

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE DMCA SUBPOENA TO REDDIT,
INC.,

Case No. [19-mc-80005-SK](#)

**ORDER REGARDING MOTION TO
QUASH SUBPOENA**

Regarding Docket No. 8

Now before the Court is a motion to quash filed by John Doe under his pseudonym, Darkspilver (“Darkspilver”). Having carefully considered the parties’ papers, relevant legal authority, and the record in the case, and having had the benefit of oral argument, the Court hereby GRANTS IN PART and DENIES IN PART Darkspilver’s motion to quash for the reasons set forth below.

BACKGROUND

On January 9, 2019, Petitioner Watch Tower Bible & Tract Society of Pennsylvania (“Watch Tower”) filed this action to request that the Court issue a subpoena pursuant to the Digital Millennium Copyright Act (“DMCA”) to Reddit, Inc. to discover the identity of Darkspilver (the pseudonym used by someone who posted on Reddit). On January 16, 2019, the Clerk issued the subpoena. Watch Tower served the subpoena on Reddit on January 24, 2019. (Dkt. 12 (Declaration of Paul D. Polidoro), ¶ 11.) Reddit has not yet provided Darkspilver’s identity and filed a document stating that it joins in Darkspilver’s motion to quash.

Darkspilver was raised as a Jehovah’s Witness and has been a member of that community his¹ whole life. (Dkt. 8-1 (Declaration of John Doe (Darkspilver)), ¶ 3.) Many of Darkspilver’s

¹ It unknown whether Darkspilver is male or female, but Darkspilver has chosen the male

1 friends and family members are currently active Jehovah’s Witnesses, and Darkspilver considers
2 himself a practicing Jehovah’s Witness. (*Id.*)

3 Darkspilver states that there are aspects of the organization of Jehovah’s Witnesses’
4 teachings and practices that he questions and that he does not feel as though he can openly discuss
5 his views with other members of the community. (*Id.*, ¶ 4.) He states that different opinions and
6 questions are strongly discouraged. (*Id.*)

7 Darkspilver states that, in his experience, people who voice their disagreement or doubts
8 “face rejection [by] and disapproval” from other members of the Jehovah’s Witness community,
9 including leadership and ordinary members. (*Id.*) Those who openly disagree with the
10 organization’s teachings publicly may be labelled “apostates” and be “excommunicated” or
11 “disfellowshipped” from the community. (*Id.*) Other Jehovah’s Witnesses, including friends and
12 family members, cut off ordinary social interactions with people who have been disfellowshipped.
13 (*Id.*) Darkspilver has personal knowledge of people who, after voicing certain opinions, have been
14 shunned by Jehovah’s Witnesses, including people with whom they had close relationships. (*Id.*)

15 Reddit is a social media platform where people can post to different forums. Reddit allows
16 people to use pseudonyms to communicate. For the past few years, Darkspilver has participated in
17 a Reddit forum for self-described former Jehovah’s Witnesses. (*Id.*, ¶ 5.) Although Darkspilver
18 does not consider himself a “former” member, he believes that it is the only place he has been able
19 to discuss and debate matters related to the Jehovah’s Witnesses freely and openly. (*Id.*)

20 Darkspilver also chose Reddit because of his ability to communicate anonymously on the site.
21 (*Id.*) Darkspilver states that keeping his name and identity private is necessary for him to feel
22 comfortable participating in open discussions about religious teachings and practice. (*Id.*)

23 Darkspilver does not live in the United States. (*Id.*, ¶ 6.) According to a map made by
24 participants in the Jehovah’s Witness forum, many of the participants reside in the United States.
25 (*Id.*, ¶ 6; Dkt. 12, ¶ 9; Dkt. 12-4 (Ex. D (2,869 subscribers contributed to the map; 1,944 of those
26 subscribers reside in the United States).) Watch Tower states that, as of April 9, 2019, there were

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28 *nom de plume* of John Doe. Thus, the Court will use male pronouns in this Order in referring to
Darkspilver.

1 “34.1 thousand reported subscribers” to the Reddit forum, which is an increase from the
2 approximately 29,000 subscribers in November 2018 before Watch Tower issued the subpoena
3 regarding Darkspilver. (Dkt. 12, ¶¶ 6, 8.) Watch Tower issued notices of copyright infringement
4 under the DMCA to Darkspilver and to one other subscriber to the Reddit forum. (*Id.*, ¶ 6.)

