

regarding the infringement alleged in Plaintiffs' Complaint, including information regarding who is responsible for such infringement. Plaintiffs also seek a forensic examination of the computer allegedly used to infringe Plaintiffs' copyrights. Plaintiffs seek such discovery in order to identify the individual or individuals responsible for the infringement of their copyrights so that Plaintiffs can pursue their lawsuit to protect their copyrighted works from repetitive, rampant infringement. Plaintiffs are serving a copy of this Motion (with supporting declarations and exhibits) on counsel for the individual who owns the computer at issue in this case and whom is believed to have information concerning the identify of the direct infringer or infringers.

II. BACKGROUND

The Internet and P2P networks have spawned an illegal trade in copyrighted works. By downloading P2P software, and logging onto a P2P network, an individual can upload (distribute) or download (copy), without authorization, countless copyrighted music and video files to or from any other Internet user worldwide. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331 (S.D.N.Y.), *aff'd sub nom.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (describing a viral system, in which the number of infringing copies made available multiplies rapidly as each user copying a file also becomes a distributor of that file). Until enjoined, Napster was the most notorious online media distribution system. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). One of the current online media distribution systems, KaZaA, was used in this case.

Despite the continued availability of such systems, there is no dispute that the uploading and downloading of copyrighted works without authorization is copyright infringement. *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (“[P]eople who post or download music files are primary infringers.”); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (“[M]aking . . . a digital copy of [copyrighted] music . . . infringes copyright.”); *Napster*, 239

F.3d at 1014 (making copyrighted works available for electronic distribution on a P2P network violates the exclusive right of distribution, even absent evidence of actual distribution); *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 125 S. Ct. 2764 (2005); 2 M. & D. Nimmer, NIMMER ON COPYRIGHT (“NIMMER”) § 8.08[A][1], at 8-115 (“[The] input of a work into a computer results in the making of a copy, and hence . . . such unauthorized input infringes the copyright owner’s reproduction right.”). Nonetheless, at any given moment, millions of people illegally use online media distribution systems to upload or download copyrighted material. (Linares Decl. ¶ 6, Exhibit A.) More than 2.6 billion infringing music files are downloaded monthly. L. Grossman, *It’s All Free*, TIME, May 5, 2003, at 60-69.

The scope of online piracy of copyrighted works cannot be underestimated. Plaintiffs lose significant revenue on an annual basis due to the millions of unauthorized downloads and uploads of well-known recordings that are made available on the Internet by infringers. (Linares Decl. ¶ 9, Exhibit A.) Evidence shows that the main reason for the lost revenue is that individuals are downloading music illegally for free, rather than buying it. *See In re Aimster Copyright Litig.*, 334 F.3d at 645.

On June 13, 2005, Plaintiffs’ third-party investigators located an individual using the KaZaA file sharing program under the username “omc@KaZaA” to engage in copyright infringement on a massive scale. (Linares Decl. ¶ 13, Exhibit A). Plaintiffs’ investigators detected the infringement by logging onto the peer-to-peer (“P2P”) network, in the same fashion as any Internet user, and viewing the files that were being distributed to other users. (*Id.*) Plaintiffs’ investigators found 349 music files being distributed, for free, from the computer’s “shared” folder to the millions of people who use similar P2P networks. (*Id.*) On information

and belief, many of these 349 music files were downloaded to the computer's shared folder without the permission of the record company copyright owners.

Plaintiffs' investigators further ascertained that the sound recordings were being distributed from Internet Protocol ("IP") address 68.160.209.185. (*Id.*) To determine who used this IP address, Plaintiffs filed a "Doe" complaint and, after obtaining a court order, issued a Rule 45 subpoena to Verizon Internet Services, Inc. ("Verizon"). (Rust Decl. ¶ 2). In response to Plaintiffs' subpoena, Verizon identified Joan Cassin as the person to whom the above IP address was registered at the time of infringement. (*Id.*) On September 18, 2007, after having tried unsuccessfully to resolve the matter with Ms. Cassin, Plaintiffs filed a complaint against Ms. Cassin for copyright infringement, *Warner Bros. Records Inc., et al. v. Cassin*, Case No. 06-CV-3089 (SCR)(GAY) (the "*Cassin*" case). (*Id.*) On July 10, 2007, Ms. Cassin filed a motion to dismiss the complaint for failure to state a claim. It was not until May 27, 2008 that Ms. Cassin's counsel in the *Cassin* case first made clear Ms. Cassin's claim that she did not commit the copyright infringement that occurred through her Internet account. (*Id.* ¶ 3) Neither Ms. Cassin, nor her attorney, however, revealed who might be responsible for the infringing activity alleged in Plaintiffs' Complaint. (*Id.*) In light of Ms. Cassin's denial of liability and failure to reveal who might be responsible for the infringement, Plaintiffs moved for a voluntary dismissal of the *Cassin* case and pursued the copyright infringement through the current *Doe* action. (*Id.*)

