which appear to overlap with the information in Exhibit A
21 to the Complaint, docket no. 1. For purposes of this Order, unless otherwise indicated, reference
22 to “Exhibit A to the Complaint” means both versions of Exhibit A.

21 ⁴ Strike 3 challenged Yasumoto’s approach because the hard drive at issue contains undisclosed
22 data and Strike 3 had not had an opportunity to examine such data or cross-examine Yasumoto.
23 *See* Pla.’s Resp. at 11-12 (docket no. 178). Strike 3 waived such objections by failing to take
24 advantage of the discovery permitted by the Court or propose any alternatives to the restrictions
25 imposed by the Court with regard to Strike 3’s expert’s analysis of the “imaged” hard drive.

1 **Discussion**

2 **A. Summary Judgment Standard**

3 The Court shall grant summary judgment if no genuine dispute of material fact
4 exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
5 56(a). The moving party bears the initial burden of demonstrating the absence of a
6 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A
7 fact is material if it might affect the outcome of the suit under the governing law. *See*
8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for
9 summary judgment, the adverse party must present “affirmative evidence,” which “is to
10 be believed” and from which all “justifiable inferences” are to be favorably drawn. *Id.* at
11 255, 257. When the record, taken as a whole, could not, however, lead a rational trier of
12 fact to find for the non-moving party on matters as to which such party will bear the
13 burden of proof at trial, summary judgment is warranted. *See Matsushita Elec. Indus.*
14 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Celotex*, 477 U.S. at 322.

15 **B. Jurisdiction Over Declaratory Judgment Counterclaim**

16 In opposing John Doe’s motion for summary judgment, which seeks a declaration
17 of non-infringement, Strike 3 contends that the Court lacks jurisdiction to grant the
18 requested relief. Strike 3’s argument is without merit. This case does not involve the
19 type of preemptive litigation that frequently raises concerns about the existence of an
20 actual case or controversy. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118
21 (2007); *see also* U.S. CONST. art. III, § 2. In such actions, which are often premised on a
22 cease-and-desist letter or similar threat received by the plaintiff from the defendant, the
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1 question is whether, “under all of the circumstances,” a “substantial controversy” exists
2 “between parties having adverse legal interests, of sufficient immediacy and reality to
3 warrant the issuance of a declaratory judgment.” *See MedImmune*, 549 U.S. at 127.

4 Unlike in *MedImmune*, in this matter, Strike 3 did not merely threaten John Doe,
5 or render him reasonably apprehensive, about the prospect of a lawsuit. *See MedImmune*,
6 549 U.S. at 121-22; *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
7 1555-56 (9th Cir. 1989) (a declaratory judgment action presents a case or controversy “if
8 the plaintiff has a real and reasonable apprehension that he will be subject to liability if he
9 continues” his allegedly infringing actions). Instead, Strike 3 took the very “real” steps
10 of commencing this proceeding and seeking expedited discovery so that John Doe could
11 be served with summons and a copy of the Complaint. When John Doe asserted his
12 declaratory judgment counterclaim on March 8, 2018, docket no. 22, and when he filed
13 an amended version of his counterclaim on May 1, 2018, docket no. 32, Strike 3’s
14 copyright infringement claim was still pending, and the Court had Article III jurisdiction.

15 Strike 3’s subsequent dismissal of its copyright infringement claim did not render
16 moot John Doe’s request for declaratory relief. The case or controversy requirement
17 persists through all stages of litigation, *LHF Prods., Inc. v. Kabala*, 2018 WL 4053324
18 at *1 (D. Nev. Aug. 24, 2018); *Crossbow Tech., Inc. v. YH Tech.*, 531 F. Supp. 2d 1117,
19 1120 (N.D. Cal. 2007), but this action is not one in which jurisdiction was lost after the
20 Complaint was filed. Unlike in *LHF Productions*, in which an alleged BitTorrent user’s
21 counterclaim for a declaration of non-infringement was dismissed as moot in light of the
22 plaintiff’s dismissal **with** prejudice of the underlying copyright infringement claim, in
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1 this matter, Strike 3’s voluntary dismissal was **without** prejudice, *see* Notice (docket
2 no. 53), and in contrast to the plaintiff in *Crossbow*, Strike 3 has not provided any
3 covenant not to sue. Indeed, not only has Strike 3 preserved its ability to pursue further
4 litigation against John Doe, it has indicated that it will not consent to a declaration of
5 non-infringement unless John Doe is precluded from receiving attorney’s fees and costs
6 and Strike 3 is explicitly permitted to bring copyright infringement claims against John
7 Doe’s son. *See* Order at 2 n.3 (docket no. 167).

