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and Verizon Online LLC  
12

(additional counsel listed on signature page)  
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14 **IN THE UNITED STATES DISTRICT COURT**

15 **FOR THE DISTRICT OF ARIZONA**

17 CP PRODUCTIONS, INC., an Arizona  
18 corporation,  
Plaintiff,

19 v.  
20

21 JOHN DOE,  
Defendant.  
22

**CASE NO.: 2:12-CV-1183-PHX-SLG**

**INTERNET SERVICE PROVIDERS'  
MOTION FOR RECONSIDERATION  
OF AUGUST 24, 2012 ORDER (ECF  
No. 13) GRANTING PLAINTIFF'S *EX  
PARTE* MOTION FOR PROTECTIVE  
ORDER**

23 Internet service providers SBC Internet Services, Inc. d/b/a AT&T Internet  
24 Services; BellSouth.net; CenturyTel; Comcast Cable Communications, LLC; Cox  
25 Communications, Inc.; Cellco Partnership d/b/a Verizon Wireless; Embarq Corporation;  
26 Qwest Communications; Cequel Communications, LLC d/b/a Suddenlink  
27  
28

1 Communications; and Verizon Online LLC (collectively, the "Internet Service  
2 Providers" or the "ISPs") move for reconsideration of the Court's August 24, 2012  
3 Order Granting Plaintiff's *Ex Parte* Motion for Protective Order (the "Order," ECF No.  
4 13) pursuant to LR Civ. 7.2(g). The Order was issued based on authorities presented by  
5 the Plaintiff, CP Productions, Inc. ("CP") that concern court-ordered preservation by  
6 *parties* to litigation. Here, the ISPs are not parties to the lawsuit, and the preservation  
7 order essentially amounts to a mandatory injunction against *potential* third-party  
8 "witnesses" that, among other things, is not contemplated within the framework of  
9 protections and requirements set forth in Rule 45 of the Federal Rules of Civil  
10 Procedure governing discovery of third-party witnesses. Furthermore, CP's bare  
11 assertion that it seeks to identify hundreds of Internet subscribers because those  
12 identifications are relevant to CP's claims against a single John Doe has been found  
13 meritless by other courts. CP's intention here is not to proceed in this court with  
14 litigation against potential future defendants, but rather to coerce multiple settlements  
15 with persons who are never likely to (and in all likelihood could not) be made  
16 defendants in this case. The true and sole purpose of the "discovery" sought – to  
17 identify settlement targets to whom threatening demand letters and/or phone calls can be  
18 directed – is well known by the ISPs and the federal courts, and explained in numerous  
19 opinions from district courts throughout the country. Absent any legitimate basis for the  
20 proposed discovery, the imposition of additional burdens on the ISPs in the form of a  
21 preservation order is unwarranted, even if such relief were otherwise available.

## 22 **I. BACKGROUND**

### 23 **The National Wave of BitTorrent Copyright Infringement Cases**

24 This lawsuit is of a piece with scores of similar copyright infringement cases  
25 brought across the country by attorneys representing owners of pornographic content.  
26 The cases follow what district judges have called a "common arc":  
27  
28

1 (1) a plaintiff sues anywhere from a few to thousands of Doe  
2 defendants for copyright infringement in one action; (2) the plaintiff  
3 seeks leave to take early discovery; (3) once the plaintiff obtains the  
4 identities of the IP subscribers through early discovery, it serves the  
5 subscribers with a settlement demand; (4) the subscribers, often  
6 embarrassed about the prospect of being named in a suit involving  
7 pornographic movies, settle.... Thus, these mass copyright  
8 infringement cases have emerged as a strong tool for leveraging  
9 settlements – a tool whose efficiency is largely derived from the  
10 plaintiffs' success in avoiding the filing fees for multiple suits and  
11 gaining early access en masse to the identities of alleged infringers.

12 *MCGIP, LLC v. Does 1-149*, 2011 U.S. Dist. LEXIS 108109, at \*11 n.5 (N.D. Cal.  
13 Sept. 16, 2011); *see also In re BitTorrent Adult Film Copyright Infringement Litig.*,  
14 2012 WL 1570765 at \*10 (E.D.N.Y. May 1, 2012) (noting that unfair litigation tactics  
15 similar to those described above "may be the principal purpose of these actions, and . . .  
16 distinguish these plaintiffs from other copyright holders.").

