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10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

11
12 **CREATIVECODE LTD.**
Plaintiff,

13 v.

14 **DOES 1-20**

15 Defendants.
16

CASE NO. 23-cv-03832-LJC

PLAINTIFF’S EX PARTE
APPLICATION FOR LEAVE TO TAKE
IMMEDIATE AND LIMITED
DISCOVERY

17 Plaintiff CreativeCode Ltd. seeks leave of this Honorable Court to serve immediate,
18 limited discovery on third parties to the extent necessary for Plaintiff to determine the identity of
19 Doe Defendants in this matter. Plaintiff has good cause for seeking this expedited discovery,
20 and *ex parte* relief is proper under these circumstances. The proposed limited discovery will be
21 taken with respect to Google, LLC (“Google”), which will consist of a subpoena for the actual
22 DMCA Notices referenced in Plaintiff’s Complaint, as well as any and all identifying
23 information with regard to the senders of the DMCA Notices. In the event that the subpoena
24 response from Google is insufficient to identify the Defendants, the discovery will also include

1 subpoenas to internet service providers (“ISPs”), email providers, proxy services, and other third
2 parties as needed to identify the senders of the fraudulent DMCA Notices.

3 The sole purpose of this proposed limited discovery is to identify the Doe Defendants so
4 as to name them as individual defendants in this matter.

5 **I. FACTUAL BACKGROUND**

6 Plaintiff filed its Complaint against 20 unidentified “Doe” Defendants. *See* Complaint at
7 ECF. No. 1. (“Complaint”). Plaintiff owns and operates certain websites with the URLs of
8 “y2mate.nu” and “ytmp3.nu” (the “Websites”). Complaint, at ¶ 7. The Websites allow users to
9 save the audio tracks from online videos to their computers without necessarily saving the video
10 content as well. *Id.* at ¶ 8. The functionality of the Websites is content neutral and there are
11 substantial non-infringing reasons why users want to use the Websites, such as the fact that
12 many publishers put out videos free from copyright and invite users to freely download and copy
13 their work. *Id.* at ¶ 9. There are other examples, such as professors or students who might
14 choose to download the audio portions of lectures for later reference and playback, bands that
15 may want to capture the audio tracks from their live performances that they have captured on
16 video, parents that may want the audio portion of a school concert that they recorded, or any
17 other number of other non-infringing uses and fair uses. *Id.*

18 Starting on or about June 27, 2023, Defendants began to submit fraudulent DMCA
19 notices to Google, falsely alleging that the Websites were infringing on copyrights allegedly held
20 by Defendants (or copyrights that Defendants were authorized to act on account of the copyright
21 holders) and that the Websites implemented software that circumvented technologic barriers
22 regarding copyright. *Id.* at ¶ 10. Defendants sent scores of fraudulent DMCA notices to Google
23 regarding the Websites (the “DMCA Notices”).
24

1 On account of the DMCA Notices, upon information and belief, Google downranked or
2 delisted the Websites, significantly reducing the amount of traffic to the Websites, which has, or
3 will, directly result in reducing Plaintiff’s advertising revenue from the Websites, causing
4 Plaintiff damage. *Id.* at ¶¶ 13-16.

5 The DMCA Notices are fraudulent for the following reasons:

6 • It is obvious that the copyright “owners” listed on the DMCA Notices do not
7 actually own the copyrights referenced on the DMCA Notices. For instance, often times the
8 copyrighted work is a prominent and world-famous work and the owner is listed as a small or
9 obscure entity. *Id.* at ¶¶ 18-20;

10 • They falsely claim that the Websites employ circumvention software banned by the
11 DMCA. *Id.* at ¶ 27;

12 • They fail to provide full information about the entity sending the respective
13 DMCA Notice, such as omitting with the sender’s organization and failing to identify the
14 copyrighted work. *Id.* at ¶¶ 22-23.

