

1 KILPATRICK TOWNSEND & STOCKTON LLP  
JAMES G. GILLILAND, JR. (State Bar No. 107988)  
2 TIMOTHY R. CAHN (State Bar No. 162136)  
MEHRNAZ BOROUMAND SMITH (State Bar No. 197271)  
3 HOLLY GAUDREAU (State Bar No. 209114)  
RYAN BRICKER (State Bar No. 269100)  
4 Two Embarcadero Center Eighth Floor  
San Francisco, CA 94111  
5 Telephone: (415) 576-0200  
Facsimile: (415) 576-0300  
6 Email: jgilliland@kilpatricktownsend.com  
tcahn@kilpatricktownsend.com  
7 mboroumand@kilpatricktownsend.com  
hgaudreau@kilpatricktownsend.com  
8 rbricker@kilpatricktownsend.com

9 Attorneys for Plaintiff  
SCEA COMPUTER ENTERTAINMENT AMERICA LLC

10  
11 UNITED STATES DISTRICT COURT  
12 FOR THE DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 SCEA COMPUTER ENTERTAINMENT  
AMERICA LLC, a Delaware limited  
15 liability company,

16 Plaintiff,

17 v.

18 GEORGE Hotz; HECTOR MARTIN  
CANTERO; SVEN PETER; and DOES  
19 1 through 100,

20 Defendants.

CASE NO. 11-cv-000167 SI

**NOTICE OF MOTION AND MOTION  
FOR EXPEDITED DISCOVERY**

Date: February 9, 2011  
Time: 9:00 a.m.  
Courtroom: 10, 19th Floor  
Judge: Hon. Susan Illston



1 expeditious attempt to stop the distribution of these illicit circumvention devices, SCEA  
2 filed a motion seeking a Temporary Restraining Order (“TRO”) against Hotz.<sup>3</sup>

3 On January 27, 2011, this Court granted SCEA’s motion for a TRO and directed  
4 the parties to “meet and confer regarding a briefing schedule and hearing date on (1)  
5 plaintiff’s motion for preliminary injunction against defendant Hotz and (2) defendant  
6 Hotz’s motion to dismiss for lack of personal jurisdiction.” Order Granting Plaintiff’s  
7 Motion for TRO (Docket No. 51) at 2. Though the Court made an initial finding that  
8 personal jurisdiction over Hotz was appropriate because he purposefully directed his  
9 activities to California, the Court noted that through the motion to dismiss, it was  
10 permitting the jurisdictional challenges to be presented “on a fuller factual record.” *Id.*  
11 SCEA and Hotz stipulated to a schedule for Hotz’s motion to dismiss, agreeing to a  
12 hearing date of March 11, 2011. Hotz filed his motion to dismiss on February 2, 2011;  
13 SCEA is scheduled to file its opposition on February 18, 2011; and Hotz’s reply brief is  
14 due one week later.<sup>4</sup> Counsel for Hotz did not agree to allow SCEA to take expedited  
15 discovery in connection with the motion to dismiss, thus SCEA was forced to file this  
16 motion. Gaudreau Decl., ¶ 3.

17 With this motion, SCEA seeks limited expedited discovery to enable SCEA to:

- 18 1. Obtain additional evidence of Hotz’s contacts with this District and the  
19 harm to SCEA here resulting from Hotz’s unlawful conduct;
- 20 2. Promptly identify each of the FAIL0VERFLOW Defendants, and their  
21 respective locations, so SCEA can expeditiously seek appropriate,  
22 effective injunctive relief from this Court; and

23 \_\_\_\_\_  
24 <sup>3</sup> SCEA did not immediately seek injunctive relief against the FAIL0VERFLOW and  
25 the Doe Defendants. These individuals have concealed their identities by, among other  
26 things, using Internet aliases and online “privacy services.” For example, Does 1 and 2  
27 (both part of the FAIL0VERFLOW group) hide their identities on the Internet by using the  
28 aliases “Bushing” and “Segher.” Gaudreau Decl., ¶ 2, Exh. A.

