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6 IN THE UNITED STATES DISTRICT COURT FOR THE
7 EASTERN DISTRICT OF CALIFORNIA
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9 In the Matter Of a Petition By)
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INGENUITY13 LLC

No. 2:11-mc-00084-JAM-DAD

**PLAINTIFF'S RESPONSE TO MOTION
FOR RECONSIDERATION OF ORDER
GRANTING INGENUITY13 LLC'S
PETITION TO PERPETUATE
TESTIMONY**

15 **INTRODUCTION**

16 On November 28, 2011, four nonparty Internet Service Providers¹ (hereinafter “the
17 Nonparties”) filed a joint motion seeking reconsideration of this Court’s order granting Petitioner’s
18 petition to perpetuate testimony. (ECF No. 9.) The Nonparties’ motion is a tactical move in the
19 broader discussion between copyright holders and Internet Service Providers (“ISPs”) over copyright
20 protection. *See, e.g., Call of the Wild Movie v. Does 1–1,062*, 770 F. Supp. 2d 332 (D.D.C. 2011)
21 (rejecting attempt by Time Warner d/b/a Road Runner to defeat discovery in a BitTorrent-based
22 copyright infringement case). Copyright holders, like Petitioner, seek infringer-identifying
23 information to salvage the value of their copyrights in an age where digital infringement represents
24 an existential threat to creative arts professionals. *See Metro Goldwyn-Mayer Studios Inc. v.*
25 *Grokster, Ltd.*, 545 U.S. 913, 928-29 (2005) (citing the concern that “digital distribution of
26 copyrighted material threatens copyright holders as never before.”). The Nonparties, on the other
27 hand, wish to protect their high-speed (and highly-profitable) Internet business.

28 ¹ Cox Communications, Road Runner Holdco LLC, SBC Internet Services, Inc. d/b/a AT&T Internet Services, and Verizon Online LLC.

1 In this action, the Court granted Petitioner’s narrowly-tailored request to preserve critical
2 evidence that will, with certainty, be destroyed in the near future. (ECF No. 8.) The Court’s order
3 was consistent with Rule 27’s sole purpose: preserving such evidence. *In re Application of*
4 *Checkosky*, 142 F.R.D. 4, 5 (D.D.C. 1992) (stating the purpose of Rule 27 “is simply to preserve
5 evidence that would otherwise would be in danger of being lost.”). The Nonparties’ objections to
6 Petitioner’s Rule 27 petition range from *ad hominem* attacks against Petitioner (ECF No. 9 at 3, 8)
7 (referring to Petitioner as a vexatious litigant, notwithstanding that Petitioner’s Rule 27 petition was
8 its first legal filing in its company history) to objections that are transparently inconsistent with
9 voluminous authority to the contrary. (*id.* at 12-13) (arguing that Petitioner’s Rule 27 request
10 violates the infringer’s First Amendment rights, notwithstanding overwhelming authority to the
11 contrary.) After carefully reviewing the Nonparties’ objections and the cases cited in support thereof,
12 Petitioner is confident that the Court will reject the Nonparties’ arguments.

13 **DISCUSSION**

14 The Nonparties make several arguments against Petitioner’s Rule 27 petition. Specifically,
15 the Nonparties argue: Petitioner failed to show that it is presently unable to bring a lawsuit against
16 the infringers (ECF No. 9 at 7-9); Petitioner is using its Rule 27 petition to discover information for
17 its lawsuit instead of simply preserving evidence (*id.* at 9-11); Petitioner failed to serve notice of the
18 petition on the expected adverse parties (*id.* at 11-12); the use of the Rule 27 petition would violate
19 the First Amendment rights of the expected adverse parties (*id.* at 12-13); and denying the petition
20 would not result in a failure or delay of justice. (*Id.*)

21 This section consists of three parts. In part I, Petitioner argues that the Nonparties lack
22 standing to move for reconsideration of this Court’s order. In part II, Petitioner argues that the
23 Nonparties have not demonstrated that the Court’s order was clearly erroneous. In part III, Petitioner
24 addresses each of the Nonparties’ legal arguments.

