

1 Julie E. Schwartz, CA Bar No. 260624
JSchwartz@perkinscoie.com
2 PERKINS COIE LLP
1201 Third Avenue, Suite 4900
3 Seattle, Washington 98101-3099
Telephone: +1.206.359.8000
4 Facsimile: +1.206.359.9000

5 Hayden M. Schottlaender, TX Bar No. 24098391
6 *Pro Hac Vice Application Pending*
HSchottlaender@perkinscoie.com
7 PERKINS COIE LLP
500 N. Akard Street, Suite 3300
8 Dallas, Texas 75201
Telephone: +1.214.965.7700
9 Facsimile: +1.214.965.7799

10 Attorneys for Reddit, Inc.

11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 **Originating Case:** *After II Movie LLC., et al. v. Grande Communications*
16 *Networks LLC, No. 1:21-cv-00709 (W.D. Tex.)*

17 In re Subpoena to:
18 Reddit, Inc.

CASE NO. 3:23-mc-80173
NON-PARTY REDDIT, INC'S
OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL

Date: July 27, 2023
Time: 9:30 a.m.
Judge: Hon. Laurel Beeler

19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Plaintiffs' Motion seeks to unmask six anonymous Reddit users that Plaintiffs
3 assume to have committed copyright infringement using Grande, an internet service
4 provider (ISP). If these Reddit users did engage in copyright infringement on
5 Grande's networks, then Plaintiffs hope to learn whether the users were drawn to
6 Grande for the ease of infringement. Weeks ago, this Court denied a nearly identical
7 motion by these same Plaintiffs in *In re Reddit, Inc.*, – F. Supp. 3d –, 2023 WL
8 3163455 (N.D. Cal. Apr. 28, 2023) (Beeler, M.J.) (“RCN”). But rather than returning
9 with better facts capable of meeting the applicable First Amendment standard,
10 Plaintiffs here offer worse facts—expressly acknowledging that they have no need to
11 identify these Reddit users at all.

12 In *RCN*, Plaintiffs subpoenaed Reddit to unmask a number of anonymous
13 Reddit users for the same reasons that they seek to unmask the users here. *Id.* at *1.
14 Reddit objected based on those users' First Amendment rights, Plaintiffs moved to
15 compel Reddit's compliance, and this Court denied that motion because the
16 governing *2TheMart* standard requires Plaintiffs to show that identifying the users
17 supplies “directly and materially relevant” evidence for Plaintiffs' claim that is
18 “unavailable from any other source.” *Id.* at *3 (quoting *Doe v. 2TheMart.com*, 140 F.
19 Supp. 2d 1088, 1095 (W.D. Wash. 2001)). This Court ruled that Plaintiffs could not
20 meet the test with respect to that subpoena because it was “implausible” that Reddit
21 users supply an “irreplaceable source” for the type of evidence the Plaintiffs sought.
22 *Id.* at *4. As one example, this Court recognized that RCN, the ISP itself, could serve
23 as an alternate source of evidence about the ease of committing copyright
24 infringement on that ISP's network. *Id.* Indeed, Reddit had expressly argued that
25 Plaintiffs could avoid unmasking the Reddit users in that case by instead obtaining
26 “a list of customers directly from RCN in party discovery, and then contact[ing]
27 those confirmed customers directly. That list could even be narrowed to customers
28 with IP addresses that engaged in piracy.” Reddit's Opp. to Mot. to Compel at 15,

1 *RCN*, 2023 WL 3163455 (N.D. Cal. Feb. 28, 2023).

2 This Motion involves a nearly identical subpoena to Reddit. Once again,
3 Plaintiffs speculate that certain Reddit users committed copyright infringement on
4 Grande and hope to subpoena them to learn more. But, unlike in *RCN*, the Plaintiffs
5 here have already successfully done exactly what Reddit suggested Plaintiffs do
6 there. Plaintiffs have already obtained from Grande identifying information for 118
7 of Grande’s “top 125 pirating IP addresses.” Doc. 1 (“Mot.”) ¶¶ 6, 13. That concession
8 dooms the Motion; Plaintiffs cannot possibly establish that unmasking these six
9 Reddit users is the *only* way for Plaintiffs to generate evidence necessary for their
10 claims when they have already succeeded in pursuing an alternative and *better* way.
11 The Motion should therefore be denied for failing the *2TheMart* standard.