8 In essence, Strike 3 is attempting to thwart John Doe’s efforts to obtain attorney’s
9 fees and costs by, on the one hand, refusing to dismiss its Copyright Act claim with
10 prejudice and thereby denying John Doe “prevailing party” status, while on the other
11 hand, deploying its dismissal without prejudice as a jurisdictional shield against John
12 Doe’s declaratory judgment claim. The Court will not permit Strike 3 to use such
13 “gimmick designed to allow it an easy exit . . . [now that] discovery [has] reveal[ed] its
14 claims are meritless.” *See Malibu Media, LLC v. John Doe Subscriber Assigned IP*
15 *Address 76.126.99.126*, 2016 WL 3383758 at *2 (N.D. Cal. June 20, 2016) (denying a
16 copyright owner’s motion to dismiss a counterclaim for declaration of non-infringement,
17 observing that “[a]bsent defendant’s counterclaim, if events reveal that this case is
18 meritless, Malibu Media could voluntarily dismiss its affirmative claims without
19 prejudice under Rule 41(a)(2), seeking to avoid an award of attorney’s fees”).

20 **C. Declaration of Non-Infringement**

21 Strike 3, not John Doe, bears the burden of proof with respect to infringement.
22 *See Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp. 3d 975, 984 (C.D. Cal. 2015)

1 (“there is no reason to relieve the alleged [copyright] owners . . . of the usual burden of
2 proof just because they are nominally the defendants in this declaratory judgment action”
3 (citing Medtronic, Inc. v. Mirowski Family Ventures, LLC, 571 U.S. 191 (2014))). A core
4 element of copyright infringement is a “copying” of the protected components of the
5 work. See Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 984 (9th Cir. 2017);
6 Pasillas v. McDonald’s Corp., 927 F.2d 440, 442 (9th Cir. 1991). Strike 3 has provided
7 no evidence that John Doe copied any of Strike 3’s copyrighted motion pictures. At
8 most, Strike 3 has shown that an entity with access to the IP address 73.225.38.130
9 downloaded certain materials identified by the “Hash” sequences listed in Exhibit A to
10 the Complaint. Strike 3 cannot link John Doe to the activity associated with the
11 IP address, see Cobbler Nevada, LLC v. Gonzales, 901 F.3d 1142 (9th Cir. 2018),⁵ and it
12 has now abandoned any assertion that the items allegedly transferred over the BitTorrent
13 system were themselves copyrighted motion pictures or viewable pieces thereof, as
14 opposed to simply non-copyrightable data that may be used to find certain motion

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16 ⁵ As observed by the Honorable Royce C. Lamberth, the method of identifying copyright
17 infringers by IP address is “famously flawed” for a variety of reasons, including IP address
18 spoofing, the existence of unsecured routers, the ability of malware to crack passwords or open
19 backdoors, the sharing of IP addresses among family members, roommates, guests, neighbors,
20 and others, and the random assignment of IP addresses to a general location if a more specific
21 one cannot be identified by geolocation services. See Strike 3 Holdings, LLC v. Doe, 351
22 F. Supp. 3d 160, 162 (D.D.C. 2018). Moreover, dynamic IP addresses might be reassigned to
23 many different individuals during a short timeframe, and these frequent changes create a
significant chance of misidentification. See Strike 3 Holdings, LLC v. Doe, 2019 WL 5446239
at *11 (D.N.J. Oct. 24, 2019). In this matter, Exhibit A to the Complaint lists dates of BitTorrent
activity spanning from May 10, 2017, through December 1, 2017, see docket no. 43-1, but the
only time for which the ISP provided subscriber information in response to Strike 3’s expedited
discovery request was September 5, 2017, at 10:40:33 GMT. See Comcast Letter (docket
no. 11). Strike 3’s assertion that John Doe was the subscriber for IP address 73.225.38.130 at
any other moment is entirely unsupported by the record.

