

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO. 11-18746 CA 27

PATRICK COLLINS, INC., a California
Corporation, and K-BEECH, INC., a California
corporation,

Plaintiff,

vs.

JOHN DOES 1-1003,

Defendants.

THE ORIGINAL
FILED ON:

AUG 31 2011

IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

**AT&T'S MOTION TO QUASH SUBPOENAS OR FOR PROTECTIVE ORDER AND
INCORPORATED MEMORANDUM OF LAW**

Pursuant to Rule 1.410(c), Florida Rule of Civil Procedure, non-parties SBC Internet Services d/b/a AT&T Internet Services and AT&T Corporation (collectively, "AT&T") hereby file this Motion to Quash Subpoenas or for Protective Order, in response to the subpoenas duces tecum served on AT&T on July 28, 2011 ("Subpoenas").¹ In support, AT&T relies on the following Memorandum of Law:

I. Introduction and Background

The lawsuit from which the Subpoenas were issued is a pure bill of discovery chose in action arising from the Court's equity jurisdiction. The stated purpose of a pure bill of discovery is to "obtain the disclosure of facts within the defendant's knowledge, or deeds, writings, or other things in his or her custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court." *Publix Supermarkets, Inc. v. Frazier*, 696 So. 2d 1369,

¹ Copies of the Subpoenas are attached hereto as Composite Exhibit "A."

1370-71 (Fla. 4th DCA 1997) (emphasis added). Here, however, Plaintiffs do not actually seek discovery from the Defendants whom they have sued. Instead, Plaintiffs seek discovery from AT&T and other non-party Internet service providers (“ISPs”) to obtain personal information concerning specific, alleged copyright infringers (the 1,003 “John Doe Defendants”) of Plaintiffs’ alleged copyright interests in a number of different adult films. On information and belief, after obtaining personal information from the ISPs, Plaintiffs’ counsel intends to contact the John Doe Defendants and threaten the filing of a federal lawsuit against them if they do not pay money to settle Plaintiffs’ alleged federal copyright claims.

This lawsuit is improper, and the subpoenas issued to AT&T (and presumably other ISPs) in this lawsuit are unreasonable and oppressive. Indeed, no John Doe Defendant has even been served with process in this case – not in person, by mail, by publication, by substituted service, or otherwise. Nor does it appear that Plaintiffs have requested that a summons be issued for service or served on any Defendant as permitted and required by Florida law. For that matter, there is no indication that the John Doe Defendants have any connection with the State of Florida. The John Does are made “defendants” solely to create the illusion that this is a real lawsuit, although no relief is sought against any of them. The real purpose of this lawsuit is to obtain discovery from AT&T and other ISPs through the use of Orders obtained from the Court ex parte in a “case” in which not a single defendant has been or will ever be made a party.

The copyright claims that are the subject of this lawsuit are matters within the exclusive jurisdiction of the Federal Courts pursuant to the Federal Copyright Act, and therefore this Court lacks subject matter jurisdiction over the claims at issue. Further, the pure bill of discovery process is improperly utilized where, as here, Plaintiffs have an adequate remedy at law –

namely, third-party discovery in federal copyright infringement lawsuits – to obtain the information sought.

II. Plaintiffs' Discovery Motion and the Subpoenas at Issue

When this lawsuit was filed, Plaintiffs had already determined the IP addresses associated with the John Doe Defendants who are the subject of Plaintiffs' alleged copyright infringement claims. Specifically, these alleged infringers are ISP customers who were assigned specified IP addresses by various ISPs in connection with Internet use at specified dates and times. Compl. ¶ 4.² A week after filing this lawsuit, Plaintiffs filed a Motion for Internet Service Providers to Disclose Identifying Information of Unknown Defendants and Incorporated Memorandum of Law ("Plaintiff's Motion")³ seeking "to learn Defendants' identities from their respective internet service providers" via third-party subpoenas. Pls.' Mot. at 1. If Plaintiffs had actually named as defendants the entities from whom the discovery was sought (the ISPs), those entities would have had an opportunity to be heard and to assert their positions in response to the relief sought in Plaintiffs' Motion. Instead, by naming only the unrepresented John Doe Defendants, Plaintiffs were able to avoid any opposition at all to the relief they sought. Plaintiffs' Motion was considered ex parte and was granted by this Court's Order dated July 12, 2011 (the "Order")⁴. The Order is dispositive of this lawsuit because the unrepresented John Doe Defendants will never be (1) served with process, (2) named as parties, or (3) given an opportunity to be heard in this lawsuit. *See* Pls.' Mot. at 1-2 (Plaintiff seeks discovery from ISPs "so that Plaintiffs may file copyright infringement suits against [Defendants]" and/or "to resolve [Plaintiffs'] copyright infringement dispute with the Defendant[s]").

