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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 **Originating Case:** *Bodyguard Productions, Inc., et al., v. RCN Telecom Services of*
18 *Massachusetts, LLC, et al.*, No. 3:21-cv-15310 (D.N.J.)

19 In re Subpoena to:

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Reddit, Inc.

Case No.: 3:23-mc-80037-LB
Hearing Date: March 23, 2023
Time: 9:30 AM
Place: Zoom

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO COMPEL THIRD-PARTY
REDDIT TO RESPOND TO SUBPOENA**

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2 **PLAINTIFFS’ REPLY IN SUPPORT OF THEIR MOTION TO COMPEL THIRD-**
3 **PARTY REDDIT TO RESPOND TO SUBPOENA**

4 Plaintiffs AFTER II MOVIE, LLC, BODYGUARD PRODUCTIONS, INC., HITMAN
5 TWO PRODUCTIONS, INC., KILLING LINK DISTRIBUTION, LLC, LHF PRODUCTIONS,
6 INC., MILLENNIUM FUNDING, INC., MILLENNIUM IP, INC., MILLENNIUM MEDIA,
7 INC., MON, LLC, NIKOLA PRODUCTIONS, INC., OUTPOST PRODUCTIONS, INC.,
8 RAMBO V PRODUCTIONS, INC., VENICE PI, LLC, VOLTAGE HOLDINGS, LLC, and
9 WONDER ONE, LLC (“Plaintiffs”), by and through their counsel, pursuant to Civ L.R. 7.3(c), file
10 their Reply in support of their Motion for an order compelling third-party REDDIT, INC. (“Reddit”)
11 to fully produce documents in response to Plaintiffs’ subpoena.

12 **I. INTRODUCTION**

13
14 1. Reddit’s Opposition begins with this blatantly untrue and libelous statement: “Before
15 discovery had even begun...Plaintiffs sent a subpoena to Reddit.” Opp. at p. 8. At the latest,
16 discovery begun on Jan. 6, 2023 which is the day before Plaintiffs sent the subpoena to Reddit.
17 And Plaintiffs’ counsel provided Reddit’s counsels with uncontroverted evidence of this fact, yet
18 Reddit refused to even correct this misstatement. See Decl. of Culpepper. of ¶¶16-17; Ex. “6”.
19 Without doubt, Reddit continued to assert this purposeful falsehood so that it could portray itself
20 as putting up a good fight against copyright holders until it had to be dragged kicking and
21 screaming by this Court to disclose user information and send a message to any other litigants
22 who are considering requesting similar information from Reddit.

23
24 2. Then Reddit cleverly tries to move the goalposts in the middle of the game by shifting
25 from the “fear of economic or official retaliation” standard that was the basis of its original
26 objections to arguing that Plaintiffs must satisfy the highest First Amendment standard reserved
27 for political and religious speech. This Court should reject Reddit’s attempt to treat comments
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1 boasting of piracy or complaining of RCN’s browser hijacking as political or religious speech and
2 order Reddit to disclose the requested information in accordance with the proposed order attached
3 to this Reply Brief.

4 **II. ARGUMENT**

5 ***A. Discovery had begun in the underlying case at the time Reddit was served a subpoena.***

6
7 3. As stated in the introduction, Reddit’s argument that it was served with a subpoena prior
8 to start of discovery is *knowingly* false. Plaintiffs and RCN (sometimes “Parties”) had their Rule
9 26(f) conference on Nov. 7, 2022. *See* Decl. of Culpepper at ¶3. Accordingly, per Rule 26(d)(1),
10 discovery opened on Nov. 7, 2022. However, during the pretrial conference on Dec. 5, 2022, the
11 Court ordered the Parties to exchange settlement proposals by Dec. 20, 2022 and go forward with
12 discovery if settlement was not feasible. *See* Id. at ¶4; Ex. “1”. This deadline was extended to
13 the close of business of Jan. 6, 2023 per Defendants’ request. *See* Decl. of Culpepper at ¶5; Ex.
14 “2”. Accordingly, after settlement efforts proved futile, discovery reopened after the close of
15 business on Jan. 6, 2023. Notably, RCN has not objected to a Request for Production of
16 Documents that was served on it on Jan. 9, 2023 based upon being served prior to the opening of
17 discovery. *See* Decl. of Culpepper at ¶¶8, 11; Ex. “3”-“4”. Plaintiffs’ counsel provided the key
18 exhibits to Reddit after reading its Opposition yet Reddit refused to amend its brief to remove this
19 flagrant falsehood. *See* Decl. of Culpepper at ¶5; Ex. “6”.

