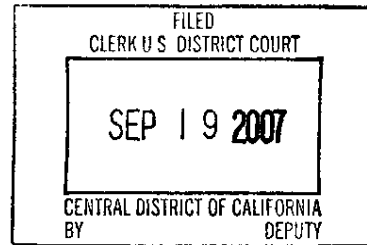


# EXHIBIT U



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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES  
INDUSTRIES, et al.,

Plaintiffs,

v.

GARY FUNG, et al.,

Defendants.

) Case No. CV 06-5578 SVW(JCx)

) REPORT AND RECOMMENDATION  
) OF UNITED STATES MAGISTRATE  
) JUDGE RE: PLAINTIFFS' REQUEST  
) FOR RULE 37 SANCTIONS

\_\_\_\_\_  
This Report and Recommendation is submitted to the Honorable  
Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. § 636 and  
General Order 05-07 of the United States District Court for the Central District of  
California.

**I. SUMMARY**

On August 21, 2007, plaintiffs filed a "Notice of Ex Parte Application and  
Ex Parte Application for a Report and Recommendation for Evidentiary Sanctions  
for Violation of Court's June 8 and August 10 Orders – Fees Requested" ("Ex  
Parte Application"), and a supporting declaration of Gianni P. Servodidio

1 (“Servodidio I Decl.”) with attached exhibits. Plaintiffs request that, as an  
2 evidentiary sanction for defendants’ violation of this court’s orders, direct  
3 infringement of each of plaintiffs’ copyrighted works for which a dot torrent file  
4 has appeared on defendants’ torrent sites be deemed established conclusively for  
5 purposes of this action.

6 On August 23, 2007, defendants submitted their Opposition to the Ex Parte  
7 Application (“Opposition”) and supporting declarations of defendant Gary Fung  
8 (“Fung Decl.”) and Jared R. Smith (“Smith Decl.”) with accompanying exhibits.<sup>1</sup>  
9 On August 27, 2007, plaintiffs filed a Reply in Support of the Ex Parte  
10 Application (“Reply”) and another supporting declaration of Gianni P. Servodidio  
11 (“Servodidio II Decl.”) with an exhibit. The court held a hearing on this matter on  
12 September 17, 2007.

13 Based upon the court’s consideration of the arguments and evidence  
14 presented, and the applicable law, plaintiffs’ request for evidentiary sanctions  
15 should be granted in part and denied in part as discussed below.

## 16 **II. PROCEDURAL HISTORY**

17 On September 26, 2006, plaintiffs filed a First Amended Complaint  
18 (“Complaint”) against defendants for copyright infringement. Plaintiffs allege,  
19 inter alia, that defendants knowingly enable, encourage, induce, and profit from  
20 massive online piracy of plaintiffs’ copyrighted works through the operation of  
21 their internet websites. The Complaint is predicated on theories of contributory  
22 infringement, secondary infringement, and inducement. Defendants filed an  
23 Answer on November 28, 2006.

24 On June 8, 2007, this court issued an order (the “June 8 Order”) directing  
25 defendants to preserve and produce certain data relating to “defendants’ websites,”  
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27 <sup>1</sup>The declarations of defendant Gary Fung and Jared R. Smith with attached exhibits in  
28 support of the Opposition to the Ex Parte Application were filed on August 23, 2007. The  
Opposition was subsequently filed on August 28, 2007.

1 which term the June 8 Order defined to include the two trackers associated with  
2 the Torrentbox and Podtropolis websites (“defendants’ trackers”).<sup>2</sup> More  
3 specifically, the court ordered the preservation and production of (i) redacted IP  
4 addresses of the users of defendants’ websites who request dot-torrent files or hash  
5 links; (ii) the specific dot-torrent file or hash-links requested by users; (iii) the  
6 dates and times of such requests; (iv) reports from users’ computers confirming  
7 that the actual download of the desired content item corresponding to the dot-  
8 torrent file or hash-link has been completed by the user; and (v) masked IP  
9 addresses of users who are downloading content items and who themselves seek  
10 the IP addresses of other users who have a desired content item (collectively  
11 “server log data”).<sup>3</sup>