17 This particular case is another example of current plaintiff's counsel's relentless  
18 "mass discovery" efforts. In the current formulation, the plaintiff sues just one  
19 defendant, then says there are numerous potential "joint tortfeasors" or so-called "co-  
20 conspirators" as to which identification discovery should be permitted even though they  
21 are not parties. *E.g., CP Prod. v. Doe*, 2012 WL 3205621 (E.D. Cal. Jul. 31, 2012)  
22 (reconsidering and vacating prior order authorizing discovery of the ISPs to identify  
23 alleged "co-conspirators," on grounds including that joinder of the "co-conspirators"  
24 likely would be improper).<sup>1</sup> Thus, discovery is sought as to hundreds or thousands of  
25 individuals – identified solely by IP address – under the theory that they are  
26 simultaneously (i) potential parties as to whom identification is warranted but also  
27 (ii) non-parties as to whom personal jurisdiction, venue, and joinder are not pertinent.  
28 Plaintiff will say that the subscribers' rights, if any, should be addressed after they are

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<sup>1</sup> Additional authorities cited at pages 12-15, *infra*.

1 served and enter an appearance, when the histories of plaintiff's counsel's many cases  
2 show that they have no desire to serve or name any of them as defendants, and, even if  
3 they did, it would come at or near the conclusion of the mass identification and coercion  
4 game that is actually in play.

5 In reality, what CP seeks is not "discovery" at all. Similar to the plaintiffs in  
6 hundreds of comparable cases, CP is actually pursuing a shopping list of names and  
7 contact information that it can use to coerce settlement.<sup>2</sup> Although CP has told the  
8 Court that the identities of hundreds of Internet subscribers (who may or may not be the  
9 individuals using a given Internet account at any point in time) would be relevant to its  
10 claims against the single John Doe, CP does not articulate any basis for such a  
11 contention as to *even one* of the hundreds of so-called "joint tortfeasors," let alone all of  
12 them.

13 Federal courts across the country have recognized the potential for abusive  
14 settlement tactics and have, in rapidly increasing numbers, quashed subpoenas, severed  
15 multiple defendants, imposed sanctions, and generally increased their supervision and  
16 skepticism over these lawsuits and massive discovery requests. For example, Chief  
17 Judge Holderman of the Northern District of Illinois recently observed, in a case  
18 factually identical to this one involving CP's national counsel, that plaintiffs who are  
19 enlisting the courts for the purpose of harvesting contact information are encountering a  
20 "stiffening judicial headwind" in federal courts across the country. *Pac. Century Int'l,*  
21 *Ltd. v. John Does 1-37*, 282 F.R.D. 189, 194 (N.D. Ill. 2012) (finding that because  
22 plaintiff had not, and could not plausibly, plead the existence of an agreement among  
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24 <sup>2</sup> See, e.g., *K-Beech, Inc. v. Does*, 2011 U.S. Dist. LEXIS 124581, at \*7 (E.D. Va. Oct.  
25 5, 2011) (explaining the court's concern that "plaintiffs have used the offices of the  
26 Court as an inexpensive means to gain the Doe defendants' personal information and  
27 coerce payment from them"). Additional authorities cited at pages 2-3, *supra* and pages  
28 5-6, 9, 15, *infra*.

1 these unidentified users of IP addresses, "allegations of civil conspiracy are only  
2 unjustified attempts to bolster the obtaining of irrelevant discovery about non-parties.").

3 Another judge stated:

4 [T]he court shares the concern that these cases potentially open the door to  
5 abusive settlement tactics. . . . Nothing currently prevents Plaintiff from  
6 sending a settlement demand to the individual that the ISP identifies as the  
7 IP subscriber. That individual—whether guilty of copyright infringement  
8 or not—would then have to decide whether to pay money to retain legal  
9 assistance to fight the claim that he or she illegally downloaded sexually  
10 explicit materials, or pay the money demanded. This creates great  
11 potential for a coercive and unjust "settlement."