20
21 ***B. The Court should not consider Reddit’s new First Amendment standard of its Opposition***
22 ***that diverges starkly from its objections.***

23
24 4. In Reddit’s original letter detailing its objections to Plaintiffs’ subpoena dated Jan. 17,
25 2023, it merely cited the lower First Amendment standard of *In re DMCA § 512(h) Subpoena to*
26 *Twitter, Inc.*, No. 20-mc-80214-VC, 2022 WL 2205476, at *2 (N.D. Cal. June 21, 2022)
27 concerning the ability of its users to speak anonymously without fear of economic or official
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1 retaliation or concern about social ostracism. *See* Ex. “2” [Doc. #1-3] at 2-3. Plaintiffs addressed
2 this concern by pointing out that they would not be seeking to retaliate against these Reddit users
3 by suing them for direct copyright infringement but would rather discuss the comments with the
4 subscribers so that they could use them as evidence in support of their claims and to rebut RCN’s
5 defenses. *See* Memo. [Doc. #1] at p.8, ¶25. To further underscore this point, there is a Protective
6 Order in this case that limits protected information obtained from nonparties to “be used *solely*
7 for the purpose of preparation, trial, and appeal of *this litigation and for no other purpose.*”
8 Second Decl. of Culpepper at ¶24; Ex. “7” (emphasis added). Should Plaintiffs’ motion be
9 granted, Plaintiffs will designate the information obtained from Reddit as protected information.
10 Accordingly, these Reddit users have absolutely no fear of economic or official retaliation or
11 concern about social ostracism.
12

13
14 5. Conceding that Plaintiffs satisfied the lower standard First Amendment standard set forth
15 in the objections, Reddit now shift to arguing that the appropriate standard for disclosure is the
16 “exceptional case” and “compelling need” standard discussed in *Rich v. Butowsky*, No. 20-mc-
17 80081-DMR, 2020 U.S. Dist. LEXIS 185252, at *10, 2020 WL 5910069 (N.D. Cal. Oct. 6, 2020)
18 where this Court adopted the logic of *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1095
19 (W.D. Wash. 2001). *Butowsky* was not mentioned in either Reddit’s original letter of Jan. 17
20 detailing its objections or its follow up letter of Feb. 3, 2023. *See* Ex. “2” [Doc. #1-3] and Ex. “4”
21 [Doc. #1-4]. This shift in First Amendment standard is effectively a new objection. Courts
22 generally do not consider new objections that were not included in the initial response. *See Thorpe*
23 *v. Hearn*, No. 2: 19-cv-1974 KJM KJN P, 2022 U.S. Dist. LEXIS 56299, at *11, 2022 WL 902891
24 (E.D. Cal. Mar. 28, 2022)(“Defendants are correct that in ruling on a motion to compel, the court
25 generally considers objections timely asserted in the initial response to the discovery request that
26 are reasserted in the opposition”); *Sonnino v. Univ. of Kan. Hosp. Auth.*, 220 F.R.D. 633, 642 (D.
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1 Kan. 2004) (“When ruling on a motion to compel, a court generally considers only those
2 objections that have been timely asserted in the initial responses to the discovery request and that
3 are subsequently reasserted and relied upon in response to the motion to compel.”). Accordingly,
4 the Court should not consider Reddit’s new First Amendment standard when evaluating Plaintiffs’
5 Motion because it was not in Reddit’s original objection.
6

7 ***C. Butowsky is not relevant to the fact of the present case.***

8 6. Moreover, *Butowsky* is not a copyright case but a defamation case and thus not applicable
9 to the present facts. Courts apply a “rigorous or most exacting” standard when the speech is
10 political, religious, or literary. In contrast, commercial speech is afforded less protection. *See In*
11 *re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). Courts routinely apply an
12 even lower standard to speech pertaining to copyright infringement because copyright law
13 includes built-in First Amendment accommodations such as the fair use defense that ease the
14 apparent tension between free expression and U.S. copyright law. *See Eldred v. Ashcroft*, 537
15 U.S. 186, 219, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003). For example, in *In re DMCA Subpoena*
16 *to Reddit, Inc.*, this Court noted that applying the anonymous speech approach in the context of
17 a copyright dispute would be “problematic” because “[t]he doctrine of fair use provides
18 everything needed to balance the competing interests of the First Amendment and
19 the copyright laws”. *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 882 (N.D. Cal.
20 2020).
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23 ***D. The discovery requested for users “compypaq” and “matt3324” is relevant and proportional***
24 ***to the needs of the case.***