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1 **I. THE NONPARTIES LACK STANDING TO MOVE FOR RECONSIDERATION OF**
2 **THE COURT’S ORDER**

3 The Nonparties make clear that they “are not parties and have no interest in the underlying
4 dispute....” (ECF No. 9 at 5 n.2.) Because of this, the Nonparties lack standing to invoke the power
5 of the Court to decide on their motion. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)
6 (Stating standing is “an essential and unchanging part of the case-or-controversy requirements of
7 Article III.”); *see also* U.S. Const. art III. It is the “burden of the party who seeks the exercise of
8 jurisdiction in his favor to allege facts demonstrating that he is a proper party to invoke judicial
9 resolution of the dispute.” *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (internal quotation marks
10 omitted). Far from alleging facts demonstrating that they are the proper party to invoke the court’s
11 jurisdiction, the Nonparties have affirmatively disclaimed any basis for standing to bring their
12 motion. (ECF No. 9 at 5 n.2.)²

13 The Constitutional requirement of standing is not merely academic. When nonparties bring
14 motions for relief on behalf of others they usurp the prerogatives of actual participants to the action.
15 In this case, the interests of the infringers and those of the Nonparties are in material conflict.
16 Attachment A to the Nonparties’ memorandum of points and authorities illustrates this conflict. (*Id.*
17 at 14-15.) Throughout the attachment the Nonparties argue that Rule 27 involves less judicial
18 oversight than a traditional legal action. (*Id.*) What the Nonparties fail to consider is that litigation is
19 a measure of last resort. The Nonparties appear eager to thrust the infringers into litigation and deny
20 them an opportunity traditionally afforded to all potential litigants: the right to negotiate claims prior
21 to litigation. Because they “are not parties and have no interest in the underlying dispute,” the
22 Nonparties will not bear the burden of higher litigations costs that the infringers will be certain to
23 experience if named and served with process. And one should not forget that infringers are liable for
24 Plaintiff’s attorney’s fees and costs if Petitioner prevails against them. 17 U.S.C. § 505.

25 To be clear, Petitioner is not arguing that the Nonparties lack standing to file any motion in
26 this action. It is clear that the Nonparties would have standing to file a motion to quash Petitioner’s

27 ² Certain of the Nonparties were not even served with subpoenas in this action. These Nonparties have no good faith
28 basis to claim standing to move the Court for reconsideration of its order.

1 subpoena on the grounds of undue burden, for instance. Fed. R. Civ. P. 45(c)(1). By moving the
2 Court to reconsider its order, however, the Nonparties travel far beyond the arguments that they have
3 standing to make.

4 **II. THE NONPARTIES HAVE NOT DEMONSTRATED THAT THE COURT’S ORDER**
5 **WAS CLEARLY ERRONEOUS**

6 The Nonparties brought their motion for reconsideration on the basis that this Court’s order
7 was “clearly erroneous or contrary to law.” (ECF No. 9 at 6.) This standard requires more than a
8 suggestion that some courts may rule differently, and instead requires proof that the court was
9 clearly mistaken and its decision cannot be legally justified. *See Sch. Dist. No. 1J, Multnomah Cnty.,*
10 *Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth grounds for
11 reconsideration). That is not the case here. Multiple courts have granted Rule 27 petitions in highly
12 similar factual contexts. *See e.g., Gen. Bd. of Global Ministries v. Cablevision Lightpath, Inc.*, No.
13 06-03669, 2006 WL 2807177 (E.D.N.Y. Nov. 30, 2006); *GWA, LLC v. Cox Commc’ns, Inc.*, No. 10-
14 00741, 2010 WL 1957864 (D. Conn. May, 17 2010). The Nonparties are unable cite to a case—
15 much less controlling authority—for the proposition that Rule 27 may not be used to preserve an
16 anonymous wrongdoer’s identity. “The standard for granting such a motion is strict, and
17 reconsideration will generally be denied unless the moving party can point to controlling decisions
18 or data that the court overlooked . . .” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255 (2nd Cir. Nov. 15,
19 1995). Because of this failure, the Nonparties cannot meet the high burden required to succeed on a
20 motion for reconsideration.

21 **III. THE NONPARTIES IDENTITY NO FATAL FLAWS WITH PETITIONER’S RULE**
22 **27 PETITION**

23 This section is organized into two subsections. Subsection A discusses why Petitioner’s Rule
24 27 petition exhaustively satisfies the elements of Rule 27. Subsection B addresses the Nonparties’
25 miscellaneous objections.

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1 **A. Petitioner’s Rule 27 Petition Exhaustively Satisfies the Elements of Rule 27**

2 The elements of a valid Rule 27 petition are straightforward. First, a petitioner must show:

- 3 (A) that the petitioner expects to be a party to an action cognizable in a United
4 States court but cannot presently bring it or cause it to be brought;
- 5 (B) the subject matter of the expected action and the petitioner’s interest;
- 6 (C) the facts that the petitioner wants to establish by the proposed testimony and
7 the reasons to perpetuate it;
- 8 (D) the names or a description of the persons whom the petitioner expects to be
9 adverse parties and their addresses, so far as known; and
- 10 (E) the names, address, and expected substance of the testimony of each deponent.

