

No. 24-3893

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: SUBPOENA TO REDDIT, INC.

REDDIT, INC.

Interested Party-Appellee,

v.

KILLING LINK DISTRIBUTION, LLC AND SCREEN MEDIA
VENTURES, LLC

Movants-Appellants,

VOLTAGE HOLDINGS, LLC

Movant

On Appeal from the United States District Court
for the Northern District of California
No. 1:24-mc-80005-JD
Hon. James Donato

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Movant-Appellant Killing Link Distribution, LLC (“Killing Link”) states that it is a California Limited Liability Company with its principal place of business in Beverly Hills, California. CineTel Films, Inc. is its parent corporation. No publicly held corporation owns 10% or more of the stock of CineTel Films, Inc.

On July 11, 2024, Movant-Appellant Screen Media Ventures, LLC’s (“SMV”) Chapter 11 bankruptcy petition was converted to a Chapter 7 petition¹. SMV was a Delaware Limited Liability Company with its principal place of business in New York, NY. Publicly held entity Chicken Soup for the Soul Entertainment, Inc. owned more than 10% of SMV.

Date: Oct. 14, 2024

Culpepper IP, LLLC

/s/ Kerry S. Culpepper

Kerry S. Culpepper

Attorney for Appellants

¹ Counsel will be filing a motion to substitute the Chapter 7 Trustee for SMV.

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INTRODUCTION

This appeal raises the question of whether a nonparty social media company must comply with a Rule 45 subpoena commanding it to provide evidence in its possession that is unquestionably relevant to proving a party's core claims and rebuts the opposing party's defenses.

Rule 26(b) states that the scope of discovery includes “**any** nonprivileged matter that is **relevant** to any party's claim or defense and proportional to the needs of the case...” Fed. R. Civ. Pro. 26(b)(1) (emphasis added). And this Court has repeatedly recognized that the scope of permissible discovery under Rule 26 is “broad”. *Republic of Ecuador v. Mackay*, 742 F.3d 860, 866 (9th Cir. 2014) (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993)).

But rather than apply the broad test for relevance set forth in Rule 26(b)(1) that includes considering the importance of the issues at stake, the District Court applied an incorrect legal standard of requiring the party to establish that evidence sought from the nonparty conclusively rebuts the opposing party's affirmative defense while ignoring the party's core claims based upon vicarious and contributory infringement. The District Court's decision should be reversed.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the miscellaneous action Appellants opened to file the motion to compel compliance with the subpoena pursuant to Fed. R. Civ. Pro. 45(d)(2)(B)(i) under 28 U.S.C. § 1331. This Court has jurisdiction pursuant to Fed. R. App. Pro. 3(a)(1) and 28 U.S.C. §1291.

On May 16, 2024, the District Court issued a final order denying Appellants' motion for de novo review and adopting the Magistrate Judge's order quashing the subpoena. ER-5. 30 days from May 16, 2024 was Saturday June 15, 2024. Fed. R. Civ. Pro. 6(a)(1)(C) and Fed. R. App. Pro. 26(a)(1)(C) provide that if "...the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Appellants filed a Notice of Appeal on Monday, June 17, 2024 which was the next day that was not a Saturday, Sunday or legal holiday. ER-144. Accordingly, Appellants filed the Notice of Appeal within the 30 day deadline provided by Fed. R. App. Pro. 4(a)(1)(A). This appeal is from a final order or judgment that disposed of the miscellaneous action. ER-5.

ISSUES PRESENTED

1. Whether the District Court erred in quashing the subpoena based primarily on an evaluation of the strength of the evidence of the documents requested in rebutting the opposing party's affirmative defense in the underlying case rather than applying the broad test for the scope of discovery set forth in Rule 26(b)(1) and considering whether the evidence was relevant to Appellants' copyright claims?

2. Whether the District Court erred in quashing the Rule 45 subpoena based upon purported burden to the nonparty Reddit even though Reddit never objected to the subpoena based upon burden?

3. Whether the District Court erred in quashing the Rule 45 subpoena based upon purported burden to a nonparty Reddit even though the record does not contain any evidence of a burden to Reddit?

STATEMENT OF THE CASE

Appellant Killing Link is the owner of the copyrights to the motion picture *Kill Chain* and exclusive rights provided by 17 U.S.C. §106. *See* Copyright Certificate No. PAu003975781.² *Kill Chain* is an action thriller starring Nicholas Cage that tells a story of an evening of murder, betrayal and revenge amongst a crooked gang of police, gangsters, assassins, and mercenaries. *See* IMDb, *Kill Chain* (2019), <https://www.imdb.com/title/tt8535180> (last visited on Sept. 19, 2024).