25 7. Plaintiff established that the comments from “compypaq” are relevant as evidence that (ii)
26 RCN controls the conduct of its subscribers and monitors its subscribers’ access. Reddit argues
27 that Plaintiffs’ assertion that compypaq’s statement that RCN would remotely reset its modem
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1 establishes that RCN monitors and controls its subscribers' conduct is "nonsense" and that this is
2 not relevant to a copyright claim. Opp. at 9. However, what does not make sense is Reddit's
3 argument that "unexplained is how a reset modem would "control" subscriber conduct." Id.
4 Common sense dictates that if RCN can remotely reset its customers' modem, it can also remotely
5 *turn off* the customer's modem and stop the customer from sharing pirated content. This bears
6 directly on RCN's denial that it has the ability to monitor or control its subscribers conduct.
7

8 8. Plaintiffs established that the comments from u/matt3324 are relevant as evidence that (ii)
9 RCN controls the conduct of its subscribers and monitors its subscribers' access. Rather than
10 trying to rebut this point, Reddit attempts to distract the Court by raising unnecessary and
11 unproven technical details and arguing "...many ISPs have engaged in [the same conduct] to
12 display advertisements to their customers." Opp. at 13. Plaintiffs' counsel would be laughed out
13 of New Jersey if he argued "many ISPs do it" to refute RCN's denial that it monitored the conduct
14 of its subscribers. Ironically, Reddit relies on a comment (Ex. A-3 at 7) in the same thread as its
15 so-called proof that what matt3324 was discussing was just some type of routine ISP behavior.
16 Plaintiffs object to Reddit's reliance on this comment and the wiki style article
17 <https://www.dnsknowledge.com/whatis/nxdomain-non-existent-domain-2/> as impermissible
18 hearsay in violation of FRE 802 and lacking foundation in violation of at least FRE 901.
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20 9. Reddit argues that a comment that establishes that RCN redirected a user's browser when
21 he attempted to go to a website "has absolutely nothing to do with copyright infringement or
22 piracy." Opp. at 13. However, Plaintiffs never argued that u/matt3324 and u/compypaq engaged
23 in piracy. Rather, Plaintiffs assert that these comments rebut RCN's assertion (by its denial in its
24 Answer) that it could not control the conduct of its subscribers or that it monitored or controlled
25 the conduct of its subscribers. Reddit's argues "DNS hijacking does not demonstrate ever present
26 surveillance or control by an ISP over its users." Opp. at 9. Firstly, Reddit has not proven what
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1 happened to matt3324 was DNS hijacking. Secondly, and more importantly, Reddit is arguing a
2 false standard. The issue is not “ever present surveillance” but whether RCN *could* control or
3 monitor the conduct of its subscribers. Assuming *arguendo* that RCN was engaged in DNS
4 hijacking, RCN could just as easily use the same approach of DNS hijacking to prevent its
5 customers from accessing certain notorious piracy websites that were identified in notices of
6 RCN’s subscribers’ piracy.

7
8 10. Lastly, Reddit argues “If DNS re-routing were relevant to establishing ISP notice for
9 purposes of infringement, the entire notice system established by the DMCA would be a nullity.”
10 *Id.* This irrelevant parade of horrible has nothing to do with what Plaintiffs are arguing. Rather,
11 Plaintiffs are merely attempting to prove that Reddit can control or monitor the conduct of its
12 subscribers.

