

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DISCOUNT VIDEO CENTER, INC.
DOING BUSINESS AS MAYHEM,

Plaintiff,

v.

DOES 1-5041,

Defendants.

Case No.: C 11-02694 CW (PSG)

**ORDER GRANTING-IN-PART
PLAINTIFF DISCOUNT VIDEO,
INC.'S EX PARTE APPLICATION FOR
LEAVE TO TAKE LIMITED
DISCOVERY PRIOR TO RULE 26(F)
CONFERENCE**

(Re: Docket No. 6)

Plaintiff Discount Video Center, Inc. doing business as Mayhem ("Mayhem") applies *ex parte* for leave to take expedited and limited discovery prior to the Fed. R. Civ. P. 26(f) conference. The court heard oral argument on the application on September 22, 2011. Mayhem's application raises the same issues as those recently addressed by the court in *Diabolic Video Productions, Inc. v. Does 1-2099*¹ and *Boy Racer, Inc. v. John Does 2-52*.² In each of those cases, the undersigned granted leave to take expedited discovery, but only as to the initial Doe. The court severed or recommended severance of the remaining Does and recommended that the claims against the

¹ See *Diabolic Video Productions, Inc. v. Does 1-2099*, No. 5:10-cv-05865-PSG, Amended Order Granting-In-Part Motion for Leave to Take Limited Discovery Prior to Rule 26(f) Conference (Docket No. 16).

² See *Boy Racer, Inc. v. Does 2-52*, Case No. 5:11-02834 LHK, Order Granting-In-Part Plaintiff Boy Racer, Inc.'s *Ex Parte* Application for Leave to Take Limited Discovery Prior to Rule 26(f) Conference (Docket No. 12).

1 remaining be dismissed without prejudice and, if re-filed within 20 days, deemed a continuation of
 2 the original action for purposes of the statute of limitations.

3 In *Diabolic*, the undersigned found that the copyright owner had not adequately explained
 4 how or why the peer-to-peer architecture of the BitTorrent protocol differed from other file-sharing
 5 protocols considered in *Leface Records, LLC*,³ *Interscope Records*,⁴ *BMG Music*,⁵ or *Twentieth*
 6 *Century Fox Film Corp.*⁶ In each of those cases, the peer-to-peer nature of the protocol was
 7 insufficient to justify joinder of dozens of otherwise unrelated defendants in a single action.

8 Under *Gillespie v. Civiletti*, before allowing expedited discovery to uncover the identity of
 9 unnamed defendants, the district courts of this circuit must determine whether either of two
 10 conditions applies. The first is whether the requested discovery would fail to uncover the identities
 11 sought.⁷ The second is whether the claim against the defendant could be dismissed.⁸

12 As to the first *Gillespie* condition,⁹ whether or not the individuals identified are ultimately
 13 liable under Mayhem's theory of infringement, the court is once again informed by the plaintiff that
 14 the discovery sought here would uncover the identities sought. Mayhem seeks leave to subpoena
 15 various Internet Service Providers ("ISP") associated with certain IP addresses to produce the
 16 names, addresses, email addresses, phone numbers, and Media Access Control numbers associated
 17

18 ³ No. 5:07-cv-298-BR, 2008 WL 544992 (E.D.N.C. Feb. 27, 2008).

19 ⁴ No. 6:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004).

20 ⁵ No. 06-01579, 2006 U.S. Dist. LEXIS 53237 (N.D. Cal. Jul. 31, 2006).

21 ⁶ No. C 04-04862, Docket No. 12 (N.D. Cal. Nov. 16, 2004).

22 ⁷ See *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980); see also *Columbia Ins. Co.*
 23 *v. SeesCandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) ("With the rise of the Internet has come the
 24 ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark
 25 infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give
 26 fictitious or incomplete identifying information. Parties who have been injured by these acts are likely
 27 to find themselves chasing the tortfeasor from [ISP] to ISP, with little or no hope of actually discovering
 the identity of the tortfeasor. In such cases the traditional reluctance for permitting filings against John
 Doe defendants or fictitious names and the traditional enforcement of strict compliance with service
 requirements should be tempered by the need to provide injured parties with a forum in which they may
 seek redress for grievances.").

28 ⁸ See *id.* at 642.

⁹ See *id.*

1 with each IP address alleged to have conducted infringing activity. The Nicolini Declaration³
2 explains that Copyright Enforcement Group, LLC's proprietary file sharing forensic software
3 captured the unique IP address by which each Doe Defendant allegedly infringed. If provided with
4 the IP address and the date and time of the infringing activity, Mayhem asserts that the ISP can
5 identify the Doe Defendant because information is contained in the ISP's subscriber activity log
6 files. Mayhem's claims notwithstanding, the court has serious doubts as to the efficacy of the ISP
7 subpoenas in uncovering the identity of the individuals alleged to have committed infringement. As
8 the court has come to learn in yet another of the recent "mass copyright" cases, subscriber
9 information appears to be only the first step in the much longer, much more intrusive investigation
10 required to uncover the identity of each Doe Defendant.⁴ The reason is simple: an IP address
11 exposed by a wireless router might be used by the subscriber paying for the address, but it might not.
12 Roommates, housemates, neighbors, visitors, employees or others less welcome might also use the
13 same address.