² A copy of Plaintiff's Complaint is attached hereto as Exhibit "B."

³ A copy of Plaintiff's Motion is attached hereto as Exhibit "C."

⁴ A copy of the Order is attached hereto as Exhibit "D."

After obtaining the Order, Plaintiffs served AT&T with the Subpoenas. Each of the Subpoenas purports to require AT&T to “produce documents sufficient to identify the true name and address of each person who was assigned one of the IP Addresses set forth on Exhibit A to your subpoena by September 1, 2011.” The Subpoenas are overly broad, unduly burdensome,⁵ and oppressive.

III. Arguments and Authorities

The Subpoenas should be quashed pursuant to Rule 1.410(c) of the Florida Rules of Civil Procedure, because: (i) Plaintiffs have not properly asserted a cause of action for a pure bill of discovery, and the discovery sought in the Subpoenas (and presumably in similar subpoenas issued to and served on other ISPs) is the only real relief sought in this lawsuit; (ii) AT&T and other ISPs (the actual targets of the discovery sought by Plaintiffs) were never given notice or an opportunity to be heard regarding the legal sufficiency and legitimacy of Plaintiff’s claims before relief was granted; and (iii) the unrepresented John Doe Defendants were never and will never be given any opportunity to be heard in this lawsuit at all. In the alternative, the Court should grant a Protective Order, pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, staying all discovery in this case (and the use of any information already obtained by Plaintiffs in discovery) until such time as the interests of the John Doe Defendants and the ISPs can be heard and considered by the Court. Finally, the Court may choose to dismiss the Plaintiffs’ improper lawsuit on any of several available grounds.

⁵ The burden imposed on AT&T to handle and respond to subpoenas seeking IP address lookups in connection with claims such as those at issue here (as asserted in numerous federal lawsuits across the country) includes not only the legal resources associated with handling the subpoenas, and the personnel time associated with performing IP address research, but also the personnel hours and expenses required to notify and respond to inquiries from AT&T’s subscribers. If left unchecked, such burden would unduly interfere not only with AT&T’s business operations, but also with AT&T’s ability to respond to law enforcement requests and other civil litigants.

A. Plaintiffs' lawsuit is based on a fiction.

In bringing a pure bill of discovery, a plaintiff must allege:

- (1) the nature and contents of documents or other matters in the defendant's possession or control, as to which discovery is prayed,
- (2) the matter or controversy to which the requested discovery relates,
- (3) the interest of each party in the subject of the inquiry,
- (4) the complainant's right to have the requested relief,
- (5) the complainant's title and interest, as well the complainant's relationship to the discovery claimed, and
- (6) that the requested discovery is material and necessary to maintain the complainant's claims in the prospective litigation.

Payne v. Beverly, 958 So. 2d 1112, 1114 (Fla. 5th DCA 2007). Here, Plaintiffs do not seek any discovery from the John Doe Defendants. Accordingly, Plaintiffs' bill of discovery fails to meet the very first and most fundamental element for such an action.

Plaintiffs' Complaint makes clear that the true reason Plaintiffs filed this lawsuit is to obtain the John Doe Defendants' names, addresses, and other personally identifying information from their ISPs. Compl. ¶ 51. Plaintiff also alleges that "[e]ach of the Defendant's identities is known only to each of the Defendants and by the ISP to which each of the Defendants subscribe." *Id.* ¶ 50. Then, in the Complaint's prayer, Plaintiff hollowly requests a judgment "[o]rdering each of the Defendants to file a notice with the Court confirming that the identifying information which will be provided to Plaintiff by each of the Defendants' respective ISPs is complete, accurate and current." *Id.* ¶ 54(A).

