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16
17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN FRANCISCO DIVISION**

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

22 *In re Subpoena to:*
23 *Reddit, Inc.*

Case No. 3:23-MC-80037-lb

24 **REDDIT, INC.'S OPPOSITION TO**
25 **MOTION TO COMPEL**

Hearing Date: March 23, 2023

Time: 9:30 AM

Courtroom: B - 15th Floor

Judge: Hon. Laurel Beeler

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Music Grp. Macao Com. Offshore Ltd. v. Does,
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ADDITIONAL REFERENCES

1
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3 Ars Technica (July 28, 2022), <https://arstechnica.com/information-technology/2022/07/comcasts-20-year-streak-of-gaining-broadband-users-every-quarter-is-over/>..... 7
4
5 Broadbandnow, <https://broadbandnow.com/All-Providers> (last visited Feb. 27, 2023).... 7
6 Diana Goovaerts, *Astound Broadband unites regional ISPs RCN, Grande, Wave under one brand*, Fierce Telecom (Jan. 12, 2022),
7 <https://www.fiercetelecom.com/broadband/five-regional-isps-unite-under-astound-broadband-brand>..... 7
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11 *r/Piracy*, Reddit,
12 https://www.Reddit.com/r/Piracy/comments/szewb3/copyright_infringement_email_from_comcast_i/ (last visited Feb. 27, 2023) 6
13
14 *r/Technology*, Reddit,
15 https://www.reddit.com/r/technology/comments/9b6kh/an_outrage_rcn_now_senses_your_user_agent_and/?sort=top (last visited Feb. 27, 2023)..... 7
16 Robert Channick, *Cable provider RCN sold to Texas private equity firm for \$1.6 billion*,
17 Chi. Tribune (Aug. 15, 2016), <https://www.chicagotribune.com/business/ct-rcn-sold-0816-biz-20160815-story.html>..... 8
18
19 *What is NXDOMAIN?*, DNS Knowledge (Nov. 18, 2021),
20 <https://www.dnsknowledge.com/whatis/nxdomain-non-existent-domain-2/>..... 9
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INTRODUCTION

1
2 Plaintiffs are copyright owners pursuing a vicarious infringement action against
3 an Internet Service Provider (ISP), RCN, for allegedly ignoring piracy on its network.
4 Before discovery had even begun in that case, Plaintiffs sent a subpoena to Reddit,
5 seeking to unmask nine anonymous Reddit users (seven of which are at issue in this
6 dispute) in what amounts to a wholly unjustified fishing expedition.

7 Courts have long recognized that the First Amendment protects online
8 anonymity and have established a stringent standard to use in precisely this scenario,
9 where a litigant seeks to unmask users for the purpose of providing evidence in
10 litigation that does not involve those users. That standard requires the requesting
11 party to establish that it is an “exceptional case” where a “compelling need” for the
12 discovery outweighs the users’ First Amendment rights. *Rich v. Butowsky*, No. 20-mc-
13 80081-DMR, 2020 WL 5910069, at *3 (N.D. Cal. Oct. 6, 2020) (quoting *Doe v.*
14 *2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001)).

15 Plaintiffs are far from meeting that strict standard here. First, they cannot
16 overcome the Reddit users’ First Amendment rights because the users’ posts Plaintiffs
17 have identified as the basis for this subpoena are completely irrelevant to Plaintiffs’
18 lawsuit. Four of the seven users at issue do not appear to have ever even *mentioned*
19 *RCN*, based on the evidence offered by Plaintiffs. They merely refer to “my provider” or
20 “our ISP.” And those references are all made in a discussion about Comcast, not RCN.
21 Plaintiffs’ argument that the users are “very likely” referring to RCN should be rejected
22 as speculative. Two of the three remaining users did mention RCN, but were discussing
23 issues (such as their customer service experience) unrelated to copyright infringement
24 or Plaintiffs’ allegations. And the final user vaguely mentioned RCN arguably in the
25 context of copyright infringement once nine years ago, well beyond any arguably
26 relevant timeframe for Plaintiffs’ allegations.