11 Fed. R. Civ. P. 27(a)(1). Next, a court must find that “perpetuating the testimony *may* prevent a
12 failure or delay of justice.” Fed. R. Civ. P. 27(a)(3) (emphasis added).

13 The Nonparties argue that Petitioner failed to satisfy Fed. R. Civ. P. 27(a)(1)(A) (unable to
14 presently bring an action), (a)(1)(E) (showing the substance of the testimony of each deponent) and
15 Fed. R. Civ. P. 27(a)(3) (preventing a failure or delay of justice). (ECF No. 9 at 2-3.) Petitioner’s
16 satisfaction of parts (B) and (C) and (D) of Fed. R. Civ. P. 27(a)(1) were not challenged in the
17 Nonparties’ motion and will not be discussed in this response.³ (*Id.*)

18 **1. Petitioner Cannot Presently Bring an Action Against the Infringers**

19 Fed. R. Civ. P. 27(a)(1)(A) requires a petitioner to show, *inter alia*, that it cannot *presently*
20 bring or cause an action to be brought. Petitioner readily satisfies this requirement because it does
21 not know the infringers’ identities. (ECF No. 1 ¶¶ 2-4.) Only after Petitioner learns the infringers’
22 identities will Petitioner be able to bring an action against them. In other words, Petitioner cannot
23 *presently* bring an action or cause it to be brought against unknown infringers. Fed. R. Civ. P.
24 27(a)(1)(A).

25 ³ The Nonparties incorrectly state the legal standard for deciding a Rule 27 petition. In particular, the Nonparties attempt
26 to insert the notice and service requirements of Fed. R. Civ. P. 27(a)(2) into the elements of a Rule 27 petition—an
27 attempt for which they provide no authority. Fed. R. Civ. P. 27(a)(2) is a procedural provision and not an element of a
28 Rule 27 petition. *See Tennison v. Henry*, 203 F.R.D. 435 (N.D. Cal. 2001) (explaining that the requirements for a Rule
 27 petition are that the petitioner show it: 1) is acting in anticipation of litigation in federal court; 2) adequately explained
 the substance of the testimony it seeks to obtain; and 3) presents evidence that there is a significant risk that the evidence
 will be lost if it is not perpetuated.).

1 The Nonparties argue that Petitioner could utilize “Doe defendant procedures” to preserve
2 the identities of the anonymous infringers. (ECF No. 9 at 8.) Their argument misses the point. Rule
3 27 does not require Petitioner to show that there are no other available means of preserving the
4 infringers’ identities. Fed. R. Civ. P. 27(a)(1)(A). It instead requires, by its very words, Petitioner to
5 show that it cannot *presently bring an action*. *Id.* “[W]here other means of obtaining evidence exist,
6 it has been held that the court need not order the petitioner to exhaust those other means before
7 ordering the taking of depositions under Rule 27.” Construction and Application of Fed. R. Civ. P.
8 27, 37 A.L.R. Fed. 2d 573 at *12 (2009) (*citing Frasier v. Twentieth Century-Fox Film Corp.*, 22
9 F.R.D. 194 (D. Neb. 1958). The Nonparties do not cite to, nor is Petitioner aware of, any authority
10 that supports the proposition that the availability of “Doe defendant procedures” precludes the use of
11 a Rule 27 petition to preserve the identities of anonymous wrongdoers. (*See generally* ECF No. 9.)
12 To the contrary, multiple courts have granted Rule 27 petitions to preserve the identifying
13 information of ISP subscribers, notwithstanding the availability of “Doe defendant procedures.” *See*
14 *Gen. Bd. of Global Ministries*, No. 06-03669, 2006 WL 2807177; *Cox Commc’ns, Inc.*, No. 10-
15 00741, 2010 WL 1957864.