Prior to its chapter 7 bankruptcy, Appellant SMV was owner of a library of motion pictures. *See* Screen Media, <https://screenmediafilms.net/films> (last visited on Oct. 12, 2024). In 2019, SMV purchased 13 motion pictures (the “Foresight titles”) including two academy award nominations *Lone Survivor* with Mark Wahlberg, and romantic comedy *And So It Goes*, starring Diane Keaton and Michael Douglas. *See* Screen Media, *Chicken Soup For The Soul Entertainment Acquires Mark Damon’s Production & Sales Outfit Foresight Unlimited* (Nov. 5, 2019), <https://screenmediafilms.net/blog/details/30337/deadline-chicken-soup-for-the-soul-entertainment-acquires-mark-damons-production-sales-outfit-foresight-unlimited> (last visited on Oct. 12, 2024).

² Copy is publicly accessible at copyright office website <https://cocatalog.loc.gov> (choose “Registration Number” and type “PAu003975781” in Search for box).

Killing Link and its business partners invested financial resources, time and effort in making and marketing *Kill Chain* based upon the expectation that they would get a return on their investment from rentals and sales. *See id.* (estimated budget of 3.5 million dollars). SMV invested financial resources by purchasing its library of films. Massive ongoing piracy of movies by Internet users on BitTorrent protocol peer-to-peer networks hinders Appellants’ opportunity to get a return on their investments.

To deal with ongoing piracy, Appellants’ agents send notices of infringement (“DMCA notices”) to Internet Service Providers’ (“ISPs”) designated DMCA agents’ email addresses concerning Internet protocol (“IP”) addresses where infringements were confirmed.³ ER-9–10, ER-81. Appellants also sought and obtained legal relief against operators of piracy software applications that distribute pirated copies of their movies. *See, e.g., Millennium Funding, Inc. v. Doe*, No. 1:21-cv-282-RDA-TCB, 2021 U.S. Dist. LEXIS 220120, 2021 WL 5217018, (E.D. Va. Oct. 15, 2021), *report and recommendation adopted in pertinent part sub nom. Millennium Funding, Inc. v. Wicked Tech. Ltd.*, 2022 U.S. Dist. LEXIS 89899, 2022 WL 1156579 (E.D. Va. Jan. 20, 2022).

³ An IP address is a unique bit address that specifies the location of each device or workstation on the Internet. *See HB Prods., Inc. v. Faizan*, 603 F. Supp. 3d 910, 917 n.2 (D. Haw. 2022). The ISP assigns the IP address to its subscriber. *See United States v. Conner*, 521 Fed. Appx. 493, 495 (6th Cir. 2013).

Frontier Communications, Inc. (“Frontier”) is a provider of Internet service to residential and business subscribers. *See* Frontier, <https://frontier.com> (last visited on Sept. 20, 2024). On April 14, 2020, Frontier filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court of the Southern District of New York. *See In re Frontier Commc'ns Corp.*, 655 B.R. 413, 415 (Bankr. S.D.N.Y. 2023).

Reddit, Inc. (“Reddit”) is a community of online forums. Within those forums, called “subreddits,” users gather to discuss shared interests. Users generally participate on the platform pseudonymously, and Reddit does not require that they use or provide Reddit with their legal names or addresses. ER-105. Reddit includes a subreddit “Piracy” explicitly dedicated to online piracy where users boast of pirating copyright protected content and exchange tips on piracy websites and software applications. ER-111–123. For example, in the Piracy subreddit Reddit user “Cyb3rR3b0rn” admitted to using Frontier’s service to pirate from the notorious piracy websites 1337x and PirateBay for a decade without getting a DMCA notice. ER-114, ER-135. And Reddit user “Arceist_Justin” admitted: “Been using Frontier DSL for years. Despite the sh*tty internet, they didn't give a sh*t what I downloaded.” ER-113.

In 2020, after Appellants received user information from other copyright owners in connection with different litigation⁴, Appellants discovered that Frontier had ignored nearly 200,000 DMCA notices sent by their agents. *See In re Frontier Commc'ns Corp.*, 658 B.R. 277, 283 (Bankr. S.D.N.Y. 2024). In the summer of 2020, Appellants filed proofs of claims in the Bankruptcy Court of the Southern District of New York (“Bankr. Court”) asserting that Frontier is secondarily liable for copyright infringement (“copyright claims”). *See id.* Numerous other movie and record companies also filed proofs of claims asserting copyright claims based upon similar underlying facts. *See id.*

On May 17 and 24 of 2021, Frontier filed an omnibus objection to the copyright claims in the Bankr. Court arguing: (a) the claimants could not establish any direct or actual copyright infringement of Frontier customers; (b) any direct infringement was *de minimus*; and (c) 17 U.S.C. §512(a) provides it a safe harbor as an affirmative defense that barred monetary liability. *See Frontier*, 658 B.R. at 283; ER-108–109.

⁴ *See* Ernesto Van der Sar, *Torrent Site 1337x Bans ‘YTS’ For Handing User Data to Movie Companies*, TorrentFreak (Aug. 20, 2020), <https://torrentfreak.com/torrent-site-1337x-bans-yts-user-data-200820/> (last visted on Sept. 21, 2024) (“YTS, a popular torrent site in its own right, shared user details with several movie companies.”).