12 **II. BACKGROUND**

13 Reddit is a community of online communities. Declaration of Hayden M.
14 Schottlaender (“Schottlaender Decl.”) ¶ 2. Within those communities, called
15 “subreddits,” users gather to discuss shared interests. *Id.* Users generally
16 participate on the platform pseudonymously, and Reddit does not require that they
17 use their real names. *Id.*

18 Plaintiffs are content owners, pursuing a vicarious copyright infringement
19 action against an ISP, Grande Communications Networks, LLC (“Grande”). Mot. ¶ 1;
20 *see also* Schottlaender Decl., Ex. A. They allege that Grande ignores piracy on its
21 networks. Mot. ¶ 3. Discovery in Plaintiffs’ underlying case against Grande does not
22 appear to close until at least November 3, 2023. *See* Schottlaender Decl., Ex. B, at 3.
23 Plaintiffs concede that they already possess identifying subscriber information for
24 118 of Grande’s “top 125 pirating IP addresses.” Mot. ¶¶ 6, 13.

25 On April 24, 2023, Plaintiffs sent the instant subpoena to Reddit, seeking to
26 unmask the identities of six Reddit users who posted generally about using Grande
27 to torrent. Mot. ¶ 10; *id.* Ex. 1 (the “Subpoena”)¹. These six Reddit users responded

28 ¹ The users are: u/Aikidi, u/kelsoATX, u/xBROKEx, u/Schadenfreude_Taco,

1 to two threads in a subreddit for the city of Austin, Texas. The majority of the users²
2 posted over 12 years ago while the remaining two³ posted five years ago. Mot. Ex. 1.

3 Reddit timely objected to the Subpoena, asserting that it infringed upon
4 Reddit users' First Amendment rights to speak anonymously, and targeted accounts
5 that are irrelevant to the underlying litigation. Mot. ¶ 11; *id.* Ex. 2. In an effort to
6 avoid judicial intervention, the parties then conferred on Reddit's objections but
7 were unable to resolve them. Mot. ¶ 12. Plaintiffs thereafter filed the instant Motion.

8 III. ARGUMENT

9 A. An unmasking subpoena should be quashed under *2TheMart* 10 where the information sought is available from another source.

11 *RCN* recently confirmed that this type of unmasking subpoena, targeting a
12 potential witness rather than a potential defendant, is subjected to First
13 Amendment scrutiny under the *2TheMart* standard. *RCN*, 2023 WL 3163455, at *3
14 (citing *2TheMart*, 140 F. Supp. 2d 1088; *Rich v. Butowsky*, No. 20-mc-80081-DMR,
15 2020 WL 5910069, at *3–4 (N.D. Cal. Oct. 6, 2020)). As this Court described:

16 disclosure of anonymous users' identities is appropriate only "in the
17 exceptional case where the compelling need for the discovery sought
18 outweighs the First Amendment rights of the anonymous speaker."
19 Courts consider four factors: whether "(1) the subpoena seeking the
20 information was issued in good faith and not for any improper purpose,
21 (2) the information sought relates to a core claim or defense, (3) the
22 identifying information is directly and materially relevant to that claim
23 or defense, and (4) information sufficient to establish or to disprove that
24 claim or defense is unavailable from any other source."

22 *Id.* (internal citations omitted).

23 A higher standard for unmasking a non-party witness exists than for
24 unmasking a potential defendant because—unlike the need to identify a potential
25 defendant—litigation can often continue without trampling a non-party witness's
26 First Amendment right to anonymity. *2TheMart*, 140 F. Supp. 2d at 1095.

27 _____
u/Robowiener, and u/SquirtyBottoms.

28 ² u/Aikidi, u/kelsoATX, u/Schadenfreude_Taco, and u/xBROKEx.

³ u/Robowiener and u/SquirtyBottoms.

1 Consequently, this Court in *RCN* recognized that a dispositive “question here is
 2 whether the information is available from ‘any’ other source.” *RCN*, 2023 WL
 3 3163455, at *4; *see also Rich*, 2020 WL 5910069, at *5 (subpoena only enforced
 4 because the anonymous account was a singularly “essential witness” for the
 5 litigants).

6 **B. Plaintiffs already have other, less constitutionally invasive**
 7 **sources of even better information.**

8 Plaintiffs cannot show that the information they seek here is unavailable from
 9 other sources.⁴ As in *RCN*, Plaintiffs justify their First Amendment encroachments
 10 here by arguing that they seek evidence: (i) that Grande failed to implement a
 11 repeat infringer policy; and (ii) that “the ability to freely pirate” drew customers to
 12 Grande. Mot. ¶ 23. But evidence on those issues is not “unavailable” outside of these
 13 six targeted Reddit users.

