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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 Groupe Canal+ S.A., et al.,

12 Plaintiffs,

13 v.

14 NDS Group PLC, et al.,

15 Defendants.

Case No. C02-01178 (VRW)

**DEFENDANTS NDS GROUP PLC'S
& NDS AMERICAS, INC.'S
OPPOSITION TO MOTION FOR
ORDER EXPEDITING DISCOVERY
AND TO PRESERVE DOCUMENTS
AND THINGS**

Judge: Hon. Vaughn R.
Walker

Date of Hearing: April 18, 2002

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1 **I. INTRODUCTION**

2 This lawsuit is not what plaintiffs would have the Court and the press
3 believe. This is not the suit of a cheated business seeking protection from piracy. It is an
4 attempt by an inept competitor to shift the blame for its incompetence, to damage its
5 skilled competitor behind the shield of the litigation privilege and to extract an unfair
6 price in merger negotiations.

7 The present motion is no more than a tactic in that strategy. There is no
8 reason to expedite discovery in this case. On the contrary, there are very good reasons to
9 follow the Federal and Local Rules in this case. First, it is very doubtful that venue is
10 proper in this District or that plaintiffs – Groupe Canal+ S.A. and its subsidiaries Canal+
11 Technologies S.A. and Canal+ Technologies, Inc. (collectively, “Canal+”) – have alleged
12 claims upon which relief can be granted. It would be better for the Court that will have
13 the case for the long run to manage discovery and assess the pleadings. Second, Canal+
14 has not shown good cause to commence early discovery: if Canal+ had evidence to
15 support the scurrilous charges alleged in the complaint, it should have presented such
16 evidence in support of this motion. Third, the discovery sought is unusual and will be
17 exceptionally expensive. Such discovery should be scheduled and managed with proper
18 care, and it should proceed only after the true issues in the case have been determined
19 through testing of the pleadings, if any of the case survives at all. Fourth, Canal+ is guilty
20 of laches in bringing this action. Finally, if early discovery is warranted, the proper
21 solution is an order opening discovery generally, not an order allowing specific one-way
22 discovery.

23 Defendants NDS Group PLC and NDS Americas, Inc. (collectively, “NDS”)
24 have no objection to an appropriate interim order requiring all parties to preserve existing
25 documents.

26 **II. STANDARD OF REVIEW**

27 As conceded by Canal+, it must provide good cause to expedite discovery.
28 Yokohama Tire Corp. v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 613-14 (D. Ariz.

1 2001). While the Advisory Committee Notes indicate that cases involving preliminary
2 injunctive relief may be appropriate for early commencement of discovery, there is no
3 right to expedite discovery merely because a preliminary injunction is contemplated. The
4 moving party is still required to show good cause, in particular, to demonstrate that it has
5 evidence suggesting that there is a reasonable probability that a motion for preliminary
6 injunction would be successful. Nataro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982).
7 Canal+ has not met this standard.

8 **III. FACTUAL BACKGROUND**

9 **A. The Allegations and the Evidence.**

10 Canal+ boldly asserts that NDS took actions – in 1998 and 1999 – that
11 caused the breach of encryption technology Canal+ sells for limiting access to television
12 signals broadcast via satellite. Canal+ offers no evidence to support this claim. Since
13 Canal+ claims to have conducted an extensive investigation, its failure to present anything
14 more than unsupported charges is the first clue to the hollowness of its allegations.

15 NDS denies Canal+'s charges.

16 **B. The Alleged Urgency.**

17 Canal+ alleges that there is an urgent need to commence discovery because
18 it contemplates introduction of new smartcards in the near future. It postulates that once it
19 releases such cards, NDS will compromise the encryption technology in those cards and
20 enable further piracy. This seems like a very serious matter. But has Canal+ acted as if
21 its contentions were true?

22 As early as December 2001 – nearly four months ago – Canal+ approached
23 NDS to propose a merger between NDS and the Canal+ Technologies entities.
24 (Declaration Of Abraham Peled In Support Of Defendants' Opposition To Motion To
25 Expedite Discovery ("Peled Decl.") ¶ 8.) At that time, represented by its present litigation
26 counsel, it accused NDS of complicity in the compromise of Canal+'s current smartcards.
27 (Id. ¶¶ 9-10.) It laid out the theory now alleged in its complaint,¹ and it argued that these

28 ¹ Canal+ even provided a diagram of the alleged chain of misdeeds, a copy of which is
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1 allegations justified placing a value on Canal+ for merger purposes that far exceeds the
2 value justified by Canal+'s market performance. (Id.)