On June 7, 2021, Appellants and other movie companies filed a Response to Frontier's objection in the Bankr. Court disputing Frontier's assertions and particularly asserting that Frontier failed to qualify for the §512(i) safe harbor from monetary damages. ER-109.

On Nov. 21, 2023⁵, the Bankr. Court held a case management conference and declared the matter a contested proceeding for which all part VII rules would apply. ER-109, ER-121 at ¶13.

On Dec. 17, 2023, Appellants and some of the movie companies ("Movants") served Reddit a Rule 45 subpoena requesting "IP address log information from 1/1/2017 to present for users: "Gibson125T"; "Sankerin"; "Old_Package540", "Arceist_Justin"; "ZeroHart"; and "Cyb3rR3b0rn"". ER-110, ER-122, ER-125–140.

On Jan. 2, 2024, Reddit's counsel served objections to the subpoena on Movants' counsel based upon: (1) purported failure to satisfy the First Amendment standard for disclosure of identifying information regarding an anonymous speaker; and (2) Reddit's intention to provide the users with adequate notice and an opportunity to object before producing any records. ER-142–143. Reddit did not

The matter was effectively stayed for more than two years while the District Court for the Southern District of New York considered the movie and record companies' motion to withdraw the reference to the District Court. ER-121 at ¶12.

assert that the information Movants requested was irrelevant or that Reddit would be burdened by producing the information.

On Jan. 9, 2024, Movants filed a motion to compel Reddit to comply with the Rule 45 subpoena in the Northern District of Cal. (the “District Court”). ER-106–143. Particularly, Movants argued that: (a) The discovery requested is relevant and proportional to the needs of the case [ER-111]; (b) The information Movants request from Reddit does not implicate the First Amendment Right to Anonymous Speech [ER-114]; (c) The six part test of *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (“*2TheMart.com*”) concerning disclosure of identifying information for an anonymous speaker is not applicable [ER-115]; (d) The Reddit users’ comments are directly and materially relevant to the core claims and defenses [ER-116]; (e) The information Movants seek is not available from another source before the discovery cutoff [ER-117]; and (f) There is no burden to Reddit to disclose the requested information [ER-117].

On Jan. 23, 2024, Reddit filed an Opposition to the motion to compel asserting: (a) the subpoena could not satisfy the *2TheMart.com* test for unmasking anonymous users [ER-96]; (b) Movants can obtain evidence on the issues from other sources [ER-98–99]; and (c) the Court should reject Movants’ argument that the *2TheMart.com* test is not applicable [ER-101]. Notably, Reddit did not argue that it would be overly burdened by responding to the subpoena.

On Feb. 7, 2024, the Magistrate Judge issued an Order denying Movants' motion to compel. ER-62–72. Particularly, despite Movants requesting IP address log information and not identification information, the Magistrate Judge stated, “the Court finds no reason to believe provision of an IP address is not unmasking subject to First Amendment scrutiny” and concluded that the requested information could not satisfy the *2TheMart.com* test because the information requested could purportedly be obtained from other sources. ER-69 and ER-71. Notably, the Magistrate Judge did not state that the information requested was not relevant or that Reddit would be burdened by complying with the subpoena.

On Feb. 20, 2024, Movants filed a motion for de novo determination of the Magistrate Judge's Order. ER-56–61. Particularly, Movants objected to: (a) the Magistrate Judge's conclusions that disclosure of an IP address is unmasking subject to First Amendment scrutiny; (b) the Magistrate Judge's conclusions the information Movants seek is available from other sources; and (c) the Magistrate Judge's failure to examine the nature of the speech and balance rights of anonymous speakers versus the information requested.

On Mar. 5, 2024, Reddit filed its Opposition to the motion for de novo determination arguing that the Magistrate Judge's Order should be adopted. ER-39–55. Reddit did not dispute Movants' contention that the appropriate standard of review of the Magistrate Judge's Order was *de novo*. ER- 47.

On Mar. 12, 2024, Movants filed their Reply in support of the motion for de novo determination further pointing out that the information requested would rebut an argument Frontier was making in the underlying case that Movants had no proof that its subscribers actually downloaded or uploaded a copy of copyright protected content rather than merely offered to share a copy. ER-25.

On Mar. 27, 2024, the Bankr. Court denied Frontier's motion for judgment on the pleadings. *See In re Frontier Commc'ns Corp.*, 658 B.R. 277 (Bankr. S.D.N.Y. 2024).

On June 13, 2024, fact discovery concluded in the underlying case in the Bankr. Court. ER-122 at ¶17.