5 On February 7, 2019, Reddit informed Darkspilver of Watch Tower’s subpoena for
6 Darkspilver’s identifying information based on two of Darkspilver’s anonymous posts in the
7 Reddit forum: (1) an advertisement and (2) a chart. (Dkt. 8-1, ¶¶ 7, 8.) Watch Tower states that
8 both of these items are copyrighted works. (Dkt. 12, ¶ 2.) The advertisement, which was
9 published in a Watchtower magazine, encourages people to make donations to the Jehovah’s
10 Witnesses and directs readers to make donations through the website donate.jw.org. (Dkt. 8-1, ¶
11 8; Dkt. 8-2 (Ex. A).) Darkspilver states that, to his knowledge, both the Watchtower magazine
12 and the advertisement are available for free online. (Dkt. 8-1, ¶ 8.) Watch Tower published this
13 advertisement on line at JW.ORG and on the back cover of the 32-page November 2018 issue of
14 The Watchtower – Announcing Jehovah’s Kingdom. (Dkt. 12, ¶ 2; *see also*
15 <https://www.jw.org/en/publications/magazines/watchtower-study-november-2018>.) Darkspilver’s
16 stated that his reason for posting the advertisement on the Reddit forum was:

17 to show how openly the organization was petitioning for financial
18 donations from members, to illustrate the organization’s use of
19 commercial advertising design, and to point out the organization’s
20 encouragement of online donations. All of these represented major
21 changes from the teachings and practices the organization had . . .
22 espoused in the past. [Darkspilver] wanted to inform others and spark
23 discussion about the organization’s tone, message, and fundraising
24 practices.

25 (Dkt. 8-1, ¶ 9.) Darkspilver did not make any money by posting the advertisement on the forum.

26 (*Id.*)

27 Darkspilver also posted a screenshot of a chart with information about the personal data the
28 Jehovah’s Witness organization stores and processes along with citations to relevant provisions of
a European Union data privacy law called the General Data Protection Regulation. (*Id.*, ¶ 10; Dkt.
8-4 (Ex. C).) The chart was an internal document that Watch Tower did not intend to publicly
distribute. (Dkt. 12, ¶ 2.) Darkspilver created this image by using data in an Excel file that he re-

1 formatted to make it more visually appealing and easy to read on a screen. The Excel file that
2 Darkspilver used to create this image is attached as Exhibit D to his declaration. (Dkt. 8-1, ¶ 10;
3 Dkt. 8-5 (Ex. D).) Darkspilver's stated that his reason for posting the chart on the Reddit forum
4 was "to provide information to people in the Jehovah's Witness community about the type of
5 information the organization actually stores and what it does with that information." (Dkt. 8-1, ¶
6 11.) Darkspilver is "aware of concerns that some former Jehovah's Witnesses have with respect to
7 data the organization collects and stores," including "records of the number of hours individual
8 Witnesses spend doing direct evangelical outreach" and "internal handling of many issues,
9 including abuse allegations." (*Id.*) Darkspilver concludes: "Although some people are concerned
10 about data in the organization's possession, I am concerned about excessive deletion of stored
11 information, largely because it might include information about past abuses (or the handling of
12 past abuses) that might be helpful in the future for discovering or substantiating claims." (*Id.*)

13 Darkspilver has serious concerns about Watch Tower obtaining his identity. He believes
14 that it would chill his speech and would damage or destroy his relationships with friends and
15 family who remain active members of the Jehovah's Witness community. (*Id.*, ¶ 12.) Darkspilver
16 believes that Watch Tower would be able to use information from Reddit to determine his real
17 identity based on the information the Jehovah's Witnesses have collected about him, including his
18 name and address. (*Id.*) Darkspilver explains that he has been part of the Jehovah's Witness
19 community his whole life, and so the pain of social exclusion would be overwhelming.
20 Additionally, if his identity is revealed, Darkspilver would not feel comfortable talking about his
21 experience openly online. (*Id.*) Darkspilver would not have shared truthful information or
22 commentary regarding the Jehovah's Witness organization if he knew that his name would be
23 revealed. (*Id.*) Darkspilver has already stopped posting on the former Jehovah's Witness Reddit
24 forum and, if his identity is disclosed, he will not begin again. (*Id.*)

25 In support of his motion, Darkspilver also submits newspaper articles recounting stories
26 from former Jehovah's Witnesses who were shunned or disfellowshipped from the religion. (Dkt.
27 8-6 (Declaration of Alexandra Moss); Dkt. 8-7 (Ex. A).)

28 Watch Tower submits messages from subscribers to the Reddit forum after Darkspilver

1 filed this motion to quash the subpoena. (Dkt. 12, ¶ 7; Dkt. 12-1 (Ex. A).) Some subscribers
 2 posted messages stating that their speech would not be chilled by Watch Tower's efforts to obtain
 3 the identity of people they accuse of copyright infringement, but it is unclear if those users are,
 4 like Darkspilver, current members of the Jehovah's Witnesses. (Dkt. 12-2 (Ex. B).)

5 Watch Tower is not Darkspilver's local church and does not have the ability to
 6 excommunicate him from his local congregation. (Dkt. 12, ¶ 10.) Watch Tower states that no
 7 person who has been the subject of a DMCA subpoena has been excommunicated from his or her
 8 local church as a result of Watch Tower's learning his or her identity and that Watch Tower has
 9 not disclosed to the public the names of individuals who were the subjects of DMCA subpoenas.
 10 (*Id.*)

11 ANALYSIS

12 Watch Tower contends that the advertisement and the chart are protected by copyright and
 13 that Darkspilver infringed Watch Tower's copyright by posting them. Darkspilver counters that
 14 his identity is protected by the First Amendment right to free speech and that his posting of these
 15 items were non-infringing fair use.