The nominal relief sought against the John Doe Defendants, however, is not discovery – instead, the Plaintiffs' pretend to seek a court order requiring the John Doe Defendants to

“confirm” that the personal information Plaintiffs seek from the ISPs is correct. Putting aside the fact that Plaintiffs will never seek such an order,⁶ such prayer for relief is nothing more than a ruse.

Read literally, the requested relief amounts to a nonsensical request that the identified parties confirm their own identities. More leniently read, the relief nominally sought against the John Doe Defendants is neither feasible nor proper. As a practical matter, the John Doe Defendants would not know the specific IP addresses that had been assigned to them by their ISPs for a given Internet connection at any particular time and, a fortiori, they could not “confirm” that the ISP’s records regarding such IP address allocations were correct. If, on the other hand, the Plaintiffs would contend that they want the Defendants to “confirm” that they are guilty of copyright infringement, then Plaintiffs’ claims would amount to a complete degradation of the right to judicial process with respect to claims that are preempted by federal copyright law under the authorities discussed below. *See e.g., Mendez v. Cochran*, 700 So. 2d 46, 47 (Fla. 4th DCA 1997) (observing that use of bill of discovery to establish statutory violations is improper).

In reality, the true Defendants in this lawsuit are the ISPs. Through the use of a fictional prayer for relief, Plaintiffs have already, through the Order obtained dispositive relief in this lawsuit without the opportunity for the true defendants (or the unrepresented John Doe Defendants) to be heard. Such a tactic is unreasonable and oppressive, and a violation of the most fundamental notions of due process. The Subpoenas should be quashed on this basis alone.⁷

⁶ Plaintiffs’ counsel admitted in discussions with AT&T’s counsel that the relief nominally sought with respect to the John Doe Defendants is a “fiction.” See Affidavit of Bart Huffman, Esq., ¶ 3. Mr. Huffman’s affidavit is being filed concurrently with this motion and is incorporated herein by reference.

⁷ Other basis for the Subpoenas to be quashed include, inter alia, the fact that pursuant to the Order (which was entered ex parte) AT&T cannot seek its costs in responding to the Subpoenas from Plaintiffs prior to undertaking the time and effort of responding to the Subpoenas, in violation of Rule 1.410(c), and, in addition, the fact that AT&T

B. Plaintiffs have an adequate remedy at law.

A pure bill of discovery is available only where no adequate legal remedy is available. *Debt Settlement Admin. v. Antigua*, 950 So. 2d 464, 465 (Fla. 3d DCA 2007) (“A pure bill of discovery is only authorized in equity in the absence of an adequate legal remedy.”); *see Venezia Lakes Homeowners Assoc., Inc. v. Precious Homes at Twin Lakes Property Owners Assoc., Inc.*, 34 So. 3d 755, 759 (Fla. 3d DCA 2010) (bill of discovery improper where plaintiff had available adequate remedies at law); *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998) (“In the absence of an adequate legal remedy, equity has long authorized a pure bill of discovery”). Here, Plaintiffs have an adequate legal remedy – namely, to assert their federal copyright infringement claims in federal court.

Plaintiffs concede that the information they seek is readily available to them in connection with federal copyright infringement actions filed in federal court.⁸ Pls.’ Mot. at 4 (“Plaintiffs may also obtain the Defendants’ identities through a federal copyright suit ...”). In their federal lawsuits, as here, Plaintiffs sue unnamed “Doe” defendants and then obtain orders permitting the service of third-party subpoenas seeking personally identifying information concerning the individuals who were assigned IP addresses by the ISPs in connection with Internet usage on specified dates at specified times. *See* Mot. at 6 (“[W]ithin the last month, five (5) federal court judges in the Southern District of Florida have approved the issuance of

cannot seek a meaningful opportunity for its affected subscribers (who may reside outside of Florida) to assert their rights, as discussed further below.

