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5
6 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

7
8 CREATIVECODE LTD.

9 Plaintiff,

10 v.

11 DOES 1-20

12 Defendants.

CASE NO. 23-cv-03832-LJC

PLAINTIFF’S *EX PARTE*
APPLICATION FOR LEAVE TO TAKE
ADDITIONAL IMMEDIATE AND
LIMITED DISCOVERY AND TO
ENLARGE TIME FOR SERVICE

Action Filed: July 31, 2023

Trial Date: None set

13
14 Plaintiff CreativeCode Ltd. seeks leave of this Honorable Court to serve additional
15 immediate, limited discovery on third parties to the extent necessary for Plaintiff to determine the
16 identity of Doe Defendants in this matter. The prior discovery permitted by the Court did not lead
17 to the discovery of the identity and location of the Doe Defendants, and Plaintiff now requests
18 additional discovery in accordance with the Court’s prior order. Plaintiff has good cause for
19 seeking this expedited discovery, and *ex parte* relief is proper under these circumstances.

20 The proposed limited discovery will be taken with respect to: (a) Namecheap, Inc.
21 (“Namecheap”), a domain name registrar with which a number of domains are registered that
22 appear to be associated with the suspected Defendants; (b) Cloudflare, Inc. (“Cloudflare”), a name
23 service provider that is providing services for the same domain names; and (c) Google LLC
24

1 (“Google”) the operator of the Gmail service where the suspected defendants use and operate email
2 addresses.

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 In the meantime, the Court has set the date of May 15, 2024, to serve defendants. However,
6 given that Defendants have not yet been identified, Plaintiff requires additional time and therefore
7 also brings this Application to request the Court to enlarge the time for service pursuant to Fed. R.
8 Civ. P. 4(m).

9 **I. FACTUAL AND HISTORICAL BACKGROUND**

10 **A. Defendants’ Fraudulent Activities**

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

23 Starting on or about June 27, 2023, Defendants began to submit fraudulent DMCA notices
24 to Google, falsely alleging that the Websites were infringing on copyrights allegedly held by

1 Defendants (or copyrights that Defendants were authorized to act on account of the copyright
2 holders) and that the Websites implemented software that circumvented technologic barriers
3 regarding copyright. *Id.* at ¶ 10. Defendants sent multiple fraudulent DMCA notices to Google
4 regarding the Websites (the “DMCA Notices”).

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

9 The DMCA Notices are fraudulent for the following reasons:

10 • It is obvious that the copyright “owners” listed on the DMCA Notices do not
11 actually own the copyrights referenced on the DMCA Notices. For instance, often times the
12 copyrighted work alleged to have been infringed is a prominent and world-famous work and the
13 owner is listed as a small or obscure entity. *Id.* at ¶¶ 18-20;

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

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

19 • A number of fraudulent DMCA Notices were sent subsequent to Plaintiff sending
20 a cease and desist letter to a few suspected senders of the DMCA Notices. These responsive
21 DMCA Notices were intentionally provocative to Plaintiff and further demonstrated the fraudulent
22 nature of the DMCA Notices. For instance, these entity(ies) sent a “rick roll”¹ to Plaintiff, *i.e.* a
23

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

1 DMCA Notice purporting that the Websites infringed Rick Astley’s 1987 hit “Never Gonna Give
2 You Up”, and also falsely alleging that the Websites infringed on CeeLo Green’s 2010 hit “F***
3 You!”. *Id.* at ¶¶ 20, 25-26.

4 **B. Procedural History Regarding Efforts to Identify Defendants**

5 Previously, Plaintiff’s only information that it had to try to identify the Defendants was
6 based on the DMCA notices that Google received, but which did not identify the actual senders of
7 the notices. *See* Docket No. 7, p.4. Upon motion, this Court granted Plaintiff limited early
8 discovery to serve a subpoena on Google to determine whether Google had further information
9 that would allow Plaintiff to identify the senders of the DMCA notices. Docket No. 9.

10 After significant delays from Google, Google eventually, on or about January 25, 2024,
11 produced very limited documentation about the senders of the DMCA notices, which contained
12 what are suspected to be false email addresses for the senders. Declaration of Matthew Shayefar
13 [“Shayefar Decl.”], filed herewith, ¶¶ 2-3. Google’s responses did not include any IP addresses.
14 *Id.* at ¶ 4. Further discovery with regards to the produced email addresses will be necessary to
15 proceed down the chain towards identifying the Doe Defendants.