3 NDS rejected Canal+'s allegations as unfounded and a transparent attempt to
4 extort an unfair valuation. (Id. ¶¶ 11-12.)

5 If, as Mr. Carayol asserts, Canal+ intended to introduce "a new, latest-
6 generation smart card," Canal+ had every opportunity to commence this action no later
7 than January. Discovery could have been conducted in accordance with the Federal Rules
8 in a proper and cost effective manner. Instead, Canal+ delayed filing the litigation, as it
9 prepared its public relations strategy. On February 19, 2002, a month before filing this
10 case, Canal+ registered a website devoted to this litigation –

11 www.actiononecanalplus.com. (Declaration Of David Eberhart In Support Of
12 Defendants' Opposition To Motion To Expedite Discovery ("Eberhart Decl.") ¶¶ 2-3.)
13 Obviously, Canal+ considered it far more urgent to arrange its press strategy than to
14 obtain discovery through the litigation process. Canal+ has no right to proceed at its
15 leisure and then demand that the Rules be suspended once it gets around to taking action.

16 **C. The Complaint.**

17 Canal+'s decision to file in this District is mystifying. No relevant fact is
18 alleged to have occurred in this District, and defendants have no relevant contacts with
19 this District.² Yet, the venue statutes require that the action be commenced in the District
20 where the defendants are located. See 28 U.S.C. § 1391(b); 28 U.S.C. § 1400. Venue in
21 this District is improper.

22 Further, the complaint does not state a claim upon which relief can be
23 granted. It is premature to lay out the defects in the complaint, but it is very important to
24 know that NDS will challenge that complaint. Because the discovery requested involves
25 exceptionally difficult and expensive issues due to the foreign situs of most of the

26 submitted herewith. (Id. ¶ 10.)

27 ² While Canal+ Technologies, Inc. is alleged to be a California corporation based in
28 Cupertino, that corporation was not even in existence at the time of the alleged
wrongdoing. It was registered on December 15, 1999. (Eberhart Decl. ¶ 5.)

1 witnesses from whom testimony is sought – and, potentially, the business sensitivity of
2 the subject matter – discovery should be framed by valid, tested pleadings.

3 **D. The Discovery Requested.**

4 It is apparent that Canal+'s motion is misconceived. Even assuming early
5 commencement of discovery is warranted, there is absolutely no justification for one-way
6 discovery. Nor does it make sense to order specific discovery, on truncated time limits,
7 that is exempt from the standard meet and confer rules.

8 Canal+ seeks discovery from twelve witnesses, six of whom reside in Israel,
9 two of whom are based in England, one of whom is located either in Germany or England,
10 one of whom is presumably located in Canada, and only two of whom are located in the
11 United States. Once discovery commences, NDS will seek discovery from Canal+
12 witnesses, most of whom are believed to reside in France. Canal+ also seeks documents,
13 and NDS will certainly require production of documents from Canal+.

14 Obviously, taking discovery in this case will be very expensive and
15 complicated to arrange. Canal+ blithely asks the Court to order its proposed depositions
16 “at any time upon seven days calendar notice (sic)” – presumably free of the meet and
17 confer process – and to suspend, in advance, the limitations of Rule 30(a)(2)(A).
18 (Proposed Order at 2.) There is no justification for these requests. Nor has Canal+ ever
19 met and conferred with NDS regarding an expansion of the numerical deposition limits set
20 forth in Rule 30(a)(2)(A).³ Without question, this is exactly the kind of complex
21 discovery that should be carefully planned in accordance with an overall pretrial schedule.

22 **E. The Satellite Television Industry And The Alleged Misdeeds.**

23 Beginning with the commercial deployment of digital satellite television,
24 certain individuals and groups – none named as parties in the complaint – have

25 _____
26 ³ The text of Canal+'s motion suggests that the real purpose of its request is to avoid the
27 protection of Rule 30(a)(2)(B) – the limit on multiple depositions of a single witness.
28 (See Motion at 3 (“[T]hese depositions are of a limited nature and should not count...”).)
If so, this is a rule that should be enforced except upon the most compelling showing of
necessity. The difficulty and expense involved in these largely-foreign depositions further
militates in favor of retaining that protection.