⁸ Based on a review of the federal courts’ PACER website, it appears that Plaintiff Patrick Collins, Inc. (“Patrick Collins”) has filed over eight (80) such lawsuits, and Plaintiff K-Beech, Inc. (K-Beech) has filed thirty (30) such lawsuits. *Huffman Aff.* ¶ 7, Exs. E-F.] In the past few months, AT&T has received at least sixteen (16) federal court subpoenas in lawsuits filed by Patrick Collins and at least three (3) federal court subpoenas in lawsuits filed by K-Beech. *Id.* ¶ 8.

subpoenas to ISPs in cases that [Plaintiffs' counsel] is managing.”). The orders sought and obtained by Plaintiffs in those lawsuits are virtually identical to the Order in this lawsuit.⁹

Further, in Plaintiffs' Motion, Plaintiffs vaguely allege that their use of a pure bill of discovery instead of federal subpoenas is “procedurally advantageous for a variety of reasons,” Pls' Mot. at 4, and “arguably better for myriad reasons,” *id.* at 6. But Plaintiffs do not articulate even one such reason in Plaintiffs' Motion, presumably because the true reason is that Plaintiffs hope to obtain a very large number of potential settlements of their federal claims using a single, ex parte state court procedure, while avoiding fundamental procedural requirements and protections (such as venue and personal jurisdiction) that would otherwise apply in federal court.

Plaintiffs' Motion cites two old decisions, *The First Nat'l Bank of Miami v. Dade-Broward Co.*, 171 So. 510 (Fla. 1937) and *Carner v. Ratner*, 207 So. 2d 310 (Fla. 3d DCA 1968), for the proposition that a pure bill of discovery may be available notwithstanding the availability of an adequate remedy at law. To the extent those decisions stand for that proposition, they are contrary to the weight and trend of modern authority. *E.g.*, *Venezia Lakes Homeowners Assoc., Inc.*, 34 So. 3d at 759; *Debt Settlement Admin., L.L.C.*, 950 So. 2d at 465; and *Trak Microwave Corp.*, 728 So. 2d at 1178. In any event, as the court in *The First Nat'l Bank of Miami* recognizes, the general rule has always been that “a person who has no interest in the subject matter of the suit or is merely a witness” (such as AT&T here) should not be the target of a pure bill of discovery proceeding. 171 So. at 511. And the *Carner* court's holding is limited to a statement that a court of equity may afford discovery relief despite the discovery provisions of the Florida Rules of Civil Procedure in “proper circumstances.” 207 So. 2d at 311.

⁹ See, e.g., Huffman Aff. ¶ 6, Exs. B-D (Order Granting Mot. for Leave to Serve Third Party Subpoenas, Patrick Collins, Inc. v. John Does 1-12, No. 11-cv-20905 (S.D. Fla. Apr. 6, 2011), ECF No. 10; Order Granting Mot. for Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference, Patrick Collins, Inc. v. John Does 1-6, No. 11-cv-00570 (M.D. Fla. Mar. 21, 2011), ECF No. 6; and Order, K-Beech v. John Does 1-85, No. 11-cv-00469 (E.D. Va. July 26, 2011), ECF No. 4).

As discussed above, Plaintiffs have not provided any reason to justify the use of a pure bill of discovery here, notwithstanding an adequate remedy at law, much less any showing of “proper circumstances” under these outdated authorities.

In analogous situations, the application of the rule that a pure bill of discovery is available only in the absence of an adequate legal remedy by Florida Courts confirms that use of the bill of discovery in this lawsuit is improper.¹⁰ For example, it has been held that the use of a bill of discovery was inappropriate where an action was already pending in another court concerning the subject matter for which a discovery had been sought. *Debt Settlement Admin.*, 950 So. 2d at 465 (pending action in foreign jurisdiction); *see also Trak Microwave*, 728 So. 2d at 1178 (pending federal action rendered use of bill of discovery inappropriate; “[i]n this case, we have grave doubt that [plaintiff’s] federal presuit investigatory tools were so inadequate as to justify state intervention through equity jurisdiction.”). As discussed immediately below, the *Trak Microwave* court’s concern for the avoidance of “state intervention through equity jurisdiction” in a federal matter is certainly implicated here.

C. The relief sought by plaintiffs is preempted by the Federal Copyright Act.

This lawsuit is nothing more than Plaintiffs’ attempt to obtain personal information from ISPs pertaining to Internet users already specified by Plaintiffs. Specifically, Plaintiffs allege that the John Doe Defendants (specifically described by IP addresses and corresponding dates and times) have committed copyright infringement. The problem with this, however, is that such a claim is within the exclusive jurisdiction of the Federal Courts, and thus cannot serve as the basis for the relief sought here.