Plaintiffs in this case allege that the Doe Defendants, without authorization, used an online media distribution system (*e.g.*, a P2P system) to download and distribute Plaintiffs' copyrighted works in violation of the Copyright Act. (Compl. ¶ 16.) Although Plaintiffs do not at this time know the specific identities of the Doe Defendants, Plaintiffs have reason to believe, based on their own investigation, that information regarding the infringement in Plaintiffs'

Complaint likely resides on Ms. Cassin's computer, and that Ms. Cassin likely has information concerning who may be responsible for such infringement. Through Plaintiffs' continued investigation, Plaintiffs have identified Ms. Cassin's daughter as Olivia M. Cassin. As Olivia Cassin's initials - OMC- are a match to the KaZaA username, "omc@KaZaA," Plaintiffs believe that Olivia Cassin likely has information concerning the person responsible for the copyright infringement at issue.

Plaintiffs now seek leave of Court to take limited, expedited discovery to determine the identify of the direct infringers in this case. Specifically, Plaintiffs intend to serve a Rule 45 subpoena on Ms. Cassin for a forensic examination of computers in her house on June 13, 2005 and to take her deposition in order to obtain information sufficient to identify those individuals responsible for the infringement of Plaintiffs' copyrights in this case. Plaintiffs also intend to serve Rule 45 subpoenas on other members of Ms. Cassin's household and/or whoever else may be identified by Ms. Cassin as potentially responsible for this infringement, including Olivia M. Cassin. Once Plaintiffs have identified the individuals responsible for the infringement of their copyrights, they will attempt to resolve the dispute with those individuals. If the dispute is not resolved, and it is determined that it would be more appropriate to litigate the copyright infringement claims, Plaintiffs will amend their Complaint to name the particular Defendants to this lawsuit.

III. ARGUMENT

Courts routinely allow discovery to identify "Doe" defendants. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (error to dismiss unnamed defendants given possibility that identity could be ascertained through discovery); *Valentin v. Dinkins*, 121 F.3d 72, 75-76 (2d Cir. 1997) (vacating dismissal; *pro se* plaintiff should have been permitted to conduct discovery to reveal identity of defendant); *Dean v. Barber*, 951 F.2d 1210, 1215 (11th

Cir. 1992) (error to deny plaintiff's motion to join John Doe defendant where identity of John Doe could have been determined through discovery); *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985) (error to dismiss claim merely because defendant was unnamed; "Rather than dismissing the claim, the court should have ordered disclosure of the Officer Doe's identity"); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) ("where the identity of alleged defendants [are not] known prior to the filing of a complaint . . . the plaintiff should be given an opportunity through discovery to identify the unknown defendants"); *Maclin v. Paulson*, 627 F.2d 83, 87 (7th Cir. 1980) (where "party is ignorant of defendants' true identity . . . plaintiff should have been permitted to obtain their identity through limited discovery"); *United Parcel Serv. of Am., Inc. v. John Does One Through Ten*, No. Civ. A. 1-03-CV-1639, 2003 WL 21715365, at *1 (N.D. Ga. June 13, 2003) (authorizing expedited discovery to determine the identity of defendants); *see also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 n. 2 (1971) (noting, without discussion, the use of unnamed defendants).

Indeed, in similar copyright infringement cases brought by Plaintiffs, and/or other record companies, against Doe defendants for infringing copyrights over P2P networks, many courts, including this Court, have granted Plaintiffs' motions for leave to take expedited discovery. *See, e.g.,* Order, *Capitol Records, Inc. v. Does 1-250*, No. 04 CV 472 (LAK) (S.D.N.Y. Jan. 26, 2004); Order, *Sony BMG Music Ent't v. Does 1-2*, Civil Action No. 5:04-cv-1253 (NAM/GHL) (N.D.N.Y. Nov. 5, 2004); Order, *Virgin Records Am., Inc. v. Does 1-3*, Civil Action No. 3-04-cv-701 (JCH) (D. Conn. April 29, 2004) (true and correct copies of these Orders are attached hereto as Exhibit B). This Court should not depart from its well-reasoned decisions, or the well-reasoned decisions of other courts that have addressed this issue directly.