<sup>4</sup> As described in the Stipulation jointly filed by SCEA and Hotz on February 1, 2011  
(Docket No. 56), the parties could not reach agreement on the timing for Hotz’s OSC  
briefing regarding preliminary injunction. Hotz proposed a separate briefing schedule for  
the OSC brief (to be concluded and set for hearing on February 9<sup>th</sup> or 10<sup>th</sup>), whereas  
SCEA understood the Court’s TRO to contemplate one hearing for both motions.



1           3.       Promptly determine the identities of third parties hosting and distributing  
2                   the circumvention devices so that SCEA can serve them with DMCA “take  
3                   down” notices and, if necessary, seek appropriate relief from this Court.

4           Accordingly, pursuant to Federal Rule of Civil Procedure 26(d)(1), which expressly  
5 authorizes the relief requested here, SCEA moves for an order so that it may  
6 immediately expedite its targeted discovery. Specifically, SCEA requests that the Court  
7 order Hotz and third parties – who may either have information to help identify the  
8 infringers or may be knowledgeable about the unlawful scheme to distribute the  
9 circumvention devices – to respond to limited and targeted discovery no later than five  
10 days after service of the Court’s order granting this motion. This discovery is needed for  
11 SCEA to fully oppose Hotz’s motion to dismiss by February 18, 2011 in accordance with  
12 the Court’s order that Hotz’s jurisdictional challenges be presented “on a fuller factual  
13 record.” Order Granting Plaintiff’s Motion for TRO (Docket No. 51) at 2. Discovery is  
14 also needed to identify the FAILOVERFLOW and Doe Defendants violating SCEA’s  
15 intellectual property rights with impunity. Allowing this limited discovery on an expedited  
16 basis serves the interest of judicial efficiency as the culpable parties will be timely  
17 identified early on in the action, jurisdictional issues resolved, the pleadings perfected  
18 early, and any injunctive relief properly fashioned against the right persons. Without it,  
19 SCEA will be severely hindered in its ability to effectively pursue those who are illegally  
20 distributing and trafficking in devices that circumvent SCEA’s PS3® System’s TPMs and  
21 inducing piracy of video games.

22       **II.       GOOD CAUSE EXISTS FOR EXPEDITED JURISDICTIONAL DISCOVERY ON**  
23       **HOTZ’S CONTACTS WITH CALIFORNIA AND HARM TO SCEA IN**  
24       **CALIFORNIA**

24       **A.       Relief From Rule 26(d)’s Hold on Discovery To Conduct Expedited**  
25       **Jurisdictional Discovery Is Necessary**

26           SCEA seeks leave to conduct jurisdictional discovery so that it can present  
27 additional admissible evidence of Hotz’s forum-related contacts in its opposition to Hotz’s  
28 motion to dismiss, currently due on February 18, 2011. Courts apply a “flexible good



1 cause” standard to determine whether expedited discovery is warranted. *Semitoal v.*  
2 *Tokyo Electron America, Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002) (“Good cause may be  
3 found where the need for expedited discovery, in consideration of the administration of  
4 justice, outweighs the prejudice to the responding party.”). Although SCEA believes the  
5 record evidence of Hotz’s contacts with California is more than sufficient to support  
6 personal jurisdiction over Hotz by this Court, SCEA is entitled to jurisdictional discovery to  
7 present a fuller factual record and to rebut Hotz’s contrary assertions.

8 Anticipating the need for jurisdictional discovery, SCEA sought Hotz’s  
9 acquiescence to such discovery before Hotz filed his Motion to Dismiss so that discovery  
10 could proceed with little or no impact on the briefing and hearing of Hotz’s motion. These  
11 efforts, however, were not successful as Hotz did not agree to expedited discovery.  
12 Gaudreau Decl., ¶ 3. Limited discovery of third parties is also necessary for SCEA to  
13 learn more about Hotz’s contacts with California and the harm he has caused here.