1 consistently sought to avoid or disable conditional access restrictions to obtain free access
2 to restricted television signals. (Peled Decl. ¶ 4.) This practice may be broadly termed
3 satellite television piracy. (Id.) Piracy deprives satellite television companies – including
4 customers of NDS – of television revenues to which they are entitled. (Id.) It is, in other
5 words, theft. NDS neither tolerates nor supports piracy. (Id. ¶ 5.) In fact, NDS spends
6 millions of dollars every year fighting signal piracy. (Id. ¶ 6.) NDS has filed numerous
7 civil lawsuits against pirates, and NDS has provided information to law enforcement
8 agencies that resulted in criminal prosecutions for signal theft. (Id.)

9 Interestingly, one of Canal+'s proposed witnesses is an individual named
10 Oliver Kommerling. Canal+ does not reveal that Mr. Kommerling, a German national
11 who spends substantial time in England, works for and is a majority owner of a joint
12 venture with NDS.⁴ (Id. ¶13.) That joint venture is currently under contract with Canal+
13 – seemingly in the design of its so-called “latest generation” smart cards. (Id.) Mr.
14 Kommerling, in fact, provided the basis for NDS’s belief that Canal+’s new card is not
15 state of the art. (Id. ¶ 17.)

16 While Mr. Kommerling’s present, simultaneous involvements with NDS
17 and Canal+ belie Canal+’s claims in this action, his views on the background of this
18 dispute are also noteworthy. In a scholarly article published in May of 1999, Mr.
19 Kommerling correctly observed that:

20 Since around 1994, almost every type of smartcard processor
21 used in European and later also American and Asian, pay-TV
22 conditional-access systems has been successfully reverse
23 engineered. Compromised secrets have been sold in the form
24 of illicit clone cards that decrypt TV channels without revenue
 to the broadcaster. The industry has had to update the security
 processor technology several times already and the race is far
 from over.

25 (“Design Principles for Tamper-Resistant Smartcard Processors,” O. Kommerling & M.
26 Kuhn, Proceedings of the USENIX Workshop on Smartcard Technology, May 10-11,
27 1999 (Eberhart Decl. ¶ 7).)

28 ⁴ Mr. Kommerling owns 60%; NDS owns 40%.

1 Mr. Kommerling's description of the entire industry was true of Canal+.
2 Canal+ alleges that its system was compromised because of the publication in March 1999
3 of object code for the "UserROM".⁵ (Complaint ¶ 24.) Canal+ does not disclose that its
4 cards had been fully and publicly "hacked" well before March 1999. Belittling Canal+'s
5 allegations in this case, a trade publication reported that a break of the Canal+ card was
6 published as early as 1997. (Eberhart Decl. ¶ 8.) "[S]everal sources said yesterday that
7 they credit a well-known hacker based in Quebec, who goes by the acronym 'PGM,' with
8 posting in 1997 the first break of the Canal Plus conditional access system that is the
9 subject of the lawsuit.")⁶ In addition, there currently exists on the Internet an extensive
10 set of files disclosing information on how to "fool" Canal+'s restrictions that appears to
11 have been posted no later than 1998. (Eberhart Decl. ¶ 9.)

12 While NDS was neither involved in nor responsible for the publication of
13 the Canal+ UserROM in March 1999, it is apparent that this publication cannot have been
14 the cause of any injury to Canal+. In fact, the UserROM published in March 1999 would
15 be of extremely limited value to anyone seeking to break the Canal+ system. In very
16 broad terms, a smartcard employs (1) a sort of microcomputer (the "security processor" of
17 Mr. Kommerling's discussion above), in conjunction with (2) certain programming
18 instructions that unscramble encrypted over-the-air signals and (3) certain secret code-
19 keys that, in effect, "unlock" the software. (Peled Decl. ¶ 14.) The UserROM, like all
20 computer data, is encoded in ones and zeros ("object code"), a language that can be made
21 intelligible to human beings only with very great effort. (Id. ¶ 15.) Even if translated into
22 a human-readable format ("source code"), effective use of the information contained in
23 the UserROM requires reverse engineering of the code-keys. (Id.) These are usually
24 found in a separate, "EPROM"⁷ or "EEPROM"⁸ portion of the smartcard. (Id.) The

25 _____
26 ⁵ Presumably, a Read Only Memory on Canal+ smartcards devoted to user information.