13
14 ***E. The discovery requested for user u/ChikaraFan is relevant and proportional to the needs of***
15 ***the case despite being prior to the 3 year statute of limitations.***

16 11. Reddit concedes that the comment from ChikaraFan is relevant but argues it is useless
17 because it is outside the three year statute of limitations (“SOL”). *Id.* at 10. Initially, Plaintiffs
18 wish to point out that Reddit’s statement that “All of the allegations in the Complaint relate to
19 copyright infringement in 2020” is completely wrong. *Id.* The Oct. 19, 2020 date in paragraph
20 112 of the Complaint Reddit cites is merely referring to the date *a demand letter was sent to RCN.*
21 *See* Ex. “8” at ¶112. More importantly, Reddit’s argument misses the point. As repeatedly
22 emphasized in the opening brief and this reply brief, Plaintiffs are not attempting to assert any
23 liability to ChikaraFan for copyright infringement. Rather, Plaintiffs seek to use this as evidence
24 that (i) RCN did not reasonably implemented a policy for terminating repeat infringers sufficient
25 for a safe harbor affirmative; and (iii) the ability to freely pirate without consequence was a draw
26 to becoming a subscriber of RCN. (i) is for rebutting RCN’s safe harbor and (iii) is one of the
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1 elements for establishing vicarious infringement. Reddit does not even attempt to rebut Plaintiffs’
2 citation of *UMG Recordings, Inc. v. Grande Communs. Networks, LLC*, 2018 U.S. Dist. LEXIS
3 164761, at *9, 2018 WL 4627276 (W.D. Tex. Sep. 26, 2018) (supporting the position that
4 evidence of an ISP’s conduct prior to the 3 year SOL cut-off is relevant evidence). Moreover, the
5 Third Circuit has adopted the discovery rule that tolls the SOL until “the plaintiff discovers, or
6 with due diligence should have discovered, the injury that forms the basis for the claim.” *William*
7 *A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3d Cir. 2009). Accordingly, Reddit’s SOL
8 argument is both incorrect and not applicable.
9

10 ***F. Plaintiffs propose a means for obtaining relevant evidence from u/SquattingCroat,***
11 ***u/aromaticbotanist, u/ilikepie96mng and u/Griffdog21 only if they are Astound users.***

12 12. Reddit argues that it is unlikely that users “SquattingCroat”, “aromaticbotanist”,
13 “ilikepie96mng” and “Griffdog21” were commenting about RCN or an ISP in the Astound family.
14 Initially, Plaintiffs disagree with Reddit’s label of these users as “Comcast Users” that gives the
15 mistaken impression that they are Comcast customers. Further, Plaintiffs never represented to
16 Reddit or the Court that the screenshot displayed in Ex. “3” [Doc. #1-4] were how they appeared
17 in the thread. Accordingly, Plaintiffs take exception with Reddit’s assertion that the
18 representation in Exhibit “3” is “disingenuous”. Opp. at p.6; FN2.
19

20 13. However, Reddit has the Internet Protocol (“IP”) address logs for these users.
21 Accordingly, this issue of whether these users are Astound customers can be easily put to rest by
22 merely inputting the IP addresses Reddit has for these users into public records such as American
23 Registry of Internet Numbers (“ARIN”) to determine if any of these users logged in from an
24 Astound IP address (RCN, Grande, Wave, Entouch, Starpower). *See* Decl. of Culpepper at ¶¶23,
25 28-29. Plaintiffs made this good faith proposal to Reddit that resolves its concern but it was
26 rejected without any explanation. *See Id.* at ¶25; Ex. “6”. Alternatively, if Reddit’s position is
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1 that it would be a burden for it to merely look up these IP addresses, Plaintiffs' counsel will do it.
2 Reddit can disclose the IP address logs for these users (but not identification information) to
3 Plaintiffs' counsel under the confines of the Attorneys' Eyes Only provision of the Protective
4 Order and he will use ARIN to determine if any of the Astound ISPs are tied to these IP addresses.
5 Then, he can provide Reddit with the particular users who used an Astound IP address so only
6 those users' information would be provided. Plaintiffs request that the Court modify the subpoena
7 to adopt one of these proposals.
8

9 ***G. Only Reddit possesses the information Plaintiffs seek.***

10 14. As discussed above, Reddit's argument that Plaintiffs "have no idea" what they need
11 because discovery had not begun is completely wrong because discovery had begun. Reddit
12 makes the bizarre argument that Plaintiffs could use an anonymous Reddit comment itself as
13 evidence. Besides lacking foundation (because Plaintiff does not even know who the author of
14 the comment is or if that person has said the comment was true), it would also be hearsay. The
15 present case is completely different from *Doe v. 2themart.com Inc.* where the Court stated that
16 the existence of the messages themselves was sufficient for establishing that they influenced the
17 stock price. *See Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001). Here
18 Plaintiffs are not trying to prove the *effect* of the messages but that the messages are *true*.
19