12 *Hard Drive Prods. v. Does*, 2011 U.S. Dist. LEXIS 132449, at \*9 (N.D. Cal. Nov. 16,  
13 2011).<sup>3</sup>

14 <sup>3</sup> See also, e.g., *Cinetel Films, Inc. v. Does 1-1,052*, 2012 WL 1142272 (D. Md. Apr. 4,  
15 2012) (dismissing all Does for improper joinder but one); *AF Holdings LLC v. Does 1-  
16 135*, 2012 WL 1038671 (N.D. Cal. Mar. 27, 2012) (dismissing lawsuit for failing to  
17 serve any defendants); *Patrick Collins, Inc. v. John Does 1-23*, 2012 WL 1019034 (E.D.  
18 Mich. Mar. 26, 2012) (dismissing from action Does 2-23 for improper joinder); *K-  
19 Beech, Inc. v. John Does 1-41*, 2012 WL 773683 (S.D. Tex. Mar. 8, 2012) (dismissing  
20 all Does but one because plaintiff's copyright concerns "do[] not justify perverting the  
21 joinder rules"); *SBO Pictures, Inc. v. Does 1-87*, 2012 WL 177865 (D.D.C. Jan. 19,  
22 2012) (ordering plaintiff to show Does' IP addresses are within Court's jurisdiction  
23 before granting any discovery); *Raw Films, Inc. v. Does 1-32*, 2011 WL 6840590 (N.D.  
24 Ga. Dec. 29, 2011) (dismissing claims against 29 of 32 Does for improper joinder, and  
25 noting that earlier grant of plaintiff's motion for discovery was done "before  
26 appreciating the manageability problems posed by joinder of unrelated defendants");  
27 *Berlin Media Art v. Does 1-654*, 2011 WL 36383080 (N.D. Cal. Oct. 18, 2011)  
28 (denying motion for *ex parte* discovery for failure to show personal jurisdiction over  
each Doe or proper venue); *Hard Drive Productions, Inc. v. Does 1-30*, 2011 WL  
4915551 (E.D. Va. Oct. 17, 2011) (after initially granting plaintiff's request to take  
discovery, finding "upon due consideration" that Does 2-30 are improperly joined);  
*DigiProtect USA Corp. v. Does 1-240*, 2011 WL 4444666 (S.D.N.Y. Sept. 26, 2011)  
(vacating subpoena and dismissing complaint, with leave to replead only as to Does  
over whom there is prima facie personal jurisdiction); *On the Cheap, LLC v. Does 1-  
5011*, 2011 WL 4018258 (N.D. Cal. Sept. 6, 2011) (dismissing Does 1-16 and 18-5,011,  
after originally granting plaintiff's *ex parte* order, based on multiple concerns arising

Footnote continues on next page.

### Procedural History of This Case

1  
2 Plaintiff CP Productions, Inc. filed a complaint against a single John Doe  
3 defendant alleging that this single Doe used the BitTorrent protocol to violate CP's  
4 copyright in one of its pornographic movies. (Compl. ¶¶ 1-3, ECF No. 1.) The  
5 Complaint asserts three causes of action: (1) copyright infringement, (2) civil  
6 conspiracy with the so-called "joint tortfeasors" – the hundreds of other subscribers  
7 whose identities CP wants so badly to obtain; and (3) contributory infringement.  
8 (Compl. ¶¶ 1-3, 26-46.)

9 CP initially sought leave, *ex parte*, to issue expedited discovery to a host of  
10 Internet service providers (ISPs) to determine the identities of some 700 subscribers  
11 listed in Exhibit A to the Complaint under the theory that they were putative "co-  
12 conspirators" of the single Doe defendant. (Pl.'s *Ex Parte* Mot. for Leave to Take Disc.  
13 Prior To Rule 26(f) Conference at ¶¶ 1-3, ECF No. 5.) Never mind that the actual  
14 downloaders will include visitors, family members, neighbors or strangers to the  
15 Internet subscribers to be identified, and never mind that the single Doe defendant could  
16 not have "conspired" with any of them because that Doe wouldn't have any more of an  
17 idea who they all are than CP does.<sup>4</sup>

18 The Court denied CP's request for mass discovery on an expedited basis, and  
19 instead granted CP leave to issue a subpoena only to the Internet service provider of the  
20 IP address said to correspond to the single Doe defendant, and only for the purpose of  
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22 during the case); *AF Holdings LLC v. Does 1-97*, 2011 WL 2912909 (N.D. Cal. July 20,  
23 2011) (denying discovery of Does 2-97 due to improper joinder).