27 ⁶ This will, of course, be an area where NDS will require discovery.

28 ⁷ Erasable Programmable Read Only Memory.

⁸ Electrically Erasable Programmable Read Only Memory.

1 UserROM object code for the Canal+ smartcard published on the Internet in March 1999
2 did not include, even in object code, the code keys necessary to clone Canal+ smart cards.
3 (Peled Decl. ¶ 16.) In fact, the UserROM information, as such, is information that an
4 experienced engineer – or signal pirate – could obtain rather easily using the facilities of
5 any number of publicly available laboratories or service bureaus. (*Id.*) The hard work of
6 completing the circumvention of the conditional access system would only begin with that
7 information. (*Id.*) As indicated above, public sources indicate that at least one pirate had
8 completed that work and published what appears to be a complete hack of Canal+'s
9 system prior to 1999.

10 Finally, Canal+'s conduct belies its claims of threat. In October 2001,
11 Canal+ attempted to recruit Chris Tarnovsky away from NDS. (Declaration Of John
12 Norris In Support Of Defendants' Opposition To Motion To Expedite Discovery ("Norris
13 Decl.") ¶ 7; Peled Decl. ¶ 18.) When Tarnovsky declined these overtures, Gilles Kaehlin,
14 Canal+'s chief of security, delivered new Canal+ smartcards to Tarnovsky and asked him
15 to see if he could find a way to break their codes. (Norris Decl. ¶ 7; Peled Decl. ¶ 19.)
16 Having used an NDS affiliate to design its new cards and having given an NDS employee
17 access to its cards for the express purpose of trying to breach their security measures,
18 Canal+ is hardly being candid with the Court when it claims that it is concerned that NDS
19 will "hack" its claimed "latest generation" devices.

20 **F. The Motivation for Canal+'s Actions.**

21 Why is none of the foregoing disclosed in Canal+'s motion? Why is there
22 no concrete information to support the bald claim that NDS is responsible for Canal+'s
23 plight?

24 The reality of the matter is that Canal+ has been an inept provider of
25 conditional access systems. It failed to plan for the foreseeable third-party attacks on its
26 designs, and it failed to respond in a timely way when it became apparent that such attacks
27 had occurred. (Peled Decl. ¶ 7.) As a result, Canal+'s performance in the industry has
28 been subpar, and has subjected Canal+'s management to criticism by its corporate parents.

1 Canal+ is looking for an alibi and a scapegoat.

2 When Canal+ approached NDS in late 2001, it was apparent that the charges
3 asserted in this case were a thinly-disguised pretext for dumping its business at an
4 outrageous price. When NDS did not buckle to this extortion, Canal+ adopted the
5 strategy of using litigation as a cover to attack NDS in the financial press. The present
6 motion – along with its puffed-up prediction of a motion for preliminary injunction – is
7 meant for the newspapers, which do not have a “good cause” requirement and repeat bare
8 allegations regardless of the lack of evidentiary support.

9 NDS has no interest in delaying discovery in this matter. On the contrary,
10 NDS has been damaged by the publication of Canal+'s allegations. But NDS does have
11 an interest in having this action proceed in an efficient and a logical manner. NDS
12 believes that discovery should be supervised in the District where this action belongs, that
13 discovery should not proceed until the complaint provides a valid measure of what is and
14 what is not relevant, that discovery should not proceed absent a plan that takes full and
15 proper account of the foreign situs of litigation, and that discovery, once it commences,
16 should be bilateral and subject to the usual meet and confer rules that engender a cost-
17 effective and fair discovery process.

18 **G. Document Retention.**

19 NDS has no objection to entry of an interim order on the terms proposed by
20 Canal+, provided it is bilateral and applicable only to the parties. NDS has already
21 instructed its personnel to preserve all relevant documents. NDS will be interested to
22 know if Canal+ has preserved documents since it formed the plan to commence this
23 litigation. Press reports indicate that Canal+ retained its litigation counsel for this action
24 in the Fall of 2001. (Eberhart Decl. ¶ 10.)