1 pictures and/or their constituent parts within the BitTorrent network. Consistent with
2 Strike 3's lack of proof of copying, John Doe's expert has indicated that John Doe's
3 computer does not contain any of the motion pictures described in Exhibit A to the
4 Complaint. No genuine dispute of material fact exists, and John Doe is entitled to
5 judgment as a matter of law. John Doe's motion for summary judgment is GRANTED,
6 and a declaratory judgment of non-infringement will be entered.

7 **D. Attorney's Fees and Costs**

8 Under the Copyright Act, attorney's fees are not awarded to the prevailing party
9 automatically or as a matter of course. *See Killer Joe Nevada, LLC v. Does 1-20*, 807
10 F.3d 908, 911 (8th Cir. 2015). Rather, the Court must exercise its discretion in equity,
11 considering various non-exclusive factors, including whether the losing party's position
12 was frivolous or objectively unreasonable, the losing party's motivations, the need in
13 particular circumstances to compensate or deter, and the purposes of the Copyright Act.
14 *See id.*; *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994); *Palladium*
15 *Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1200-01 (10th Cir. 2005). These
16 guideposts indicate that attorney's fees are warranted in this matter.

17 A different result might have been appropriate if, back in August 2018, Strike 3
18 had dismissed its copyright infringement claim **with** prejudice and shortly thereafter
19 sought dismissal of John Doe's declaratory judgment counterclaim as moot. Instead,
20 Strike 3 attempted to preserve its ability to pursue further litigation against John Doe
21 while aggressively seeking evidence against him and his son in the guise of defending
22 against John Doe's now defunct abuse-of-process counterclaim. Months after the
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1 abuse-of-process counterclaim had been dismissed by the Court, *see* Order (docket
2 no. 167), and over 14 months after dismissing its own copyright infringement claim
3 **without** prejudice, Strike 3 revealed a level of uncertainty about the factual allegations of
4 its Complaint and Amended Complaint that should have inhibited it from filing this
5 lawsuit in the first place. *Cf. Strike 3 Holdings*, 2019 WL 5446239 at *10 (observing that
6 Strike 3 “resort[ed] to making unequivocal statement of alleged facts that it does not
7 know to be true in order to obtain expedited discovery” and describing such behavior as
8 “troublesome”). This new information weighs in favor of awarding attorney’s fees to
9 John Doe.

10 Many courts have articulated concerns about the motivations involved in pursuing
11 these types of cases, which appear to be extortive, forcing individuals, who would be
12 embarrassed by allegations that they have been visiting pornographic websites, to pay
13 nuisance-value amounts to keep their names out of publicly-available documents. *See*
14 *Malibu Media*, 2016 WL 3383758 at *2-*3. The pattern of filing numerous suits, and
15 then dismissing those in which the defendant does not quickly agree to settle, manifests a
16 lack of intent to bring these matters to trial, and reinforces the sense that the plaintiffs are
17 simply in the “shakedown” business. *Id.* In the nine actions filed by Strike 3 in this
18 district during a two-day period, this case is the only one that advanced past the pleading
19 stage; all other matters were voluntarily dismissed by Strike 3. *See* Order at 2 n.2 (docket
20 no. 167) (indicating that five of the suits settled, one was dismissed for unknown reasons,
21 and two others were not pursued because service could not be effected or default could
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1 not be secured). To deny John Doe’s request for attorney’s fees, as Strike 3 proposes,
2 would improperly reward Strike 3 for adhering to its suspicious litigation script.⁶

3 The Ninth Circuit’s decision in *Cobbler Nevada* appears to have stemmed the tide
4 of BitTorrent litigation, and the Court does not view deterrence as a basis for awarding
5 attorney’s fees in this matter. Compensation, however, is a relevant factor, as is the
6 policy underlying the Copyright Act of encouraging defendants to advance and litigate
7 meritorious copyright defenses. *See Fogerty*, 510 U.S. at 527. In outlining the services
8 for which John Doe is requesting attorney’s fees, his lawyers have carefully segregated
9 between the successful and unsuccessful defenses, counterclaims, and motions, and the
10 amount sought is narrowly tailored to the matters on which John Doe prevailed.