27 Second, any information purportedly held by the Reddit users is not
28 “unavailable” elsewhere. *Rich*, 2020 WL 5910069, at *4. Plaintiffs can obtain evidence

1 about RCN’s repeat infringer policies in countless ways that do not involve unmasking
2 anonymous online speakers. Most obviously, Plaintiffs could seek discovery directly
3 from RCN. That would be far more efficient than taking wild guesses about which
4 Reddit users *might* be RCN customers or *might* have engaged in copyright
5 infringement at some point in the last decade. And, more importantly, it would not
6 involve setting aside the fundamental First Amendment rights of uninvolved third
7 parties.

8 Because Plaintiffs’ Motion does not comport with the First Amendment
9 protections afforded anonymous online speech, it should be denied.

10 BACKGROUND

11 Reddit is a community of online communities. Declaration of Hayden M.
12 Schottlaender (“Schottlaender Decl.”) ¶ 3. Within those communities, called
13 “subreddits,” users gather to discuss shared interests. *Id.* Users generally participate
14 on the platform pseudonymously, and Reddit does not require that they use their real
15 names. *Id.*

16 Plaintiffs are content owners, pursuing a vicarious copyright infringement action
17 against an internet service provider, RCN. Mot. ¶ 1. They allege that RCN ignores
18 piracy on its networks. Mot. ¶¶ 1-2. That case is in its infancy, with the defendants
19 having filed their answer on October 25, 2022 (*Id.* ¶ 5), and discovery between the
20 parties commencing only a few weeks ago, on January 26, 2023. *See* Text Minute
21 Entry, *Bodyguard Prods., Inc. v. RCN Telecom Servs. of Mass., LLC.*, No. 3:21-cv-15310
22 (D.N.J. Jan. 26, 2023).

23 On January 9, 2023, before discovery began between the parties, Plaintiffs sent
24 the instant subpoena to Reddit, seeking to unmask the identities of nine users. Reddit
25 timely objected to that subpoena, asserting that it infringed upon Reddit users’ First
26 Amendment rights to speak anonymously, and targeted accounts that are irrelevant to
27 the underlying litigation. Mot., Ex. 2. In an effort to avoid judicial intervention, the
28 parties then conferred on Reddit’s objections, and Plaintiffs provided Reddit with

1 various screenshots purporting to explain why Plaintiffs had targeted the nine
 2 accounts at issue. Mot. ¶ 8. After reviewing those screenshots, Reddit provided notice of
 3 the subpoena to one user, u/ben125125, and thereafter produced identifying
 4 information to Plaintiffs for that one user. Schottlaender Decl. ¶ 7; Doc. 1-1, ¶ 15.
 5 Reddit maintained its objections as to the other eight users, explaining: “Reddit has
 6 reviewed the examples provided by plaintiffs and continues to believe the requests for
 7 identifying information associated with the additional eight accounts are . . . neither
 8 relevant nor permissible under the First Amendment.” Mot., Ex. 4 (Doc. 1-5). Plaintiffs
 9 thereafter filed the instant Motion.¹

10 ARGUMENT

11 **I. PLAINTIFFS CANNOT SATISFY THE HEIGHTENED FIRST** 12 **AMENDMENT STANDARD FOR UNMASKING THE REDDIT USERS.**

13 “It is well established that the First Amendment protects the right to
 14 anonymous speech.” *Music Grp. Macao Com. Offshore Ltd. v. Does*, 82 F. Supp. 3d 979,
 15 983 (N.D. Cal. 2015) (Beeler, M.J.) (cleaned up). “This protection applies with equal
 16 force to online speech.” *In re DMCA § 512(h) Subpoena to Twitter, Inc.*, No. 20-mc-
 17 80214-VC, 2022 WL 2205476, at *2 (N.D. Cal. June 21, 2022). “When adjudicating
 18 discovery requests that would unmask an anonymous speaker, then, courts must
 19 consider the First Amendment implications of disclosure—just as they would when
 20 adjudicating any other discovery request that risks infringing First Amendment
 21 rights.” *Id.*

22 Courts have developed a standard for evaluating First Amendment rights in
 23 precisely this scenario. Where a subpoena seeks to unmask anonymous users of an
 24 online platform, and those users are merely alleged to hold discoverable evidence, “non-
 25 party disclosure is only appropriate in the *exceptional* case where the compelling need
 26

27 ¹ The Motion moves to compel Reddit to disclose identifying information for seven
 28 accounts because Plaintiffs abandoned their request as to one of the users.