On July 14, 2024, the District Court rejected Reddit's argument that the *2TheMart.com* test is applicable: "I don't think this is a First Amendment case. It's plain as day that these people were saying that they were involved in copyright infringement, and First Amendment does not protect infringing conduct." ER-17. However, the District Court denied the Movants' motion to compel based upon a purported burden to Frontier and a conclusion on the relevance of the requested information to the case – objections that were not made by Frontier in response to the subpoena or in any of its Oppositions. ER-5, ER-17–18.

On June 17, 2024, Killing Link and SMV filed a notice of appeal. ER-144-146. Reddit did not file a notice of cross-appeal of the District Court's rejection of its First Amendment objection.

SUMMARY OF THE ARGUMENT

The District Court's decision to quash the subpoena should be reversed because it was based upon an incorrect legal standard, and an argument not even Reddit made and for which there is zero evidence in the record.

The District Court failed to consider that the IP addresses from where Reddit's users boasted of piracy requested in the DMCA subpoena help Appellants prove that Frontier is secondarily liable for its subscribers' direct infringements of their movies such as *Kill Chain* and *Lone Survivor* under vicarious and contributory infringement. Particularly, the IP addresses show that the users who made incriminating comments were, one, making these comments from Frontier's Internet service, and two, had shared pirated copies of Appellants' Works from the IP addresses. Further, the IP addresses are necessary to show that the users who boasted that Frontier took no action in response to DMCA notices were indeed users of Frontier's service and thereby rebut Frontier's safe harbor defense. However, the District Court improperly focused on only whether or not the IP addresses would conclusively rebut Frontier's safe harbor defense. This was an

error. The proper approach was to consider whether the requested IP addresses were relevant – not conclusive proof – to not just Frontier’s safe harbor defense but also Appellants’ copyright claims.

The District Court’s conclusion that the burden to Reddit to producing the IP addresses was unjustified was improper because not even Reddit argued that compliance with the subpoena was a burden. Nor is there any evidence on the record of any purported burden to Reddit. Thus, the conclusion that the burden is unjustified was an abuse of discretion. On the other hand, the District Court’s correct conclusion that the First Amendment was not implicated by the DMCA subpoena was properly based upon an examination of the purported speech.

STANDARD OF REVIEW

This Court has applied an abuse of discretion standard for appeals of district court orders quashing subpoenas, and a clear error standard for factual findings underlying a discovery ruling. *See Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 813 (9th Cir. 2003). A district court necessarily abuses its discretion if it applies the wrong legal rule, which is a question this Court determines *de novo*. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014). Even where the trial court has applied the correct legal rule, it abuses its discretion if its decision is “(1)

illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Id.* (quotation marks omitted).

This Court reviews a District Court’s interpretation of the Federal Rules of Civil Procedure *de novo*. *See Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013).

ARGUMENT

I. THE DISTRICT COURT’S DECISION TO QUASH THE SUBPOENA BASED UPON BURDEN TO REDDIT WAS AN ABUSE OF ITS DISCRETION.

The District Court’s decision to quash the subpoena based upon purported unjustified burden to Reddit as a nonparty was clearly erroneous because: (i) the evidence Appellants sought from Reddit is relevant to proving the Frontier is secondary liable for its subscribers’ copyright infringements and rebutting Frontier’s safe harbor defense; (ii) Reddit never objected to the subpoena based upon an undue burden; and (ii) there is no evidence in the record of any burden to Reddit. As explained below, the Reddit users’ comments are clearly relevant because they help establish that Frontier is secondarily liable for copyright infringement and rebut Frontier’s safe harbor defense. However, Appellants need the IP addresses to establish that the Reddit users indeed used Frontier’s Internet

service just as they boasted, and to ascertain whether DMCA notices were sent to Frontier concerning these IP addresses and whether copies of any of their movies were pirated from the IP addresses.

A. Appellants seek unquestionably relevant evidence from Reddit.

Appellants assert in the underlying case that Frontier is secondarily liable for copyright infringement under vicarious infringement and contributory infringement. ER-25–27. The evidence from the Reddit comments will help prove Frontier’s liability.

1. The Reddit comments help establish that Frontier vicariously infringed the Works.

In the Second Circuit, vicarious liability for copyright infringement may arise when the defendant had the “right and ability to supervise that coalesced with an obvious and direct financial interest in the exploitation of copyrighted materials.” *EMI Christian Music Grp. Inc. v. MP3 Tunes LLC*, 844 F.3d 79, 99 (2d Cir. 2016) (internal quotation marks, citations, and alterations omitted). A party “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). The admissions of the Reddit users that they use Frontier’s service to pirate freely despite receiving dozens of DMCA notices proves an element of vicarious infringement – that Frontier was profiting

from the infringing activity while declining to stop it. For example: the Reddit user “Gibson125T” states that he/she received 44 DMCA notices but Frontier had not terminated the service [ER-129]; the Reddit user “Old_Package540” admits that she/he torrents “every once in a while, been getting DMCA notices quite often” [ER-130]; Sankerin admits to using Frontier’s service for piracy for two years [ER-137], and Cyb3rR3b0rn admits to using Frontier’s service for piracy for over 10 years [ER-135]. Indeed, Cyb3rR3b0rn replies to his own comment that “They were probably just ignoring [DMCA notices] and not forwarding DMCA [notices] previously” [ER-136].