16 Moreover, recently Plaintiff was apparently contacted by an individual making threats
17 against Plaintiff that they would “spam negative link to your all domain !!” unless the individual’s
18 demands were met. Shayefar Decl., ¶ 5. Plaintiff has reason to believe that this individual has been
19 behind the actions forming the basis of the Complaint. *Id.* at ¶ 6. Through internal investigation,
20 Plaintiff has determined a number of domain names and email addresses associated with the email
21 addresses used to threaten Plaintiff – including domain names that appear to copy content from
22 Plaintiff’s own websites. *Id.* at ¶ 7-9. Plaintiff therefore seeks additional discovery to the internet
23 service providers, NameCheap, CloudFlare, and Google, for these domain names and the email
24 addresses associated with them. *Id.* at ¶ 10.

1 Plaintiff expects that this additional discovery will lead either directly to information
2 identifying the Doe defendants, or at least internet protocol (IP) addresses that can thereafter be
3 used, after further discovery, to identify the Doe defendants. Shayefar Decl., ¶ 11.

4 **C. Procedural History Regarding Time to Serve Defendants**

5 Given that the Doe defendants have not yet been identified, Plaintiff requires additional
6 time to serve Doe defendants. Plaintiff has previously requested to extend the time to serve
7 Defendants once. *See* Docket No. 12. As set forth in the previous motion, additional time was
8 required because the Defendants were not yet identified, and Google had failed to timely respond
9 to the first subpoena sent to them to attempt to identify the Defendants. *Id.* Accordingly, the Court
10 granted the motion to extend the time to serve by 90 days through May 15, 2024. *See* Docket No.
11 14.

12 As set forth above, Plaintiff has not yet been able to identify Defendants because the
13 information provided by Google as of yet has been insufficient to do so and it is only recently that
14 Plaintiff has obtained, through other means, further leads to try to identify Defendants.

15 Moreover, Plaintiff's efforts have been somewhat delayed by reason of major life events
16 for undersigned counsel. Counsel was married on January 28, 2024, just three days after Google
17 finally responded to the initial subpoena. Shayefar Decl., ¶ 12. Shortly thereafter, counsel left on
18 his honeymoon, which had to be cut short to travel to Arizona, where his new father-in-law was
19 severely sick with cancer. Shayefar Decl., ¶ 13. Upon arriving in Arizona, counsel became sick
20 with COVID. Shayefar Decl., ¶ 14. Then counsel's father-in-law passed on February 19, 2024,
21 and counsel had to take further time off to manage his affairs after his death and care for his own
22 wife. *Id.* at ¶ 15. For these reasons, undersigned counsel was not able to immediately review and
23 attend to the responses that were already received late from Google and request further discovery
24 from this Court. *Id.* at ¶ 16.

1 **II. REASONS WHY THIS LIMITED EARLY DISCOVERY IS REQUIRED TO**
2 **IDENTIFY DEFENDANTS**

3 Plaintiff anticipates that Google, as the service provider for the email addresses that (a)
4 purportedly sent the DMCA notices, (b) sent the threatening emails to Plaintiff, and (c) are linked
5 to on the websites associated with the person(s) sending the threatening emails, will have further
6 information that may help identify the senders of the DMCA Notices and the other persons liable
7 for the fraudulent activities as described in the Complaint. For instance, Google may have internet
8 protocol (IP) addresses associated with the email addresses, which may then allow Plaintiff to
9 serve further discovery on the internet service provider for those IP addresses, which may lead to
10 the identification of the Defendants.

11 Plaintiff also anticipates that NameCheap and Cloudflare will have further information
12 about the Doe defendants as they provide domain name and relates services for the websites
13 associated with the individuals who have sent threatening emails to Plaintiff. NameCheap and
14 Cloudflare may have, for instance, billing information for the Defendants that will identify them,
15 or further IP addresses associated with the accounts that may be used, after further discovery, to
16 identify Defendants.

17 As the Doe Defendants cannot currently be identified, this lawsuit cannot proceed unless
18 this Court grants Plaintiff's application to take additional early discovery.

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

20 This Court should grant Plaintiff's application because Plaintiff's need for limited early
21 discovery outweighs any prejudice to the Doe Defendants. Indeed, this case cannot progress unless
22 and until Plaintiff identifies the Defendants and effectuates service of process on them. Moreover,
23 *ex parte* relief is proper under these circumstances as there is no known Defendant with whom
24 Plaintiff can confer for purposes of F.R.C.P. 26(f) and the proposed discovery is directed at a third

1 party. The scope of the information and documentation Plaintiff seeks pursuant to this application
2 is limited only to information leading to the identity of the Doe Defendants.