12 Based upon defendants’ representation that they intended to seek review of  
13 the June 8 Order, this court temporarily stayed the portion of the June 8 Order  
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15 <sup>2</sup>The June 8 Order defined “defendants’ websites” to include four websites (Isohunt,  
16 Torrentbox, Podtropolis and Ed2k-it) and defendants’ trackers (one associated with Torrentbox,  
and one associated with Podtropolis)

17 <sup>3</sup>The discovery ordered produced was responsive to plaintiffs’ document request nos. 23  
18 and 25

19 Request No. 23 called for the production of “all documents that identify the dot-torrent  
20 files, torrents, hash-links, and releases that have been made available by, searched for, or  
21 downloaded by users of the Fung Websites and Trackers including documents that identify the  
22 users who have made available, searched for, or downloaded such dot-torrent files, torrents,  
hash-links, and releases ”

23 Request No 25 called for the production of “all documents, including server logs,  
24 databases of a similar nature, or reports derived from such logs or databases, that [defendants]  
25 maintain, have ever maintained, or have available that record the activities of the Fung Websites  
26 and Trackers or their users, including documents concerning . . .Electronic communications of  
27 any type between the Fung Websites and Trackers and users; . . . Logs of user activities; . . . Logs  
28 or records of dot-torrent files or torrents made available, uploaded, searched for, or downloaded  
on Ishohunt, Torrentbox or Podtropolis; . . . Logs or records of hash-links or messages  
containing hash-links made available, searched for or otherwise obtained at Ed2k-it, and . . .  
Logs or records of releases documented, searched for, or reviewed on Isohunt.”

1 which required defendants to preserve and produce certain server log data until  
2 June 22, 2007 – defendants’ deadline to seek review. See Local Rule 72-2.1.

3 On June 25, 2007, defendants sought review of only the portion of the  
4 June 8 Order which awarded attorneys’ fees and costs. Judge Wilson denied the  
5 motion for review on July 25, 2007.

6 On August 10, 2007, this court issued an order (the “August 10 Order”)  
7 directing defendants to comply with the June 8 Order, and accordingly to produce  
8 the server log data for defendants’ trackers, including event-by-event user  
9 communications with defendants’ trackers tied to/correlated with the  
10 corresponding masked IP address, file name and date and time of communication  
11 and, if applicable, completed content download (“event-by-event data”).<sup>4</sup> The  
12 court cautioned defendants that the failure to produce documents in compliance  
13 with the August 10 Order by August 16, 2007, or any future failure to comply with  
14 defendants’ discovery obligations or other discovery orders might result in a  
15 recommendation to Judge Wilson to impose further monetary sanctions as well as  
16 non-monetary sanctions in a form authorized by Fed. R. Civ. P. 37(b)(2) and/or  
17 other applicable law, including but not limited to evidentiary sanctions, an adverse  
18 jury instruction, and/or terminating sanctions. Defendants did not seek a stay,  
19 reconsideration, or review of the August 10 Order.

20 On August 17, 2007 – the day after the production deadline set in the  
21 August 10 Order – defendants’ counsel advised plaintiffs’ counsel that they could  
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26 <sup>4</sup>The August 10 Order, which granted “Plaintiffs’ Ex Parte Application to Enforce  
27 Compliance with Court Orders and Compel Deposition of Gary Fung – Fees Requested,” filed  
28 July 20, 2007, was e-mailed to all counsel on the date it was issued, i.e., August 10, 2007  
During the hearing on this matter, defendants’ counsel confirmed that he had in fact received the  
August 10 Order on August 10th

1 not currently comply with the August 10 Order.<sup>5</sup> (Servodidio I Decl. ¶ 6, Ex. 7).

2 As of the date of the hearing on this matter – September 17, 2007 – defendants had  
3 yet to produce the event-by-event data.

### 4 **III. PERTINENT LAW**

5 Rule 37(b)(2) of the Federal Rules of Civil Procedure provides in pertinent  
6 part:

7 If a party . . . fails to obey an order to provide or permit discovery . . . the  
8 court in which the action is pending may make such orders in regard to the  
9 failure as are just, and among others the following: (A) An order that the  
10 matters regarding which the order was made or any other designated facts  
11 shall be taken to be established for the purposes of the action in accordance  
12 with the claim of the party obtaining the order; . . .