14 **B. Jurisdictional Discovery Is Regularly Granted On An Expedited Basis To**  
15 **Allow Parties To Develop A Full Factual Record**

16 The Ninth Circuit test for authorizing jurisdictional discovery is whether “pertinent  
17 facts bearing on the question of jurisdiction are controverted,” or “a more satisfactory  
18 showing of the facts is necessary.” *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556  
19 F.2d 406, 430 n.24 (9th Cir. 1977) (vacating district court’s refusal to grant jurisdictional  
20 discovery); *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 n.1 (9th  
21 Cir. 1977). The Ninth Circuit has repeatedly held that discovery normally should be  
22 permitted to allow plaintiffs the opportunity to develop the factual record regarding the  
23 issue of jurisdiction. See *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*,  
24 328 F.3d 1122, 1135 (9th Cir. 2003) (“a remand will be necessary to allow [plaintiff] the  
25 opportunity to develop the record and make a prima facie showing of jurisdictional facts”);  
26 *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1406 (9th Cir. 1994) (remanding to  
27 district court for jurisdictional discovery due to insufficient factual record regarding  
28 personal jurisdiction).



1 “[I]n granting [jurisdictional] discovery, the trial court is vested with broad discretion.”  
2 *Data Disc*, 557 F.2d at 1285 n.1. Indeed, after surveying the Ninth Circuit law, one district  
3 court in California concluded that defendants face a “high burden” to prevent jurisdictional  
4 discovery and that “[d]iscovery should be denied only where ‘it is clear that further  
5 discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.’”  
6 *Orchid Biosciences, Inc. v. St. Louis University*, 198 F.R.D. 670, 674-75 (S.D. Cal. 2001)  
7 (quoting *Wells Fargo*, 556 F.2d at 430 n.24). See also *Focht v. Sol Melia S.A.*, 2010 U.S.  
8 Dist. LEXIS 92027, at \*6 (N.D. Cal. 2010) (“[T]he fact that the Ninth Circuit has adopted a  
9 prima facie standard for deciding the merits of the jurisdiction issue indicates that a *lesser*  
10 *showing is required in order for a plaintiff to obtain jurisdictional discovery in the first*  
11 *place.*”) (emphasis added); *Calix Networks, Inc. v. Wi-LAN Inc.*, 2010 U.S. Dist. LEXIS  
12 97657, at \*10 (N.D. Cal. 2010) (“plaintiff need not make out a prima facie case of personal  
13 jurisdiction before it can obtain jurisdiction discovery”); *Internet Archive v. Shell*, 2006 U.S.  
14 Dist. LEXIS 33351 (N.D. Cal. 2006) (granting motion for expedited jurisdictional discovery).  
15 Here, the Court has already found that SCEA has made out a prima facie case of personal  
16 jurisdiction, and therefore its entitlement to jurisdictional discovery is clear.

### 17 **C. Jurisdictional Discovery Is Warranted Here**

18 Hotz is unable to meet the “high burden” needed to deny jurisdictional discovery.  
19 As set forth more fully below, SCEA only seeks limited discovery to: (1) be responsive to  
20 the Court’s desire that the motion to dismiss be based on a further factual record; (2) build  
21 further evidence that sufficient contacts exist between Hotz and California and to further  
22 establish the harm to SCEA in California resulting from Hotz’s unlawful conduct; and (3)  
23 rebut contrary assertions made in Hotz’s motion to dismiss and supporting declarations.  
24 These reasons clearly militate in favor of jurisdictional discovery. See, e.g., *Harris*  
25 *Rutsky*, 328 F.3d at 1135; *Data Disc*, 557 F.2d at 1285 n.1; *Wells Fargo*, 556 F.2d at 430  
26 n.24.

27 ///

28 ///



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**1. The Expedited Jurisdictional Discovery Requested by SCEA Is Narrowly Tailored And Will Provide Further Evidence Supporting This Court’s Exercise of Personal Jurisdiction Over Hotz**

The expedited discovery that SCEA seeks here will provide additional evidence of Hotz’s contacts with California and harm to SCEA in California. Moreover, it is very likely that this jurisdictional discovery will reveal additional California contacts by Hotz that he failed to disclose in his motion. *Orchid Biosciences, supra*, 198 F.R.D. at 674-75 (granting limited jurisdictional discovery where defendants filed a motion to dismiss based on lack of jurisdiction, explaining the “court is unpersuaded that further discovery would not reveal additional facts not contained in [defendant’s] affidavit (or further define what is meant by the facts addressed in the affidavit) that might be sufficient to constitute a basis for jurisdiction.”).