1 for the discovery sought outweighs the First Amendment rights of the anonymous
2 speaker.” *Rich*, 2020 WL 5910069, at *3 (emphasis added) (quoting *2TheMart.com Inc.*,
3 140 F. Supp. 2d at 1095); *see also Sines v. Kessler*, No. 18-mc-80080-JCS, 2018 WL
4 3730434, at *12 (N.D. Cal. Aug. 6, 2018) (same). This is because, where “the
5 anonymous Internet user is not a party to the case, the litigation can go forward
6 without the disclosure of their identity.” *2TheMart.com*, 140 F. Supp. 2d at 1095. To
7 unmask a user, the requesting party must therefore establish that:

8 (1) the subpoena seeking the information was issued in good faith and
9 not for any improper purpose, (2) the information sought relates to a
10 core claim or defense, (3) the identifying information is directly and
11 materially relevant to that claim or defense, and (4) information
sufficient to establish or to disprove that claim or defense is unavailable
from any other source.

12 *Rich*, 2020 WL 5910069, at *4 (quoting *2TheMart.com*, 140 F. Supp. 2d at 1095); *see*
13 *also Sines*, 2018 WL 3730434, at *12 (same).

14 Here, Plaintiffs cannot satisfy the first three factors because the subpoena
15 targets accounts that have nothing to do with their dispute. “Indeed, this is not merely
16 an improper fishing expedition, this is a net cast blindly from an ocean troller in the
17 mere hopes of dredging some speculative treasure from the bottom of the sea.” *United*
18 *States v. Johnson*, No. CR 94-0048 SBA, 2008 WL 62281, at *4 (N.D. Cal. Jan. 4, 2008).
19 And Plaintiffs cannot satisfy the fourth factor, requiring them to establish the
20 unavailability of this information from any other source, because discovery had not
21 even *begun* when they issued this subpoena. In these circumstances, Plaintiffs cannot
22 possibly argue that this premature subpoena is the only hope they have of overcoming
23 RCN’s defenses.

24 **II. PLAINTIFFS CANNOT ESTABLISH THAT THE SUBPOENA’S**
25 **REQUESTS ARE RELEVANT AND NOT A MERE FISHING**
26 **EXPEDITION.**

27 Relevance underpins the first three factors of the *Rich* standard. *See, e.g.*,
28 *2TheMart.com*, 140 F. Supp. 2d at 1095-96 (first factor weighs against unmasking
where “information . . . has no relevance to the issues raised in the lawsuit,”

1 demonstrating an “apparent disregard for the privacy and the First Amendment rights
 2 of the online users”). “District courts need not condone the use of discovery to engage in
 3 ‘fishing expedition[s].’” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004);
 4 *Fleming v. Dollar Tree Stores Inc.*, No. C 06-3409 MJJ (JL), 2006 WL 8443148, at *5
 5 (N.D. Cal. Oct. 30, 2006) (quashing subpoena as “an impermissible ‘fishing expedition’
 6 into [plaintiff]’s constitutionally protected private information”). Plaintiffs have not
 7 established that the Subpoena’s requests are anything other than a fishing expedition.

8 Plaintiffs argue that the users they hope to unmask fall into three potential
 9 categories of relevance: (i) establishing that RCN failed to implement a repeat infringer
 10 policy; (ii) establishing that RCN “controls the conduct of its subscribers and monitors
 11 its subscribers’ access;” and (iii) establishing that “the ability to freely pirate” drew
 12 customers to RCN. Mot. at 4-5. But Plaintiffs cannot connect these particular Reddit
 13 users with those categories of evidence without extraordinary speculation, as reflected
 14 in the following table:

User(s)	Irrelevance
u/SquattingCroat, u/aromaticbotanist, u/ilikepie96mng, u/Griffdog21	Do not mention RCN at all, and there is no reason to think they are either current or former RCN customers.
u/compypaq, u/matt3324	Do not discuss copyright infringement or piracy in any way. u/compypaq merely discusses the attractiveness of RCN as an ISP with respect to connectivity and customer service. And u/matt3324 discusses RCN replacing default browser webpages with its own webpages.
u/ChikaraFan	Posted about RCN 9 years ago.

1 **A. Most of the accounts at issue do not mention or discuss RCN.**

2 Most of the accounts at issue do not discuss RCN and have nothing to do with
3 this dispute at all. u/SquattingCroat, u/aromaticbotanist, u/ilikepie96mng, and
4 u/Griffdog21 (the “Comcast Users”) happened to post in a discussion about **Comcast**—
5 an ISP that is not RCN—and Plaintiffs merely offer the unsupported opinion that it is
6 “very likely” that they are RCN customers. This bare assertion is simply insufficient to
7 support Plaintiffs’ request to infringe upon the users’ First Amendment rights.