16 **A. Motion Is Not Untimely.**

17 Watch Tower argues that the Court should reject Darkspilver's motion as untimely.
 18 However, the authority upon which Watch Tower relies applies to parties. Darkspilver is not a
 19 party to a lawsuit and was not even the recipient to of the subpoena. According to Watch Tower,
 20 Darkspilver should have moved to quash before the return date on the subpoena – February 15,
 21 2019. But Darkspilver did not even have notice of the subpoena until after that date, on February
 22 22, 2019. Moreover, it is undisputed that Reddit has not yet responded to the subpoena.
 23 Therefore, the Court finds that the motion is not untimely and will address the merits of
 24 Darkspilver's motion to quash.

25 **B. Whether the First Amendment Applies.**

26 Watch Tower disputes that Darkspilver's speech is entitled to any protection under the
 27 First Amendment. According to Watch Tower, because Darkspilver resides outside of the United
 28 States, applying the First Amendment to his speech would be impermissible as an extraterritorial

1 application of American law. For support, Watch Tower cites two cases evaluating different
2 constitutional provisions – the Fourth and the Fifth Amendments. *See Johnson v. Eistrager*, 339
3 U.S. 763 (1950) (Fifth Amendment); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)
4 (Fourth Amendment).

5 In *Johnson*, the Supreme Court held that military prisoners captured abroad were not
6 entitled to protection under the Fifth Amendment because they were: (a) enemy aliens; (b) had
7 never been or resided in the United States; (c) were captured outside of the United States and held
8 in military custody as war prisoners; and (d) were tried and convicted by a Military Commission
9 sitting outside the United States for war crimes committed abroad. *Johnson*, 339 U.S. at 777.
10 Under those circumstances, the Supreme Court rejected the extraterritorial application of the Fifth
11 Amendment. *Id.* at 784.

12 In *United States v. Verdugo-Urquidez*, the Supreme Court noted the nature of the Fourth
13 Amendment: “It prohibits ‘unreasonable searches and seizures’ . . . and a violation of the
14 Amendment is ‘fully accomplished’ at the time of an unreasonable governmental intrusion. . . .
15 [T]herefore, if there were a constitutional violation, it occurred solely in Mexico.” *Verdugo-*
16 *Urquidez*, 494 U.S. at 264 (internal citations omitted). In that case, the Court rejected the
17 extraterritorial application of the Fourth Amendment to a search conducted in Mexico of a Mexican
18 resident and citizen’s homes. *Id.* at 262, 274-75.

19 In contrast, here, the constitutional right at stake is a different constitutional amendment –
20 the First Amendment – and the asserted violation does not concern merely extraterritorial conduct.
21 The subpoena here was issued by a Court in the United States, on behalf of a United States
22 company (Watch Tower) and was directed against another United States company (Reddit).

23 Moreover, the First Amendment protects the audience as well as the speaker. *See Desai v.*
24 *Hersh*, 719 F. Supp. 670, 676 (N.D. Ill. 1989) (“The first amendment shields the actions of
25 speakers for the benefit of their audience.). As another court in this District explained:

26 The First Amendment does protect the public of this country. As Mr.
27 Justice Brennan pointed out in *A Quantity of Copies of Books v. State*
28 *of Kansas, supra*, there is a ‘right of the public in a free society to
unobstructed circulation of nonobscenebooks’ (emphasis added).
The First Amendment surely was designed to protect the rights of

1 readers and distributors of publications no less than those of writers
2 or printers. Indeed, the essence of the First Amendment right to
3 freedom of the press is not so much the right to print as it is the right
4 to read. The rights of readers are not to be curtailed because of the
5 geographical origin of printed materials.

6 *United States v. 18 Packages of Magazines*, 238 F. Supp. 846, 847-48 (N.D. Cal. 1964). In other
7 words, the protections of the First Amendment extend beyond the personal rights of the speaker.
8 *Burse v. United States*, 466 F.2d 1059, 1083-84 (9th Cir. 1972). As the Ninth Circuit explained:

9 The First Amendment interests in this case are not confined to the
10 personal rights of [Plaintiffs]. . . . Freedom of the press was not
11 guaranteed solely to shield persons engaged in newspaper work from
12 unwarranted governmental harassment. The larger purpose was to
13 protect public access to information. Freedom of association was
14 secured not only to protect the privacy of those who assert their rights
15 in litigation, but also to shelter all persons from unjustifiable
16 governmental prying into their associations with lawful groups. In
17 the context of litigation, vindication of these public rights secured by
18 the First Amendment is primarily committed to persons who are also
19 asserting their individual constitutional rights.