24 <sup>4</sup> See, e.g., *Hard Drive Prods. v. Does 1-130*, 2011 U.S. Dist. LEXIS 132449, at \*6-7  
25 (the targeted Internet subscribers necessarily will include "[innocent] ISP 'Subscriber[s]'  
26 over whose internet connection the Work allegedly was downloaded."); *Digital Sin, Inc.*  
27 *v. Does 1-5698*, 2011 U.S. Dist. LEXIS 128033, at \*10 (N.D. Cal. Nov. 4, 2011) ("as  
28 has been discussed by other courts in this district, the ISP subscribers may not be the  
individuals who infringed upon Digital Sin's copyright").

1 seeking that person's identity. (Order Granting in Part Pl.'s *Ex Parte* Mot. to Take Disc.,  
2 ECF No. 9.) The Court declined to revisit that order despite CP's request to alter or  
3 amend it; and the Court also denied CP's initial request for a preservation order (Pl.'s  
4 Mot. to Alter or Am. Court's Order of Jul. 25, 2012 Pursuant to Rule 59(e), ECF No.  
5 10), but the Court invited CP to provide authority and arguments on which such an  
6 order might be issued. (Order Re Pl.'s Mot. to Alter or Amend at 2, ECF No. 11.) In  
7 response, CP filed a motion citing authority pertaining to preservation orders issued to  
8 *parties*, without making that distinction clear to the Court (Pl.'s *Ex Parte* Mot. for  
9 Preservation Order at 3, ECF No. 12), and the Court granted the motion and issued the  
10 Order. CP never provided any notice to the ISPs that it was seeking relief against them  
11 in this proceeding until after the Order was issued, and even then CP's counsel did not  
12 provide notice to the ISPs' counsel but instead proceeded to serve it on the ISPs as  
13 though it were just another document in CP counsel's steady stream of Rule 45  
14 subpoenas.<sup>5</sup>

## 15 **II. ARGUMENT**

16 Upon reconsideration, the Court should vacate the Order. While the Court has  
17 been properly leery of allowing CP the invasive discovery it really wants as to the  
18 personally identifiable information of all 700 subscriber targets on its list, even  
19 preservation as required by the Order constitutes unwarranted and unduly burdensome  
20 relief that is not authorized by the Rules or applicable law.

21 The Order is effectively a mandatory injunction compelling the ISPs to suspend  
22 ordinary course of business practices, at their sole cost and expense, even though none  
23 of the injunction elements were established or limitations observed, and even though the  
24 enjoined entities are not parties to this proceeding and were never notified, served, or

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25  
26 <sup>5</sup> The Order directs the ISPs identified in Exhibit A to the Complaint to preserve the  
27 personally identifying information that CP seeks as to all supposed "joint tortfeasor"  
28 subscribers until the completion of the Rule 26(f) conference in this lawsuit.

1 given an opportunity to respond to the requests for relief against them. In addition, CP  
2 has not and cannot establish that the information sought to be preserved is legally  
3 relevant to CP's claims against the single John Doe defendant.

4 **A. The preservation order is tantamount to a mandatory injunction against**  
5 **third parties, and CP has established none of the injunction factors.**

6 The Order should be vacated for the simple reason that it is effectively a  
7 preliminary mandatory injunction – against the ISPs who are at most third-party  
8 witnesses and not actual parties. CP did not even argue, much less establish, that the  
9 preliminary-injunction factors are satisfied (Pl.'s *Ex Parte* Mot. for Preservation Order  
10 at 3),<sup>6</sup> and such an order would only be permitted against an adverse party in the case  
11 with notice.<sup>7</sup> FED. R. CIV. P. 65(a).