16 The Nonparties cite several of cases in support of their “Doe Defendant procedures”
17 argument, but all but one do not even analyze the “presently able to bring a suit” element of Rule 27
18 and none of them involve doe defendants. (ECF No. 9 at 7-9.) The court in *In re Winning (HK)*
19 *Shipping Co.*, merely stated, “[t]he litigants spent much time at the hearing arguing about whether
20 [the petitioner] would be able to bring a suit However, the undersigned need not address that
21 issue as it is manifest that [the petitioner] cannot satisfy any of the other requirements of Rule 27.”
22 2010 U.S. Dist. LEXIS 54290, at *22 n 9 (S.D. Fla. Aug. 30, 2010). Similarly, the court in *Nevada v.*
23 *O’Leary* stated, “[w]e need not decide in this case whether [the petitioner] can meet the requirements
24 for subsection 1 of Rule 27(a)(1) . . .” 63 F.3d 932, 936 (9th Cir. 1995). The court in *In re Landry-*
25 *Bell* did not consider the Rule 27(a)(1)(A) element in its decision. 232 F.R.D. 266 (W.D. La. 2005)
26 (denying Rule 27 petition on the grounds that petitioner was seeking pre-suit discovery under Fed.
27 R. Civ. P. 11). While the court in *In re Yamaha Motor Corp.* explained that being able to presently
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1 bring a lawsuit will defeat a Rule 27 petition, the court did not analyze the element any further. 251
2 F.R.D. 97, 99-100 (N.D.N.Y. 2008) (denying Rule 27 petition for failure to demonstrate that the
3 testimony would be lost or destroyed and for failure to demonstrate what the testimony would
4 involve). In *Briscoe v. Winslow Twp.*, the basis for the court’s denial of the Rule 27 petition was the
5 failure by petitioner to show that security tapes would be destroyed with the passage of time, not the
6 ability of the petitioner to presently bring a suit. 2010 U.S. Dist. LEXIS 862248 (D.N.J. Aug. 23,
7 2010).

8 The Nonparties cite only one case where Fed. R. Civ. P. 27(a)(1)(A) served as a basis—albeit
9 one of many—for the denial of a Rule 27 petition. *In re I-35W Bridge Collapse Site Inspection*, 243
10 F.R.D. 349 (D. Minn. 2007). But *In re I-35W Bridge Collapse Site Inspection* did not involve a
11 factual scenario where Doe Defendant procedures would have had any applicability. *Id.* Instead, the
12 petitioner’s request was to examine a bridge collapse site. *Id.* Importantly, the petitioner was unable
13 to provide any explanation for its inability to bring an action. *Id.* In this case, Petitioner has such an
14 explanation: the infringers are anonymous. (ECF No. 1 ¶¶ 2-4.)

15 2. Petitioner is Seeking to Preserve Known Testimony

16 Fed. R. Civ. P. 27(a)(1)(E) requires a petitioner to show the substance of the testimony it
17 seeks to preserve. Petitioner did so. (ECF No. 1 ¶ 3) (“Petitioner seeks the name, address, telephone
18 number, e-mail address and Media Control Access number of each account holder . . .”).

19 The Nonparties argue otherwise. (ECF No. at 9-11.) Specifically, the Nonparties argue that
20 Petitioner cannot satisfy Fed. R. Civ. P. 27(a)(1)(E)’s requirement of showing the substance of
21 testimony when Petitioner does not presently know the account holder’s identifying information.
22 (*Id.*) In essence, the Nonparties argue that Rule 27 can only be used when a petitioner knows the
23 answers to the questions it would ask. The U.S. Court of Appeals for the Ninth Circuit disagrees.

24 In *Martin v. Reynolds Metal Corp.*, Reynolds filed a Rule 27 petition to, *inter alia*, sample
25 the “fluorine content of samples of forage, feed, air, water, soil, vegetation and mineral supplements
26 taken periodically from areas where livestock are being pastured.” 297 F.2d 49, 52 (9th Cir. 1961).
27 The Ninth Circuit affirmed the district court’s grant of the petitioner’s Rule 27 petition, reasoning,

1 “The inquiry here proposed is narrowly limited, its purpose being to enable Reynolds to discover
2 when relevant physical evidence is likely to be disposed of and lost, and the location of other
3 physical evidence that has been transferred away from appellees’ property and thus made less readily
4 available.” *Id.* at 55. Reynolds did not “know”, *a priori*, the fluorine content of the various items it
5 sought to sample. *Id.* Nor did the Ninth Circuit believe this was relevant. *Id.* Instead, the Ninth
6 Circuit focused its decision on the narrow scope of Reynolds’ inquiry and the relevance of the
7 physical evidence that Reynolds was seeking to preserve. *Id.* This interpretation of Fed. R. Civ. P.
8 Rule 27(a)(1)(E) meshes seamlessly with the broader purpose of Rule 27, which “is simply to
9 preserve evidence that would otherwise would be in danger of being lost.” *In re Application of*
10 *Checkosky*, 142 F.R.D. 4, 5 (D.D.C. 1992).