14 First, this Court has already rejected Plaintiffs’ argument as to unavailability
 15 and recognized that this information is available from the ISP itself. In *RCN*, this
 16 Court recognized that the ISP “is the party that (according to the plaintiffs) ‘has not
 17 reasonably implemented a policy for terminating repeat infringers,’ ‘controls the
 18 conduct of its subscribers,’ and allows its customers ‘to freely pirate without
 19 consequence.’” *RCN*, 2023 WL 3163455, at *4. As a result, the Court rightly ruled
 20 that the “high likelihood that this information is available from [the ISP] defeats the
 21 plaintiffs’ subpoena[.]” *Id.* The Court rightly recognized it to be “implausible” that

22 ⁴ While this Opposition focuses on the unavailability factor, Reddit does not concede
 23 that the identification of these six Reddit users is “directly and materially” relevant
 24 to Plaintiffs’ claims. The majority of the posts at issue here are from a conversation
 25 twelve years ago. *See* Mot. Ex. 1, at 6–7. This Court rejected a prior unmasking
 26 attempt on that basis. *RCN*, 2023 WL 3163455, at *4 (“as Reddit points out,
 27 ChikaraFan’s comment predates *RCN*’s conduct at issue in this case, thus raising
 28 doubt that ChikaraFan’s comment is ‘directly and materially’ relevant.”). And the
 posts are discussing torrenting, which is “capable of commercially significant
 noninfringing uses,” and does not automatically equate to copyright infringement.
Columbia Pictures Indus. v. Fung, 710 F.3d 1020, 1032–34 (9th Cir. 2013).

1 targeted Reddit users would offer “an irreplaceable source” of evidence vital to
2 Plaintiffs’ contributory infringement claim. *Id.* The change in ISP here does not alter
3 the result; this is the exact same group of Plaintiffs making the exact same
4 arguments under exactly the same circumstances. Mot. ¶ 25. Just as the Court
5 recognized for RCN, Plaintiffs can obtain the evidence they need about Grande’s
6 repeat infringer policy directly from Grande.

7 And second, unlike in *RCN*, Plaintiffs here admit to already possessing
8 evidence far better than what they could obtain from Reddit. In *RCN*, this Court
9 found relevant that the underlying subpoena was issued at the “start of discovery,”
10 because Plaintiffs might be able to obtain identifying information from the
11 defendant ISP rather than from Reddit. *RCN*, 2023 WL 3163455, at *4. Here,
12 Plaintiffs have admitted to successfully doing just that; they already possess
13 identifying information for 118 of Grande’s “top 125 pirating IP addresses.” Mot. ¶¶
14 6, 13. That concession dooms Plaintiffs’ attempt to satisfy the *2TheMart* standard.
15 Plaintiffs cannot show that the anonymous Reddit accounts possess material
16 information unavailable elsewhere when Plaintiffs already have even better
17 evidence on that topic. Plaintiffs need only subpoena the identified 118 Grande
18 subscribers that are known to have engaged in copyright infringement to learn
19 whether those 118 “top [] pirat[es]” subscribed to Grande for the “ability to pirate
20 without consequence.”⁵

21
22 ⁵ While Plaintiffs claim to have “been sending letters to most of the subscribers of
23 the 118 IP addresses,” Doc. 1-1 ¶ 19, Plaintiffs conspicuously fail to state that they
24 have subpoenaed those subscribers. “The proper mechanism for obtaining documents
25 from a non-party to use in a lawsuit is a Rule 45 subpoena.” *Enwere v. Terman*
26 *Assocs., L.P.*, No. C 07-1239 JF (PVT), 2008 WL 2951795, at *1 n.7 (N.D. Cal. July
27 24, 2008). Plaintiffs’ mention of an upcoming expert report deadline does not explain
28 the incongruity of repeatedly subpoenaing Reddit but failing to subpoena known
copyright infringers on Grande. For one, Plaintiffs fail to explain how subscriber
identification relates to expert reports at all. For another, even if Plaintiff were to
obtain subscriber information for the six Reddit accounts, Plaintiffs would *still* need
to send subpoenas to *those* subscribers, and the Reddit subscribers are no more
likely to respond to “letters” than would be the Grande subscribers.

1 **C. The Court should not separately analyze or reach any differing**
 2 **conclusion for user xBROKEx.**

3 Plaintiffs agree that *2TheMart* applies here for all users except “xBROKEx,”
 4 whom Plaintiffs argue should be analyzed under a test supplied by *In re DMCA §*
 5 *512(h) Subpoena to Twitter, Inc.*, 608 F. Supp. 3d 868, 876 (N.D. Cal. 2022) (“*DMCA*
 6 *Subpoena to Twitter*”). They argue that xBROKEx ought to be subjected to this
 7 different test, designed for an anonymous potential *defendant*, because xBROKEx
 8 mentioned torrenting “the expendables” twelve years ago. Mot. ¶ 30.