12 In this Circuit, a party seeking a preliminary injunction must establish: a  
13 likelihood of success on the merits, a likelihood that the party will suffer irreparable  
14 harm in the absence of preliminary relief, that the balance of equities tips in the favor of  
15 the party seeking the injunction, and that the sought-after injunction is in the public  
16 interest. *Cervantes v. Countrywide Home Loans, Inc.*, 09-cv-517, 2009 WL 1636169 at  
17 \*1-2 (D. Ariz. Jun. 10, 2009) (citing *Am. Trucking Assoc., Inc. v. City of Los Angeles*,  
18 559 F.3d 1046 (9th Cir. 2009) and ultimately denying injunctive relief where the  
19 moving party had failed to demonstrate irreparable harm). At most, CP's motion argued  
20 only irreparable harm. (Pl.'s *Ex Parte* Mot. for Preservation Order at 3-5.) However, if

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21  
22 <sup>6</sup> Nor did CP purport to meet the even higher requirements associated with obtaining a  
23 temporary restraining order. *See* FED. R. CIV. P. 65(b) (temporary restraining order may  
24 issue only where specific facts in an affidavit or verified complaint "show that  
25 immediate and irreparable injury, loss, or damages will result to the movant before the  
adverse party can be heard in opposition" and "the movant's attorney certifies in writing  
any efforts made to give notice and reasons why it should not be required").

26 <sup>7</sup> CP's national counsel is well aware, from a multitude of other copyright litigations, of  
27 the identities of these ISPs' counsel, but did not bother to serve counsel with the motion  
or notify counsel and did not attest to having done so.



1 none of the other factors are demonstrated, even a plaintiff who has established  
2 irreparable harm is not entitled to a preliminary injunction. *See Winter v. Natural*  
3 *Resources Defense Council*, 555 U.S. 7, 24 (2008) ("even if plaintiffs have shown  
4 irreparable injury from the [defendant's actions], any such injury is outweighed by the  
5 public interest . . . "). And CP's motion does not even address any of the other factors.

6 That said, CP's invocation of irreparable harm misses the mark. The Complaint  
7 alleges that CP has used "geolocation technology to trace the IP address of John Doe to  
8 a point of origin within the State of Arizona" and explains that "[g]eolocation is a  
9 method for ascertaining the likely geographic region associated with a given IP address  
10 at a given date and time." (Compl. ¶ 7.) If that is the case, CP can use "geolocation"  
11 technology to determine the proper court in which each of the purported "joint  
12 tortfeasors" might be sued and seek discovery under Rule 45 of the Federal Rules of  
13 Civil Procedure in such proceedings. That CP's business model may lead it to pursue  
14 mass identification under a thin cover of pretextual "joint tortfeasor" or "co-conspiracy"  
15 allegations does not support a legitimate claim of irreparable harm. Any harm here  
16 arises from CP's inappropriate litigation tactics, which is CP's choice and CP's own  
17 doing. *See, e.g., Malibu Media, LLC v. John Does 1-10*, 2012 U.S. Dist. LEXIS 89286  
18 at \*5-9 (C.D. Cal. Jun. 27, 2012) (stating that "[t]he federal courts are not cogs in  
19 plaintiff's copyright-enforcement business model. The Court will not idly watch what is  
20 essentially an extortion scheme, for a case that plaintiff has no intention of bringing to  
21 trial. . . . If [plaintiff] desires to vindicate its copyright rights, it must do it the old-  
22 fashioned way and earn it.").

23 Not only has CP failed to demonstrate the elements of a preliminary injunction,<sup>8</sup>  
24 such relief is not permitted against third-parties like the ISPs. Under the Federal Rules  
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26 <sup>8</sup> CP was also not required to provide any security to pay the ISPs' costs and damages in  
27 the event the injunction was wrongfully issued. FED. R. CIV. P. 65(c).

1 of Civil Procedure, a preliminary injunction may only bind: the parties; the parties'  
2 officers, agents, servants, employees, and attorneys; and other persons who are in active  
3 concert or participation with any of the parties, or the parties' officers, agents, servants,  
4 employees, and attorneys. *See* FED. R. CIV. P. 65(d)(2). Here, none of the ISPs are in  
5 "active concert or participation" with the single John Doe defendant (or, for that matter,  
6 any of the so-called "joint tortfeasors"). (*See* Compl., Ex. A., ECF No. 1-1.) The  
7 injunctive relief contained in the Order is not permitted by the applicable Rules.