¹⁰ Notably, neither of the two cases on which Plaintiffs primarily rely in their Motion includes any discussion of “adequate remedies at law.” *Payne*, 958 So. 2d at 1114; *Sunbeam Television*, 694 F. Supp. 889. The plaintiff in *Payne* specifically alleged that a bill of discovery was “the only means of discovery available to him to obtain the information,” 958 So. 2d at 1113, and the *Sunbeam Television* court observed that a bill of discovery “permits a Plaintiff to seek nothing more than otherwise unavailable information,” 694 F. Supp. at 891-92 and 894-95.

Federal courts have original and exclusive jurisdiction over civil actions arising under federal copyright law. 28 U.S.C. § 1338(a) (stating that the jurisdiction of the federal district courts “shall be exclusive of the courts of the states in ... copyright cases”); *see* H.R. Rep. No. 94-1476, at 60 (1976) (legislative history of 17 U.S.C. § 301 describing 28 U.S.C. § 1338 as “mak[ing] clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts”). The Federal Copyright Act specifically states that, after its effective date, “no person is entitled to any [legal or equitable] right or equivalent right in any [copyright] work under the law or statutes of any State.” ” 17 U.S.C. § 301(a); *see also* H.R. Rep. No. 94-1476, at 130 (1976) (noting that the declaration of preemption in 17 U.S.C. § 301 is “intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection”).

In this action, Plaintiffs must show, among other things, “that the requested discovery is material and necessary to maintain the [plaintiff’s] claims in the prospective litigation.” *Payne*, 958 So. 2d at 1114. Here, the only claims at issue are federal copyright claims, and any determination of whether the Plaintiffs’ requested discovery (as to Internet users whose IP addresses have already been specifically identified by Plaintiffs) is “material and necessary” to maintain Plaintiff’s copyright claims is a matter within the exclusive jurisdiction of the federal courts. 28 U.S.C. § 1338(a); *See Pincus v. Carlisle*, 585 So. 2d 1172 (Fla. 4th DCA 1991) (“Since the fundamental nature of the plaintiffs’ claim against petitioner [] ... involves rights equivalent to those protected by federal patent and copyright law, we conclude that [such claim] is within the exclusive jurisdiction of the federal courts.”).

Florida courts have recognized that subject matter jurisdiction is lacking when a claim is preempted by the Copyright Act. *EMSA Ltd. P'ship v. Lincoln*, 691 So. 2d 547,549-550 (Fla. 4th DCA 1997) (upholding dismissal of claims arising under copyright laws); *see also Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 568 (Fla. 2005) (federal preemption is question of subject matter jurisdiction). Here, as Plaintiffs admit, the sole purpose of this lawsuit is the assertion of copyright claims against individuals associated with a long list of IP addresses at specified dates on specified times. Pls.' Mot. at 1-2 (Plaintiff seeks discovery from ISPs "so that Plaintiffs may file copyright infringement suits against [Defendants]" and/or "to resolve [Plaintiffs'] copyright infringement dispute with the Defendant[s]"). Thus, Plaintiffs' alleged right to discovery from ISPs in this lawsuit is based entirely on federal copyright laws.

Plaintiffs have not provided any authority for the proposition that a right to discovery based solely on an alleged federal claim as to already-known defendants is not preempted, and AT&T strongly believes that no such authority exists. Instead, Plaintiffs rely on *Sunbeam Television Corp. v. Columbia Broadcasting Sys., Inc.*, 694 F. Supp. 889 (S.D. Fla. 1988) to support their claims. In *Sunbeam*, the plaintiff contended it "may have been wronged by several or all of the Defendants under federal antitrust law and state law theories sounding in antitrust, interference with existing and prospective advantageous business relationship and/or contracts, breaches of fiduciary duty and the duty to act in good faith, and perhaps, though not explicitly alleged, civil conspiracy." *Id.* at 893-94. Thus, *Sunbeam* involved a complicated series of events and players and potential claims under both state and federal law. There, the court observed that it was proper to utilize a pure bill of discovery "to ascertain, as a matter of equity[,] who an

injured party may sue and under what theory.” *Id.* at 892.¹¹ This is simply not Plaintiffs’ purpose in this instance.