13 Fed. R. Civ. P. 37(b)(2)(A).

14 “Rule 37(b)(2) contains two standards – one general and one specific that  
15 limit a district court’s discretion. First, any sanction must be ‘just’; second the  
16 sanction must be specifically related to the particular ‘claim’ which was at issue in  
17 the order to provide discovery.” Navellier v. Sletten, 262 F.3d 923, 947 (9th Cir.  
18 2001) (citing Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,  
19 456 U.S. 694, 707-09 (1982)), cert. denied, 536 U.S. 941 (2002). “Sanctions may  
20 be warranted under Federal Rule of Civil Procedure 37(b)(2) for failure to obey a  
21 discovery order as long as the established issue bears a reasonable relationship to  
22 the subject of discovery that was frustrated by sanctionable conduct.” Id. “In the  
23 Ninth Circuit, sanctions are appropriate only in ‘extreme circumstances’ and  
24 where the violation is ‘due to willfulness, bad faith, or fault of the party.’” Fair  
25 Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002) (citing United

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27 <sup>5</sup>At the hearing on this matter, defendants’ counsel indicated that it was not until *after* the  
28 August 10 Order was issued that defendant Fung undertook to determine what would be required  
to produce the event-by-event data.

1 States v. Kahaluu Constr. Co., Inc., 857 F.2d 600, 603 (9th Cir. 1988)), cert.  
2 denied, 537 U.S. 1018 (2002). “Disobedient conduct not shown to be outside the  
3 litigant’s control meets this standard.” Fair Housing of Marin, 285 F.3d at 905;  
4 Henry v. Gill Indus. Inc., 983 F.2d 943, 948 (9th Cir. 1993).

5 The court may, in deciding whether to grant a motion for sanctions,  
6 “properly consider all of a party’s discovery misconduct . . . including conduct  
7 which has been the subject of earlier sanctions.” Payne v. Exxon Corp., 121 F.3d  
8 503, 508 (9th Cir. 1997); Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th  
9 Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

10 In the context of assessing whether the more drastic remedy of terminating  
11 sanctions is appropriate, courts are to consider five factors: “(1) the public’s  
12 interest in expeditious resolution of litigation; (2) the court’s need to manage its  
13 dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public  
14 policy favoring disposition of cases on their merits; and (5) the availability of less  
15 drastic sanctions.”<sup>6</sup> Connecticut General Life Ins. Co. v. New Images of Beverly  
16 Hills, 482 F.3d 1091, 1096 (9th Cir. 2007); Malone v. United States Postal Serv.,  
17 833 F.2d 128, 130 (9th Cir. 1987), cert. denied, 488 U.S. 819 (1988); Kahaluu  
18 Constr. Co., Inc., 857 F.2d at 603 & n.5 (discussing sanction order taking  
19 plaintiff’s allegations as established and awarding judgment to plaintiff on that  
20 basis); Commodity Futures Trading Comm’n v. Noble Metals Int’l, Inc., 67 F.3d  
21 766, 772 (9th Cir. 1995) (same), cert. denied, 519 U.S. 815 (1996).

22 Since the “first two of these factors favor the imposition of sanctions in  
23 most cases, while the fourth cuts against a . . . dismissal sanction[,] . . . the key  
24 factors are prejudice and the availability of lesser sanctions.” Henry, 983 F.2d at  
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26 <sup>6</sup>The fifth factor has three sub-parts: (1) whether the court has considered lesser  
27 sanctions; (2) whether the court has tried them; and (3) whether the court has warned the  
28 recalcitrant party about the possibility of case dispositive sanctions. Connecticut General Life  
Ins. Co., 482 F.3d at 1096.

1 948 (citing Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990)); Valley  
2 Eng'r, Inc. v. Electric Eng'r Co., 158 F.3d 1051, 1056 (1998) ("factors 1 and 2  
3 support sanctions and 4 cuts against case-dispositive sanctions, so 3 and 5,  
4 prejudice and availability of less drastic sanctions, are decisive"), cert. denied, 526  
5 U.S. 1064 (1999). This "test" is not mechanical. Connecticut General Life Ins.  
6 Co., 482 F.3d at 1096. "It provides the district court with a way to think about  
7 what to do, not a set of conditions precedent for sanctions or a script that the  
8 district court must follow." Id.