8 On February 23, 2022, a user not at issue here (u/ilovea1steaksauce) started a
9 discussion by explaining that they had received a copyright infringement email from
10 Comcast and expressing that they were “kinda worried.” Schottlaender Decl., Ex. A-1.
11 In the year since, there have been over 240 replies in that discussion (the “Comcast
12 Thread”). *Id.* Among those hundreds of comments about Comcast’s copyright practices,
13 **one** mentions RCN. *Id.* It was posted by user u/ben125125, is visible in Plaintiffs’ Ex.
14 3, at 1, and Reddit has produced identifying information for that user to Plaintiffs. But
15 the remaining four Comcast Users are now being targeted merely because they
16 happened to post in the Comcast Thread, despite the fact that *none* of the users were
17 responding or referring to any discussion of RCN, and none mention RCN themselves.²
18 The disconnect between the Comcast Users and this lawsuit is so evident from the face
19 of the Comcast Thread that the Comcast Thread is attached in its entirety for the
20 Court’s review as Exhibit A-1.³

21 Before delving into each of the Comcast Users’ posts, it is important to
22 contextualize RCN’s share of the ISP market. There are *thousands* of ISPs operating in
23

24

25

26 ² Notably, while Plaintiffs’ Exhibit 3 displays a post by u/SquattingCroat immediately
27 below a post by u/ben125125a, viewing the full thread, the Court can see that that
28 representation is disingenuous. u/SquattingCroat is not replying to u/ben125125, and
their comments are not found near each other in the discussion. *See* Ex. A-1.

³ The Court can also review the discussion in its hosted format. *r/Piracy*, Reddit,
[https://www.Reddit.com/r/Piracy/comments/szewb3/copyright_infringement_email_fro
m_comcast_i/](https://www.Reddit.com/r/Piracy/comments/szewb3/copyright_infringement_email_from_comcast_i/) (last visited Feb. 27, 2023).

1 the United States.⁴ In the Comcast Thread alone, there are at least seven other ISPs
 2 mentioned that are *not* related to RCN, including: Comcast, Usenet, Telus, Verizon,
 3 SpaceX Starlink, ATT, and Metro PCS. Ex. A-1. And, in terms of market share, RCN is
 4 miniscule.⁵ Even when combined with its related companies under the “Astound”
 5 umbrella,⁶ Astound has 1.2 million customers.⁷ There are roughly 300 million internet
 6 users in the United States alone. A single RCN competitor, Comcast, has more than
 7 *thirty times* RCN’s market share.⁸ This context is important to understanding just how
 8 absurd it is for Plaintiffs to suggest that any mention of an unnamed ISP in a
 9 discussion about Comcast is “very likely” discussing RCN. It’s akin to suggesting that
 10 whenever a user mentions a “car” on a Reddit discussion about Ford, they are “very
 11 likely” talking about an Alfa Romeo.

12 In the Comcast Thread, u/SquattingCroat does not mention RCN, they merely
 13 mention “my provider.” Ex. 3, at 1. u/aromaticbotanist likewise does not mention RCN,
 14 they merely say they “work for a national ISP.” *Id.* at 2. RCN is not a national ISP, it is
 15

16 ⁴ *The Complete List of Internet Companies in the US*, Broadbandnow,
 17 <https://broadbandnow.com/All-Providers> (last visited Feb. 27, 2023).

18 ⁵ In fact, the top-voted comment in the RCN DNS hijacking discussion (*infra*, Part II.B)
 19 is “and RCN is?” *r/Technology*, Reddit,
 20 https://www.reddit.com/r/technology/comments/9b6kh/an_outrage_rcn_now_senses_your_user_agent_and/?sort=top (last visited Feb. 27, 2023).

21 ⁶ To hide the unlikelihood that any of the users are discussing RCN, Plaintiffs suggest
 22 that users could be relevant to their litigation if they are discussing *any* of the
 23 Astound brands. But Astound is not a defendant in this litigation, and Plaintiffs’
 24 Complaint lacks a single reference to Astound. Plaintiffs have not alleged shared
 25 management, shared copyright policies, or shared practices among Astound
 26 companies. *See* Complaint, *Bodyguard Prods., Inc. v. RCN Telecom Servs. of Mass., LLC.*, No. 3:21-cv-15310 (D.N.J. Aug. 13, 2021), ECF No. 1.