25 Experience indicates that the order tendered by Canal+ is likely overbroad.
26 Business realities usually make it inappropriate to preserve transitory documents (e.g.,
27 system backup tapes) that are duplicative, vastly overinclusive and cumbersome. Any
28 document retention order should be without prejudice to modification upon stipulation or

1 proper showing by a party.

2 **IV. LAW AND ARGUMENT**

3 **A. Canal+ Has Failed To Show A Probability Of Success.**

4 There are good reasons to postpone the commencement of discovery until a
5 balanced and efficient discovery plan has been presented to the trial court and approved.
6 Rule 26(f). This process should be shortcut only upon a showing of good cause,
7 Yokohama Tire Corp., 202 F.R.D. at 613-14, and one element of that showing is some
8 demonstration of a probability of success on the merits. Crown Crafts, Inc. v. Aldrich,
9 148 F.R.D. 151, 152 (E.D.N.C. 1993); Notaro v. Koch, 95 F.R.D. at 405. While
10 expedited discovery has been granted in some cases where preliminary injunctive relief
11 was at issue, Canal+ cannot establish the requisite good cause merely by stating that they
12 will move for a preliminary injunction – especially where they provide no evidentiary
13 support for their claims and no justification for their months-long delay in seeking relief.

14 **1. Canal+ Offers No Evidence To Support A Motion For Preliminary**
15 **Injunction.**

16 Canal+ has offered no evidence that there is a basis for a preliminary
17 injunction. It merely offers the self-serving declaration of the Executive Vice President of
18 the French parent company that “Canal+ investigated the source of the security breach of
19 its smart cards and came to the conclusion that the defendants in this lawsuit...were
20 responsible for the illegal acts underlying the publication of Canal+ software and
21 facilitating the circumvention of Canal+'s security measures and the production of
22 counterfeit smart cards.” (Carayol Decl. ¶ 7.) As they say in the Bar Exam, “mere
23 conclusions are entitled to no weight.” No evidence has been offered to support the
24 contention that Canal+ has any prospect of success on the merits of a motion for
25 preliminary injunction.⁹ On the contrary, although Canal+ did not disclose these facts to

26 ⁹ NDS, of course, has no intention of facilitating piracy of Canal+'s new smart card
27 technology. On the other hand, the injunction seeks to block NDS from legitimate reverse
28 engineering for its own knowledge. Reverse engineering is an entirely lawful practice,
one in which every company in the industry engages in order to remain abreast of the state
of the art. There would never be a legitimate basis to enjoin lawful reverse engineering.

1 the Court, it is apparent that the breach of its security system was complete long before
2 the facts alleged in the complaint, and was effective only because Canal+ failed to take the
3 countermeasures imposed on vendors by the inherent nature of the business.¹⁰

4 Canal+ has also failed to disclose that as recently as October 2001, Canal+'s
5 head of security, Gilles Kaehlin, provided what were described as "new" smartcards to
6 Chris Tarnovsky with the explicit request that Tarnovsky attempt to crack the security in
7 those cards. In its motion, Canal+ identifies Mr. Tarnovsky as an "engineer at NDS
8 Americas." (Motion at 5 (emphasis added).) Canal+'s "piracy diagram" provided at the
9 December 12, 2001, meeting is more explicit: it alleges that Mr. Tarnovsky was the
10 person who transmitted the Canal+ code for publication on the pirate website. (Peled
11 Decl. Ex. A.) Mr. Kaehlin, who is French, provided a handwritten agreement to Mr.
12 Tarnovsky, a copy of which is submitted herewith. (Declaration Of Josette S. Pinel In
13 Support Of Defendants' Opposition To Motion To Expedite Discovery, Ex. A.) If Canal+
14 were truly concerned about hacking of its new smartcards, would it provide unreleased
15 smartcards to the person it claims publicly distributed hacked Canal+ code in the past?

16 2. Canal+ Seeks To Preclude An Entirely Legal Activity: Reverse 17 Engineering.