9 **IV. DISCUSSION**

10 **A. Defendants' Contentions Should Be Rejected**

11 Plaintiffs contend that defendants' conduct in failing to comply with the  
12 June 8 and August 10 Orders with respect to the production of server log data  
13 data for defendants' trackers constitutes willful disobedience. This court agrees.  
14 Although defendants offer various explanations for their failure to produce the  
15 server log data for their trackers, these explanations do not excuse defendants'  
16 non-compliance with the court's orders.<sup>7</sup>

17 First, defendants claim that they were unaware of their obligation to  
18 preserve and produce server log data for their trackers. (Opposition at 2; Fung  
19 Decl. ¶ 3). Specifically, defendants assert that they did not understand the June 8  
20 Order to require the production of event-by-event data for their trackers, and that  
21 the court effectively broadened the scope of the June 8 Order by ordering  
22 defendants to produce such data in the August 10 Order. (Opposition at 2; Fung  
23 Decl. ¶ 3). The court rejects this argument.

24 The June 8 Order is unambiguous. It expressly defined defendants'  
25 websites to include defendants' trackers, and expressly ordered the preservation  
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27 <sup>7</sup>To the extent defendants request the appointment of a special master at this stage in the  
28 proceedings, this court recommends such request be denied. (Opposition at 4).



1 and production of server log data which it defined as: “(i) redacted IP addresses of  
2 the users of defendants’ websites who request dot-torrent files . . . ; (ii) the specific  
3 dot-torrent file . . . requested by users; (iii) the dates and times of such requests;  
4 (iv) reports from users’ computers confirming that the actual download of the  
5 desired content item corresponding to the dot-torrent file . . . has been completed  
6 by the user; and (v) masked IP addresses of users who are downloading content  
7 items . . . .” Although the June 8 Order does not use the term “event-by-event”  
8 data, it is implicit in such order that the data sets correspond to one another and are  
9 “event-by-event.”<sup>8</sup> Thus, the August 10 Order did not expand the scope of the  
10 June 8 Order. Rather it simply enforced defendants’ compliance with the June 8  
11 Order by directing defendants to produce server log data for their trackers.

12 Even if, however, defendants were unclear or uncertain of their obligations  
13 under the June 8 Order, they do not dispute that as of August 10, 2007, when they  
14 received the August 10 Order, they knew that they were obligated to produce the  
15 event-by-event data. Defendants have nonetheless failed to preserve and produce  
16 such data. If defendants were truly unclear or uncertain of their obligations under  
17 the June 8 Order and truly believed that the August 10 Order improvidently  
18 expanded the scope of the June 8 Order, defendants could have sought  
19 clarification, reconsideration, or review of the pertinent portions of such orders.  
20 By eschewing such potential avenues of relief and instead, ignoring their duty to  
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22 <sup>8</sup>Defendants point to language in the June 8 Order which afforded defendants certain  
23 flexibility in the manner of preserving and producing the data called for by the June 8 Order.  
24 (Opposition at 2) (quoting June 8 Order: “the court does not by this order mandate a particular  
25 method by which defendants are to preserve the Server Log Data. . . For example, if defendants  
26 are able to preserve and produce all of the Server Log Data through Google Analytics, nothing in  
27 this order precludes defendants from satisfying their obligations under this order in that  
28 fashion”). The language in issue did not relieve defendants of their obligation to preserve and  
produce the corresponding data sets called for by the June 8 Order. As noted above, however,  
even assuming the June 8 Order was ambiguous on this front, defendants do not dispute that the  
August 10 Order – with which defendants have failed to comply – clearly directed defendants to  
produce event-by-event tracker data.

1 preserve and produce the server log data for their trackers, defendants have  
2 engaged in a calculated course of conduct. See Commodity Futures Trading  
3 Comm'n, 67 F.3d at 771 (finding defendants' misconduct willful because  
4 defendants ignored discovery request and failed to seek a protective order).