14 Even if the court were not dubious of the plaintiff's ability to meet the first *Gillespie*
15 condition, it is not convinced that Mayhem can satisfy the second. To address the second *Gillespie*
16 condition and to distinguish the technical architecture of BitTorrent from those file-sharing protocols
17 which other courts have found failed to justify joinder, Mayhem explains that users of the BitTorrent
18 protocol have a higher degree of interactivity and engage in deep and sustained collaboration with
19 their peers, as follows:

20 The process begins with one user accessing the Internet through an Internet Service
21 Provider ("ISP") and intentionally making a digital file of the work available on the
22 Internet to the public from his or her computer. This first file is often referred to as
23 the first "seed." I will refer to the person making this seed available as the "original
24 seeder." Persons seeking to download such a work also access the Internet through
25 an ISP (which may or may not be the same ISP as used by the original seeder) and
26 seek out the work on a P2P network. With the availability of the seed, other users,
who are referred to as "peers," access the Internet and request the file (by searching
for its title or even searching for the torrent's "hash"-as described below) and engage
the original seeder and/or each group, sometimes referred to as a "swarm," and begin
downloading the seed file. In turn, as each peer receives portions of the seed, most
often that peer makes those portions available to other peers in the swarm. Therefore,

27 ³ See Docket No. 6-1.

28 ⁴ See *Boy Racer, Inc. v. Doe 1*, Case No. 5:11-cv-02329 PSG, Order Denying Plaintiff's
Ex Parte Motion for Leave to Take Further Expedited Discovery (Docket No. 21).

each peer in the swarm is at least copying and is usually distributing, as a follow-on seeder, copyrighted material at the same time. Of the over 20,000 infringers tracked in connection with several cases currently pending, at least 95% of the Doe defendants were uploading (i.e., distributing) illegal copies of our clients' motion pictures at the moment indicated by the Timestamp in the respective Exhibit A appended to each complaint, which is also true for this case. In P2P networks, the infringement may continue even after the original seeder has gone completely offline. Any BitTorrent client may be used to join a swarm.

Mayhem goes on to note:

As more peers join a swarm at any one instant, they obtain the content at even greater speeds because of the increasing number of peers simultaneously offering the content as seeders themselves for unlawful distribution. As time goes on, the size of the swarm varies, yet it may endure for a long period, with some swarms enduring for 6 months to well over a year depending on the popularity of a particular motion picture. As a result, the original seed file becomes unlawfully duplicated multiple times by multiple parties, with a potentially exponential increase in the number of illegal copies of any copyrighted work. With respect to any particular swarm, the hash (an alphanumeric representation of a digital file) associated with the copied file's torrent file remains the same.

According to Mayhem, this greater extent of cooperation and concerted action among BitTorrent users than among users of other protocols makes joinder proper here.⁵

Even with the description of the BitTorrent technology provided by Mr. Nicolini, the court remains unpersuaded that the peer-to-peer architecture of the BitTorrent technology justifies the joinder of otherwise unrelated defendants in a single action. First, the Nicolini declaration argues at length about the concerted activity within a given swarm. Presumably he does so in response to the concern highlighted by Judge Ryu⁶ and this court in *Boy Racer* that users in different swarms have nothing in common other than downloading the same work, which as this court and others have noted is insufficient under our precedent. Even if the IP addresses at issue in this motion all came from a single swarm, there is no evidence to suggest that each of the addresses acted in concert with all of the others. In fact, the many weeks covering the activity associated with each of the addresses

⁵ This claim that BitTorrent is different from other protocols considered in earlier cases because of its swarming download functionality does not appear to be correct as a factual matter. For instance, the Kazaa and Gnutella protocols that were at issue in earlier cases have a swarming download feature that works similarly to BitTorrent's. See, e.g., L. Jean Camp, "Peer to Peer Systems," in Hossein Bidgoli (ed.), *The Internet Encyclopedia* (Wiley, 2004), vol. 3, at 30. ("In order to increase the speed of downloads and distribute the load on peer-provid[ed] files Limewire uses swarming transfers. See also, Alex Jantunen, et al., "Peer to Peer Analysis: State of the Art" (Tampere University of technology, 2006) (noting that swarming supporting protocols include at least FastTrack, Gnutella, ED2K/Overnet and BitTorrent).")

⁶ See *Pacific Century Intern. Ltd. v. Does 1-101*, Case No. 11-02533, Docket No. 7 (N.D. Cal. Jul. 8, 2011).

