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3 (Motion to appear Pro Hac Vice  
4 pending)  
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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF ILLINOIS**  
14 **DIVISION**

15 THIRD DEGREE FILMS, INC., a California ) CASE NO. \_\_\_\_\_  
16 Corporation, )  
17 Plaintiff, ) MOTION TO QUASH SUBPOENA  
18 vs. ) SERVED UPON CUSTODIAN OF  
19 DOES 1-2010, ) RECORDS, WIDE OPEN WEST,  
20 Defendants. ) AND MEMORANDUM OF  
21 ) AUTHORITIES

22 COMES NOW DOE No. 605 and states as follows:

23 1. Pursuant to Fed. R. Civ. P. 45(c)(3)(A), DOE 605 files this Motion to Quash  
24 Subpoena served upon Custodian of Records, Wide Open West, because the subpoena requires  
25 disclosure of protected information and subjects DOE No. 605 to undue burden.

26 Additionally, the subpoena seeks information that is not relevant given Plaintiff's  
27 inability to link DOE 605 to alleged infringing activity.  
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1           2.       Plaintiff filed suit in the Northern District of California (C.A. No. 5:10-CV-05862  
2 HRL) against 2010 unnamed DOE defendants, who are identified in its Amended Complaint only  
3 by internet protocol (IP) addresses. Plaintiff alleges that these DOE defendants have obtained an  
4 adult video in violation of Plaintiff's copyrights.

5           3.       DOE No. 605 is a resident of the City of Columbus, Ohio. Wide Open West is an  
6 internet service provider (ISP) that provides internet service to its customers, including DOE No.  
7 605. Plaintiff, Third Degree Films, on information and belief, is a producer of adult entertainment  
8 films and content. Plaintiff served a subpoena on Custodian of Records, Wide Open West, to  
9 compel the disclosure of documents to identify the name, address, telephone number, and e-mail  
10 address of DOE No. 605, so DOE No. 605 can be named as a defendant in Plaintiff's copyright  
11 infringement action. A true and correct copy of the subpoena is attached as Exhibit A.

12           4.       DOE No. 605 has standing to move to quash the subpoena because it seeks  
13 disclosure of personal identification information considered to be confidential and over which  
14 DOE No. 605 has personal and proprietary interests. DOE No. 605 also has standing to move to  
15 quash the subpoena to protect reputational interests. FED. R. CIV.P. 45(c)(3)(B) allows a person  
16 affected by, but not subject to, a subpoena to move to quash the subpoena.

17           5.       According to the docket sheet for Plaintiff's suit, no defendant has been identified,  
18 served with process, or answered. The Northern District of California thus lacks personal  
19 jurisdiction over any of the DOEs at this point. The Northern District of California also lacks  
20 personal jurisdiction over DOE No. 605.

21           6.       Plaintiff filed an ex parte application for "early discovery" (before a Rule 26(f)  
22 conference) so that it could serve subpoenas on ISPs, such as Wide Open West, to determine the  
23 internet subscriber names, addresses, and e-mail addresses associated with the IP addresses listed  
24 in its Amended Complaint. Magistrate Judge Howard Lloyd of the Northern District of  
25 California, San Jose Division, entered the order attached hereto as Exhibit B permitting service of  
26 subpoenas on ISPs. Judge Lloyd also set a schedule for filing motions to quash either by the ISPs  
27  
28

1 or the DOEs. See Exhibit B Paragraph 5. This Motion to Quash is timely filed as Wide Open  
2 West notified DOE No. 605 of the subpoena on June 13, 2011.

3  
4 7. The Third Degree Films complaint and ex parte request for expedited discovery  
5 form yet another in a wave of suits in which copyright infringement plaintiffs seek to “tag” a  
6 defendant based solely on an IP address. However, an IP address is not equivalent to a person or  
7 entity. It is not a fingerprint or DNA evidence – indeed, far from it. In a remarkably similar case  
8 in which an adult entertainment content producer also sought expedited discovery to learn the  
9 identity of persons associated with IP addresses, United States District Judge Harold Baker of the  
10 Central District of Illinois denied a motion for expedited discovery and reconsideration, holding  
11 that, “IP subscribers are not necessarily copyright infringers...The infringer might be the  
12 subscriber, someone in the subscriber’s household, a visitor with her laptop, a neighbor, or  
13 someone parked on the street at any given moment.” Order of Apr. 29, 2011, VPR Internationale  
14 v. DOES 1-1017, No. 2:11-cv-02068 (Central District of Illinois) (Judge Harold A. Baker)  
15 [hereinafter VPR Internationale Order], attached hereto as Exhibit C. The point so aptly made by  
16 Judge Baker is that there may or may not be a correlation between the individual subscriber, the IP  
17 address, and the infringing activity. *Id.* The risk of false identification by ISPs based on internet  
18 protocol addresses is vividly illustrated by Judge Baker when he describes a raid by federal agents  
19 on a home allegedly linked to downloaded child pornography. The identity and location of the  
20 subscriber were provided by the ISP (in the same fashion as Plaintiff seeks to extract such  
21 information from Wide Open West.) After the raid revealed no pornography on the family  
22 computers, federal agents eventually learned they raided the wrong home. The downloads of  
23 pornographic material were traced to a neighbor who had used multiple IP subscribers’ Wi-Fi  
24 connections. *Id.* This risk of false identification and false accusations through disclosure of  
25 identities of internet subscribers is also presented here. Given the nature of the allegations and the  
26 material in question, should this Court force Wide Open West to turn over the requested  
27 information, DOE No. 605 would suffer a reputational injury.