5 Second, defendants contend that they are unable to comply with the court's  
6 orders due to the burden and costs associated with the production of event-by-  
7 event data for defendants' trackers, and that they should be relieved of the  
8 obligation to preserve and produce such data given plaintiff's asserted lack of need  
9 for such discovery. (Opposition at 3-6, Fung Decl. ¶¶ 3-5).<sup>9</sup> This court carefully  
10 considered the evidence and arguments presented by counsel in conjunction with  
11 the June 8 Order and August 10 Order before issuing the orders. Defendants did  
12 not then present the court with the evidence of "burden" that they now claim  
13 exists. The court will not excuse defendants' failure to comply with court orders  
14 based upon evidence that defendants could have, but failed to present to the court  
15 for consideration in connection with such matters. Defendants' counsel conceded  
16 during the hearing in this matter that defendant Fung did not even undertake to  
17 determine what would be necessary to preserve and produce the event-by-event  
18 data until *after* this court had already issued the August 10 Order, despite  
19 indisputably being on notice at least twenty days before then, that a request  
20 seeking such relief was pending before the court. Defendants waited until the day  
21 after production of the event-by-event tracker data was due pursuant to the  
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23 <sup>9</sup>Defendants represent that (i) the event-by-event data from defendants' trackers is only  
24 kept in the Random Access Memory of defendants' trackers; (ii) defendant do not currently  
25 retain the event-by-event data; (iii) defendants' tracker servers do not have the capacity to record,  
26 store or copy the event-by-event data on an ongoing basis; (iv) retention of the event-by-event  
27 data would require the installation of hardware; and (v) the production of event-by-event data  
28 includes personally identifying information, not considered by the parties or the court in the  
June 8 Order; and (vi) developing a program to parse the tracker logs and automate hashing of  
the identified fields of personally identifying information would take up to three months and cost  
\$50,000. (Fung Decl ¶¶ 3-5).

1 August 10 Order to inform plaintiffs of their alleged inability to comply with the  
2 August 10 Order. (Smith Decl. ¶ 2, Ex. A; Servodidio I Decl. ¶ 6, Ex. 7).<sup>10</sup> Even  
3 at that point, defendants did not seek a stay, reconsideration, or review the August  
4 10 Order. Although defendants, on August 17, 2007, advised plaintiffs' counsel  
5 that defendants intended to seek ex parte relief, defendants did not do so. Instead,  
6 they persisted with their non-compliance with the August 10 Order.<sup>11</sup>

7 As the history above suggests, defendants' failure to comply with the  
8 court's orders was not due to events outside of their control.<sup>12</sup> In sum, this court  
9 concludes that defendants have willfully disobeyed the June 8 Order and the  
10 August 10 Order.

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13 <sup>10</sup>Defendants belatedly request that the court order a shifting of the burden and costs in  
14 light of the "additional burden" of producing the event-by-event data "made clear" by the  
15 August 10 Order because the court "specifically provided for a burden and cost shifting request".  
16 (Opposition at 2, 5) Defendants appear to refer to footnote 22 of the June 8 Order in which the  
17 court encouraged the parties to meet and confer and to submit a stipulation regarding sampling,  
18 and indicated that absent such a stipulation, the order was without prejudice to a request by  
19 defendants to share or shift the costs of preservation and production. (June 8 Order at 25 n.22).  
20 The record reflects that plaintiffs did attempt to narrow the scope of the requested data, thereby  
21 minimizing any burden and costs on defendants, that plaintiffs prepared a proposed stipulation  
22 for defendants' consideration, and that defendants' counsel, although representing that he would  
23 email comments regarding such proposed stipulation, never did so. (Ex Parte Application at 3  
24 n.2; Servodidio I Decl. ¶ 4, Ex. 4; Smith Decl. ¶ 4, Ex. B; Reply at 8-9 n.2). In light of this  
25 history and the timing of defendants' current request, this court does not believe it appropriate to  
26 issue a cost-shifting order at this juncture.

27 <sup>11</sup>For the reasons set forth in plaintiffs' reply at pages 5-6, this court is also not persuaded  
28 by defendants' contention that plaintiffs have no need for the data in issue because they could  
participate as a peer in the BitTorrent network and allegedly could acquire the same data that is  
in issue. (Opposition at 5).

<sup>12</sup>To the extent defendants' failure to comply with this court's orders may be predicated  
upon their disagreement with such orders, defendants' "disagreement with the court is not an  
excuse for failing to comply with courts orders" Hyde & Drath, 24 F.3d 1162, 1168 (9th Cir.) as  
amended (1994) (quoting Adriana, 913 F.2d at 1411).

1           **B. Limited Evidentiary Sanctions Should Be Imposed**

2           Plaintiffs, by the pending Ex Parte Application, seek evidentiary, not  
3 terminating sanctions. The court will nonetheless consider plaintiffs' request for  
4 evidentiary sanctions under the analytical rubric applicable to requests for  
5 terminating sanctions.