18 Even accepting, arguendo, the proposition that United States law governs
19 the actions of engineers in Israel employed by an English company to reverse engineer the
20 ROM in a smartcard created by and for a French company, that law provides that reverse
21 engineering a competitor's computer code for competitive research and to examine the
22 functional elements of the card is a fair use under section 107 of the Copyright Act. 17
23 U.S.C. § 107; see also, e.g., Sega v. Accolade, 975 F.2d 1510, 1514-15 (9th Cir. 1992);
24 Sony Computer Entertain., Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000). Nor,
25 contrary to the notions contained in the complaint, is such conduct prohibited by the
26

27 ¹⁰ NDS, like Canal+, has suffered invasions of its security system, and has been forced to
28 expend effort and expense to upgrade its technologies to stay ahead of the pirates. Canal+
has been notably slow to protect itself. (Peled Decl. ¶ 7.)

1 Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201(a)(2).¹¹

2 **B. Canal+ Slept On Its Alleged Rights.**

3 Courts deny requests to expedite discovery when time pressures are
4 plaintiff’s own fault. See Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 952 (S.D.
5 Cal. 1996) (denying motion for expedited discovery in part because “any time pressures
6 Gen-Probe faces were brought about by its own delays”). The facts alleged in the
7 complaint go back over three years. Assuming, for purposes of argument, that Canal+
8 will claim that it took three years to investigate the very public disclosure that took place
9 in March 1999, Canal+ cannot deny that nearly four months ago it advanced the
10 allegations on which it now posits its claim of an urgent need for discovery. Canal+ has
11 offered no explanation for waiting three full months to file this action and then
12 shortcutting the logical planning process mandated by Rule 26.

13 **C. Early Discovery Would Do More Harm Than Good.**

14 Venue is improper in this District,¹² and the complaint does not allege facts
15 on which relief can be granted. The discovery sought is complex, sensitive and, most

16 _____
17 ¹¹ The DMCA’s text does not prohibit the copying through reverse engineering of the
18 encryption measure itself (i.e., the “technological measure that effectively controls access
19 to a [protected] work”). Rather, by its plain terms, the DMCA targets circumvention
20 technologies, such as de-encryption programs. Id. The case law supports this plain
21 meaning of the statute. See, e.g., Universal City Studios, Inc. v. Corley, 111 F. Supp. 2d
22 294, 318 (S.D.N.Y. 2000) (describing liability question as “whether DeCSS was designed
23 primarily to circumvent CSS,” which was the “technological measure at issue”), aff’d 273
24 F.3d (2d Cir. 2001); Sony Computer Entertain. Am., Inc. v. Gamemasters, 87 F. Supp. 2d
25 976, 987 (N.D. Cal. 1999). A reverse-engineered copy of Canal+’s technology would not
26 be a circumvention (de-encryption) technology, but rather a copy of the technological
27 protection (encryption) measure itself. (See also Complaint ¶ 60 (describing MediaGuard
28 smartcards).) The DMCA does not prohibit copying the technological protection
measure.

23 ¹² For example, venue for plaintiffs’ copyright claims is proper “in the district in which
24 the defendant or his agent resides or may be found.” 28 U.S.C. § 1400(a). Under this
25 provision, a defendant may only “be found” in a judicial district if the defendant has
26 sufficient contacts – specific to that judicial district – to be subject to personal jurisdiction.
27 Milwaukee Concrete Studios, Ltd. v. Fjeld Manufacturing Co., 8 F.3d 441, 445 (7th Cir.
28 1993); Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc., 106
F.3d 284, 289 (9th Cir. 1997), overruled on other grounds, Feltner v. Columbia Pictures
Television, Inc., 523 U.S. 340 (1998). Neither NDS Group PLC nor NDS Americas, Inc.
has sufficient contacts with the Northern District of California to be subject to personal
jurisdiction; thus, neither “may be found” in this District and venue for plaintiff’s
copyright claims is improper.

1 importantly, involves witnesses located outside the United States. Such discovery should
2 be supervised by the court in which the action properly belongs. Graham Technology
3 Solutions, Inc. v. Thinking Pictures, Inc., 949 F. Supp. 1427, 1428 (N.D. Cal. 1997) (court
4 deferred motion for expedited discovery because “the issue of venue must be resolved
5 prior to any other procedural or substantive issue in this case.”) Assuming arguendo that a
6 claim can ultimately be stated, it would be costly and wasteful to launch a very extensive
7 and costly discovery program without the standard controls on the nature and scope of
8 inquiry.