15 • A number of fraudulent DMCA Notices were sent subsequent to Plaintiff sending
16 a cease and desist letter to a few suspected senders of the DMCA Notices. These responsive
17 DMCA Notices were intentionally provocative to Plaintiff and further demonstrated the
18 fraudulent nature of the DMCA Notices. For instance, these entity(ies) sent a “rick roll”¹ to
19 Plaintiff, *i.e.* a DMCA Notice purporting that the Websites infringed Rick Astley’s 1987 hit
20 “Never Gonna Give You Up”, and also falsely alleging that he Websites infringed on CeeLo
21 Green’s 2010 hit “F*** You!”. *Id.* at ¶¶ 20, 25-26.

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24 ¹ See <https://en.wikipedia.org/wiki/Rickrolling>.

1 The amount of information that Plaintiff currently has to identify the Defendants only
2 consists of what is publicly available on the Lumen Database. *Id.* at ¶¶ 20, 23, 26 and Exhibits
3 1, 4-5 thereto. The Lumen Database maintains a website at lumendatabase.org, that allows
4 recipients of DMCA notices to submit them to the Lumen Database either for advice or as a
5 public service. *See* [https://en.wikipedia.org/wiki/Lumen_\(website\)](https://en.wikipedia.org/wiki/Lumen_(website)). Google voluntarily submits
6 the DMCA notices it receives to the Lumen Database. *Id.* The information publicly available
7 regarding the DMCA Notices on the Lumen Database does not provide identifying information
8 regarding the senders of the DMCA Notices. *See*, Complaint at ¶¶ 20, 22-24, 26 and Exhibits 1,
9 4-5 thereto; *See, also*, Exhibit A attached to Declaration of Frank Scardino filed herewith, a
10 printout of Google's Report alleged copyright infringement Web Search page. As can be seen
11 from the printout of Google's Copyright Infringement Web Search Page, Google states that it
12 may send some information in the DMCA request to the Lumen database, but that personal data
13 is not provided to Lumen.

14 **II. REASONS WHY THIS LIMITED EARLY DISCOVERY IS REQUIRED TO**
15 **IDENTIFY DEFENDANTS**

16 Plaintiff anticipates that Google, as the recipient of the DMCA Notices, will have
17 sufficient additional information regarding the Senders of the DMCA Notices that will be the
18 only way that Plaintiffs can identify the Defendants in this matter. For example, Google may
19 have the actual form of the DMCA Notices, rather than what Google uploaded to the Lumen
20 Database, which may include more information than what was uploaded to the Lumen Database.
21 For instance, the Google webform requires a submitter to provide a name, company name, email
22 address, signature, and other pieces of information. *See* Exhibit A to Scardino Declaration. Even
23 if the Doe Defendants did not provide accurate identification information on the DMCA Notices
24

1 they submitted to Google,² Google may still have certain pieces of informational data that will
2 aid Plaintiffs in identifying the Doe Defendants, such as the email address of the sender, the
3 internet protocol (IP) address of the computer that sent the DMCA Notice (which can provide
4 the general location from where the DMCA Notice was sent), the sender’s Youtube.com account
5 information, metadata associated with the DMCA Notice, and potentially other identifying
6 information. With this information, Plaintiffs can further subpoena an ISP, email provider, or
7 other technology provider who may have further identifying information regarding the sender,
8 such as a physical address.

9 As Doe Defendants cannot be identified, this lawsuit cannot proceed unless this Court
10 grants Plaintiffs application to take early discovery.

11 **III. LEGAL BASIS TO GRANT DISCOVERY**

12 This Court should grant Plaintiff’s application because Plaintiff’s need for limited early
13 discovery outweighs any prejudice to the Doe Defendants. Indeed, this case cannot progress
14 unless and until Plaintiff identifies the Defendants and effectuates service of process on them.
15 Moreover, *ex parte* relief is proper under these circumstances as there is no known Defendant
16 with whom Plaintiff can confer for purposes of F.R.C.P. 26(f) and the proposed discovery is
17 directed at a third party. The scope of the information and documentation Plaintiff seeks
18 pursuant to this application is limited only to information leading to the identity of the Doe
19 Defendants.

