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11 UNITED STATES DISTRICT COURT

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13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Digital Sin, Inc., a California corporation,

CASE NO. CV 11-4397 LB

15

Plaintiff,

16

v.

17

DOES 1-,5698

18 **PLAINTIFF'S APPLICATION FOR
ENLARGEMENT OF TIME TO
SERVE DEFENDANTS**

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Defendants.

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21 Plaintiff applies to the Court for an Order enlarging the time for Plaintiff to serve
22 defendants with summonses in view of the fact that no defendant will have been served with a
23 summons and complaint in this case within 120 days of the date the case was filed as set forth in
24 Rule 4(m) of the Federal Rules of Civil Procedure.

25

26 The Court will be familiar with the particulars of this case from the concurrently-filed
27 Plaintiff's Ex Parte Application for Leave to Take Limited Discovery Prior to a Rule 26
28 Conference and Declaration of Jon Nicolini, and the Complaint filed in this case.

29

I. General Background

30

31 This case is a copyright infringement case. It arises out of the mass piracy of motion
32 pictures that has been plaguing the country as advances in technology have made infringements
33 almost effortless to accomplish at the same time that identifying the infringers has become more
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1 difficult. This mass piracy is conducted by numerous people participating in a "swarm" of
2 infringers who use the Internet to illegally copy and distribute motion pictures.¹

3 Former United States Senator Chris Dodd, in his inaugural speech as the new president of
4 the Motion Picture Association of America, on March 29, 2011, stated,

5 "Let's begin with perhaps the single biggest threat we face as an industry:
6 movie theft. At the outset, I want you to know that I recognize and appreciate that
7 NATO [National Association of Theatre Owners] members are on the front lines
8 every day when it comes to preventing camcording. Further, I want you to know
9 that the member studios of the MPAA deeply appreciate the efforts you make
10 every day to stop the hemorrhaging of movie theft in your theaters.

11 "I am deeply concerned that too many people see movie theft as a
12 victimless crime. After all, how much economic damage could there be to some
13 rich studio executive or Hollywood star if a movie is stolen or someone watches a
14 film that was stolen? It is critical that we aggressively educate people to
15 understand that movie theft is not just a Hollywood problem. It is an American
16 problem.

17 "Nearly 2.5 million people work in our film industry. The success of the
18 movie and TV business doesn't just benefit the names on theater marquees. It also
19 affects all the names in the closing credits and so many more - middle class folks,
20 working hard behind the scenes to provide for their families, saving for college
21 and retirement. And since movies and TV shows are now being made in all 50
22 states, Puerto Rico and the District of Columbia, movie theft harms middle class
23 families and small businesses all across the country.

24 "Those who steal movies and TV shows, or who knowingly support those
25 who do, don't see the faces of the camera assistant, seamstresses, electricians,
26 construction workers, drivers, and small business owners and their employees
27 who are among the thousands essential to movie making."

28 See, e.g., the web page at,

29 <http://www.boxofficemagazine.com/news/2011-03-29-new-mpaa-chief-senator-chris-dodd-delivers-inaugural-state-of-the-industry-speech>

30 a copy of which is attached to the aforementioned Ex Parte Application as **Exhibit 5**.

31 ¹ "Swarm" thievery enabled by the Internet is, unfortunately, not limited to copyright
32 downloading. Cases of "swarm" or "flash mob" shoplifting are now arising. See the reports at
33 the following web pages about swarm shoplifting events in Washington, D.C., Las Vegas, NV,
34 and St. Paul, MN:

35 http://www.myfoxdc.com/dpp/news/dc/video-mob-of-teens-rob-dupont-circle-store-042711?utm_medium=twitter&utm_source=twitterfeed
36 http://www.cbsnews.com/8301-504083_162-20060576-504083.html
37 <http://www.myfoxtwincities.com/dpp/news/minnesota/st.-paul-stores-suffer-'mob-thefts'-feb-22-2011>

38 The Court is asked to take notice that the theory of at least some participants in swarm thievery,
39 by shoplifting or by copyright infringement, is that an aggrieved party may be so overwhelmed
40 by the number of people involved and the time, effort and expense required to catch any
41 offender, that few, if any, will be caught, and if any are, it may be a long time before that occurs.