11 For example, Adrienne D. McEntee of Terrell Marshall Law Group PLLC has not
12 included in her computations any time spent on the failed abuse-of-process counterclaim,
13 *see* McEntee Decl. at ¶ 10 (docket no. 176-2), and she has even excluded the billings
14 related to John Doe’s current motion for summary judgment, *see id.* at ¶ 11. Likewise,
15 J. Curtis Edmondson of Edmondson IP Law has significantly curtailed the amount

17 ⁶ Strike 3 has been described as a “copyright troll.” *Strike 3 Holdings*, 351 F. Supp. 3d at 161.
18 A copyright troll’s success derives “not from the Copyright Act, but from the law of large
19 numbers.” *Id.* at 162. Nationwide, during the thirteen months from October 2017 through
20 November 2018, Strike 3 filed 1,849 cases similar to this one. *See id.* In 2015, copyright trolls
21 accounted for 58% of the federal copyright docket. *Id.* The copyright troll’s playbook outlines
22 the following strategy: “file a deluge of complaints; ask the court to compel disclosure of the
23 account holders; settle as many claims as possible; abandon the rest.” *See id.* (citing Matthew
Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV.
571, 575-80 (2018)). It teaches that cases should be dropped “at the first sign of resistance” to
stay “one step ahead of any coordinated defense” or, metaphorically speaking, that when “a Billy
Goat Gruff moves to confront a copyright troll in court, the troll [should] cut[] and run[] back
under its bridge.” *See id.*

1 requested on behalf of John Doe by not including any time billed after August 23, 2018,
 2 when Strike 3 dismissed its copyright infringement claim, and by applying a 50%
 3 reduction to all other fees. *See* Edmondson Decl. at ¶¶ 19 & 21. Having reviewed the
 4 materials submitted by John Doe, the Court concludes that the requested hourly rates are
 5 commensurate with the amounts charged by lawyers of similar skill in the local legal
 6 community for comparable work, and that the following attorney's fees are reasonable
 7 under all of the circumstances:

<u>Attorney's Fees</u>	
Terrell Marshall Law Group PLLC	\$ 13,615.00
Edmondson IP Law	<u>\$ 26,886.63</u>
TOTAL:	\$ 40,501.63

10 With respect to costs, the Terrell Marshall Law Group PLLC seeks \$300 in court
 11 reporter fees and \$2,358.20 for transcripts, for a total of \$2,658.20. These costs are
 12 consistent with 28 U.S.C. § 1920 and will be awarded. Edmondson IP Law has itemized
 13 costs totaling \$11,226.60, but asks for only 50% of that sum. Strike 3 objects to inclusion
 14 of costs for DVDs, expert-related fees, and videographer expenses. Excluding those
 15 items results in costs of \$9,234.85, half of which will be awarded, or \$4,617.43. The
 16 total amount of costs to be taxed is \$7,275.63.

Conclusion

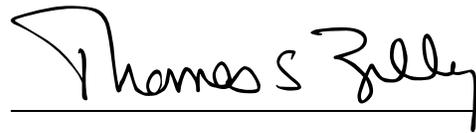
18 For the foregoing reasons, the Court ORDERS:

- 19 (1) Defendant's motion for summary judgment, docket no. 174, is GRANTED;
 20 (2) Defendant is entitled to judgment on his first counterclaim under 28 U.S.C.
 21 § 2201 for a declaration of non-infringement, *see* docket no. 64; and
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1 (3) The Clerk is directed to enter judgment consistent with this Order, as well
2 as with the Minute Order entered October 24, 2018, docket no. 58, the Order entered
3 July 8, 2019, docket no. 167, and Strike 3's Notice of Voluntary Dismissal, docket
4 no. 53, to send a copy of the Judgment and this Order to all counsel of record, and to
5 CLOSE this case.

6 IT IS SO ORDERED.

7 Dated this 31st day of January, 2020.

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10 Thomas S. Zilly
11 United States District Judge
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