Specifically, along with this motion, SCEA has proposed narrowly tailored discovery requests including: (1) Requests for Production to Hotz; (2) Demand for Inspection to Hotz; (3) Interrogatories to Hotz; and (4) Subpoenas to third parties for the production of documents pertaining to Hotz’s illegal activity. See Gaudreau Decl., ¶¶ 4-6, 8-18. Exhs. B-D, F-P. SCEA also seeks leave to take a limited deposition of Hotz on personal jurisdiction. *Id.* at ¶ 7, Exh. E. The discovery requested is necessary because SCEA disputes whether Hotz has disclosed *all* relevant facts regarding the following categories of jurisdictional discovery:

- All contacts with California by Hotz and/or any third parties working with him on the unlawful conduct at issue in this lawsuit.
- All of Hotz’s communications with individuals who have used or downloaded the circumvention devices offered by Hotz.
- All conferences, forums and meetings attended by Hotz in California.
- All benefits that Hotz has received in connection with his use and distribution of the circumvention devices.
- All communications with Doe 1 Defendant (“Bushing”), an individual who likely resides in the Bay Area.

///



1                   • Any use of the PlayStation Network (“PSN”), which – after the submission  
2 of two declarations – Hotz *still* has been unable to unequivocally deny.  
3 See Gaudreau Decl., ¶¶ 4-6, Exhs. B-D. Jurisdictional discovery sought from third parties  
4 on an expedited basis includes, for example:

- 5                   • Information from the content server host on the accessing and  
6 downloading of circumvention devices from Hotz’s website.
- 7                   • Information from Google concerning Hotz’s discussion of his circumvention  
8 activities with others on his interactive blog.
- 9                   • Information from PayPal on Hotz’s PayPal account regarding financial  
10 benefits obtained by Hotz as a result of his illegal activity.
- 11                   • Information from Twitter concerning Hotz’s communications with others via  
12 Twitter regarding his efforts to bypass the TPMs in the PS3 System.
- 13                   • Information from YouTube concerning the viewing of Hotz’s video entitled  
14 “Jailbroken PS3 3.55 with Homebrew.”

15 See Gaudreau Decl., ¶¶ 8-18, Exhs. F-P. The discovery sought is relevant to the  
16 jurisdictional question presently before the Court because it will help establish Hotz’s  
17 contacts with California and that his unlawful activity was directed to, and harm was  
18 sustained by, SCEA in this District. SCEA’s proposed discovery is tailored narrowly to  
19 address the relevant jurisdictional issue. Accordingly, SCEA’s motion for leave to  
20 propound this discovery on an expedited basis should be granted.

21 **III. SCEA URGENTLY NEEDS DISCOVERY TO IDENTIFY THE FAIL0VERFLOW  
22 DEFENDANTS AND THIRD PARTIES WHO ARE DISTRIBUTING  
23 CIRCUMVENTION DEVICES IN VIOLATION OF THE DMCA AND THE CFAA**

24 **A. Orders for Expedited Discovery Are Routinely Granted In  
25 Infringement Actions, Particularly When The True Identities of  
26 Defendants Are Unknown**

27 Good cause also exists for SCEA to take expedited discovery to determine the  
28 identity of the FAIL0VERFLOW Defendants and third parties who are illegally distributing  
the circumvention devices. Indeed, expedited discovery is routinely granted in actions  
involving infringement. See, e.g., *Behnam Jewelry Corp. v. Aron Basha Corp.*, 1997 U.S.  
Dist. LEXIS 15927, \*58 (S.D.N.Y. 1997) (granting motion for expedited discovery in  
copyright infringement action); *Semitoal*, 208 F.R.D. at 276 (good cause is “frequently  
found in cases involving claims of infringement and unfair competition.”). Expedited