20 *Id.*

21 Although the exact percentage of subscribers to Reddit forum who live in United States is
22 unknown, the only data before the Court suggests that a substantial number are United States
23 residents. (Dkt. 8-1, ¶ 6; Dkt. 12, ¶ 9; Dkt. 12-4 (map showing that more than two-thirds of the
24 subscribers who provided their information reside in the United States) Based on the involvement
25 of the United States Court’s procedures by and against United States companies and the audience
26 of United States residents, as well as the broad nature of the First Amendment’s protections, the
27 Court finds that the First Amendment is applicable here.

28 **C. Determining the First Amendment Test.**

“It is well established that the First Amendment protects the right to anonymous speech.”
Art of Living Found. v. Does 1-10, 2011 WL 5444622, at *3 (N.D. Cal. Nov. 9, 2011) (citing
McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 342 (1995) (“An author’s decision to remain
anonymous, like other decisions concerning omissions or additions to the content of a publication,
is an aspect of the freedom protected by the First Amendment”). Moreover, the protection for
anonymous speech applies to speech on the internet. *In re Anonymous Online Speakers*, 661 F.3d
1168, 1172-73 (9th Cir. 2011) (“[O]nline speech stands on the same footing as other speech –

1 there is ‘no basis for qualifying the level of First Amendment scrutiny that should be applied’ to
2 online speech.’’) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). “As with
3 other forms of expression, the ability to speak anonymously on the Internet promotes the robust
4 exchange of ideas and allows individuals to express themselves freely without “fear of economic
5 or official retaliation ... [or] concern about social ostracism.” *Id.* (quoting *McIntyre*, 514 U.S. at
6 341-42).

7 “The right to speak, whether anonymously or otherwise, is not unlimited, however, and the
8 degree of scrutiny varies depending on the circumstances and the type of speech at issue.” *In re*
9 *Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). “[T]he nature of the speech
10 should be the driving force in choosing a standard by which to balance the rights of anonymous
11 speakers in discovery disputes.” *Id.* at 1177; *see also Signature Mgmt. Team, LLC v. Automattic,*
12 *Inc.*, 941 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (noting that courts begin “by considering the
13 nature of the speech before determining the appropriate standard”).

14 Courts apply a rigorous or “most exacting” standard when the speech is political, religious,
15 or literary. In contrast, commercial speech is afforded less protection. *In re Anonymous Online*
16 *Speakers*, 661 F.3d at 1177. Where, as here, the speech touches on a matter of public interest,
17 courts in this district have applied a stronger standard than if the speech were commercial. *See*
18 *Highfields Capital Management, L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *see also Art*
19 *of Living Found. v. Does 1-10*, 2011 WL 5444622, at *7 (N.D. Cal. Nov. 9, 2011).

20 In *Highfields*, the speech at issue was postings of “sardonic commentary on a public
21 corporation; through irony and parody, these bulletin board postings express[ed] dissatisfaction
22 with the performance of the stock and the way company executives choose to spend company
23 resources.” *Highfields*, 385 F. Supp. 2d at 975. The speech also expressed disapproval or
24 criticism of the corporation’s largest single shareholder. *Id.* The speech expressed “views in
25 which other members of the public may well be interested” and that the speaker had the right to
26 express anonymously. *Id.* The court noted speaker’s rights to speak anonymously on these topics
27 were vulnerable and precarious and “close to the central societal values that animate our
28 Constitution.” *Id.*

1 In *Art of Living Foundation*, the speakers were former students and teachers of the
2 organization, Art of Living Foundation, who anonymously criticized the organization and its
3 leader on an internet blog. *Id.*, 2011 WL 544622 at * 1. The court cited an opinion from the
4 California Court of Appeal for the proposition that “although matters of public interest include
5 legislative and governmental activities, they may also include activities that involve private
6 persons and entities, especially when a large, powerful organization may impact the lives of many
7 individuals.” *Id.*, 2011 WL 544622 at * 6 (quoting *Church of Scientology v. Wollersheim*, 42 Cal.
8 App. 4th 628, 649 (1996) (allegations that the Church of Scientology harmed and abused its
9 members was speech in connection with a “public issue”). Considering that the organization had
10 chapters in 140 countries and was one of the United Nations’ largest volunteer-based non-
11 governmental organizations, the court held that the speakers’ condemnation of the organization
12 was clearly a matter of public interest. *Id.*, 2011 WL 544622 at * 6.

13 Here, Darkspilver anonymously posted to the Reddit forum to comment on and foster
14 thoughtful and critical dialogue on the practices of Jehovah’s Witnesses. The Court finds that
15 Darkspilver’s speech was a matter of public interest. Therefore, the Court will apply the following
16 two-part test articulated in *Highfields* and *Art of Public Living*:

17 (1) The [subpoenaing party] must produce competent evidence
18 supporting a finding of each fact that is essential to a given cause of
19 action; and (2) if the [subpoenaing party] makes a sufficient
20 evidentiary showing, the court must compare the magnitude of the
21 harms that would be caused to the competing interests by a ruling in
22 favor of the [subpoenaing party] and by a ruling in favor of the
23 [anonymous speaker].