11 The Ninth Circuit discussed *Martin* in its decision in *O’Leary. Nevada v. O’Leary* 63 F.3d at
12 936 (9th Cir. 1995). In *O’Leary*, the State of Nevada sought to depose over two dozen scientists to
13 learn their thoughts and opinions about certain technical reports on the federal government’s
14 proposed Yucca Mountain project. *Id.* at 933. In its opinion affirming the district court’s denial of
15 Nevada’s petition, the Ninth Circuit reasoned that Nevada, by virtue of its expansive request, was
16 “seeking to undertake an inquiry similar to that authorized as discovery under Rule 26.” *Id.* at 936.
17 The Ninth Circuit did not rule—as the Nonparties suggest—that “knowledge” of the answers to the
18 questions it would ask was required. *Id.* Instead, the Ninth Circuit used the word “unknown” to mean
19 that Nevada was required to “know”, *a priori*, enough about the testimony to show that the
20 scientists’ depositions would yield testimony that was material and competent. *Id.* According to
21 *O’Leary*, Rule 27 cannot be used when a Petitioner does not know whether material and competent
22 evidence exists or as a device to determine whether such evidence exists. *See Id.* Of course,
23 requiring both a narrowly-tailored preservation request and a showing of materiality safeguards
24 against the misuse of Rule 27 as a pre-suit discovery device. *Martin*, 297 F.2d at 55.

25 In this action, there can be no serious question over whether the account holder identities’ are
26 material and competent evidence. This evidence is vital to Petitioner’s ability to seek redress for its
27 copyright infringement claims. When it is destroyed, Petitioner’s ability to prosecute its claim will
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1 likewise be destroyed. Moreover, the scope of Petitioner’s request is narrow—even narrower than
2 Reynolds’ request for fluorine sampling in *Martin*, 297 F.2d 49.

3 The Nonparties claim that “overwhelming authority from courts across the country holds that
4 Rule 27 is not a vehicle to be used for identifying potential defendants.” (ECF No. 9 at 2.) But they
5 fail to cite to any such authority. (*See generally* ECF No. 9.) Instead, they just cite to cases that stand
6 for the proposition that Rule 27 cannot be used to investigate claims or for broad Rule 26-style
7 discovery requests. (*Id.* at 9-10.)

8 In *In re Checkosky*—miscited by Nonparties as a C.D. Cal. case—petitioners submitted a
9 broad Rule 27 request to preserve documentary evidence in an ongoing Securities and Exchange
10 Commission dispute. 142 F.R.D. 4 (D.D.C. 1992). Far from demonstrating that Petitioner’s use of
11 Rule 27 is improper, *In re Checkosky* actually supports Petitioner’s request. While the *In re*
12 *Checkosky* Court found that the petitioner’s “broad request for relief f[ell] short of the Rule-27
13 requirement that a petitioner must make a narrowly-tailored showing of ‘the substance of the
14 testimony which the petitioner expects to elicit from’ each person deposed,” it left the door open to
15 very narrowly-tailored requests such as Petitioner’s. *Id.* at 8.

16 The case of *Wilkins v. County of Alameda* also has little relevance to Petitioner’s request.
17 2011 U.S. Dist. LEXIS 24642 (N.D. Cal. Feb. 25, 2011). In response to a lengthy handwritten
18 request by a prisoner moving, *pro se*, for a variety of forms of relief (including a request for relief
19 under Rule 27) the district court ruled that Wilkins could not use Rule 27 to seek unknown
20 evidence—just as the Ninth Circuit did in *O’Leary*. *Id.* at 2. In *In re Ramirez*, the court noted that
21 petitioner’s deposition request failed to “delineate any limits” to its scope. 241 F.R.D. 595, 596
22 (W.D. Tex. 2006). Citing *O’Leary*, the court ruled that requests to perpetuate testimony must be
23 “narrowly tailored” and held that petitioner’s petition involved a “broad Rule-26 request[.]” *Id.* at
24 597.

25 The sole holding of *In re Ford* was that Rule 27 did not extend to allow pre-complaint
26 discovery under Rule 11. 170 F.R.D. 504, 508 (M.D. Ala. 1997). In the present action, Petitioner
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1 petitions the Court to preserve crucial evidence, not allow pre-complaint discovery under Rule 11.
2 (ECF No. 1 ¶ 3.)

3 In *In re Allegretti*, the petitioners filed a Rule 27 petition to depose an individual about the
4 “facts of the expected litigation and other facts surrounding Petitioners’ claims” and obtain
5 production of documents including “all correspondence between Vincenzo and Di Costanzo at any
6 time since the incorporation of AGI.” 229 F.R.D. 93, 97-98 (S.D.N.Y. 2005). In its denial of the
7 petitioner’s request, the court focused specifically on the impermissibly broad nature of the
8 petitioner’s request and cited *O’Leary* in holding that proposed testimony must be set forth with
9 sufficient specificity. *Id.* at 96-98.