28 8. DOE No. 605 resided in a three story residential structure that had been subdivided  
into various individual sleeping rooms and common areas. DOE No. 605 was the only one of  
several persons living in the residential structure that had an internet service provider. His

1 personal computer and internet service connection was maintained in a common lounge area on  
2 the third floor of said structure. Any resident in the apartment building had access to said personal  
3 computer and had ample opportunity to use DOE No. 605 IP address, for their own purposes,  
4 without detection. The likelihood that an individual, other than DOE No. 605, infringed Plaintiff's  
5 copyrights is too great to support any correlation between DOE No. 605 and the alleged violation  
6 that Plaintiff seeks to prove. Here, the risk of reputational injury to a young man from public  
7 exposure and association with the Third Degree Films allegations—even if later disproven—is too  
8 great and presents an undue burden to DOE No. 605 under FED. R. CIV. P. 45(c)(3)(A)(iv).  
9 See VPR Internationale Order, at 3.

10 9. If the mere act of having an internet address can link a subscriber to copyright  
11 infringement suits, internet subscribers such as DOE No. 605 will face untold reputational injury,  
12 harassment, and embarrassment. The reputational risk that Judge Baker found to be an undue  
13 burden is equally presented here: “[W]hether you’re guilty or not, you look like a suspect.” *Id.* at  
14 3. Moreover, this case presents the same extortion risk that so concerned Judge Baker:

15 “Could expedited discovery be used to wrest quick settlements,  
16 even from people who have done nothing wrong? The  
17 embarrassment of public exposure might be too great, the legal  
18 system too daunting and expensive, for some to ask whether VPR  
19 has competent evidence to prove its case.”

20 *Id.* Discovery is not a game. Yet, plaintiffs in these types of cases use discovery to extort  
21 settlements from anonymous defendants who wish to avoid the embarrassment of being publicly  
22 associated with this type of allegation. *Id.* Such abuse of the discovery process cannot be allowed  
23 to continue.

24 10. Additionally, this subpoena should not have been issued in the first place because  
25 the information sought is not relevant to Plaintiff's allegations. Implicit in the rule granting  
26 subpoena power is a requirement that the subpoena seeks relevant information. *See Syposs v.*  
27 *United States*, 181 F.R.D. 224, 226 (W.D.N.Y. 1998)(“the reach of a subpoena issued pursuant to  
28 [FED. R. CIV. P. 45] is subject to the general relevancy standard applicable to discovery under  
[FED. R. CIV. P. 26(b)(1)].”). The information linked to an IP address cannot give you the

1 identity of the infringer. *VPR Internationale Order*, at 2. Because the infringer could have been  
2 anybody with a laptop passing within range of the router, the information sought by Plaintiff is not  
3 relevant to the allegations in any way. *Id.* Moreover, even if the information has some small  
4 amount of relevance to the claim—which it does not—discovery requests cannot be granted if the  
5 quantum of relevance is outweighed by the quantum of burden to the defendant. FED. R. CIV. P.  
6 26(b)(2)(C)(iii). Plaintiff’s request fails that balancing test. Given that DOE No. 605 was only  
7 one of many persons who could have used the IP address in question, the quantum of relevance is  
8 miniscule at best. However, as discussed above, the burden to DOE No. 605 is severe. The lack  
9 of relevance on the one hand, measured against the severe burden of risking a significant  
10 reputational injury on the other, means that this subpoena fails the Rule 26 balancing test. *Id.*  
11 Plaintiff’s request for information is an unjustified fishing expedition that will cause reputational  
12 injury, prejudice, and undue burden to DOE No. 605 if allowed to proceed. Good cause exists to  
13 quash the subpoena served on Wide Open West to compel the disclosure of the name, address,  
14 telephone number and e-mail address of DOE No. 605.

15 11. FOR THESE REASONS, DOE No. 605 requests that this Court quash the subpoena  
16 served on Wide Open West in this matter.

17 DATED: August 3rd, 2011

Respectfully submitted,

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20 By: /s/ Richard Koehler

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CERTIFICATE OF SERVICE

This is to certify that a true, correct and complete copy of the foregoing Motion to Quash Subpoena was served via First Class Mail, postage pre-paid and Electronic Mail, addressed to Plaintiff's counsel of record as follows:

Ira M. Siegel  
433 N. Camden Drive, Suite 970  
Beverly Hills, California 90210  
Email: irasiegel@earthlink.net

This 3rd day of August, 2011.

/s/Richard N. Koehler II  
Richard N. Koehler II