20 Courts in the this district apply the “good cause” standard in deciding whether to permit
21 early discovery. *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal.

23 ² Since Plaintiff alleges that Defendants are in violation of federal law by sending clearly
24 fraudulent DMCA Notices, it would not be surprising if Defendants also entered false or
misleading identifying information in the DMCA Notices themselves.

1 2002). “Good cause exists ‘where the need for expedited discovery, in consideration of the
2 administration of justice, outweighs the prejudice to the responding party.’ ... Good cause for
3 expedited discovery has been found in cases involving claims of infringement and unfair
4 competition.... In infringement cases, expedited discovery is frequently limited to allowing
5 plaintiffs to identify Doe defendants.” *Strike 3 Holdings, LLC v. Doe*, No. 223CV01185, 2023
6 WL 4551646, at *1 (E.D. Cal. July 14, 2023) (*quoting Semitool*, 208 F.R.D. at 276, *which in*
7 *turn cites UMG Recordings, Inc. v. Doe*, 2008 WL 4104207, at *3 (N.D. Cal. Sept. 4, 2008)).

8 When the identity of a defendant is not known before a complaint is filed, a plaintiff
9 “should be given an opportunity through discovery to identify the unknown defendant, unless it
10 is clear that discovery would not uncover the identity, or that the complaint would be dismissed
11 on other grounds.” *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Courts in this
12 district routinely grant immediate discovery requests when the reason for such a request is to
13 identify an unknown defendant so that the suit can proceed. *See, e.g., UMG Recordings, Inc. v.*
14 *Does 1–4*, 2006 WL 1343597 (N.D. Cal. Mar. 6, 2006); *IO Group, Inc. v. Does 1–65*, 2010 WL
15 4055667 (N.D. Cal. Oct. 15, 2010); *Zoosk Inc. v. Does 1–25*, 2010 WL 5115670 (N.D. Cal. Dec.
16 9, 2010).

17 Plaintiff’s request for discovery does not meaningfully prejudice the Doe Defendants.
18 Plaintiff’s discovery requests are narrowly tailored to the basic identity, location, and contact
19 information of the Doe Defendants, solely enough to name them as defendants in this case.
20 Moreover, First Amendment protections do not extend to the torts and statutory violations
21 alleged in Plaintiff’s Complaint. *See, e.g., Universal City Studios, Inc. v. Reimerdes*, 82
22 F.Supp.2d 211, 220 (S.D.N.Y. 2000) (The “Supreme Court ... has made it unmistakably clear
23 that the First Amendment does not shield copyright infringement.”). Indeed, the speech at issue
24 here is not anonymous speech, which has some First Amendment protections from identifying

1 disclosure. *See, In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).
2 Instead, the speech here is a DMCA Notice which the Doe Defendants signed by name under the
3 pains and penalties of perjury, which Plaintiff alleges is false and misleading in violation of 17
4 U.S.C. 512(f). Such “speech” has a very low level of protection from disclosure, especially
5 when the Doe Defendants have voluntarily disclosed this information to a third party. *Id.*
6 (“Commercial speech, on the other hand, enjoys ‘a limited measure of protection, commensurate
7 with its subordinate position in the scale of First Amendment values,’ ... as long as ‘the
8 communication is neither misleading nor related to unlawful activity.’” (internal citations
9 omitted)).

10 CONCLUSION

11 Therefore, for the reasons stated herein, Plaintiff requests that this Honorable Court grant
12 this application and issue the Proposed Order filed herewith.

13
14 Dated: October 26, 2023

Respectfully submitted,
Plaintiff CreativeCode Ltd.,
By its attorney,

15
16 /s/ Matthew Shayefar
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