The Bankr. Court noted that direct financial interest prong of vicarious infringement can be proven by showing that “copyright infringement draws customers to the defendant’s service or incentivizes them to pay more for their service...” *In re Frontier Commc’ns Corp.*, 658 B.R. at 294. Comments such as from Reddit user “Arceist_Justin” that: “Been using Frontier DSL for years. Despite the sh*tty internet, they didn’t give a sh*t what I downloaded” show that the ability to pirate freely on Frontier’s service was not only a draw, but such as draw that Arceist_Justin continues to pay for service from Frontier despite its poor quality. ER-113, ER-139.

The Second Circuit does not require that Appellants’ movies be the specific draw to prove vicarious infringement. Nonetheless, by obtaining the IP addresses

from where these Reddit users made the comments from Reddit, Appellants can confirm whether their movies such as *Kill Chain* and *Lone Survivor* were pirated from the same IP addresses.

2. The Reddit comments help establish that Frontier contributed to infringements of the Works.

In the Second Circuit, to establish contributory infringement, Appellants must show that Frontier, “with knowledge of the infringing activity, induce[d], cause[d] or materially contribute[d] to the infringing conduct of another.” *EMI Christian Music Grp. Inc.*, 844 F.3d at 99-100 (internal quotation marks omitted). Material contribution can be established by providing machinery or goods that facilitate the infringement, or the site and facilities for known infringing activity. *See Faulkner v. Nat'l Geographic Soc'y*, 211 F. Supp. 2d 450, 473 (S.D.N.Y. 2002), *aff'd*, 409 F.3d 26 (2d Cir. 2005). The admissions of the Reddit users Gibson125T, Old_Package540 and Cyb3rR3b0rn discussed above also establish material contribution because they show that Frontier has received numerous notices from copyright holders concerning copyright infringement at subscriber accounts but continued to provide the machinery (Internet service and modems) that facilitates infringing activity. By obtaining the IP addresses from where these Reddit users made the comments from Reddit, Appellants can confirm

that the comments were made from a Frontier IP address and that their movies were pirated from the same Frontier IP address.

3. The Reddit comments help establish that Frontier’s subscribers committed direct infringements.

Under either vicarious or contributory infringement, Appellants must prove that there was an underlying direct infringement of the movie. *See EMI Christian Music Group, Inc.*, 844 F.3d at 99-100. As mentioned above, by obtaining the IP addresses from where these Reddit users made the comments from Reddit, Appellants can confirm that the comments were made from Frontier IP addresses and that their movies were pirated from the same IP addresses. Moreover, Frontier has asserted that Killing Link and SMV cannot prove that Frontier’s subscribers directly infringed copyright owners’ exclusive rights of reproduction or distribution. Particularly, Frontier argues that there is no evidence that its subscribers actually downloaded copies of copyright protected Works or that its subscribers disseminated copies of copyright protected Works to anyone besides the copyright owners’ data service provider. ER-37. However, the admissions of the Reddit users such as “Arceist_Justin” that he downloaded a copy of copyrighted work from 1337 torrent site or “Cyb3rR3b0rn” that he used 1337x to download a movie and has torrented for a decade show that Frontier’s users

actually disseminated copies of the Work over BitTorrent peer-to-peer network. ER-113–114.

4. The Reddit comments rebut Frontier’s safe harbor defense.

Frontier has asserted that it has a safe harbor under 17 U.S.C. §§512(a) and (i). ER-105. The requirements of the §512(i) safe harbor are that the service provider “...has adopted and reasonably implemented, and informs subscribers ...of, a policy that provides for the termination in appropriate circumstances of subscribers...of the service provider’s system or network who are repeat infringers”. 17 U.S.C. §512(i)(1)(A). However, the admissions of Reddit users such as “Gibson125T” and “Old_Package540” show that Frontier does not terminate subscribers that it knows are repeat infringers. Even the comment by Reddit user “ZeroHart” discussing his account being terminated shows that Frontier does not meet the requirements of §512(i)(1)(A). Particularly, according to “ZeroHart” Frontier stated that “Our system apparently did not send the notices to your email because it didn’t match it up with your account for some reason”. ER-132. ZeroHart’s comment contradicts Frontier’s assertion that its system sends email notifications to subscribers associated with the IP address identified in the DMCA notice after certain thresholds are met. *See In re Frontier Commc’ns Corp.*, 20-22476-mg, Doc. #2420, p.2 [Dkt. 14.3]. Further, ZeroHart points out that he/she received billing notifications from Frontier at the same time the DMCA

notices were not received. ER-132. This glaring inconsistency between Frontier taking care to send communications to its subscribers' accounts for billing purposes but failing to follow its own policy to forward DMCA notices to its subscribers demonstrates that Frontier has not reasonably implemented the policy required for the safe harbor.