9 First, Plaintiffs are wrong that *DMCA Subpoena to Twitter* applies here. As
 10 this Court recognized in *RCN*, that standard applies where the target of a subpoena
 11 is “accused of copyright infringement.” *RCN*, 2023 WL 3163455, at *3. Plaintiffs
 12 have not accused xBROKEx of copyright infringement in any pleading. The
 13 Subpoena does not arise out of a lawsuit that has anything to do with direct
 14 copyright infringement. *See generally* Schottlaender Decl. Ex. A. Plaintiffs’
 15 argument therefore strains credulity. They ask this Court to believe that their
 16 subpoena targets six users; five are potential witnesses, and only xBROKEx is a
 17 potential defendant due to that user’s single mention of “the expendables” over
 18 twelve years ago.

19 Even assuming Plaintiffs actually intend to sue xBROKEx for copyright
 20 infringement, Plaintiffs have not even attempted to meet the First Amendment
 21 standard set by *DMCA Subpoena to Twitter*.⁶ That standard “consists of two steps.

22 _____
 23 ⁶ If Plaintiffs read *DMCA Subpoena to Twitter* to hold that there is no First
 24 Amendment standard that applies where an anonymous user is accused of copyright
 25 infringement, they have misread the opinion. *See* Mot. ¶ 30 (“copyright law includes
 26 built in First Amendment accommodations”). *DMCA Subpoena to Twitter* expressly
 27 rejected that argument. 608 F. Supp. 3d at 877–78 (“while it may be true that the
 28 fair use analysis wholly encompasses free expression concerns in some cases, that is
 not true in all cases—and it is not true in a case like this.”). More than half of that
 opinion is spent analyzing whether that movant could establish a prima facie case of
 copyright infringement, and whether the balance of equities supported the copyright
 holder in unmasking the alleged infringer. *Id.* at 878–83. The court quashed that
 subpoena because the copyright holder failed those tests. *Id.* at 883.

1 First, the party seeking the disclosure must demonstrate a prima facie case on the
2 merits of its underlying claim. Second, the court balances the need for the discovery
3 against the First Amendment interest at stake.” *DMCA Subpoena to Twitter*, 608 F.
4 Supp. 3d at 876. Here, Plaintiffs have not attempted to make either showing with
5 respect to xBROKEEx. And that showing would fail in any event. Plaintiffs cannot
6 demonstrate a prima facie case of copyright infringement against xBROKEEx based
7 on their mention of “the expendables” over twelve years ago when the statute of
8 limitations for copyright infringement is three years. 17 U.S.C. § 507(b).⁷ The
9 Subpoena’s request for identifying information for xBROKEEx should be quashed
10 under *2TheMart* or, in the alternative, because Plaintiffs have not made the
11 requisite showing under *DMCA Subpoena to Twitter*.

12 IV. CONCLUSION

13 For the foregoing reasons, Plaintiffs’ Motion should be denied.
14
15
16
17
18

19 ⁷ Plaintiffs argue that they only recently discovered this comment from xBROKEEx.
20 Mot. ¶ 27. That does not alter their inability to establish a prima facie case of
21 copyright infringement. “A claim accrues once the plaintiff knows or has reason to
22 know of the injury upon which the claim is based[.]” *Martinelli v. Hearst*
23 *Newspapers, L.L.C.*, 65 F.4th 231, 235 (5th Cir. 2023) (emphasis added); see also
24 *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1048 (9th Cir. 2020)
25 (explaining that “‘suspicion’ of copyright infringement ‘place[s] upon [the plaintiff] a
26 duty to investigate further into possible infringements of [its] copyrights”). Plaintiffs
27 undoubtedly knew of The Expendables being pirated at least twelve years ago. In
28 2011, the copyright owner for The Expendables sued over 23,000 anonymous
defendants for pirating that movie. *Nu Image, Inc. v. Does*, 799 F. Supp. 2d 34
(D.D.C. 2011). That plaintiff voluntarily dismissed that litigation shortly after
receiving a court order questioning the propriety of the venue, and asking the
copyright owner to explain how they intended to serve over 23,000 individual
defendants. *Id.* at 44.

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

Dated: July 5, 2023

PERKINS COIE LLP

By: /s/ Julie E. Schwartz

Julie E. Schwartz
JSchwartz@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Telephone +1.206.359.8000
Facsimile +1.206.359.9000

Hayden M. Schottlaender
Pro Hac Vice Application Pending
HSchottlaender@perkinscoie.com
500 N. Akard Street, Suite 3300
Dallas, Texas 75201
Telephone: +1.214.965.7700
Facsimile: +1.214.965.7799

Attorneys for Reddit, Inc