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8 UNITED STATES DISTRICT COURT

9 Northern District of California

10 San Francisco Division

11 NEW SENSATIONS, INC.,

No. C 11-2770 MEJ

12 Plaintiff,

v.

13 DOES 1-1,474,

14 Defendants.
15 _____/

**(Proposed) AMENDED ORDER
GRANTING PLAINTIFF'S EX PARTE
APPLICATION FOR LEAVE TO
TAKE LIMITED EXPEDITED
DISCOVERY**

16
17 This Order amends and replaces the Order issued by the Court on August 24, 2011 (Dkt.
18 No. 9).

19 **I. INTRODUCTION**

20 Plaintiff New Sensations, Inc. ("Plaintiff") has filed an *ex parte* Application pursuant to
21 Federal Rules of Civil Procedure 26 and 45, requesting leave to take expedited discovery to
22 determine the identity of 1,474 Doe Defendants (collectively, "Defendants") named in this action.
23 Dkt. No. 5 ("Pl.'s App."). For the reasons provided below, the Court **GRANTS** Plaintiff's
24 Application.

25 **II. BACKGROUND**

26 On June 7, 2011, Plaintiff filed this lawsuit against 1,474 Doe Defendants, alleging that
27 Defendants illegally reproduced and distributed a work subject to Plaintiff's exclusive license,
28 ("*Big Bang Theory: A XXX Parody*"), using an internet peer-to-peer ("P2P") file sharing network

1 known as BitTorrent, and thereby violated the Copyright Act, 17 U.S.C. § 101-1322. Compl. ¶¶
2 6-15, Dkt. No. 1. Plaintiff alleges that because the alleged infringement occurred on the Internet,
3 Defendants acted under the guise of their Internet Protocol (“IP”) addresses rather than their real
4 names. *Id.* at ¶ 10; Pl.’s App. at 5-6. As a result, Plaintiff contends that it cannot determine
5 Defendants’ true identities without procuring the information from Defendants’ respective
6 Internet Service Providers (“ISPs”), which can link the IP addresses to a real individual or entity.
7 Pl.’s App. at 6. Consequently, Plaintiff asks the Court to grant it expedited discovery to issue
8 subpoenas to the relevant ISPs so that the ISPs will produce the name, address, telephone
9 number, and email address for each Defendant. *Id.* at 25, Ex. 1.

10 III. LEGAL STANDARD

11 Pursuant to Federal Rule of Civil Procedure (“Rule”) 26(d)(1), a court may authorize
12 early discovery before the Rule 26(f) conference for the parties’ convenience and in the interest
13 of justice. Courts within the Ninth Circuit generally use a “good cause” standard to determine
14 whether to permit such discovery. *See, e.g., Apple Inc. v. Samsung Electronics Co., Ltd.*, 2011
15 WL 1938154, at *1 (N.D. Cal. May 18, 2011); *Semitool, Inc. v. Tokyo Electron America, Inc.*,
16 208 F.R.D. 273, 276 (N.D. Cal. 2002). “Good cause may be found where the need for expedited
17 discovery, in consideration of the administration of justice, outweighs the prejudice to the
18 responding party.” *Semitool*, 208 F.R.D. at 276. The court must perform this evaluation in light
19 of “the entirety of the record . . . and [examine] the reasonableness of the request in light of all
20 the surrounding circumstances.” *Id.* at 275 (citation & quotation marks omitted). In determining
21 whether there is good cause to allow expedited discovery to identify anonymous internet users
22 named as doe defendants, courts consider whether: (1) the plaintiff can identify the missing party
23 with sufficient specificity such that the Court can determine that defendant is a real person or
24 entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken
25 to locate the elusive defendant; (3) the plaintiff’s suit against defendant could withstand a motion
26 to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of being
27 able to identify the defendant through discovery such that service of process would be possible.
28 *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999).

IV. DISCUSSION

A. Whether Plaintiff has Identified the Defendants with Sufficient Specificity

Under the first factor, the Court must examine whether Plaintiff has identified the Defendants with sufficient specificity, demonstrating that each Defendant is a real person or entity who would be subject to jurisdiction in this Court. *See id.* at 578. Here, Plaintiff proffers that it retained Copyright Enforcement Group, LLC (“CEG”), which utilized forensic software to identify Defendants’ IP addresses on the date and time that they engaged in the alleged distribution of *Big Bang Theory: A XXX Parody* via the BitTorrent protocol, and has compiled the information into a log attached as Exhibit A to Plaintiff’s Complaint. Pl.’s App. at 9; Decl. of Jon Nicolini ¶¶ 10-16, Dkt. No. 5-1. Plaintiff explains that Defendants gained access to the Internet only by setting up an account through various ISPs, and that by providing the ISPs the information detailed in Exhibit A, the ISPs can look up the Defendants’ identities by reviewing their respective subscriber activity logs. Nicolini Decl. ¶¶ 18-20. Thus, the Court finds that Plaintiff has come forward with sufficient information demonstrating that the Defendants are real persons or entities who may be sued in federal court. *See MCGIP, LLC v. Does 1-149*, 2011 WL 3607666, at *2 (N.D. Cal. Aug. 15, 2011) (finding that the plaintiff had identified the Doe defendants with sufficient specificity by submitting a chart listing each of the defendants by the IP address assigned to them on the day it alleged the particular defendant engaged in the infringing conduct).