24 *Art of Living Found*, 2011 WL 5444622, at *7 (citing *Highfields*, 385 F. Supp. 2d at 975-76).

25 **D. Evaluating Darkspilver’s First Amendment Challenge.**

26 **1. Evidentiary Basis for Watch Tower’s Copyright Claims.**

27 As the court in *Highfields* explained, under this prong of the test:

28 the plaintiff must adduce *competent evidence* – and the evidence
plaintiff adduces must address *all* of the inferences of fact that
plaintiff would need to prove in order to prevail under at least one of
the causes of action plaintiff asserts. In other words, the evidence that
plaintiff adduces must, if unrebutted, tend to support a finding of *each*
fact that is essential to a given cause of action. The court may not

1 enforce the subpoena if, under plaintiff's showing, any *essential* fact
or finding lacks the requisite evidentiary support.

2 *Highfields*, 385 F. Supp. 2d at 975-76 (emphasis in original).

3 To establish a *prima facie* case of copyright infringement, a plaintiff must show (1)
4 ownership of a valid copyright, and (2) violation by the alleged infringer of at least one of the
5 exclusive rights granted to copyright owners by the Copyright Act. *UMG Recordings, Inc. v.*
6 *Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011). Watch Tower argues that it laid out a *prima facie*
7 case of copyright infringement in its subpoena application. (Dkt. 11 (Watch Tower's Opp.) at pp.
8 13-14.) However, the application does not actually address the registration of any copyright or
9 otherwise show that either the advertisement or the chart is a copyright protected work. The
10 application simply states that that Darkspilver's posts infringe a copyright held by Watch Tower
11 and cite to the declaration of Paul D. Polidoro in support of the subpoena application. (Dkt. 1
12 (Subpoena Application) at p.1.) The declaration does not address the copyright protections of
13 either the advertisement or the chart. (Dkt. 2 (Declaration of Paul D. Polidoro in Support of
14 Subpoena Application).) In the declaration in support of its opposition to the motion to quash, Mr.
15 Polidoro states that "Watch Tower is the copyright owner of the both" the advertisement and the
16 chart. (Dkt. 12, ¶ 2.) This brief statement is the full extent of Watch Tower's evidence in support
17 of its claim that it owns a valid copyright in the record before the Court.

18 **a. Advertisement**

19 Darkspilver does not contest that Watch Tower registered the publication in which the
20 advertisement was included and thus does not contest copyright ownership for the advertisement.
21 (Dkt. 8 (Mot. to Quash) at p. 10.) "A certificate of registration from the U.S. Copyright Office
22 raises the presumption of copyright validity and ownership." *Unicolors, Inc. v. Urban Outfitters,*
23 *Inc.*, 853 F.3d 980, 988 (9th Cir. 2017). Therefore, for purposes of this motion, the Court will
24 assume that the advertisement is part of a registered work.

25 Moreover, Darkspilver does not contest that he posted copies of the advertisement on the
26 Reddit forum. Therefore, the Court finds that Watch Tower has demonstrated a *prima facie* case
27 of copyright infringement for the advertisement. Darkspilver argues that Watch Tower has not
28 made a sufficient showing because his posting of the advertisement fell under the doctrine of fair

1 use. However, Darkspilver bears the burden to prove the defense of fair use. Therefore, Watch
 2 Tower does not need to counter this defense in order to demonstrate a *prima facie* case of
 3 copyright infringement.² Therefore, the Court finds that Watch Tower has met its showing under
 4 the first prong as to the advertisement.

5 **b. Chart**

6 It is not clear that the chart meets the minimum standards of originality required for
 7 copyright protection. Watch Tower has not yet registered the chart. Therefore, the chart is not
 8 entitled to a presumption of copyright validity and Watch Tower must submit evidence to make
 9 the requisite showing.

10 In *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*, 936 F.2d 671, 673 (2d Cir. 1991),
 11 the court held that a chart did not merit copyright protection because it was merely a compilation
 12 of preexisting facts. Although a compilation of preexisting facts could meet the minimum for
 13 copyright protection if it features original selection, coordination or arrangement of those facts, the
 14 court found that the plaintiff's compilation failed to meet this minimum requirement. "Although
 15 novelty is not required, some 'modicum of creativity' is necessary to transform simple
 16 compilation into copyrightable expression." *Id.* (quoting *Feist Publications, Inc. v. Rural*
 17 *Telephone Service Co.*, 499 U.S. 340 (1991)). The court held that the charts were not entitled to
 18 copyright protection because the format of the charts lacked selectivity in what was reported and
 19 in how it was reported. *Id.*

20 Here, Watch Tower summarily argues that "the layout, design, and word choice [of the
 21 chart] are all creative in nature," with no supporting evidence. In the absence of any supporting
 22 evidence, the Court finds that Watch Tower has not met its burden to show, with competent
 23 evidence, its ownership of a valid copyright in the chart. Therefore, Watch Tower fails to
 24 demonstrate a *prima facie* case of copyright infringement with respect to the chart.