By obtaining the IP addresses from where these Reddit users made the comments from Reddit, Appellants can prove that the comments were indeed made by users of Frontier's Internet service and whether DMCA notices were sent to Frontier concerning these IP addresses.

5. It is irrelevant that the number of Reddit comments for which Appellants requested IP addresses is low.

The District Court compared the limited number of Reddit comments admitting infringement for which Appellants requested information to the overall number of Frontier subscribers and concluded the evidence was so limited as to be irrelevant to rebutting Frontier's safe harbor. ER-13 (“...it’s such a small sample, it seems largely irrelevant.”). ER-18. Firstly, the sample is smaller because Appellants limited the number to avoid burdening nonparty Reddit. For example, Appellants did not request information for the user who stated: “I got 7 DMCA letters from Frontier in one weekend...” [ER-138 (top of page)], user “bluemystic2017” (“The only thing they ever get me on is fast and furious movies.

Why?") [ER-131], user "Mannus01" ("I've been torrenting for years with Frontier...") [ER-131], user "Danielhh7" (shares an image of DMCA notices) [ER-129], user "CRABMAN" (ignore [DMCA notices] till you lose connection. Usually they don't do sh*t...) and numerous other Reddit users that made similar comments in different threads. The District Court's criticism of the sample being low effectively punished Appellants for avoiding burdening a non-party as it was required to by Rule 45(d)(1).

However, Rules 26 and 45 do not limit the evidence a party can obtain from a nonparty to smoking gun evidence or essential evidence. Rather, Rule 26 states that information within the scope of discovery does not even have to be admissible. *See* Fed. R. Civ. P. 26(b)(1). Nor does the evidence requested from the nonparty have to be essential, provided that the nonparty is not an expert or high-ranking government official such as a cabinet member. *See Cardona v. United States Dist. Court (In re United States Dep't of Educ.)*, 25 F.4th 692, 703-704 (9th Cir. 2022) ("To take a secretary's deposition, the information sought in the deposition must be **essential** to the case. If the information is not **absolutely needed** for a case, we cannot allow a deposition to disrupt the normal governmental balance of powers.") (emphasis added). Reddit is not an expert or high-ranking government official.

Moreover, the District Court failed to consider how the Reddit comments are evidence of Frontier's subscribers' direct infringements which Frontier is

secondarily liable for under vicarious infringement and contributory infringement. Particularly, Frontier is liable for each instance of direct infringement for which Appellants can establish secondary liability, even if it just one or two. Frontier does not possess information on the IP addresses from where Reddit users post comments. Only Reddit has this information.

And even if the number of IP addresses is low, they are still sufficient for establishing that the ability to pirate freely was a draw to using Frontier's service. As the Second Circuit has noted: "[I]nfringing material acts as a 'draw' to attract subscribers to a defendant's business, even if it is not the primary, or even a significant draw." *EMI Christian Music Grp.*, 844 F.3d at 99. Likewise, this Court has also stated that "There is no requirement that the draw be 'substantial.'" *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).

Reddit argued that Appellants can obtain evidence of why subscribers were drawn to Frontier's service from Frontier by obtaining the subscribers names that are the top infringers and pursuing discovery from those infringers. ER-15. To the extent the Court agreed, Reddit's position is incorrect. Frontier was not able to provide many of the subscriber names that were the top infringers because it did not retain IP address assignment information earlier than September 2, 2019. *See In re Frontier Commc'ns Corp.*, 20-22476-mg, Doc. #2420, p.2. [Dkt. 14.3] ("...Frontier has retained from September 2, 2019 to the present, all Reports table

data linking the IP addresses in Notices to particular subscriber accounts...). Moreover, even if Frontier was able to provide the subscribers names for the top infringers, that would not mean that the top infringers would be the Reddit users. Thus, Appellants *could not* obtain the IP addresses from where the Reddit comments were made from Frontier. And Reddit's speculation that Appellants could have obtained similar evidence from Frontier's subscribers before the discovery cut-off is wildly unrealistic.

Accordingly, the evidence Appellants seek is clearly relevant to its claims and rebutting Frontier's defenses. Although the District Court paid brief lip service to disproportionate resources, ER-17, the District Court incorrectly focused on the importance of the evidence sought and if it was essential for rebutting Frontier's safe harbor defense. The Court should have considered all the Rule 26(b)(1) factors consistent with this Court's guidance that the scope is broad, along with the fact that Reddit never objected to the subpoena based upon relevance. The District Court also failed to even consider the relevance of the evidence sought to providing direct infringement, contributory infringement and vicarious infringement. The District Court's failure to apply the proper test should be reversed by this Court on de novo review.