6           The first and second factors (the public's interest in expeditious resolution  
7 of litigation, and the court's need to manage its dockets) militate in favor of  
8 granting sanctions, and the fourth factor (the public policy favoring disposition of  
9 cases on their merits) weighs only slightly against granting sanctions, as the  
10 sanctions sought by plaintiffs would not dispose of the entire action.

11           As to the third factor (the risk of prejudice to the party seeking sanctions), a  
12 plaintiff suffers prejudice if a defendant's actions impair the plaintiff's ability to  
13 go to trial or threaten to interfere with the rightful decision of the case. Kahaluu  
14 Constr. Co., Inc., 857 F.2d at 604; Hyde & Drath, 24 F.3d at 1166. "Delay alone  
15 has been held to be insufficient prejudice . . . Failure to produce documents as  
16 ordered, however, is considered sufficient prejudice." Adriana Int'l Corp., 913  
17 F.2d at 1412 (citations omitted); Computer Task Group, Inc. v. Brotby, 364 F.3d  
18 1112, 1116 (9th Cir. 2004) (same) (citation omitted).

19           Here, defendants' refusal to comply with the court-ordered production of  
20 discovery constitutes an interference with the rightful decision of the case.  
21 Plaintiffs represent that the server log data for defendants' trackers required  
22 detailed evaluation by plaintiffs' experts in order to correlate the dot-torrent files  
23 and corresponding masked IP addresses downloaded from defendants' websites  
24 with the parallel data from defendants' trackers reflecting completed downloads of  
25 associated content items. (Ex Parte Application at 8; Servodidio I Decl. ¶ 8).  
26 Plaintiffs further represent that such evaluation would have provided conclusive  
27 proof of direct infringement, a core issue in the instant action. (Ex Parte  
28 Application at 7-8; Servodidio I Decl. ¶ 8). This court agrees that direct

1 infringement is a core and threshold issue in this case, and that the server log data  
2 in issue is likely to be extremely probative of, if not dispositive on such issue.<sup>13</sup>  
3 The court further finds in light of the current procedural posture of this case, and  
4 defendants' continued wilful disobedience, defendants' failure to produce the  
5 server log data for their trackers has prejudiced plaintiffs. See Payne, 121 F.3d at  
6 508 ("Many of the discovery responses eventually tendered by the plaintiffs came  
7 only as the discovery period was drawing to a close, or after it had already closed.  
8 [Defendants] were therefore deprived of any meaningful opportunity to follow up  
9 on that information, or to incorporate it into their litigation strategy.").  
10 Accordingly, the fourth factor weighs in favor of granting sanctions.

11 As to the fifth factor (the availability of less drastic sanctions), the court has  
12 considered and has already imposed less drastic sanctions. The court granted  
13 plaintiffs' requests for reasonable attorneys' fees and costs five times due to  
14 defendants' discovery abuses and/or failure to comply with the court's orders,  
15 without any apparent effect.<sup>14</sup> Moreover, the court expressly warned defendants  
16 that their failure to comply with their discovery obligations or discovery orders  
17 may result in evidentiary sanctions, including terminating sanctions. In light of  
18 defendants' ongoing discovery abuses, this court concludes that any sanction less  
19 than evidentiary sanctions at this juncture would be pointless. See Computer Task  
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21 <sup>13</sup>Plaintiffs also assert that even if defendants produced the court-ordered server log data  
22 for defendants' trackers immediately, there is not sufficient time prior to the summary judgment  
23 deadline to process and analyze the data to prove direct infringement of plaintiffs' copyrighted  
24 works (Ex Parte Application at 8; Servodidio I Decl. ¶ 8). Plaintiffs' Ex Parte Application was  
25 filed before the parties' deadline to file summary judgment motions. Plaintiffs have since filed a  
26 summary judgment motion which is set for hearing on November 19, 2007. The fact that  
27 plaintiffs have now filed a summary judgment motion does not remove the prejudice resulting  
28 from the non-production of the data in issue as such data likely would significantly bolster  
plaintiffs' arguments

<sup>14</sup>See Dockets Nos. 56 (Order dated February 22, 2007), 121 (Order dated May 31, 2007),  
137 (the June 8 Order), 207 (Order dated August 6, 2007), and 211 (the August 10 Order).