8 **B. The authorities provided by CP in support of its request for a preservation**  
9 **order do not provide authority for the issuance of such an order against**  
10 **third-parties.**

11 Further, the cases cited in Plaintiff's *Ex Parte* Motion for Preservation Order do  
12 not support the issuance of preservation orders against third-parties. Those authorities  
13 indicate that, in appropriate circumstances, a *party* to an action may be required to  
14 preserve information during the pendency of the litigation. *Columbia Pictures Indus. v.*  
15 *Bunnel*, 06-cv-1093, 2007 WL 2080419 at \*5-6 (C.D. Cal. May 29, 2007) (requiring  
16 party to preserve IP address logs that were within the party's possession, custody, or  
17 control); *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) (declining to require  
18 party to preserve information because plaintiff had failed to make a required showing,  
19 taking note of the costs of preservation "especially with respect to electronic data," and  
20 questioning which party should bear the expense of any such preservation that might  
21 later be ordered); *Del Campo v. Kennedy*, No. 01-cv-21151, 2006 WL 2586633 (N.D.  
22 Cal. Sep. 8, 2006) (entering interim order requiring preservation of materials by  
23 parties); *The Pueblo of Laguna v. U.S.*, 60 Fed. Cl. 133 (Fed. Cl. 2004) (requiring the  
24 United States, as a party, and several of its agencies, to preserve potentially relevant  
25 information); and *Linnen v. A.H. Robins Co., Inc.*, 10 Mass. L. Rep. 189, 1999 Mass.  
26  
27  
28

1 Super. LEXIS 240 (Mass. Superior Ct. 1999) (requiring party to preserve potentially  
2 relevant e-mails).<sup>9</sup>

3 CP has provided no authority, and the ISPs are not aware of any authority, for the  
4 issuance of a preservation order directed to third-parties such as the ISPs in this case.<sup>10</sup>  
5 Thus, it appears that such an order could only be an injunction, which is not permissible  
6 here (or as to non-parties as a general matter).

7 **C. The Order requires the preservation of materials that are not relevant to**  
8 **CP's claims.**

9 In addition, CP has not demonstrated that the information to be preserved is  
10 relevant to any of its claims against the single defendant in this lawsuit. An order to  
11 preserve specified information necessarily presumes and requires that the information  
12 would ultimately be discoverable; otherwise, there is no reason to preserve it.  
13 Accordingly, CP at least had to demonstrate that it would ultimately be entitled to  
14 discover – in this lawsuit – the identifying information it seeks. CP has made no such  
15 showing. Thus, CP has not provided the most fundamental basis for the issuance of a  
16 preservation order (even if otherwise permissible) and the consequent burden that such  
17 order would impose on the ISPs.

18 **1. CP has not established and cannot establish relevance.**

19 Discovery is appropriate as to "nonprivileged matter that is relevant to any  
20 party's claim or defense." FED. R. CIV. P. 26(b)(1). CP contends or at least intimates  
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22 <sup>9</sup> Another of the authorities cited by CP discusses a court's power to impose remedies  
23 and take appropriate action in connection with spoliation of evidence by a party, but  
24 does not address preservation orders or their propriety. *Glover v. Bic Corp.*, 6 F.3d  
1318, 1322, 1329-30 (9th Cir. 1993).

25 <sup>10</sup> If it were, almost any prospective litigant might file an action against unnamed  
26 defendants solely for the purpose of compelling third parties to preserve at their expense  
27 all information potentially relevant (or, as here, not even shown to be relevant) to  
28 possible future actions.

1 that once it obtains the identities of the 700 or so subscribers whose IP address appear in  
2 Exhibit A to the Complaint, it might name and join some of them in this lawsuit as  
3 "joint tortfeasors" or "co-conspirators." CP's position is that the identities of these non-  
4 parties associated with the IP addresses will be relevant to claims against future  
5 defendants who have not yet been sued. CP (like other plaintiffs in similar cases) seeks  
6 to avoid personal jurisdiction and joinder hurdles while obtaining the identifying  
7 information connected with hundreds of IP addresses located across the country in this  
8 single lawsuit. Again, the reason for this is that CP is actually not interested in litigation  
9 – all CP wants is a long list of names and contact information.