25 ///

26 _____
 27 ² Although fair use is not a traditional "affirmative defense," the "burden of proving fair
 28 use is always on the putative infringer." *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th
 Cir. 2016) (emphasis in original) (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n. 22
 (11th Cir. 1996)).

2. Balancing of Harms.

1 Because the Court finds that Watch Tower demonstrates a *prima facie* case of copyright
2 infringement with respect to the advertisement, the Court will address the second prong –
3 comparing the magnitude of the harms that would be caused to the competing interests by a ruling
4 in favor of Watch Tower and by a ruling in favor of Darkspilver.
5

6 Darkspilver presents evidence to show that revealing his identity to Watch Tower would
7 chill his speech on the Reddit forum. He selected that forum because it was a place where he
8 could communicate anonymously with other current and former Jehovah’s Witnesses. (Dkt. 8-1, ¶
9 5.) He is concerned that, if Watch Tower discovers his identity, the revelation of his identity
10 would damage or destroy his relationships with friends and family who are active members of the
11 Jehovah’s Witness community. (*Id.*, ¶ 12.) Speaking anonymously is necessary for him to feel
12 comfortable participating in open discussions about religious teachings and practice. (*Id.*, ¶ 5.)
13 Darkspilver has already stopped posting on the Reddit forum and will not begin again if his
14 identity is revealed. (*Id.*, ¶ 12.)

15 Watch Tower disputes Darkspilver’s assertion that his free speech will be chilled by citing
16 to statements made by other individuals posting on the Reddit forum stating that they would not be
17 deterred from speaking and by the fact that the size of the forum has grown since Watch Tower
18 issued the subpoena. (Dkt. 12-2.) Considering that this is a forum for former Jehovah’s Witnesses
19 – people who have already left the religion and, presumably, the community – it is not surprising
20 that some expressed that they would not be deterred from speaking if their identities were
21 revealed. But select quotes from others do not undermine *Darkspilver’s* expressed concern over
22 speaking openly about *his* views on Jehovah Witness’ practices. Moreover, to the extent other
23 current Jehovah’s Witnesses are publishing anonymous posts on this Reddit forum, they also
24 might have concerns similar to Darkspilver.

25 Watch Tower further argues that Watch Tower is not Darkspilver’s local church and has no
26 ability to excommunicate him from his local congregation. (Polidoro Decl., ¶ 10.) Nevertheless,
27 Darkspilver has expressed substantial concerns over having his identity revealed to anyone in the
28 Jehovah’s Witness community. The Court finds that Darkspilver has demonstrated significant

1 harms if his identity were revealed publicly or even if it were revealed to Jehovah’s Witnesses in
2 his congregation.

3 On the other hand, if Watch Tower cannot determine Darkspilver’s identity, Watch Tower
4 would lose its ability to enforce its copyright. However, in evaluating the balance of the harms,
5 the Court finds that it should address Darkspilver’s defense of fair use. As the Ninth Circuit has
6 made clear, although Darkspilver bears the burden of demonstrating fair use, “for purposes of the
7 DMCA – fair use is uniquely situated in copyright law so as to be treated differently than
8 traditional affirmative defenses. . . . [F]air use is ‘authorized by law[.]’” *Lenz*, 815 F.3d at 1153;
9 *see also id.* at 1151 (“Fair use is not just excused by the law, it is wholly authorized by the law.”)
10 Moreover, because fair use is a non-infringing use authorized by statute, a copyright holder must
11 consider the existence of fair use before issuing a takedown notification under the DMCA, which
12 is required before obtaining a subpoena. *Id.* at 1153; *see also* 17 U.S.C. §§ 512(c)(3)(A),
13 512(h)(4). If Darkspilver’s posting of the advertisement was fair use, then it was not infringing
14 and Watch Tower suffered no harm.

15 Moreover, the fair use doctrine is also relevant because Darkspilver is asserting a First
16 Amendment right to comment on the advertisement. As the court in *Art of Public Living*
17 explained, while copyright infringement is not protected by the First Amendment, “copyright law
18 contains built-in First Amendment accommodations.” *Id.*, 2011 WL 5444622, at *6 (quoting
19 *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003)). Of those protections or accommodations of the
20 First Amendment, “[p]erhaps the most important is the doctrine of fair use, which allows the
21 public to use copyrighted works ‘for purposes such as criticism, comment, news reporting,
22 teaching . . . and scholarship.’” *Id.*, 2011 WL 5444622, at *6 (quoting 17 U.S.C. § 107) (citing
23 *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) (“First Amendment
24 concerns in copyright cases are subsumed within the fair use inquiry.”); *see also Nihon Keizai*
25 *Shimbun v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) (“First Amendment concerns
26 are protected by and coextensive with the fair use doctrine.”).