10 The Nonparties describe *In re Landry-Bell* as “particularly instructive.” (ECF No. 9 at 10.)
11 Although it may be instructive, the lessons taught in *In re Landry-Bell* do not support the
12 Nonparties’ arguments. There, the petitioner sought “leave under Fed. R. Civ. P. 27 to conduct pre-
13 lawsuit discovery in order to complete a proper Rule 11 investigation.” 232 F.R.D. 266 (W.D. La.
14 2005). Specifically, the petitioner sought to obtain information from an adult website about how her
15 photograph and name appeared on the website. *Id.* Further, the petitioner sought to obtain discovery
16 from Zack Wilhelm, whom the petitioner believed posted her information to the website. *Id.* The
17 purpose of the discovery was to ascertain whether petitioner had a claim against the website or
18 Wilhelm. *Id.* at 267. Far from instructing that a Rule 27 petition cannot be used to preserve account
19 holder identifying information under the circumstances of the present action, *In re Landry-Bell*
20 merely teaches the non-controversial point that Rule 27 does not extend to allow pre-complaint
21 discovery under Rule 11—a lesson also taught in *In re Ford*.

22 In this case, Petitioner is not seeking discovery to allow it to “draft a complaint,” “determine
23 whether a cause of action exists,” or determine how its infringing content ended up in a BitTorrent
24 swarm. It is simply seeking to preserve critical, known testimony before it is permanently destroyed.
25 The Nonparties understandably wish to undermine *Gen. Bd. of Global Ministries*, No. 06-03669,
26 2006 WL 2807177 and *Cox Commc’ns, Inc.*, No. 10-00741, 2010 WL 1957864—the only decisions
27 that have been made in factually comparable scenarios—given that those decisions greatly
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1 undermine their arguments. But they fail to cite a single superseding case or offer a single
2 supportable reason for why the courts in those decisions erred.

3 **3. Denying the Petition May Result in a Failure or Delay of Justice**

4 The final element of a Rule 27 petition is a finding that “perpetuating the testimony *may*
5 prevent a failure or delay of justice.” Fed. R. Civ. P. 27(a)(3) (emphasis added). The Nonparties
6 argue that a denial of Petitioner’s Rule 27 petition will not result in a “failure or delay of justice”
7 under Fed. R. Civ. P. 27(a)(3). (ECF No. 9 at 12-13.)

8 The Nonparties’ core argument is that the availability of “Doe Defendant procedures” will
9 prevent any failure or delay of justice. (ECF No. 9 at 8.) As before, the Nonparties fail to cite to a
10 *single* case that says the availability of “Doe Defendant procedures” has any relevance to
11 determining whether a failure to preserve the account holder information will prevent a failure or
12 delay of justice. (*See generally* ECF No. 9.) To the contrary, multiple courts have granted Rule 27
13 petitions to preserve account holder information notwithstanding the availability of “Doe Defendant
14 procedures.” *See General Board of Global Ministries*, No. 06-03669, 2006 WL 2807177; *Cox*
15 *Commc’ns, Inc.*, No. 10-00741, 2010 WL 1957864. And these courts have been correct in doing so
16 because once account holder information is destroyed there is no way to prosecute anonymous
17 wrongdoers for their misdeeds.

18 Further, even if the availability of “Doe Defendant procedures” was relevant to the “failure
19 or delay of justice” element of Rule 27, it is clear that “Doe Defendant procedures” are an
20 enormously deficient mechanism when the law surrounding these procedures is so unsettled. By way
21 of example, Plaintiff’s counsel filed three lawsuits in the Northern District of California on behalf of
22 a client, AF Holdings LLC: *AF Holdings LLC v. Does 1-135*, No. 11-03336 (N.D. Cal. 2011), *AF*
23 *Holdings LLC v. Does 1-97*, No. 03067 (N.D. Cal. 2011), and *AF Holdings LLC v. Does 1-96*, No.
24 11-03335 (N.D. Cal. 2011). Each of these lawsuits involved the same underlying copyrighted work,
25 identical pleadings and identical discovery papers.

26 However, the results of the suits could not have been more diverse. In the first case, the
27 district court granted Plaintiff’s request to take expedited discovery and Plaintiff was successful in
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1 preserving the account holders' identities. *AF Holdings LLC v. Does 1-135*, No. 11-03336. In the
2 second case, the district court denied Plaintiff's request to take expedited discovery of the account
3 holders' identities and the account holder information was destroyed. *AF Holdings LLC v. Does 1-*
4 *97*, No. 03067. In the third case, the district court ultimately granted Plaintiff's request, but the
5 length of time it took for the favorable decision to be reached was such that the account holder
6 information was destroyed. *AF Holdings LLC v. Does 1-96*, No. 11-03335.