10 In nearly identical circumstances, Chief Judge Holderman of the Northern  
11 District of Illinois denied a motion to compel ISPs to comply with subpoenas for  
12 production of subscriber identifying information. *Pac. Century Int'l*, 282 F.R.D. at 196  
13 (criticizing tactic of seeking so-called co-conspirators' identities because "[b]y that  
14 device, the plaintiffs can avoid all personal jurisdiction and joinder hurdles, and yet  
15 obtain the identifying information connected with hundreds of IP addresses located all  
16 over the country through a single lawsuit."). In that case, as here, the plaintiffs were  
17 producers of pornography that sued a single John Doe defendant alleging copyright  
18 violations and civil conspiracy based on the use of BitTorrent technology to download  
19 the plaintiffs' intellectual property. *Id.* at 192, 194-95. The plaintiffs maintained that  
20 they wanted the names to learn the identities of other co-conspirators so they could  
21 name them in the suit. *Id.* at 195. The court held, however, that the information sought  
22 concerning non-parties was not relevant to any claims at issue in the suit, and thus not  
23 discoverable. *Id.* at 194-96.

24 In that case, the *Pacific Century* court noted that, for relevance to be established,  
25 the purported discovery must have some bearing on the conspiracy and copyright claims  
26 against the current Doe defendant. *Id.* at 195. But considering the nature of the  
27 BitTorrent system, subpoenas seeking the identity of users of non-party IP addresses  
28

1 were not reasonably calculated to lead to discovery of evidence relating to the pending  
2 claims. *Pac. Century Int'l*, 282 F.R.D. at 195. That is because "BitTorrent users remain  
3 anonymous to other BitTorrent users, and have no connection to them beyond the mere  
4 fact that they downloaded the same file." *Id.* The court also noted that "a BitTorrent  
5 user will have no information about other users other than their IP addresses, the same  
6 information the plaintiffs already possess." *Id.* at 195 n.13. "It is therefore," the court  
7 continued, "not a reasonable calculation that the individuals connected to the  
8 subpoenaed IP addresses will have any discoverable information related to the current  
9 defendants." *Id.* at 195.

10 The court also noted that the civil-conspiracy claims appeared unfounded  
11 because the plaintiffs did not plead the existence of an agreement among the alleged  
12 conspirators. *Id.* And, based on what was pleaded, it did not appear plausible that the  
13 plaintiffs *could* plead the existence of a conspiracy given the requirement of pleading an  
14 agreement. *Id.* Thus the court found that the allegations of civil conspiracy were "only  
15 unjustified attempts to bolster the obtaining of irrelevant discovery about non-parties,"  
16 with the real motive being to obtain the subscribers' names so that the plaintiffs could  
17 coerce settlements from them:

18 It is thus plain that the plaintiffs are not seeking information about the  
19 non-party IP addresses for the purpose of litigating their current claims.  
20 Instead, the plaintiffs intend to either sue the individuals whose identity  
21 they uncover or, more likely, to negotiate a settlement with those  
22 individuals....[And,] "when the purpose of a discovery request is to gather  
information for use in proceedings other than the pending suit, discovery  
is properly denied."

23 *Pac. Century Int'l*, 282 F.R.D. at 195-96 (quoting *Oppenheimer Fund, Inc. v. Sanders*,  
24 437 U.S. 340, 353, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978)); *see also Millennium TGA,*  
25 *Inc. v. Comcast Cable Commc'ns, LLC*, --- F.Supp.2d ---, 12-mc-00150, 2012 WL  
26 2371426 (D.D.C. Jun. 25, 2012) ("[i]f the civil conspiracy claim is invalid, there is no  
27 good cause for discovery related to the alleged co-conspirators.").

28

1           These passages could have been written about this case. The information CP  
2 seeks to preserve is not likely to lead to the discovery of admissible evidence. The very  
3 nature of BitTorrent technology and its anonymity precludes plaintiff from alleging an  
4 agreement between BitTorrent users, and yet an agreement is the *sine qua non* of a  
5 conspiracy. Thus, consistent with Rule 11, plaintiff could never allege a conspiracy  
6 claim involving the putative subscribers on its list.