Courts allow parties to conduct expedited discovery in advance of a Rule 26(f) conference where the party establishes “good cause” for such discovery. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002); *Qwest Comm. Int’l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003); *Entertainment Tech. Corp. v. Walt Disney Imagineering*, No. Civ. A. 03-3546, 2003 WL 22519440, at *4 (E.D. Pa. October 2, 2003) (applying a reasonableness standard; finding that, absent extraordinary circumstances, “a district court should decide a motion for expedited discovery on the entirety of the record to date and the reasonableness of the request in light of all of the surrounding circumstances”) (quotations omitted); *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613-14 (D. Ariz. 2001) (applying a good cause standard). Plaintiffs easily have met this standard.

First, good cause exists where, as here, the complaint alleges claims of infringement. *See Semitool*, 208 F.R.D. at 276; *Qwest Comm.*, 213 F.R.D. at 419 (“The good cause standard may be satisfied . . . where the moving party has asserted claims of infringement and unfair competition.”); *Benham Jewelry Corp. v. Aron Basha Corp.*, No. 97 CIV 3841, 1997 WL 639037, at *20 (S.D.N.Y. Oct. 14, 1997). This is not surprising since such claims necessarily involve irreparable harm to the plaintiff. 4 NIMMER § 14.06[A], at 14-103; *see also Health Ins. Ass’n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) (“A copyright holder [is] presumed to suffer irreparable harm as a matter of law when his right to the exclusive use of copyrighted material is invaded.”) (quotations and citations omitted); *see also ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996); *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1034, 1042 (8th Cir. 2003).

Second, good cause exists here because there is a very real danger that evidence of infringement on Ms. Cassin’s computer will not be preserved. Computer-based data are

constantly revised, edited, and even deleted. *See Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 111-12 (D. Colo. 1996) (discussing the nature of computer-based evidence). The deletion process does not completely destroy data but only targets the deleted data's file space on the hard drive for future reuse by other data. If the space allotted to a "deleted" file is later reused, or "overwritten" by a new document or by executing a computer function, the original data is erased and become irretrievable. *Id.* In this case, if information of infringement is erased from Ms. Cassin's computer hard drive through the ordinary use of the computer, Plaintiffs' ability to identify more specifically the Defendants and obtain evidence of their infringement will be significantly diminished. Where "physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation," good cause for expedited discovery exists. *See Qwest Comm.*, 213 F.R.D. at 419; *Pod-Ners, LLC v. Northern Feed & Bean*, 204 F.R.D. 675, 676 (D. Colo. 2002) (allowing Plaintiff expedited discovery to inspect "beans" in defendant's possession because the beans might no longer be available for inspection if discovery proceeded in the normal course).

Third, good cause exists because the proposed discovery is narrowly tailored to focus only on those individuals known to have information concerning the infringement at issue and on the computer that was used to infringe Plaintiffs' copyrights. The discovery does not exceed the minimum information required to advance this lawsuit and will not prejudice Defendants. *See Semitool*, 208 F.R.D. at 276 ("Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party."). Plaintiffs seek immediate discovery to identify the Defendants, and cannot wait until after the Rule 26(f) conference (ordinarily a prerequisite before propounding discovery) because there are no known Defendants with whom to confer (and thus, no conference is possible).

There is no prejudice to Defendants because Plaintiffs merely seek information to identify the Defendants and to serve them, and Plaintiffs agree to use the information disclosed pursuant to their subpoenas only for the purpose of protecting their rights under the copyright laws.

Fourth, courts regularly grant expedited discovery where such discovery will “substantially contribute to moving th[e] case forward.” *Semitool*, 208 F.R.D. at 277. Here, Plaintiffs’ proposed discovery will substantially contribute to moving this case forward because it will allow Plaintiffs to allege specifically who is responsible for the infringement of Plaintiffs’ sound recordings identified on Exhibit A to the Complaint. As demonstrated above, Plaintiffs already have developed a substantial case on the merits against Doe Defendants. Plaintiffs’ Complaint alleges a prima facie claim for direct copyright infringement. Plaintiffs have alleged that they own and have registered the copyrights in the works at issue, and that Defendants copied or distributed those copyrighted works without Plaintiffs’ authorization. (*See* Compl. ¶¶ 12, 16.) These allegations state a claim of copyright infringement. *See* 4 NIMMER § 13.01 (“Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant.”); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In addition, Plaintiffs have copies of a sample of the sound recordings Defendants illegally distributed, which include some of the sound recordings listed on Exhibit A. Plaintiffs have reason to believe that Ms. Cassin and others in her household, including her daughter, Olivia M. Cassin, have information regarding who specifically is responsible for the infringement of Plaintiffs’ copyrights. These individuals, and the computer itself, are the best source of information needed to identify who is responsible for the infringement of the sound recordings listed on Exhibit A to the Complaint. The requested discovery, therefore, will allow Plaintiffs to

identify specific Doe Defendants and then either resolve this matter or proceed with the litigation.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Motion and enter an Order substantially in the form attached hereto.

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