Here, Plaintiffs have already determined who they want to sue and under what legal theory, and Plaintiffs have filed this lawsuit only to obtain subscriber information from ISPs. Plaintiffs are not seeking, as in *Sunbeam*, to ascertain discovery from named defendants in order to ascertain potential liability under both state and federal laws. Plaintiffs only seek recovery under federal copyright law as to an already-established list of Internet users. As Plaintiffs’ lawsuit, and Plaintiffs’ entitlement to the relief sought, are matters exclusively within the jurisdiction of the federal courts, the Subpoenas should be quashed and the action dismissed.

D. Even if otherwise proper, Plaintiffs’ lawsuit does not present one of the “rare” circumstances where a pure bill of discovery may properly be used.

Florida courts have recognized that, given modern, liberalized discovery and pleading rules, the pure bill of discovery should be rarely used. *JM Family Enters., Inc. v. Freeman*, 758 So. 2d 1175, 1176 (Fla. 4th DCA 2000); *see also Venezia Lakes Homeowners Assoc.*, 34 So. 3d at 756, 758 (pure bill of discovery justified only in “narrow and limited circumstances” considering its “diminished” usefulness resulting from Florida’s recently “relaxed pleading requirements” and authorization of liberal discovery); *Kirlin v. Green*, 955 So. 2d 28, 29 (Fla. 3d DCA 2007) (same); *Trak Microwave*, 728 So. 2d at 1178 (“[B]ecause state and federal rules of

¹¹ The *Sunbeam* court also took note that all of the defendants “have an interest in this matter or are agents of those holding an actual interest.” *Sunbeam Television Corp.*, 694 F.Supp. at 894. In this lawsuit, AT&T has no interest in the Plaintiffs’ copyright claims, and, as a third party witness, cannot be a proper defendant in Plaintiffs’ pure bill of discovery proceeding. *See, e.g., Schwab v. Television 12 of Jacksonville, Inc.*, Civ. A. No. 91-07031 CA, 21 Media L. Rep. 11571993 WL 169181 at *3-4 (Fla. Cir. Jan. 11, 1993) (“This court is of the opinion that a Pure Bill of Discovery may not be used to obtain information, prior to the bringing of an action at law, from third-party witnesses.”); Daniel Morman, The Complaint for a Pure Bill of Discovery—A Living Breathing Modern Day Dinosaur?, 78 Fla. Bar J. 50, 52 (2004) (analyzing caselaw and noting as improper use of a pure bill of discovery both (i) suing a mere third-party witness and (ii) seeking to obtain discovery obtainable after an action at law is filed).

civil procedure have relaxed many of the older code pleading requirements and now authorize liberal discovery, it is rare that a party has a need to invoke” the bill of discovery).

As discussed above, Plaintiff’s use of a pure bill of discovery proceeding here is inconsistent with the applicable law. Plaintiffs can and do regularly obtain the information sought here in federal court. Moreover, to the extent Plaintiffs’ fictional claims against the actual John Doe Defendants are given any credence, pure bills of discovery are not to be used as a “fishing expedition” where “discovery is otherwise readily obtainable.” *Debt Settlement Admin., L.L.C.*, 950 So. 2d at 465 (citing, *inter alia*, *Trak Microwave Corp.*, 728 So. 2d at 1178); *see Venezia Lakes Homeowners Assoc., Inc.*, 34 So. 3d at 759 (“Parties [] may not utilize the trial courts’ resources to go on a pre-suit ‘fishing expedition’ to substantiate their claims or to determine the extent of their damages.”); *Kirlin*, 955 So. 2d at 29 (stating that, if the bill of discovery plaintiff believed its claims to be valid, it could simply “file suit”); *see also Kaplan v. Allen*, 837 So. 2d 1174, 1176 (a bill of discovery is not available “simply to obtain a preview of discovery obtainable once suit is filed.”); *Mendez*, 700 So. 2d at 47 (use of pure bill of discovery to “obtain a preview of discovery obtainable once suit is filed... places an undue burden on the court system”).

As discussed above, Plaintiffs pleadings indicate that they can and do obtain the information sought herein in federal court (and, thus, that the discovery they seek is “otherwise readily obtainable”). However, in federal court, Plaintiffs must plead a basis for personal jurisdiction and venue as to the John Doe defendants. Fed. R. Civ. P. 8(a); 28 U.S.C. §§ 1391(b), 1400(a). Moreover, Plaintiffs must satisfy the joinder provisions applicable to multiple defendants under the Federal Rules of Civil Procedure, including that Plaintiffs’ asserted right to relief against all of the defendants must “aris[e] out of the same transaction, occurrence, or series

of transactions or occurrences.” Fed. R. Civ. Pr. 20(a)(2). Presumably in response to these requirements, Plaintiffs’ federal lawsuits typically name a limited number of John Doe defendants who are related in some way and are believed to have some meaningful connection to the forum state.