9 If early commencement of discovery is warranted, the relief requested
10 makes no sense:

- 11 • There is absolutely no reason to have one-way discovery. NDS should
12 be permitted to take discovery from Canal+ and third parties.
- 13 • There is no showing of why discovery should be limited to the particular
14 individuals named in the motion.
- 15 • There is no showing that the particular document requests is non-
16 objectionable.¹³
- 17 • There is no basis for the unreasonable and arbitrary time limits proposed
18 for both deposition and document discovery.
- 19 • The relief requested ignores the relationship between document
20 discovery and depositions: document discovery and deposition
21 scheduling should be coordinated to avoid duplication of depositions.
- 22 • No showing has been made to support removal of the protections
23 accorded by Rule 30(a)(2)(A).¹⁴

24 In general, there is no basis for the abridged procedures contained in Canal+’s proposed
25

26 ¹³ For instance, the proposed request may call for the production of trade secret
27 information, and no protective order has been entered. The request may also call for an
28 unreasonably expensive search. NDS is entitled to retain the right to object to the request
on the basis of the Federal and Local Rules.

¹⁴ Or, Rule 30(a)(2)(B), if that is the intended target.

1 order. If discovery were to commence, there is no reason for anything other than an order
2 pursuant to Rule 26(d) authorizing both sides to commence discovery under to the
3 ordinary requirements of the Federal Rules and Local Rules – e.g., the normal
4 requirements for scheduling and completing discovery, the normal equal and bilateral
5 discovery rights, and the normal obligation to meet and confer about reasonable
6 scheduling (especially where many witnesses are located in a foreign country currently
7 involved in a violent civil disruption).

8 **D. Document Retention Should Be Bilateral.**

9 It is noteworthy that Canal+ seeks a one-way rule even on this basic
10 principle. There is no warrant for such an order. As stated above, NDS has no objection
11 to a bilateral order on the terms provided, so long as the order applies to the parties and is
12 without prejudice to modification to accommodate practicalities of document
13 management. A proposed order is submitted with this opposition.

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1 **V. CONCLUSION**

2 NDS respectfully submits that it is not appropriate to commence discovery
3 in this action until venue has been determined, the efficacy of the complaint has been
4 decided, and the discovery planning and scheduling contemplated by Rule 26(f) have been
5 accomplished. If early discovery is to be authorized, there is no reason to do more than
6 authorize the parties to commence discovery in accordance with the usual rules. The
7 particularized and one-sided approach outlined by Canal+ is unfair, inefficient and likely
8 to lead to further controversy.

9 Dated: April 2, 2002

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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 Groupe Canal+ S.A., et al.,

17 Plaintiffs,

18 v.

19 NDS Group PLC, et al.,

20 Defendants.

Case No. C02-01178 (VRW)

**[PROPOSED] ORDER DENYING
PLAINTIFFS' MOTION FOR
ORDER EXPEDITING DISCOVERY
AND GRANTING MOTION FOR
ORDER TO PRESERVE
DOCUMENTS AND THINGS**

Judge: Hon. Vaughn R.
Walker

Date of Hearing: April 18, 2002

1 The motion of plaintiffs Groupe Canal+ S.A., Canal+ Technologies, S.A.,
2 and Canal+ Technologies, Inc. (“Canal+”) for Order Expediting Discovery and Order to
3 Preserve Documents and Things came before the Court for oral argument on April 18,
4 2002, after briefing by both plaintiffs (Canal+) and defendants (NDS Group, PLC and
5 NDS Americas, Inc., collectively “NDS”). Having considered the papers submitted and
6 the arguments of counsel, and good cause appearing,

7 IT IS HEREBY ORDERED that plaintiffs’ motion is adjudicated as follows:

8 1. The request for an order for plaintiffs to obtain expedited discovery is
9 DENIED in all respects.

10 2. The request for an order to preserve documents and things is
11 GRANTED upon the terms requested by NDS: both Canal+ and NDS are ordered to
12 preserve evidence relevant to the claims in this case, without prejudice to relief from this
13 preservation order upon motion for good cause shown.

14 IT IS SO ORDERED.

15
16 Dated: _____

16 By _____
17 Hon. Vaughn R. Walker
18 United States District Judge

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