27 ⁷ Diana Goovaerts, *Astound Broadband unites regional ISPs RCN, Grande, Wave under*
 28 *one brand*, Fierce Telecom (Jan. 12, 2022),
<https://www.fiercetelecom.com/broadband/five-regional-isps-unite-under-astound-broadband-brand>.

⁸ Jon Brodtkin, *Comcast stock falls as company fails to add Internet users for first time ever*, Ars Technica (July 28, 2022), <https://arstechnica.com/information-technology/2022/07/comcasts-20-year-streak-of-gaining-broadband-users-every-quarter-is-over/>.

1 regional.⁹ u/Ilikepie96mng does not mention RCN, they merely say “our ISP.” *Id.* at 4.
2 And u/Griffdog21 not only fails to mention RCN, but context suggests that they are
3 talking about Comcast. Again, commenting in a discussion *about Comcast*,
4 u/Griffdog21 states: “They bluff all the time . . . I’ve had about 4 of these and nothing
5 has ever happened. I believe you need to get like 5 in a couple days to be in trouble.”
6 Ex. 3, at 6.

7 While Plaintiffs *might* be able to articulate how these users *could* possess
8 discoverable evidence *if* they were, in fact, referencing RCN, the First Amendment
9 should not be set aside for such speculation. “[W]hen First Amendment rights are at
10 stake, a higher threshold of relevancy must be imposed.” *2TheMart.com*, 140 F. Supp.
11 2d at 1096. Indeed, Plaintiffs cannot even show that unmasking the Comcast Users
12 would be *helpful* for their litigation. That falls far short of the “compelling need”
13 showing required. *Rich*, 2020 WL 5910069, *3.

14 **B. u/compypaq and u/matt3324 may be RCN customers, but do not**
15 **discuss piracy or copyright infringement.**

16 u/compypaq: On October 29, 2020, a user (u/maintreqd) asked a subreddit
17 devoted to the neighborhood of Astoria: “Is RCN legit for internet?” Schottlaender
18 Decl., Ex. A-2. User u/compypaq replied with their opinion, discussing RCN’s price,
19 outages, and customer service. Ex. 3, at 4. Like virtually every internet user on the
20 planet, u/compypaq complains that “the modem would need to be reset every once in a
21 while.” *Id.* Not once does u/compypaq mention anything about RCN’s tolerance for
22 piracy, copyright infringement, or anything even remotely connected to Plaintiffs’
23 lawsuit. *Id.*

24 Plaintiffs’ rationale for unmasking u/compypaq consists exclusively of the
25 following sentence from Plaintiffs’ Motion: “It appears that RCN would remotely reset
26

27 ⁹ Robert Channick, *Cable provider RCN sold to Texas private equity firm for \$1.6*
28 *billion*, Chi. Tribune (Aug. 15, 2016), <https://www.chicagotribune.com/business/ct-rcn-sold-0816-biz-20160815-story.html> (describing RCN service areas).

1 the modem, thus further establishing that RCN monitors and controls its subscribers'
2 conduct.” Mot. ¶ 23. That sentence is nonsense. Neither the Motion nor the Complaint
3 discusses “remote” or any other resetting of modems, what that means, or how that
4 would be relevant to a copyright infringement claim. Similarly unexplained is how a
5 reset modem would “control” subscriber conduct, or what basis Plaintiffs have to
6 believe that u/compypaq, in particular, was being “controlled” rather than merely
7 suffering a routine internet outage. In fact, u/compypaq directly rebuts that theory
8 themselves, stating that the modem resets were because “there was obviously some
9 wiring issue,” as they stopped after u/compypaq moved. *Id.*

10 u/matt3324: *Fourteen years ago*, on August 16, 2009, u/matt3324 started a
11 discussion in the r/technology subreddit, complaining that when navigating “to a
12 domain/subdomain that doesn’t exist, I’d get RCN branded ‘search results’ instead of
13 my browser’s 404 page.” Ex. 3, at 7; Schottlaender Decl., Ex. A-3. This practice is
14 known as NXDOMAIN DNS hijacking, and many ISPs have engaged in it to display
15 advertisements to their customers. *See, e.g., What is NXDOMAIN?*, DNS Knowledge
16 (Nov. 18, 2021), [https://www.dnsknowledge.com/whatis/nxdomain-non-existent-](https://www.dnsknowledge.com/whatis/nxdomain-non-existent-domain-2/)
17 [domain-2/](https://www.dnsknowledge.com/whatis/nxdomain-non-existent-domain-2/). It has absolutely nothing to do with copyright infringement or piracy. *See*
18 *generally id.*