1 In written responses to a series of questions submitted by Variety magazine that were
2 published on April 13, 2011, Vice President Joe Biden stated,

3 "Look, piracy is outright theft. People are out there blatantly stealing
4 from Americans -- stealing their ideas and robbing us of America's creative
5 energies. There's no reason why we should treat intellectual property any
6 different than tangible property.
7 ***

8 "The fact is, media companies have already taken significant steps to
9 adapt their business models to keep up with changes in how we watch movies
10 and listen to music. Content is being offered to consumers in a variety of different
11 ways that make it easy and cost-effective for people to access legal material.
12 Anyone who does not understand this should simply talk with one of my
13 grandkids."

14 The Variety article can be seen here,

15 <http://www.variety.com/article/VR1118035369>

16 a copy of which is attached to the aforementioned Ex Parte Application as **Exhibit 6**.

17 Of course, what we do have the Copyright Act, and aggrieved parties must, for the most
18 part, enforce their copyrights themselves.

19 But, because there are obstacles slowing down identification of the people using the
20 Internet for their infringing activities, serving actual defendants with summons and complaint is
21 delayed. This is described in the Declaration of Jon Nicolini that is of record in this case, and
22 see Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999),

23 II. OBTAINING INFORMATION FROM ISPs
24 IS, UNFORTUNATELY, A SLOW PROCESS

25 Attached to the aforementioned Ex Parte Application as **Exhibit 2** is an analogous case
26 decided by Judge Beryl A. Howell of the District Court of the District of Columbia. That case is
27 Call of the Wild Movie, LLC v. Does 1-1,062, (D. DC 2011) decided March 22, 2011 (U.S.
28 District Court for the District of Columbia, Case No. CV 10-00455-BAH). **The main reason
that case is mentioned here is to confirm that, in these cases, obtaining the identities of the
Doe defendants is a very time consuming effort.** The Court is asked to take notice that that
case had been pending for a year by the time that opinion was rendered, without any defendant's
being served. (A review of the PACER record for that case will confirm that fact.)

1 In connection with similar cases filed late last year by the undersigned counsel, Plaintiff's
2 counsel has counsel has negotiated with, and continues to negotiate with, various ISPs regarding
3 costs and rate of throughput. Some ISPs have represented that, between their obligations to
4 provide similar information to law enforcement organizations and to counsel for plaintiffs in
5 other mass infringement cases, they can only provide a fraction of the requested Doe identities
6 per month, and they have various cost demands. See, Call of the Wild Movie, LLC v. Does 1-
7 1,062, pages 2, 27-39, for a description of the type of negotiations that must be conducted
8 separately with each of many different ISPs. Of course, one would hope that ISPs would soon
9 acquire the facility to meet the throughput requested of them in view of the fact that many ISPs
10 advertise their premium (i.e., higher cost) services as the ones subscribers should purchase in
11 order to **download music and movies** (i.e., infringers' desire to enhance their downloading
12 experience helps drive up demand for ISPs' premium services). See, for example, the
13 promotional material by Time Warner Cable with respect to its Internet services. A copy is
14 attached hereto as **Exhibit 3**, with an oval and circle added by the undersigned to draw attention
15 to an ISP's promotion of its premium service.

16 Counsel has set up systems that are intended to expedite the process of issuing subpoenas
17 to the many ISPs. Upon the Court's granting of the aforementioned Ex Parte Application,
18 subpoenas will be served on the ISPs within 10 days. The expedited service of subpoenas and
19 the understandings reached with ISPs' compliance departments should help accelerate obtaining
20 Doe identities.

21 However, mass infringement cases enduring for a year without a Doe being served is not
22 unusual, as exemplified by the Call of the Wild case above. In other mass copyright
23 infringement cases pending in this district **since before** the instant case was filed, such as the
24 following:

25 IO Group, Inc. dba Titan Media v. Does 1-244, Case No. CV 10-03647 WHA;
26 IO Group, Inc. v. Does 1-65, Case No. CV 10-04377 SC;
27 IO Group, Inc. v. Does 1-34, Case No. CV 10-04380 EMC

28 no defendant had been served for at least 9 months after the case was filed.

1 Even in cases not involving mass infringements, Plaintiff believes that dismissal at this
2 stage of the litigation under Rule 4(m) of the Federal Rules of Civil Procedure is not the norm.

3 In Carmona v. Ross, 376 F.3d 829, 830 (8th Cir. 2004), dismissal was not resorted to
4 until after plaintiff in that case was warned that dismissal would result if service were not
5 completed, and plaintiff was given an extension after the warning:

6 "With respect to those defendants, the court gave Carmona an extension to file
7 completed summons forms and warned him that his failure to do so would result
8 in dismissal, and yet Carmona did not request additional summons forms until
more than five months after the extended deadline."