1 call into question whether there was ever common activity linking the 5,041 addresses in this case.
 2 As the court noted in *Boy Racer*, in this age of instant digital gratification, it is unreasonable to
 3 conclude that any one alleged infringer of the copyrighted work would patiently wait many weeks to
 4 collect the bits of the work from 5,040 other cooperators. At the very least, there is no proof that
 5 bits from each of these 5,041 addresses were ever assembled into a single file.⁷ As the court
 6 previously explained, under this court's precedent regarding other file sharing protocols, merely
 7 infringing the same copyrighted work over this period is not enough.⁸ Finally, nothing in the
 8 BitTorrent architecture changes the fact that each defendant also will likely have a different defense.
 9 As the district court in *BMG Music* put it:

10 Comcast subscriber John Doe 1 could be an innocent parent whose internet access
 11 was abused by her minor child, while John Doe 2 might share a computer with a
 12 roommate who infringed Plaintiffs' works. John Does 3 through 203 could be
 thieves, just as Plaintiffs believe, inexcusably pilfering Plaintiffs' property and
 depriving them, and their artists, of the royalties they are rightly owed.⁹

13 Mayhem's motion is therefore GRANTED, but only as to Doe 1 and as follows.

14 IT IS HEREBY ORDERED that Mayhem is allowed to serve immediate discovery on Doe
 15 1's ISP listed in Exhibit A to the Complaint by serving a Rule 45 subpoena that seeks information
 16 sufficient to identify Doe 1, including the name, addresses, telephone numbers, and email addresses
 17 of Doe 1. Mayhem's counsel shall issue its subpoena and shall include a copy of this order. This

19 ⁷ Empirical research shows that most BitTorrent users do not remain connected for very
 20 long after their downloads are complete. One large study observed that only 3.1% of BitTorrent users
 21 stayed connected (to upload to others) more than ten hours after their downloads completed; only 0.34%
 22 stayed connected over 100 hours. J.A. Pouwelse, P. Garbacki, D.H.J. Epema, and H.J. Sips, *The*
BitTorrent P2P File-Sharing System: Measurement and Analysis at 4, in Proceedings of the 4th
 23 International Workshop on Peer-to-Peer Systems, available at
<http://www.springerlink.com/content/1251rj2233u051>. Another study found that over 90% of users who
 24 successfully downloaded a file remained connected for less than a single day, while many users who
 attempted to download the file gave up entirely and disconnected within the first few hours. M. Izal,
 G. Urvoy-Keller, E.W. Biersack, P.A. Felber, A. Al Hamra and L. Garces-Erice, *Dissecting BitTorrent:*
Five Months in a Torrent's Lifetime at 7, in Proceedings of the 5th International Workshop on Passive
 25 and Active Network Management Proceedings of the 4th International Workshop on Peer-to-Peer
 Systems, available at <http://www.springerlink.com/content/fg8hqw4136t0vtx9>.

26 ⁸ See *Diabolic Video Productions, Inc. v. Does 1-2099*, No. 5:10-cv-05865-PSG, Amended
 27 Order Granting-In-Part Motion for Leave to Take Limited Discovery Prior to Rule 26(f) Conference
 (Docket No. 16).

28 ⁹ See *BMG Music v. Does 1-203*, Case No. 04-650, 2004 WL 953888, at *1 (E.D. Pa. Apr.
 2, 2004).

1 subpoena shall be deemed an appropriate order under 47 U.S.C. § 551.

2 IT IS FURTHER ORDERED that the ISP will have 30 days from the date of service upon it
3 to serve Doe 1 with a copy of the subpoena and a copy of this order. The ISP may serve Doe 1 using
4 any reasonable means, including written notice sent to Doe 1's last known address, transmitted either
5 by first-class mail or via overnight service. The ISP and Doe 1 each shall have 30 days from the
6 date of service to file any motions in this court contesting the subpoena (including a motion to quash
7 or modify the subpoena). If that 30-day period lapses without Doe 1 or the ISP contesting the
8 subpoena, the ISP shall have 10 days to produce to Mayhem the information responsive to the
9 subpoena with respect to Doe 1.

10 IT IS FURTHER ORDERED that the ISP shall not assess any charge to Mayhem in advance
11 of providing the information requested in the subpoena, and that the ISP that receives a subpoena
12 and elects to charge for the costs of production shall provide a billing summary and cost reports that
13 serve as a basis for such billing summary and any costs claimed by the ISP.

14 IT IS FURTHER ORDERED that the ISP shall preserve all subpoenaed information pending
15 the ISP delivering such information to Mayhem or the final resolution of a timely filed and granted
16 motion to quash the subpoena with respect to such information.

17 IT IS FURTHER ORDERED that any information disclosed to Mayhem in response to a
18 subpoena may be used by Mayhem solely for the purpose of protecting its rights under the Copyright
19 Act, 17 U.S.C. § 101 et seq.

20 IT IS FURTHER RECOMMENDED that Does 2-5,041 be severed from this action and
21 Mayhem's action against Does 2-5,041 be dismissed without prejudice. The undersigned further
22 recommends that if Mayhem refiles separate complaints against Does 2-5,041 within 20 days of this
23 order, such actions should be deemed a continuation of the original action for purposes of the statute
24 of limitations.

25 **IT IS SO ORDERED.**

26 Dated: September 23, 2011



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PAUL S. GREWAL
United States Magistrate Judge

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