1 discovery is particularly warranted where – as here – the true identities of the infringers  
2 need to be determined so that a copyright owner can take appropriate action against  
3 them to stop the infringement. See, e.g., *Capitol Records, Inc. v. Doe*, 2007 U.S. Dist.  
4 LEXIS 97702, \*3 (S.D. Cal. 2007) (granting expedited discovery to identify Doe  
5 defendants because “without such discovery, plaintiffs . . . cannot pursue their lawsuit to  
6 protect their copyrighted works from infringement.”); *Arista Records, LLC v. Does 1-12*,  
7 2008 U.S. Dist. LEXIS 82548, \*3 (E.D. Cal. 2008) (allowing expedited discovery in  
8 copyright infringement case). Here, these same considerations warrant granting SCEA’s  
9 motion.

10 **B. SCEA Seeks Narrowly Tailored Discovery On Hotz And Third Parties**  
11 **Concerning The Identity of Culpable Individuals**

12 Good cause further justifies SCEA’s request because the discovery has been  
13 carefully limited to minimize any burden on third parties. Permitting discovery to proceed  
14 on an expedited basis imposes no hardship on Hotz or the third parties since they merely  
15 have to disclose, albeit earlier than otherwise, information pertaining to the identity of  
16 those involved in the illegal conduct. In contrast, there is a substantial risk that without  
17 such early discovery, SCEA will be damaged because it is unable to identify the culpable  
18 parties whom it needs to apprise of suit and take appropriate action against.

19 In granting a motion for expedited discovery in a copyright infringement case, the  
20 Northern District in *UMG Recordings, Inc. v. Doe*, 2008 U.S. Dist. LEXIS 79087 (N.D. Cal.  
21 2008) explained why the order was necessary:

22 Looking first at ‘the administration of justice,’ without expedited  
23 discovery, plaintiffs absolutely cannot identify defendant, which  
24 means this matter cannot proceed forward, and plaintiffs will  
25 continue to suffer ongoing, continuous injury due to  
26 defendant’s illegal activities. Looking at the prejudice to  
27 defendant, there is none, as plaintiffs’ request is extremely  
28 narrow, seeking only to identify defendant’s contact  
information in order to advise it of suit and possibly resolve this  
matter without additional litigation.

27 2008 U.S. LEXIS 79087 at \*16. Likewise here, the “administration of justice” favors  
28 granting this motion because SCEA is sustaining harm as a result of Hotz’s and other



1 culpable entities' distribution of the circumvention devices in violation of the DMCA. *Id.*  
2 Indeed, the discovery sought by SCEA is narrow in scope to capture relevant evidence  
3 only and minimize any burden on Hotz and third parties. SCEA's categories of discovery  
4 requests include, for example:

- 5 • Hotz's communications with the FAIL0VERFLOW Defendants and others regarding  
6 his illegal activity.
- 7 • Information from PayPal for identifying information for the FAIL0VERFLOW  
8 Defendants and other infringers.
- Information from Twitter for information concerning the FAIL0VERFLOW  
Defendants and other infringers' postings regarding circumvention devices.

9 See Gaudreau Decl. at ¶¶ 4-6, 8-18. Exhs. B-D, F-P.

#### 10 **IV. CONCLUSION**

11 Expedited and targeted discovery is necessary for SCEA to: (1) further develop  
12 evidence of Hotz's contacts with California and the harm to SCEA here resulting from  
13 Hotz's unlawful conduct so that it can properly oppose Hotz's motion to dismiss; and (2)  
14 identify the FAIL0VERFLOW Defendants and other culpable entities so appropriate  
15 action can be taken against them for the distribution of the illegal circumvention devices.  
16 The discovery sought by SCEA is narrowly tailored and limited to the issues pertaining to  
17 personal jurisdiction over Hotz and the identification of other infringers. Good cause  
18 exists warranting this discovery on an expedited basis. Accordingly, SCEA respectfully  
19 requests that the Court grant its motion for expedited discovery.

20 DATED: February 4, 2011

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

23  
24 By: /s/James G. Gilliland, Jr.  
JAMES G. GILLILAND, JR.

25 Attorneys for Plaintiff  
26 SCEA COMPUTER ENTERTAINMENT AMERICA  
27 LLC

28 63097529 v1