B. Reddit never argued that the subpoena subjected it to a burden.

The District Court stated, "I'm just not hearing anything that would justify

imposing a burden on Reddit to produce these things, particularly for a seven-year period.” ER-17. However, Reddit *never* made any objection based upon burden.

Rule 45(d)(2)(B) requires a nonparty to make objections within 14 days of being served or before the subpoena response deadline. Although Reddit made objections, none were based upon a burden of the response. Accordingly, Reddit waived any objection based upon burden. *See DG Creditor Corp. v. Dabah (In re DG Acquisition Corp.)*, 151 F.3d 75, 81 (2d Cir. 1998) (stating that Rule 45 requires all objections to be raised at once); *see also Ott v. City of Milwaukee*, 682 F.3d 552, 558 (7th Cir. 2012) (following *DG Creditor Corp.*).

Assuming *arguendo* that Reddit could still assert an objection based upon an undue burden, Reddit did not argue an undue burden in its opposition to Movants’ motion to compel or its opposition to Movants’ motion for de novo review of the Magistrate Judge’s order in the District Court. ER-39–55. Movants even pointed out in their opening motion to compel that “Reddit does not argue that there is a burden to it to disclose the requested information.” ER-117. Reddit did not dispute this point in its opposition to the motion to compel. *See* ER-89–103. In fact, the word “burden” does not appear in any of Reddit’s opposition papers. In the contrary, Reddit has admitted that it has complied with a similar subpoena in another case, thereby showing that there is no burden to Reddit to comply. ER-45. The District Court applied an incorrect legal standard by quashing the subpoena

based upon a purported burden that Reddit never asserted. The District Court's failure to apply the proper test can be reversed by this Court on *de novo* review.

C. The Record contains no evidence of any purported burden to Reddit.

The District Court denied discovery based upon concern of a burden on Reddit for having to produce documents for a seven-year period. ER-17 (“...not hearing anything that would justify imposing a burden on Reddit to produce these things, particularly for a seven-year period”). However, because Reddit conceded that it did not have a burden to responding to the subpoena, Reddit did not produce any evidence of a burden to comply. And it was Reddit’s burden to prove that compliance with the subpoena was overly burdensome. *Sullivan v. Dickson*, 283 F.2d 725 (9th Cir. 1960) (“The burden of showing that a subpoena is unreasonable and oppressive is upon the party to whom it is directed”); *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) (“It is the producing party's burden to prove that compliance would be unduly burdensome.”). Indeed, the record shows that the information Appellants request in the subpoena is the type of information Reddit states it regularly produces. ER-81. Moreover, Reddit admitted that it complied with a similar subpoena in a different case. ER-45.

Appellants recognize that this Court has noted that limitations on discovery may be broader to protect a nonparty from “harassment, inconvenience, or disclosure of confidential documents.” *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980). However, these limitations to a nonparty are not applicable here because Reddit has not complained of harassment, inconvenience, disclosure of confidential documents or any burden.

Accordingly, the District Court’s conclusion that the subpoena imposes an unjustified burden on Reddit was clearly erroneous because the record contains no evidence on which the District Court rationally could have based its decision. *See Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995). Further, because there was absolutely no evidence, the District Court’s decision was “(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Mujica*, 771 F.3d at 589 (9th Cir. 2014) (quotation marks omitted).

II. THE SUBPOENA SHOULD NOT ALTERNATIVELY BE QUASHED BASED UPON FIRST AMENDMENT.

A. The District Court rejected Reddit’s argument that its subscribers have a First Amendment right to anonymously boast of copyright infringement.

The District Court rejected Reddit’s argument that the First Amendment protects its subscribers that anonymously boast of engaging in online piracy from having their identities revealed: “I don’t think this is a First Amendment Case. It’s plain as day that these people were saying that they were involved in copyright infringement, and First Amendment does not protect infringing conduct.” ER-17. Reddit did not file a notice of cross-appeal appealing the District Court’s rejection of its objection based upon the First Amendment. This Court has stated that “...the general rule [is] that we will not hear a challenge to a district court decision if a notice of cross-appeal is not filed.” *S.M. v. J.K.*, 262 F.3d 914, 923 (9th Cir. 2001). Accordingly, Reddit has waived challenging the District Court’s decision that the First Amendment is not applicable.

Nonetheless, this Court has held that it has the discretion to waive the requirement of a notice of cross-appeal based upon the following factors: (1) interrelatedness of the issues on appeal and cross-appeal (particularly whether they involve the same parties); (2) whether a notice of cross-appeal was merely late or not filed at all; (3) whether the nature of the district court opinion should have put the appellee on notice of the need to file a cross-appeal, the extent of any prejudice to the appellant caused by the absence of notice, and (4) in a case involving certification of an interlocutory appeal - whether the scope of the issues that could be considered on appeal was clear. *See Mendocino Env’tl. Ctr. v. Mendocino Cty.*,

192 F.3d 1283, 1299 (9th Cir. 1999). Factor (4) is not applicable. Factor (3) favors Appellants because the District Court's hearing transcript clearly put Reddit on notice that the Court was rejecting Reddit's First Amendment argument. Factor (2) also favors Appellants because Reddit has not filed a notice of cross-appeal. Factor (1) also favors Appellants because although the parties are the same, the issue of whether the subpoena subjected Reddit to a burden is different from whether the subpoena violated Reddit's users First Amendment right to remain anonymous. Thus, the factors do not support waiver of the requirement of a notice of cross-appeal.