3 Courts in this district apply the “good cause” standard in deciding whether to permit early
4 discovery. *Semitoool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002).
5 “Good cause exists ‘where the need for expedited discovery, in consideration of the administration
6 of justice, outweighs the prejudice to the responding party.’ ... Good cause for expedited discovery
7 has been found in cases involving claims of infringement and unfair competition.... In
8 infringement cases, expedited discovery is frequently limited to allowing plaintiffs to identify Doe
9 defendants.” *Strike 3 Holdings, LLC v. Doe*, No. 223CV01185, 2023 WL 4551646, at *1 (E.D.
10 Cal. July 14, 2023) (*quoting Semitoool*, 208 F.R.D. at 276, *which in turn cites UMG Recordings,*
11 *Inc. v. Doe*, 2008 WL 4104207, at *3 (N.D. Cal. Sept. 4, 2008)).

12 When the identity of a defendant is not known before a complaint is filed, a plaintiff
13 “should be given an opportunity through discovery to identify the unknown defendant, unless it is
14 clear that discovery would not uncover the identity, or that the complaint would be dismissed on
15 other grounds.” *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Courts in this district
16 routinely grant immediate discovery requests when the reason for such a request is to identify an
17 unknown defendant so that the suit can proceed. *See, e.g., UMG Recordings, Inc. v. Does 1–4*,
18 2006 WL 1343597 (N.D. Cal. Mar. 6, 2006); *IO Group, Inc. v. Does 1–65*, 2010 WL 4055667
19 (N.D. Cal. Oct. 15, 2010); *Zoosk Inc. v. Does 1–25*, 2010 WL 5115670 (N.D. Cal. Dec. 9, 2010).

20 Plaintiff’s request for discovery does not meaningfully prejudice the Doe Defendants.
21 Plaintiff’s discovery requests are narrowly tailored to the basic identity, location, and contact
22 information of the Doe Defendants, solely enough to name them as defendants in this case.
23 Moreover, First Amendment protections do not extend to the torts and statutory violations alleged
24 in Plaintiff’s Complaint. *See, e.g., Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp.2d 211,

1 220 (S.D.N.Y. 2000) (The “Supreme Court ... has made it unmistakably clear that the First
2 Amendment does not shield copyright infringement.”). Indeed, the speech at issue here is not
3 anonymous speech, which has some First Amendment protections from identifying disclosure.
4 *See, In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). Instead, the speech
5 here is a DMCA Notice which the Doe Defendants signed by name under the pains and penalties
6 of perjury, which Plaintiff alleges is false and misleading in violation of 17 U.S.C. 512(f). Such
7 “speech” has a very low level of protection from disclosure, especially when the Doe Defendants
8 have voluntarily disclosed this information to a third party. *Id.* (“Commercial speech, on the other
9 hand, enjoys ‘a limited measure of protection, commensurate with its subordinate position in the
10 scale of First Amendment values,’ ... as long as ‘the communication is neither misleading nor
11 related to unlawful activity.’” (internal citations omitted)).

12 **IV. THE COURT MUST GRANT ADDITIONAL TIME TO SERVE DEFENDANTS**

13 Pursuant to F.R.C.P. 4(m), the Court “must” extend the time for service for an appropriate
14 period when good cause is shown. As described herein, there exists good cause to extend the period
15 for service on the Defendants because Defendants have fraudulently concealed their true names
16 and locations, significant additional discovery is needed to attempt to find their identities in the
17 face of their fraud, and additional time is warranted given certain life events for undersigned
18 counsel.

19 If the Court does not grant Plaintiff additional time to identify and then serve the
20 Defendants, Plaintiff will be unfairly and extremely prejudiced because it will not be able to
21 proceed with its lawsuit and seek remedies for the damages it has suffered.

22 The effect of granting this modification would require the modification of the dates
23 currently set forth the Initial Case Management Conference, scheduled for July 18, 2024, and the
24

1 filing date for the case management statement in advance of the same. No other dates would need
2 to be modified as no other current deadlines are set by this Court.

3 Since Defendants cannot be identified at this time, Plaintiff has not made efforts to obtain
4 a stipulation to this Motion.

5 **V. CONCLUSION**

6 Therefore, for the reasons stated herein, Plaintiff requests that this Honorable Court grant
7 this application and issue the Proposed Order filed herewith, allowing Plaintiff to issue additional
8 third-party discovery to attempt to discovery the identities of Defendants and to extend the time
9 to serve Defendants by an additional 90 days.

10
11 Dated: May 15, 2024

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

12
13 /s/ Matthew Shayefar
14 Matthew Shayefar, Esq. (SBN 289685)
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