20 15. Reddit's third argument that Plaintiffs could interview thousands of RCN customers to
21 obtain evidence that they were drawn to be a customer of RCN due to its lax policies is
22 impractical. Courts have supported secondary liability claims against ISPs because "enforcement
23 against direct infringers is both impractical and improbable." *Sony Music Entm't v. Cox*
24 *Communs., Inc.*, 426 F. Supp. 3d 217, 235 (E.D. Va. 2019) (citing *MGM Studios Inc. v. Grokster,*
25 *Ltd.*, 545 U.S. 913, 929-30, 125 S. Ct. 2764, 2776 (2005)). On the other hand, the screenshots
26 such as where ChikaraFan says "RCN seems fairly lax" are right there. Notably, Reddit has the
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1 information Plaintiffs request in its possession and does not even argue that it has any burden
2 disclosing this information.

3 ***H. Plaintiffs addressed the First Amendment Concerns of the appropriate lower standard for***
4 ***speech pertaining to Copyright Infringement.***

5 16. As argued above, the Court should reject Reddit’s attempt to shift to a new more rigorous
6 First Amendment standard that diverges from its objections. Moreover, *Butowsky* or *Doe v.*
7 *2TheMart.com Inc.* are not relevant here because this is a copyright case. Courts apply a “rigorous
8 or most exacting” standard when the speech is political, religious, or literary. *See In re Anonymous*
9 *Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011). Courts routinely apply a lower standard
10 to speech pertaining to copyright infringement because it includes built-in First Amendment
11 accommodations such as the fair use defense that ease the apparent tension between free
12 expression and U.S. copyright law. *See Eldred v. Ashcroft*, 537 U.S. 186, 219, 123 S. Ct. 769, 154
13 L. Ed. 2d 683 (2003). For example, in *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d
14 875, 882 (N.D. Cal. 2020), this Court noted that applying the anonymous speech approach in the
15 context of a copyright dispute would be “problematic” because “[t]he doctrine of fair use provides
16 everything needed to balance the competing interests of the First Amendment and
17 the copyright laws”. Reddit’s reliance on the irreparable harm standard in the unpublished case
18 of *Art of Living Found. v. Does 1-10*, No. 10–CV–05022–LHK, 2011 WL 5444622, (N.D. Cal.
19 Nov. 9, 2011) is misguided because *Art of Living Found* the Court found that the “anonymous
20 statements that the Art of Living Foundation is basically a cult and a sham is speech on a ‘public
21 issue.’” *Art of Living Found. v. Does*, No. 10-CV-05022-LHK, 2011 U.S. Dist. LEXIS 129836,
22 at *17, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011). The comments at hand are not about religion
23 or a public issue. Nor has Reddit made that argument. Similarly, Reddit’s reliance on *Smythe v.*
24 *Does* is inapplicable because in *Smythe* the Plaintiff provided a “wholly illegible” image that
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1 failed to provide “real evidentiary basis” for any of her claims. *Smythe v. Does*, No. 15-mc-
2 80292-LB, 2016 U.S. Dist. LEXIS 1348, at *11, 2016 WL 54125 (N.D. Cal. Jan. 5, 2016). In
3 comparison, Plaintiffs have provided clear screenshots and RCN’s motion to dismiss was denied.
4 Assuming *arguendo* that a higher standard applies to “compypaq” and “matt3324”, the
5 protective order deals with these concerns.
6

7 **III. CONCLUSION**

8 17. Accordingly, Plaintiffs pray that this Court grant its motion to compel Reddit to fully
9 respond to the subpoena with the exception of Reddit user “dotsamantha” and in line with one of
10 the alternative proposals discussed above. Plaintiffs have included a modified Order. Plaintiffs
11 request that the Court rule on the papers. However, should the Court decide that oral argument is
12 necessary, Plaintiffs request that oral argument be held by remote means such as Zoom.
13

14 DATED: Kailua Kona, Hawaii, March 6, 2023.

15 Respectfully submitted,

16 **CULPEPPER IP, LLLC**

17 /s/ Kerry S. Culpepper

18 Kerry S. Culpepper

19 *Attorney for Plaintiffs*

20 *Admitted Pro Hac Vice*