27 “The fair use exception excludes from copyright restrictions certain works, such as those
28 that criticize and comment on another work.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d

1 792, 799 (9th Cir. 2003) (citing 17 U.S.C. § 107). To determine whether a work constitutes fair
 2 use, courts “engage in a case-by-case analysis and a flexible balancing of relevant factors.” *Id.* at
 3 800. The four factors are:

- 4 (1) the purpose and character of the use, including whether such use
 5 is of a commercial nature or is for nonprofit educational purposes; (2)
 6 the nature of the copyrighted work; (3) the amount and substantiality
 7 of the portion used in relation to the copyrighted work as a whole; and
 8 (4) the effect of the use upon the potential market for or value of the
 9 copyrighted work.

10 *Mattel*, 353 F.3d at 800 (citations omitted). The factors are “to be explored, and the results
 11 weighed together, in light of the purposes of copyright.” *Campbell v. Acuff–Rose Music, Inc.*, 510
 12 U.S. 569, 578 (1994). “[F]air use is a mixed question of fact and law.” *Mattel*, 353 F.3d at 800
 13 (citation omitted).

14 **a. Purpose and Character of Use.**

15 The first factor considers the purpose for using the work. “Section 107 provides that use of
 16 copyrighted materials for “purposes such as criticism, . . . scholarship, or research, is not an
 17 infringement of copyright.” *New Era Publications Int’l, ApS v. Carol Pub. Grp.*, 904 F.2d 152,
 18 156 (2d Cir. 1990) (finding factor one favored the accused infringer who declared his reasons for
 19 including the copyrighted material were to “mak[e] his point that Hubbard was a charlatan and the
 20 Church was a dangerous cult”); *see also Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792,
 21 799 (9th Cir. 2003) (“The fair use exception excludes from copyright restrictions certain works,
 22 such as those that criticize and comment on another work.”) (citing 17 U.S.C. § 107). This factor
 23 considers whether the use was transformative, that is, whether it “adds something new, with a
 24 further purpose or different character, altering the first with new expression, meaning, or
 25 message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *see also SOFA Entm’t,*
 26 *Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1278 (9th Cir. 2013) (“The central inquiry under the
 27 first factor is whether the new work is ‘transformative.’”).

28 Although not conclusive, the first factor also requires that “the commercial or nonprofit
 character of an activity” be weighed in any fair use decision. *Sony Corp. of America v. Universal*
City Studios, Inc., 464 U.S. 417, 448-49 (1984). Noncommercial, nonprofit activity is

1 presumptively fair. *Id.* at 449.

2 Here, Darkspilver's use was not commercial. Therefore, his use was presumptively fair.

3 Moreover, his stated purpose was to evoke conversation about the Jehovah's Witnesses

4 fundraising methods. He wanted "to show openly the organization was petitioning for financial

5 donations from members, to illustrate the organization's use of commercial advertising design,

6 and to point out the organization's encouragement of online donations." (Dkt. 8-1, ¶ 9.)

7 According to Darkspilver, these fundraising methods were a major change from the teachings and

8 practices the Jehovah's Witnesses had espoused in the past. (*Id.*) He posted the advertisement to

9 "inform others and spark discussion about the organization's tone, message, and fundraising

10 practices." (*Id.*) Watch Tower does not challenge this motivation. Posting copyrighted material

11 for criticism or to spark conversation about it are purposes that the fair use statute authorizes.

12 On the other hand, Darkspilver did not alter or strongly "transform" the advertisement. He

13 posted it in full with the caption: "'WHAT GIFT CAN WE GIVE TO JEHOVAH?'... guess

14 what? ... WT Magazine NOVEMBER 2018, Full Backpage 'Advert'" (Dkt. 8-1, ¶ 8; Dkt. 8-3

15 (Ex. B).) There is no factual dispute about the posting. However, because of the nonprofit nature

16 of Darkspilver's posting and his stated purpose to evoke conversation, the Court finds that this

17 factor weighs in favor of Darkspilver.

18 **b. Nature of the Copyrighted Work.**

19 The second factor "recognizes that creative works are 'closer to the core of intended

20 copyright protection' than informational and functional works." *Dr. Seuss Enterprises, L.P. v.*

21 *Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997) (quoting *Campbell*, 510 U.S. at

22 586).

23 "Whether or not a work is published is critical to its nature under factor two, the scope of

24 fair use is broader for published works." *New Era Publications*, 904 F.2d at 157 (citing *Harper &*

25 *Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985)). Thus, "even substantial

26 quotations might qualify as fair use in a review of a published work." *Harper & Row*, 471 U.S. at

27 564.

28 Here, the advertisement was published in November 2018. Moreover, the advertisement

1 was largely informational and functional, directing readers how to make donations online.
2 Therefore, this factor also weighs in favor of Darkspilver.