Accordingly, because the District Court already concluded that the First Amendment is not applicable to the subpoena and Reddit failed to file a notice of cross-appeal, this Court should not alternatively quash the subpoena based upon a purported First Amendment right of Reddit's users.

B. The subpoena does not invoke the First Amendment.

Appellants' subpoena does not request identification information such as names or email addresses or otherwise unmask Reddit's subscribers. Rather, the subpoena merely requests IP address logs. ER-125. Further, Appellants' counsel has stated in the moving papers in the District Court that he will not seek to serve a subpoena on Frontier or another ISP to obtain the identification information of subscribers assigned the IP address at the time stamps. ER-23. Appellants' counsel

repeats the same before this Court. Thus, the information requested (IP address logs) does not amount to an attempt to unmask the Reddit users. Notably, this Court has concluded that users have no privacy rights in IP addresses in the Fourth Amendment context. *See United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008). Accordingly, the subpoena does not invoke the First Amendment.

C. The nature of the Reddit users’ speech does not invoke the First Amendment.

Assuming *arguendo* that the mere request of IP address log information is akin to unmasking, because the speech at issue involves boasts of committing copyright infringement, it is subject to the lowest First Amendment protection, if any at all.

This Court has recognized that the First Amendment provides a protection for anonymous online speech that is not unlimited but “varies depending on the circumstances and the type of speech at issue.” *Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers)*, 661 F.3d 1168, 1173 (9th Cir. 2011) (“*Anonymous*”). The nature of the speech is the driving force in choosing a standard for balancing the rights of anonymous speakers in discovery disputes. *See id.* at 1177 (“[C]ommercial speech should be afforded less protection than political, religious, or literary speech...”). However, there is no First Amendment right to commit copyright infringement. *See Arista Records, LLC v.*

Doe 3, 604 F.3d 110, 118 (2d Cir. 2010) (“...to the extent that anonymity is used to mask copyright infringement or to facilitate such infringement by other persons, it is unprotected.”); *cf Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003). And as recognized by the District Court, the Reddit comments at issue are boasts of copyright infringement that should be afforded less protection than commercial speech – if any protection at all. But to the extent any protection is applicable, it is outweighed by the importance of the evidence sought in proving Appellants’ claims for copyright infringement and rebutting Frontier’s safe harbor defense, particularly since Appellants are not requesting the Reddit users’ personal identification information.

Notably, Appellants’ copyright claims are not weak or debatable like those of the purported copyright owner in *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015). Unlike the copyright owner in *Garcia*, Appellants have registrations to the motion picture copyrights and the court in the underlying action denied Frontier’s motion for judgment on the pleadings. *See In re Frontier Commc’ns Corp.*, 658 B.R. at 283.

In the face of precedent establishing a lack of First Amendment protection for copyright infringement and the strength of Appellants’ copyright infringement claims, the District Court correctly chose not to apply the *2TheMart.com* test.

D. Other District Court decisions have applied the *2TheMart.com* test without examining the nature of the speech.

Should this Court conclude that the subpoena implicates the First Amendment and that the *2TheMart.com* test is applicable, Appellants urge this Court to instruct the District Court to consider the nature of the speech (boasts of copyright infringement) when balancing the rights of the anonymous speakers as instructed by this Court in *Anonymous* in determining whether to compel compliance with the subpoena. Particularly, despite this Court's clear guidance in *Anonymous*, District Courts have focused merely on whether the information sought is unavailable from any other source without doing any examination of the nature of the speech to determine the appropriate level of First Amendment protection. *See, e.g., In re Reddit, Inc.*, 671 F. Supp. 3d 1022, 1025 (N.D. Cal. 2023) ("*Reddit I*"). Just as in *Reddit I*, the Magistrate Judge's Report and Recommendation failed to examine the nature of the speech besides merely reciting the Reddit comments at issue.

The record includes Reddit users' comments boasting of copyright infringement. Accordingly, should this Court conclude that the subpoena implicates the First Amendment and that the *2TheMart.com* test is applicable, this Court can examine these comments and conclude that they are worthy of little to no First Amendment protection and reverse the District Court.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's Order quashing the Rule 45 subpoena.

Date: Oct. 14, 2024

Culpepper IP, LLC

s/ Kerry S. Culpepper
Kerry S. Culpepper

Attorney for Appellants

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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