7 The wide variability in these results reflects the unsettled nature of the law regarding "Doe
8 Defendant procedures" in BitTorrent-based copyright infringement cases. Plaintiff's counsel expects
9 these issues to be brought before the Ninth Circuit in the near future and once the Ninth Circuit
10 resolves the split at the district court level it may be the case that Rule 27 petitions will not be
11 necessary with respect to these actions. Until that time, though, it is axiomatic that "perpetuating the
12 [account holder information] *may* prevent a failure or delay of justice." Fed. R. Civ. P. 27(a)(3)
13 (emphasis added).

14 **A. The Nonparties' Miscellaneous Objections are Unpersuasive**

15 The Nonparties make two miscellaneous objections against Petitioner's Rule 27 petition.
16 First, the Nonparties argue that Petitioner's failure to formally serve the expected adverse parties
17 should defeat the petition. (ECF No. 9 at 11-12). Second, the Nonparties argue that preserving the
18 account holders' identities will violate the account holder's First Amendment privacy rights. (*Id.* at
19 12-13.) Neither of these arguments is persuasive.

20 **1. The Expected Adverse Parties Will Have an Opportunity to Contest the 21 Petition**

22 The Nonparties take issue with the fact that Petitioner was unable to formally serve the
23 expected adverse parties (i.e. the infringers) with a copy of the petition and a notice as required
24 under Fed. R. Civ. P. 27(a)(2). (ECF No. 9 at 11-12.) Section (a)(2) of Rule 27 is a procedural
25 safeguard and is not an element necessary for the granting of the petition. *Tennison v. Henry*, 203
26 F.R.D. 435 (N.D. Cal. 2001) (explaining that the requirements for a Rule 27 petition are that the
27 petitioner show it: 1) is acting in anticipation of litigation in federal court; 2) adequately explained
28 the substance of the testimony it seeks to obtain; and 3) presents evidence that there is a significant

1 risk that the evidence will be lost if it is not perpetuated.). *See also In the Matter of Petition of*
2 *Allegretti*, 229 F.R.D. 93 (S.D.N.Y. 2005). Petitioner has exhaustively satisfied these elements. (ECF
3 No. 1 ¶¶ 2-3.)

4 The notice requirement will only defeat an otherwise valid Rule 27 petition if it results in
5 prejudice to the expected adverse party. *Application of Deiulemar Di Navigazione SpA*, 153 F.R.D.
6 592 (E.D. La. 1994) (holding that failure to give the expected adverse party notice under Fed. R.
7 Civ. P. 27(a)(2) did not warrant denying the motion to perpetuate testimony absent a showing of
8 prejudice.) The expected adverse parties in this case will not be prejudiced by the petition. Petitioner
9 proposed, and the Court ordered, that since the ISPs were the only entities aware of the identities of
10 the account holders in the action, they would provide the necessary notice. (*See* ECF No. 8 ¶ 2)
11 (“Each ISP will have thirty (30) days from the date a copy of this Order and a copy of the subpoena
12 are served to respond, so that it may have sufficient time *to provide notice to the subscribers* whose
13 information Petitioner seeks to obtain.”) (emphasis added). The Court’s order further explained that
14 the account holders had the ability to raise objections to Petitioner’s subpoena. (*Id.* ¶ 3.) The
15 expected adverse parties are made aware of the petition and are given an opportunity to raise their
16 concerns with this Court in accordance with the spirit of this rule.

17 Courts have found this method of providing notice to the account holders sufficient for the
18 requirements of a Rule 27 petition. *Global Ministries*, 2006 WL 2807177, ECF No. 26 at *7 (finding
19 that even though the petitioner was unable to ascertain the names of, and provide service to, the
20 potential adverse parties, the “petition may be granted in the absence of such information.”).
21 Petitioner has taken the steps necessary to ensure that these parties are not prejudiced by the petition.