19 Notwithstanding, Plaintiffs assert that the post from u/matt3324 is “highly
20 relevant” because it demonstrates that RCN monitors its users’ conduct. Mot. ¶ 23.
21 Again, this argument makes no sense. DNS hijacking does not demonstrate ever-
22 present surveillance or control by an ISP over its users. It instead reflects an ISP’s
23 global policy of routing certain DNS calls to an IP address of their choosing. *See*

24 If DNS re-routing were relevant to establishing ISP notice for purposes of
25 infringement, the entire notice system established by the DMCA would be a nullity.
26 *See Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 917 (C.D. Cal. 2003) (“[T]he
27 purpose behind the notice is to provide the ISP with adequate information to find and
28 examine the allegedly infringing material expeditiously.”).

1 **C. u/ChikaraFan posted about RCN 9 years ago.**

2 In July 2014, user u/ChikaraFan posted that “RCN seems fairly lax” in response
3 to a Reddit thread about whether RCN sends “copyright infringement emails.” Ex. 3, at
4 6. While that statement may be arguably relevant (albeit quite vague), it is temporally
5 useless for Plaintiffs. All of the allegations in the Complaint relate to copyright
6 infringement in 2020. *See* Compl. ¶ 112. The statute of limitations for copyright
7 infringement is three years. 17 U.S.C. § 507(b). Even Plaintiffs’ subpoena identifies a
8 relevant timeframe going back only to 2016. *See* Ex. 1, at 1. “While Rule 26 permits
9 broad discovery for information that reasonably appears relevant, a higher threshold of
10 relevancy must be imposed when First Amendment rights are implicated.” *Rich*, 2020
11 WL 5910069, at 5 (citation and quotation marks omitted). That u/ChikaraFan’s post is
12 nine years old alone establishes that it is not “directly and materially relevant” to
13 Plaintiffs’ pursuit of their claims.

14 **III. INFORMATION SUFFICIENT TO PURSUE PLAINTIFFS’ CLAIMS IS**
15 **AVAILABLE ELSEWHERE.**

16 “The final . . . factor looks at whether information sufficient to establish or
17 disprove the core claim or defense is unavailable from any other source.” *Id.* For several
18 reasons, Plaintiffs cannot meet that standard for any of these users.

19 First, where the messages at issue are “available to the public online,” the fourth
20 factor weighs against unmasking. *Id.*; *see also 2TheMart.com*, 140 F. Supp. 2d at 1097.
21 Each of the messages at issue in this case is public. As a result, Plaintiffs can use those
22 statements as evidence to support their claims to the extent they truly believe them to
23 be relevant. *2TheMart.com*, 140 F. Supp. 2d at 1097. And, crucially, this may be done
24 “without encroaching on the First Amendment rights of the Internet users.” *Id.*

25 Second, Plaintiffs have no idea what information is essential for them to pursue
26 their claims, or whether that information is accessible elsewhere, because discovery
27 *had not even begun* when they issued this subpoena to Reddit. Before trampling the
28 First Amendment rights of Reddit’s users, Plaintiffs ought to at least attempt to pursue

1 their claims without involving those users.

2 Third, there is at least one far more direct way that Plaintiffs can obtain even
3 *better* evidence than what they pursue here. If Plaintiffs want to obtain evidence of
4 RCN customers' understanding of RCN's copyright policies and the appeal of RCN for
5 their supposedly lax policies, Plaintiffs can obtain a list of customers directly from RCN
6 in party discovery, and then contact those confirmed customers directly. That list could
7 even be narrowed to customers with IP addresses that engaged in piracy. To attempt to
8 obtain purported RCN customer anecdotes as Plaintiffs try to do here—guessing at who
9 *might* be an RCN customer, and who *might* have pirated materials—comports with
10 neither the First Amendment, nor the basic rules of discovery.