7           Nor are the identities of 700 subscribers (who may or may not have been the  
8 users of the Internet accounts that allegedly committed infringement) necessary for CP  
9 to be able to prove damages in its claims against the single Doe defendant, as CP has  
10 argued but never explained. (*See* Mot. for Expedited Disc. at 4-5.) From Exhibit A to  
11 the Complaint, we learn that CP purports to have the ability to determine how many  
12 times its movie was downloaded or viewed during the period a given swarm allegedly  
13 was observed. CP will not be in a better position to establish damages if it is provided  
14 with personally identifiable information so that it can contact numerous other  
15 subscribers, unknown to CP or the single Doe defendant, who allegedly happened to  
16 upload or download content at some point in time in the same swarm.

17           It is not enough simply to say that CP needs the names and contact information  
18 of 700 non-party subscribers so it can prove damages in its single-defendant suit. In  
19 order to justify the issuance of an order permitting such discovery, CP must, but cannot,  
20 explain *why* those identities are necessary in this context, and how they bear on proof of  
21 damage.<sup>11</sup>

22           As noted above, the federal courts are all too familiar with the aggressive tactics  
23 of plaintiffs represented by CP's national counsel in seeking to uncover personally  
24 identifiable subscriber information *en masse*. Where the tactics involve pretextual "co-

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25  
26 <sup>11</sup> Protection of the subscribers from coercive "settlement" tactics post-identification is  
27 yet another matter.

1 conspirator" pleadings, it appears, based on the case law the ISPs located, that every  
2 federal court which has scrutinized mass discovery requests (outside the context of an  
3 *ex parte* submission by the plaintiff) has refused to play along. *E.g CP Prod. v. Doe*,  
4 2012 WL 3205621 (E.D. Cal. Jul. 31, 2012) (vacating portion of order allowing for  
5 expedited discovery as to co-conspirators, even while "acknowledging risk" that  
6 information might be lost); *Millennium TGA, Inc. v. Comcast Cable Commc'ns, LLC*,  
7 2012 WL 2371426 at \*7 ("Given the intimidating tactics and oppressive demands made  
8 by Plaintiff's counsel in other cases, it is particularly appropriate to require the Plaintiff  
9 to proceed according to the federal rules and only allow discovery related to valid  
10 claims that can and actually will be prosecuted in the federal court where the claims  
11 have been filed."); *First Time Videos, LLC v. Doe*, 2012 WL 1355725 (E.D. Cal. Apr.  
12 18, 2012) ("[A]s numerous other courts have noted, if the undersigned were to grant  
13 plaintiff's renewed request for expedited discovery regarding the alleged co-  
14 conspirators, plaintiff would likely send settlement demands to the individuals whom  
15 the ISP identified as the IP subscriber. That individual – whether guilty of copyright  
16 infringement or not – would then have to decide whether to pay money to retain legal  
17 assistance to fight the claim that he or she illegally downloaded sexually explicit  
18 materials, or pay the money demanded. This creates great potential for a coercive and  
19 unjust 'settlement.'") (internal citations and quotations omitted).

20 **2. The preservation order is unduly burdensome.**

21 CP asserts that the burden on the ISPs to preserve the information plaintiff seeks  
22 is "minimal" and that preserved information may be stored by the ISPs at "little or no  
23 cost." (Mot. for Protective Order at 4-5.) This is a wholly unsupported statement and is  
24 flatly untrue. Preserving information concerning hundreds of Internet subscribers  
25 obviously involves careful research and preservation efforts. And even that burden  
26 would be minor when compared to the aggregate burdens that would be imposed under  
27 the numerous preservation orders that CP's national counsel would likely obtain if  
28





1 Dated this 14th day of September, 2012.  
2

3 /s/ Jason L. Sanders

4 Jason L. Sanders, Arizona Bar No. 022679

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**NOTICE OF ELECTRONIC FILING**

I hereby certify that on this 14th day of September, 2012, I electronically filed the foregoing with the Clerk of the Court for filing and uploading to the CM-ECF system which will send notifications of such filing to all parties of record.

A COPY of the attached proposed order was electronically mailed to:

Honorable Sharon L. Gleason (gleasonproposedorders@akd.uscourts.gov)  
U.S. District Court  
Federal Building & U.S. Courthouse  
222 West 7th Ave., Box 50  
Anchorage, AK 99513-9513

/s/ Jason Sanders \_\_\_\_\_