In federal court, Plaintiffs must also serve defendants within 120 days or make a showing to the federal court as to why service was not possible in that timeframe. Fed. R. Civ. P. 4(m). Furthermore, given that AT&T typically insists on notifying its subscribers before providing their personal information in response to a federal subpoena, a given John Doe defendant may file a motion for a protective in federal court order to prevent the disclosure of such information. Fed. R. Civ. P. 45(c).

Apparently, Plaintiffs are unsatisfied with these restrictions and other legal showings¹² associated with the federal copyright suits they claim to supposedly want to assert.¹³ So Plaintiffs filed this pure bill of discovery proceeding, naming over a thousand defendants without regard to where they reside¹⁴ and with respect to alleged copyright interests in numerous

¹² Among other things, the Subpoenas would result in the disclosure of personal information without any adversarial challenge to the Plaintiffs’ claimed copyright interests or the methods by which Plaintiffs allegedly obtained the long list of IP addresses, dates, and times that allegedly correspond to instances of copyright infringement.

¹³ Actually, it is unlikely Plaintiffs would ever file a federal lawsuit against a given individual based on the information sought by the Subpoenas. As noted elsewhere herein, the works at issue are of an adult nature with graphic titles. Once the John Doe Defendants’ personal information is obtained, Plaintiffs would likely contact them directly, in which case the mere prospect of public association with such titles may be used to encourage settlement, regardless of procedural issues or actual culpability. *See, e.g., Grandmother Porn Lawsuit Dropped*, THE HUFFINGTON POST (Aug. 30, 2011, 9:03 PM), http://www.huffingtonpost.com/2011/08/30/steele-hansmeier-drops-case_n_942750.html (recent press account of the story of an elderly Internet subscriber from whom settlement was aggressively sought by plaintiff’s counsel in connection with a federal lawsuit for alleged copyright infringement of adult works). Under the circumstances, it is even more critical that the Plaintiffs’ claims be brought in an appropriate forum where the privacy interests and other substantive rights of the affected individuals can be heard and considered by the court.

¹⁴ Plaintiffs do not allege that the John Doe Defendants are believed to reside in Florida or to have acted from the State of Florida. Instead, Plaintiffs’ Complaint states that “Each Defendant was part of the same [group of peer-to-peer file sharers] with a Florida resident.” Compl. ¶ 39(B).

different works.¹⁵ Even if the John Doe Defendants were to be given an opportunity to assert their rights in this lawsuit, many if not most of them would not even be subject to the personal jurisdiction of this Court.

Plaintiffs' counsel, unfortunately, have demonstrated that they will go to great lengths to obtain contact information for use in extracting settlements from alleged individual infringers, without regard to the formalities of legal process and the privacy interests of the affected individuals.¹⁶ Clearly, the desire to bypass procedural rules and substantive rights does not constitute an "appropriate circumstance" for the "rare" invocation of the pure bill of discovery.

IV. Conclusion

Plaintiffs' use of the pure bill of discovery is improper, based on a fiction, and preempted by federal law. The only relief sought is against AT&T and other ISPs, who did not have the opportunity to respond to Plaintiff's *ex parte* request for relief. Moreover, Plaintiffs have already determined the Internet account holders against which Plaintiffs wishes to assert federal copyright claims, and Plaintiffs have asserted no justification for the invocation of this procedure in equity notwithstanding the existence of an adequate remedy at law. Plaintiffs should not be permitted to bypass the jurisdictional and other interests and protections that would be afforded the alleged copyright infringers in an appropriate judicial proceeding. If Plaintiffs' tactics were

¹⁵The listing of John Doe Defendants on Exhibit A to the Complaint alleges copyright infringement at various times from January 15, 2011 to June 5, 2011, with respect to to approximately nineteen (19) different adult "Works." Compl. ¶ 39(B) at Ex. A (IP addresses/dates/times for viewings of the adult films mentioned therein).