1 Group, Incorp, 364 F.3d at 1116. Thus, the fifth factor militates in favor of  
2 granting evidentiary sanctions.

3 In sum, the foregoing factors weigh in favor of granting plaintiffs' request  
4 for evidentiary sanctions.

5 Having determined that evidentiary sanctions are warranted in this action,  
6 the court turns to the issue of whether the specific sanction sought by plaintiffs is  
7 appropriate.

8 Plaintiffs request that the court declare that it is conclusively established for  
9 purposes of this action that each of plaintiffs' copyrighted works for which a dot  
10 torrent file has appeared on defendants' torrent sites has been, and continues to be,  
11 directly infringed by users of defendants' torrent sites. The court finds that such  
12 request is overbroad and not directly tied to plaintiffs' specific discovery requests  
13 and defendants' corresponding failure to respond because defendants' trackers are  
14 associated with only two of defendants' websites, Torrentbox and Podtropolis.

15 Accordingly, as an evidentiary sanction against defendants for violation of  
16 this court's June 8 and August 10 Orders, this court recommends that it be deemed  
17 as conclusively established for the purposes of this action that each of plaintiffs'  
18 copyrighted works for which a dot torrent file has appeared on defendants'  
19 Torrentbox and Podtropolis websites has been, and continues to be, directly  
20 infringed by users of defendants' Torrentbox and Podtropolis websites. This court  
21 finds that such evidentiary sanction, as narrowed, is reasonably related to the  
22 subject of discovery that was frustrated by the sanctionable conduct which is the  
23 subject of the Ex Parte Application. See Navellier, 262 F.3d at 947.

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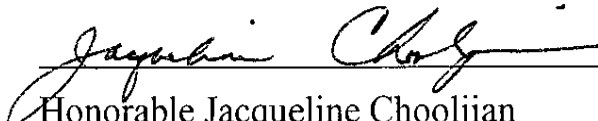
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1 **V. CONCLUSION**

2 **IT IS THEREFORE RECOMMENDED** that the District Court issue an  
3 Order: (1) approving and adopting this Report and Recommendation; and  
4 (2) granting plaintiff's request for evidentiary sanctions in part and denying it in  
5 part, as detailed in this Report and Recommendation.

6 DATED: September 19, 2007

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10 Honorable Jacqueline Chooljian  
11 UNITED STATES MAGISTRATE JUDGE  
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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
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11 COLUMBIA PICTURES  
12 INDUSTRIES, et al.,

13 Plaintiffs,

14 v.

15 GARY FUNG, et al.,

16 Defendants.  
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) Case No. CV 06-5578 SVW(JC)

) ORDER ADOPTING FINDINGS,  
) CONCLUSIONS, AND  
) RECOMMENDATIONS OF  
) UNITED STATES MAGISTRATE  
) JUDGE

18 Pursuant to 28 U.S.C. § 636, the Court has reviewed plaintiffs' Notice of Ex  
19 Parte Application and Ex Parte Application for a Report and Recommendation for  
20 Evidentiary Sanctions for Violation of Court's June 8 and August 10 Orders –  
21 Fees Requested ("Ex Parte Application"), the supporting declaration of Gianni P.  
22 Servodidio with attached exhibits, defendants' Opposition to the Ex Parte  
23 Application and supporting declarations of defendant Gary Fung and Jared R.  
24 Smith with accompanying exhibits, plaintiffs' Reply in Support of the Ex Parte  
25 Application, the supporting declaration of Gianni P. Servodidio and exhibit, all of  
26 the records pertinent to the Ex Parte Application, and the attached Report and  
27 Recommendation of United States Magistrate Judge. The Court approves and  
28 adopts the United States Magistrate Judge's Report and Recommendation.

CLARENCE



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IT IS ORDERED that (1) Plaintiff's Ex Parte Application is granted in part and denied in part as detailed in the Report and Recommendation; and (2) It is deemed as conclusively established for the purposes of this action that each of plaintiffs' copyrighted works for which a dot torrent file has appeared on defendants' Torrentbox and Podtropolis websites has been, and continues to be, directly infringed by users of defendants' Torrentbox and Podtropolis websites.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, and the United States Magistrate Judge's Report and Recommendation, on counsel for the parties.

DATED: \_\_\_\_\_, 2007

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HONORABLE STEPHEN V. WILSON  
UNITED STATES DISTRICT JUDGE