9 In Carmona it appears that dismissal did not occur until after at least 15 months after a second
10 amended complaint was filed, and 31 months after the first amended complaint was filed. See
11 the docket for Carmona v. Ross, District of Minnesota Case No. 00-cv-02447-MJD-RLE.

12

13 III. RULE 4(m) DOES NOT REQUIRE DISMISSAL

14 With respect to Rule 4(m), it states in pertinent part,

15 "If a defendant is not served within 120 days after the complaint is filed, the
16 court — on motion or on its own after notice to the plaintiff — must dismiss
the action without prejudice against that defendant or order that service be
made within a specified time. But if the plaintiff shows good cause for the
failure, the court must extend the time for service for an appropriate period."

18 Plaintiff first notes that Rule 4(m) does not require that the Court dismiss the action even
19 if a plaintiff does not show good cause for a failure to make service. See, Henderson v. United
20 States, 517 U.S. 654, 661, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996)(dicta); Mann v. American
21 Airlines, 324 F.3d 1088, 1098 (9th Cir., 2003). The Advisory Committee's Notes on Rule 4
22 states the following (emphasis added):

23 "The new subdivision [4(m)] explicitly provides that the court shall allow
24 additional time if there is good cause for the plaintiff's failure to effect service in
the prescribed 120 days, and **authorizes the court to relieve a plaintiff of the**
consequences of an application of this subdivision even if there is no good
cause shown."

26 Second, Plaintiff believes that it has shown good cause for the delay. That is, Plaintiff's
27 counsel has used the time since the filing of the Complaint to make arrangements with ISPs to
28 expedite disclosure of the requested information taking into account the ISPs representations

1 regarding throughput capabilities and to improve systems to expedite issuance of subpoenas once
2 early discovery orders are issued.

3 Further in this regard, the Advisory Committee's Notes on Rule 4 also states,

4 "Relief may be justified, for example, . . . if the defendant is evading service"

5 See, Horenkamp v. Van Winkle And Co., Inc., 402 F.3d 1129, 1132-33 (11th Cir., 2005). This
6 applies by analogy to the present case as the semi-anonymity of the Internet has made discovery
7 of Defendants' identities, and thus service upon them, difficult and time consuming. The Court
8 is asked to take notice of the fact that the semi-anonymity available from the Internet allows
9 copyright "pirates" to enjoy the fruits of their piracy while forestalling litigation against them for
10 their infringements. It would be ironic if Rule 4(m) were to provide a safe haven for such
11 pirates.

12 Also, Plaintiff notes that no Defendant would be prejudiced by Plaintiff's being allowed
13 time to discover his or her identity and then make service. (If any prejudice would exist, it
14 certainly would be exacerbated by additional delay caused by Plaintiff's having to re-file its case
15 and ex parte application.)

16

17 IV. CONCLUSION

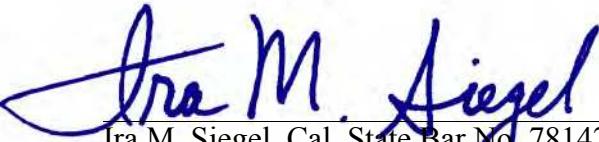
18 In view of the foregoing, including the fact that the subpoena process that has been set up
19 allows 30 days to elapse after an ISP gives notice to a subscriber so that such a subscriber has an
20 opportunity to try to prove special circumstances relating to a motion to quash, and including the
21 fact that some ISPs are not able to process all requests as quickly as desired, Plaintiff requests
22 that the Court enlarge the time for Plaintiff to serve defendants at least until 180 days after the
23 granting of the Ex Parte Application.

24 In addition, Plaintiff requests that if the Court sets a Case Management Conference
25 ("CMC"), that such CMC be set for a date about 210 days from the Court's ruling on the pending
26 Ex Parte Application.

27 That period of time will allow for (i) continued negotiations with ISPs regarding
28 throughput and costs, (ii) ISPs to have at least 30 days to make their initial searches for

1 subscriber identities and to notify each such subscriber of his or her opportunity to file motions
2 to quash the subpoena with respect to him or her, (iii) notified subscribers to consider filing
3 motions to quash, and (iv) ISPs to provide to Plaintiff's counsel the identities of those subscribers
4 that have not filed motions to quash.

5 Respectfully submitted,

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Exhibit 3

to

PLAINTIFF'S APPLICATION FOR ENLARGEMENT OF TIME TO SERVE DEFENDANTS



Internet

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