11 **IV. PLAINTIFFS MAKE ONLY TWO ARGUMENTS RELATING TO THE**
12 **FIRST AMENDMENT AND BOTH ARE WRONG AS A MATTER OF LAW.**

13 Plaintiffs' sole attempt to meet the relevant First Amendment standard here is
14 to argue: (1) that notified users have not "made an objection; and (2) that Reddit has
15 not identified any potential harm to the users through unmasking. Motion at 8. Both
16 arguments are wrong as a matter of law.

17 First, as a factual matter, Reddit did not notify users of the subpoena until after
18 the Motion was filed. Schottlaender Decl. ¶ 7.¹⁰ Users could not have "made an
19 objection" to a subpoena they did not know existed. And, as a legal matter, a user's
20 failure to formally appear and object "is not necessary." *In re DMCA § 512(h) Subpoena*
21 *to Twitter, Inc.*, 2022 WL 2205476, at *4. As Judge Chhabria explained:

22 There are many reasons why an anonymous speaker may fail to
23 participate in litigation over their right to remain anonymous. In some
24 cases, it may be difficult (or impossible) to contact the speaker or confirm

25 ¹⁰ This does not apply to user u/ben125125, who was notified of the subpoena for their
26 data prior to its disclosure. Schottlaender Decl. ¶ 7. Other users were not notified of
27 the subpoena because Reddit objected to the disclosure of their data and
28 communicated that objection to Plaintiffs. It was not until it became clear that
Plaintiffs intended to litigate this matter that Reddit proceeded with notifying the
remaining users.

1 they received notice of the dispute. Even where a speaker is alerted to
2 the case, hiring a lawyer to move to quash a subpoena or litigate a
3 copyright claim can be very expensive. The speaker may opt to stop
speaking, rather than assert their right to do so anonymously.

4 *Id.* That a user does not appear to contest the disclosure of their data is of no legal
5 consequence here, as further demonstrated by Plaintiffs’ failure to cite a single
6 authority in support of their argument.

7 Second, Plaintiffs’ argument regarding harm misunderstands the very nature of
8 a First Amendment violation. “A court order, even when issued at the request of a
9 private party in a civil lawsuit, constitutes state action and as such is subject to
10 constitutional limitations.” *2TheMart.com*, 1140 F. Supp. 2d at 1091-92. “As with other
11 forms of expression the ability to speak anonymously on the Internet promotes the
12 robust exchange of ideas and allows individuals to express themselves freely without
13 fear of economic retaliation or concern about social ostracism.” *Smythe v. Does*, No. 15-
14 mc-80292-LB, 2016 WL 54125, at *2 (N.D. Cal. Jan 5, 2016) (Beeler, M.J.) (cleaned up)
15 (quoting *In re Anonymous Online Speakers*, 661 F. 3d 1168, 1173 (9th Cir. 2011)).
16 “People who have committed no wrongdoing should be free to participate in online
17 forums without fear that their identity will be exposed under the authority of the
18 court.” *2TheMart.com*, 1140 F. Supp. 2d at 1092 (citation omitted). Unmasking a user
19 therefore has a “significant chilling effect on Internet communications and thus on
20 basic First Amendment rights.” *Id.* at 1093; *see also Music Grp. Macao*, 82 F. Supp. 3d
21 at 986 (“[B]reaching the [user’s] anonymity for this single remark would unduly chill
22 speech . . .”). Accordingly, “the disclosure of [a user’s] identity *is itself an irreparable*
23 *harm.*” *Art of Living Found. v. Does 1-10*, No. 10–CV–05022–LHK, 2011 WL 5444622,
24 at *9 (N.D. Cal. Nov. 9, 2011) (citing *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th
25 Cir. 2010) (“One injury to Proponents’ First Amendment rights is the disclosure itself. .
26 . . [T]his injury will not be remediable on appeal. . . . The potential chilling effect . . . is .
27 . . substantial . . .”). Put more simply, Reddit need not “identif[y] any potential harm
28 to these users” from unmasking; the unmasking is itself the harm, cognizable under

1 established First Amendment jurisprudence.

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CONCLUSION

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For the foregoing reasons, Reddit respectfully requests that the Court deny
5 Plaintiffs' motion to compel.

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Dated: February 28, 2023

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PERKINS COIE LLP

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By: /s/ Julie E. Schwartz

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*Pro hac vice application pending.

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ATTORNEYS FOR REDDIT, INC.

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