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UNITED STATES DISTRICT COURT  
For the Northern District of California

UNITED STATES DISTRICT COURT  
Northern District of California

NEW SENSATIONS, INC.,  
Plaintiff,  
v.  
DOES 1-1,474,  
Defendants.

No. C 11-2770 MEJ

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

**Docket No. 5**

**I. INTRODUCTION**

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

**II. BACKGROUND**

On June 7, 2011, Plaintiff filed this lawsuit against 1,474 Doe Defendants, alleging that Defendants illegally reproduced and distributed a work subject to Plaintiff's exclusive license, ("*Big Bang Theory: A XXX Parody*"), using an internet peer-to-peer ("P2P") file sharing network known as BitTorrent, and thereby violated the Copyright Act, 17 U.S.C. § 101-1322. Compl. ¶¶ 6-15, Dkt.

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

### 9 III. LEGAL STANDARD

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

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#### 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 owned

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

7 First, to locate swarms<sup>1</sup> 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 as  
9 the copyrighted work. *Id.* ¶¶ 11, 14. Mr. Nicolini states that, in this case, the P2P network on which  
10 CEG found unauthorized distribution of *Big Bang Theory: A XXX Parody* was a BitTorrent network.  
11 *Id.* ¶ 16. CEG then downloads a full copy of the file, which is then forwarded to a two-stage  
12 verification computer process and identified by two people. *Id.* ¶ 17. The process compares the  
13 digital data in the suspect file with digital data in a digital copy of the motion picture obtained from  
14 Plaintiff. *Id.* If the suspect file matches the authorized file, then the two people play the suspect file  
15 and watch the motion picture. *Id.* If both people confirm that a substantial portion of the motion  
16 picture in the suspect file is substantially the same as a corresponding portion of *Big Bang Theory: A*  
17 *XXX Parody*, then particular unique data (often referred to as metadata) in the suspect file is noted  
18 by CEG's System, and the System searches for additional computers on P2P networks that have the  
19 same suspect file. *Id.*

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

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24 <sup>1</sup>P2P networks distribute infringing copies of copyrighted works with file sharing software  
25 such as BitTorrent when one user accesses the Internet through an ISP and intentionally makes a  
26 digital file of a work available to the public from his or her computer. Nicolini Decl. ¶ 6. This file  
27 is referred to as the first "seed." *Id.* Other users, who are referred to as "peers," then access the  
28 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 was downloaded successfully to the accused infringer's computer, (c) the time and date the infringer  
2 was last successfully connected to via the P2P network with respect to the infringer's computer's  
3 downloading and/or uploading the accused file to the Internet, (d) the IP address assigned to the  
4 infringer's computer, (e) the P2P software application used by the infringer and the port number  
5 used by the infringer's P2P software, (f) the size of the accused file, (g) the percent of the file  
6 downloaded by CEG from the infringer's computer, (h) the percent of the accused file on the  
7 infringer's  
8 computer which is available at that moment for copying by other peers, and (i) any relevant  
9 transfer errors. *Id.* ¶ 18. In addition, CEG uses available databases to record the name of the ISP  
10 having control of the IP address and the state (and often the city or county) associated with that IP  
11 address. *Id.*

12 Based on Mr. Nicolini's explanation of the foregoing steps as utilized to investigate  
13 Defendants' activity with respect to *Big Bang Theory: A XXX Parody* on the BitTorrent protocol, the  
14 Court finds that Plaintiff has sufficiently described its efforts to identify Defendants.

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

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