B. Whether Plaintiff has Identified All Previous Steps to Locate Defendants

Under the second factor, the Court must assess the prior steps Plaintiff has taken to locate the Defendants. *See Columbia Ins. Co.*, 185 F.R.D. at 579. “This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants.” *Id.* Here, Plaintiff contends that it has exhausted all possible means to find the Defendants’ names, addresses, phone numbers, and email addresses. Pl.’s App. at 9. In support, Plaintiff cites to paragraphs 18 through 20 of Mr. Nicolini’s Declaration. *Id.* Reviewing Mr. Nicolini’s testimony, he states CEG’s System inspects file-sharing networks for computers that are distributing at least a substantial portion of a copy of a copyrighted work

1 owned by Plaintiff, and when CEG finds such a computer, CEG's System also collects publicly
2 accessible information, including the time and date the infringer was found, the IP address
3 assigned to the infringer's computer, the size of the accused file, and the name of the ISP having
4 control of the IP address. Nicolini Decl. ¶ 18. Mr. Nicolini states that, because of the partially
5 anonymous nature of the P2P Internet distribution system used by Defendants, CEG is unable to
6 determine their true names, street addresses, telephone numbers, and email addresses. *Id.*

7 First, to locate swarms¹ where peers were distributing *Big Bang Theory: A XXX Parody*,
8 CEG utilizes its data collection system to find digital files on the Internet that have the same title
9 as the copyrighted work. *Id.* ¶¶ 11, 14. Mr. Nicolini states that, in this case, the P2P network on
10 which CEG found unauthorized distribution of *Big Bang Theory: A XXX Parody* was a
11 BitTorrent network. *Id.* ¶ 16. CEG then downloads a full copy of the file, which is then
12 forwarded to a two-stage verification computer process and identified by two people. *Id.* ¶ 17.
13 The process compares the digital data in the suspect file with digital data in a digital copy of the
14 motion picture obtained from Plaintiff. *Id.* If the suspect file matches the authorized file, then the
15 two people play the suspect file and watch the motion picture. *Id.* If both people confirm that a
16 substantial portion of the motion picture in the suspect file is substantially the same as a
17 corresponding portion of *Big Bang Theory: A XXX Parody*, then particular unique data (often
18 referred to as metadata) in the suspect file is noted by CEG's System, and the System searches
19 for additional computers on P2P networks that have the same suspect file. *Id.*

20 After locating and inspecting computers that are distributing at least a substantial portion
21 of a copy of *Big Bang Theory: A XXX Parody*, Mr. Nicolini states that CEG's System collects (a)
22 the time and date the infringer was found, (b) the time(s) and date(s) when a portion of the
23 accused file was downloaded successfully to the accused infringer's computer, (c) the time and

24 _____
25 ¹P2P networks distribute infringing copies of copyrighted works with file sharing software such
26 as BitTorrent when one user accesses the Internet through an ISP and intentionally makes a
27 digital file of a work available to the public from his or her computer. Nicolini Decl. ¶ 6. This
28 file is referred to as the first "seed." *Id.* Other users, who are referred to as "peers," then access
the Internet and request the file. *Id.* These users engage each other in a group, referred to as a
"swarm," and begin downloading the seed file. *Id.* As each peer receives portions of the seed,
that peer makes those portions available to other peers in the swarm. *Id.*

1 date the infringer was last successfully connected to via the P2P network with respect to the
2 infringer's computer's downloading and/or uploading the accused file to the Internet, (d) the IP
3 address assigned to the infringer's computer, (e) the P2P software application used by the
4 infringer and the port number used by the infringer's P2P software, (f) the size of the accused
5 file, (g) the percent of the file downloaded by CEG from the infringer's computer, (h) the percent
6 of the accused file on the infringer's computer which is available at that moment for copying by
7 other peers, and (i) any relevant transfer errors. *Id.* ¶ 18. In addition, CEG uses available
8 databases to record the name of the ISP having control of the IP address and the state (and often
9 the city or county) associated with that IP address. *Id.*

10 **C. Whether Plaintiff's Suit Against Defendants Could Withstand a Motion to Dismiss**

11 Under the third factor, the inquiry shifts to the substance of Plaintiff's claims and
12 analyzes whether Plaintiff's Complaint would likely survive a motion to dismiss. *See Columbia*
13 *Ins. Co.*, 185 F.R.D. at 579. In its Complaint, Plaintiff has asserted a federal copyright
14 infringement claim. To state a claim for copyright infringement, Plaintiff must establish: (1)
15 ownership of a valid copyright, and (2) copying of constituent elements of the copyrighted work
16 that are original. *Rice v. Fox Broad. Corp.*, 330 F.3d 1170, 1174 (9th Cir. 2003) (citing *Feist*
17 *Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). "To be liable for direct
18 infringement, one must 'actively engage in' and 'directly cause' the copying." *Online Policy*
19 *Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1199 (N.D. Cal. 2004). Reviewing Plaintiff's
20 Complaint, Plaintiff has adequately alleged that *Big Bang Theory: A XXX Parody* is the subject
21 of a valid Certificate of Registration issued by the United States Copyright Office and that
22 Plaintiff is the exclusive rightsholder of the distribution and reproduction rights of *Big Bang*
23 *Theory: A XXX Parody*. Compl. ¶¶ 7, 8. Plaintiff has also alleged that the Defendants reproduced
24 and distributed *Big Bang Theory: A XXX Parody* via BitTorrent to numerous third parties. Compl.
25 ¶¶ 10-12. Additionally, Plaintiff has alleged that Defendants actively engaged in or directly
26 caused the copying by completing each of the steps in the BitTorrent file-sharing protocol,
27 including intentionally downloading a torrent file particular to *Big Bang Theory: A XXX Parody*,
28 loading that torrent file into the BitTorrent client, entering a BitTorrent swarm particular to *Big*

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