3 **c. Amount and Substantiality of Portion Used.**

4 The third factor “asks whether the amount and substantiality of the portion used in relation
5 to the copyrighted work as a whole, are reasonable in relation to the purpose of copying.” *Mattel*,
6 353 F.3d at 803 (internal citations and quotation marks omitted). “This factor has both a
7 quantitative and a qualitative component, so that courts have found that use was not fair where the
8 quoted material formed a substantial percentage of the copyrighted work . . . or where the quoted
9 material was ‘essentially the heart of the copyrighted work.’” *New Era Publications*, 904 F.2d at
10 158 (citing *Harper & Row*, 471 U.S. at 565).

11 Here, even though Darkspilver copied the entire advertisement, it was only a small portion
12 of the copyrighted work as a whole – the thirty-two page November 2018 Watch Tower magazine.
13 The advertisement was on the last page of the magazine. Again, there is no factual dispute about
14 this issue. Nor was the advertisement qualitatively the heart of the published magazine, which
15 was full of articles discussing matters of faith for Jehovah’s Witnesses. In contrast, the
16 advertisement described how to make online donations to the organization.

17 **d. Effect of Use on Potential Market for or Value of Copyrighted Work.**

18 The fourth factor “asks whether actual market harm resulted from the defendant’s use of
19 plaintiff’s protected material and whether ‘unrestricted and widespread conduct of the sort
20 engaged in by the defendant . . . would result in a substantially adverse impact on the potential
21 market’ for the original or its derivatives.” *Mattel*, 353 F.3d at 804 (quoting *Campbell*, 510 U.S.
22 at 590). A use that has no demonstrable effect upon the potential market for, or the value of, the
23 copyrighted work need not be prohibited in order to protect the author’s incentive to create. *Id.* at
24 450. Therefore, “[w]hat is necessary is a showing by a preponderance of the evidence that *some*
25 meaningful likelihood of future harm exists. If the intended use is for commercial gain, that
26 likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be
27 demonstrated.” *Id.* at 451 (emphasis in original).

28 Watch Tower has not demonstrated any actual harm or likelihood of future harm. It argued

1 generally at the hearing that the harm it suffered from people infringing on its copyrights was
 2 directing others away from its website. However, the advertisement that Darkspilver posted
 3 directs people to visit the website to make a donation. Nevertheless, Watch Tower has not yet had
 4 a chance to conduct discovery on its copyright claim or to engage an expert to conduct a market
 5 analysis. Perhaps Watch Tower, if provided the opportunity, could demonstrate that fewer people
 6 visited its website after Darkspilver's posting. The Court is hesitant to deprive Watch Tower of
 7 the opportunity to develop its claim and supporting evidence before it has even filed suit.

8 In balancing the harms, while considering the fair use defense, the Court finds that they tip
 9 sharply in Darkspilver's favor. However, the Court notes that Darkspilver's concerns stem largely
 10 out of his fear that those in his congregation will discover his identity and shun him. If Reddit
 11 reveals Darkspilver's identity to Watch Tower's counsel, under an "attorney's eyes only"
 12 restriction, then any harm to Darkspilver would be alleviated. This restriction would enable
 13 Watch Tower to pursue its copyright claim without causing harm to Darkspilver.

14 Therefore, the Court HEREBY GRANTS IN PART and DENIES IN PART Darkspilver's
 15 motion to quash. Reddit shall respond to the subpoena and provide the requested information to
 16 Watch Tower's counsel. **However, only attorneys of record in this matter may obtain**
 17 **information about Darkspilver's identity.** Watch Tower's attorneys of record shall not to
 18 disclose Darkspilver's identity to anyone else without approval in a Court Order from this Court.
 19 For example, Watch Tower's attorneys of record may not disclose Darkspilver's identity even to
 20 its client, staff, or expert witnesses without approval in a Court Order from this Court.³

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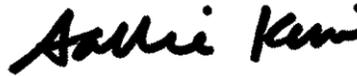
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26 ³ Watch Tower claimed at the hearing that it plans to disclose Darkspilver's identity to its
 27 forensic experts so that Watch Tower can determine how Darkspilver obtained confidential
 28 information in the chart and prevent further disclosure of that confidential information. This
 purpose is not related at all to a copyright issue, and for that reason, the Court rejects that form of
 disclosure.

1 If Watch Tower elects to file a lawsuit against Darkspilver, the Court directs Watch Tower
2 to seek to file the suit under his pseudonym and to keep his actual identity under seal, for
3 attorney's eyes only. Moreover, Watch Tower is admonished that any violation of this Order will
4 be sanctioned and that this Court retains jurisdiction over any potential violation of this Order.

5 **IT IS SO ORDERED.**

6 Dated: May 17, 2019



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8 SALLIE KIM
9 United States Magistrate Judge
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United States District Court
Northern District of California