22 The Nonparties also take issue with the fact that Petitioner did not offer to pay for court-
23 appointed counsel for the account holders pursuant to Rule 27(a)(2). (ECF No. 9 at 5.) Nowhere in
24 Rule 27, however, is it required that Petitioner offer to pay for court-appointed counsel. *See*
25 *generally* Fed. R. Civ. P. 27. The decision to appoint counsel is something for the Court to decide.
26 Further, court-appointed counsel is necessary only when the potential adverse parties are not given
27 any notice of the petition. As explained above, that is not the case here. The account holders are
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1 given notice so long as the ISPs obey the Court's November 14 order. (ECF No. 8.) And presumably
2 even the Nonparties would agree that it is preferable to allow an expected adverse party to choose
3 his own attorney rather than have one appointed for him by the Court.

4 **2. The First Amendment is not a License for Copyright Infringement**

5 The Nonparties argue that the account holders have a First Amendment right to remain
6 anonymous. (ECF No. 9 at 12.) However, federal courts across the nation have repeatedly held that
7 individuals who use the Internet to download or distribute copyrighted works without permission are
8 not entitled to protection of their identities under the First Amendment. *See, e.g., UMG Recordings,*
9 *Inc. v. Does 1–4*, No. 06-0652, 2006 WL 1343597, at *2 (N.D. Cal. Mar. 6, 2006) (finding that Doe
10 Defendants who “open[ed] their computers to others through peer-to-peer sharing had little
11 expectation of privacy.”); *Sony Music Entm’t v. Does 1–40*, 326 F. Supp. 2d 556, 558 (S.D.N.Y.
12 2004) (“[D]efendants’ First Amendment right to remain anonymous must give way to plaintiffs’
13 right to use the judicial process to pursue what appear to be meritorious copyright infringement
14 claims.”); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118–19 (2d Cir. 2010) (concluding that
15 plaintiff’s need for discovery of alleged infringer’s identity outweighed defendant’s First
16 Amendment right to anonymity); *Arista Records, LLC v. Does 1–19*, 551 F. Supp. 2d 1, 8 (D.D.C.
17 2008) (“[C]ourts have routinely held that a defendant’s First Amendment privacy interests are
18 exceedingly small where the ‘speech’ is the alleged infringement of copyrights.”).

19 The infringers cannot cloak their identities in the First Amendment when their infringing
20 activities are not private. *MCGIP, LLC v. Does 1–18*, No. 11-1495, 2011 WL 2181620, at *1 (N.D.
21 Cal. June 2, 2011) (“[I]t is difficult to say that Doe had a strong expectation of privacy because he or
22 she either opened his or her computer to others through file sharing or allowed another person to do
23 so.”); *see also Voltage Pictures, LLC v. Does 1–5,000*, No. 10-0873, 2011 WL 1807438, at *4
24 (D.D.C. May 12, 2011) (finding movants’ rights to anonymity to be minimal); *In re Verizon Internet*
25 *Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003) (“[I]f an individual subscriber opens his
26 computer to permit others, through peer-to-peer file-sharing, to download materials from that
27 computer, it is hard to understand just what privacy expectation he or she has after essentially
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1 opening the computer to the world.”), *rev'd on other grounds sub nom, Recording Indus. Ass'n of*
2 *Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

3 The cases cited by the Nonparties in support of their First Amendment argument involve a
4 different form of speech than the speech at issue in this action. In *McIntyre v. Ohio Elections*
5 *Comm'n*, 514 U.S. 334 (1995), for example, the protected speech involved the distribution of
6 pamphlets regarding an upcoming election. In *Talley v. California*, 362 U.S. 60 (1960) the protected
7 speech was similarly the distribution of handbills urging a boycott. These cases have little relevance
8 to the “speech” at issue in the instant case and provide the Court with no guidance on Internet-based
9 copyright infringement. In contrast, the cases cited by Petitioner directly address the protections
10 afforded to “speech” by anonymous individuals committing copyright infringement over the
11 Internet. According to these cases, the account holders’ privacy rights are extremely limited and do
12 not outweigh Plaintiff’s interest in preserving the infringer’s identities.

13 IV. CONCLUSION

14 The Court should deny the Nonparties’ motion for reconsideration. First, the Nonparties lack
15 standing to move for reconsideration. Second, the Nonparties’ have failed to cite a *single* case that
16 would suggest that the Court’s prior order granting Petitioner’s Rule 27 petition was flawed. Finally,
17 none of the Nonparties’ substantive or miscellaneous objections carry any weight.

18 Petitioner, by way of its Rule 27 petition is simply attempting to preserve a very narrow slice
19 of vital information that is under threat of imminent destruction. Indeed, according the publicly
20 available data retention policies of the Nonparties, a significant portion of the data will begin to be
21 destroyed starting January 2012. Petitioner’s request was properly granted by the Court because it
22 was consistent with the spirit and letter of Rule 27.

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Respectfully Submitted,

INGENUITY13 LLC

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