¹⁶ In email correspondence with Plaintiffs' counsel, Keith Lipscomb, concerning the Subpoenas, Mr. Lipscomb represented that "the [Electronic Frontier Foundation's] two most senior counsel [had] analyzed the issues and decided that the [bill of discovery] process is legally permissible." Huffman Aff. ¶ 4. When the Electronic Frontier Foundation ("EFF") was asked about this representation, they stated it was wholly false, and the EFF's most senior counsel promptly contacted Mr. Lipscomb to insist that he explain himself and cease misrepresenting that the EFF endorsed his tactics. *Id.* ¶ 4, Ex. A. Notably, this was not an isolated incident. On a separate occasion, after AT&T's counsel had apprised Mr. Lipscomb that he had forwarded a federal subpoena issued to an AT&T entity in a case that had been dismissed, Mr. Lipscomb's office nonetheless included IP addresses from that dismissed case in a spreadsheet of IP address lookups forwarded to AT&T's counsel. *Id.* ¶ 5. When the dismissal was pointed out to Mr. Lipscomb (again), he did not indicate any error, but rather suggested that discovery nonetheless should still be permissible because the dismissal had been "without prejudice." *Id.*

proper, it would mean that any ISP or telecommunications company could be compelled to provide customer information in a Florida bill of discovery proceeding any time that a prospective plaintiff wants to obtain Internet or communications details pertaining to a customer who is a prospective defendant (but who would never actually be served or appear in the proceeding). Such a result is inconsistent not only with the premise behind the bill of discovery process, but also with the most basic characteristics of due process and a true “case or controversy.” Under these circumstances, the Subpoenas are unreasonable and oppressive to the rights and interests of AT&T and its subscribers and should be quashed.

WHEREFORE, premises, considered, AT&T Internet Services respectfully requests that this Court:

- (a) Quash the Subpoenas pursuant to Rule 1.410(c) of the Florida Rules of Civil Procedure;
- (b) Enter a protective order pursuant to Rule 1.280 of the Florida Rules of Civil Procedure, staying all discovery in this case (and the use of any information already obtained by Plaintiffs in discovery) until such time as the interests of the John Doe Defendants, AT&T, and the other ISPs referenced on Exhibit A to Plaintiffs’ Complaint can be heard and considered by the Court;
- (c) Consider dismissal of this lawsuit for lack of subject matter jurisdiction or on other grounds;
- (d) If this action is not dismissed, consider the appointment of an attorney ad litem to represent the unrepresented John Doe Defendants; and
- (e) Grant such other and further relief to which AT&T may be justly entitled.

Respectfully submitted,

CARLTON FIELDS, P.A.
Miami Tower
100 S.E. Second Street, Suite 4200
Miami, Florida 33131
Telephone: (305) 530-0050
[Fax: Merrick L. Gross @305-530-0055]

By: 

MERRICK L. GROSS
Florida Bar No. 716677

AND

Bart Huffman, Esq.
Cox Smith Matthews Incorporated
112 E. Pecan Street, Suite 1800
San Antonio, Texas 78205
Telephone: (210) 554-5500
[Fax: Bart Huffman@1-210-226-8395]

AND

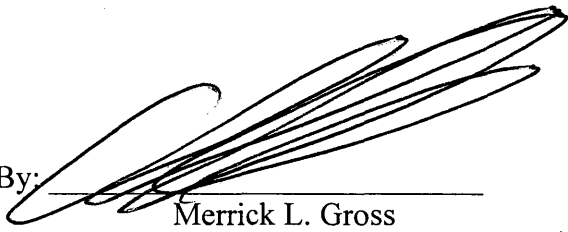
Geoff Amsel, Esq.
AT&T Services, Inc.
208 S. Akard
Dallas, TX 75202
Geoff Amsel, Unavailable

*Attorneys for SBC Internet Services d/b/a AT&T
Internet Services and AT&T Corporation*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August 2011, a true and correct copy of the foregoing was served via U.S. Mail and Facsimile to:

M. Keith Lipscomb
Lipscomb Eisenberg PL
One Biscayne Tower
2 South Biscayne Blvd.
Penthouse 3800
Miami, Florida 33131
Telephone (786) 431-2228
[Fax: M. Keith Lipscomb@786-431-2229]

By: 
Merrick L. Gross