

**Paul D. Polidoro (admitted pro hac vice)
Watch Tower Bible and Tract Society
of Pennsylvania, Legal Department
100 Watchtower Drive
Patterson, NY 12563
ppolidor@jw.org
Tel.: (845) 306-1000
Fax: (845) 306-0709
Anthony V. Smith (SBN 124840)
Law Office of Anthony V. Smith
204 East Second Avenue, #331
San Mateo, CA 94401-3904
Telephone: 650-548-0100
*Counsel for Plaintiff***

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

In Re DMCA Subpoena to Reddit, Inc.

)
:)
CASE NO. 3:19-mc-80005-SK
:
:
:
:)
Watch Tower Bible and Tract Society of
:)
Pennsylvania’s Opposition to
:
Darkspilver’s Motion to Quash Subpoena
:
to Reddit, Inc. Pursuant to 17 U.S.C. §
:
512(h) to Identify Alleged Infringer
APPEARANCE DATE: 5/6/2019
TIME: 11:00 AM

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION..... 1

II. STATEMENT OF ISSUES TO BE DECIDED 2

III. STATEMENT OF RELEVANT FACTS 2

IV. ARGUMENT..... 5

 A. There Is No Right to Anonymously Infringe Copyrighted Works. 5

 B. Advocates who are Not Citizens or Residents of the United States and Who are
 Not Physically Present in the United States Do Not Have First Amendment
 Rights..... 6

 C. Darkspilver’s Motion to Quash is Time-Barred..... 8

 D. Darkspilver Has Not Satisfied His Burden of Proof on His Motion to Quash. 9

 E. Watch Tower Is Entitled to Compliance With the DMCA Subpoena. 12

 F. An Evaluation of Fair Use At This Stage Would Be Premature. 15

V. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

1

2

3 *AmTrust N. Am., Inc. v. Safebuilt Ins. Servs.*, No. 2:16-mc-0145 KJM AC, 2016 WL
5469257, 2016 U.S. Dist. Lexis 134879 (E.D.Cal. Sept. 28, 2016)..... 8

4 *Arista Records LLC v. Doe*, 604 F.3d 110 (2d. Cir. 2010)..... 5, 6

5 *Ass'n of Am. Med. Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991) 18

6 *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015)..... 16

7 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)..... 16

8 *Cont'l Cas. Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1957)..... 17

9 *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017)..... 16, 18

10 *Dornell v. City of San Mateo*, No. CV 12-06065-CRB (KAW), 2013 WL 5443036, 2013
11 U.S. Dist. LEXIS 142335 (N.D.Cal. Sept. 30, 2013) 8

12 *Edwin K. Williams & Co. v. Edwin K. Williams & Co. – East*, 542 F.2d 1053 (9th Cir.
13 1976)..... 17

14 *Estate of Ungar v. Palestinian Auth.*, 451 F. Supp. 2d 607 (S.D.N.Y 2006) 8

15 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) 17

16 *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019)..... 14

17 *Freed v. Home Depot U.S.A., Inc.*, No. 18cv359-BAS (LL), 2019 WL 582346, U.S. Dist.
Lexis 23736 (S.D.Cal. Feb. 13, 2019) 9

18 *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) 5, 6

19 *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004)..... 13, 15

20 *In re Automobile Antitrust Cases I&II*, 135 Cal. App. 4th 100 (Ct. of Appeal of Cal., 1st
21 App. Dist., Div. 4, Dec. 22, 2005)..... 9

22 *Johnson v. Eisentrager*, 339 U.S. 763 (1950) 6

23 *Kregos v. AP*, 937 F.2d 700 (2d. Cir. 1991) 17

24 *Patrick Collins, Inc. v. Doe*, No. C 11-2766 MEJ, 2011 WL 4407172 (N.D. Cal. Sept. 22,
2011)..... 8

25 *Sam Andrews' Sons v. Mitchell*, 457 F. 2d. 745 (9th Cir. 1972) 7

26 *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013)..... 17

27 *Signature Mgmt, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145 (N.D.Cal. 2013) 5, 8, 12, 13

28 *Sony Music Entm't, Inc. v. Doe*, 326 F. Supp. 2d. 556 (S.D.N.Y. 2004) 12

1	<i>U.S. v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990).....	6, 7
2	<i>UMG Recordings, Inc. v. Augusto</i> , 628 F.3d 1175 (9th Cir. 2011).....	13
3	<i>United States v. 18 Packages of Magazines</i> , 238 F. Supp. 846 (N.D.Cal. 1964).....	10
4	<i>Universal City Studios, Inc. v. Reimerdes</i> , 82 F.Supp.2d 211 (S.D.N.Y.2000)	6
5	<i>Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton</i> , 536 U.S. 150	
6	(2002).....	1
7	Statutes	
8	17 U.S.C. § 107.....	16, 17, 18
9	17 U.S.C. § 501.....	12, 13
10	17 U.S.C. §512.....	13, 14, 16
11	Other Authorities	
12	Fed. R. Civ. P. 45 Advisory Committee’s Note	8
13	Rules	
14	Fed. R. Civ. P. 12.....	16
15	Fed. R. Civ. P. 45.....	8, 16
16	Constitutional Provisions	
17	Article 1, Section 8	5
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1
2 **I. INTRODUCTION**

3 To defeat the clear intent of the law protecting copyright holders, Darkspilver attempts
4 to convert this intellectual property matter into a religious dispute by seeking refuge behind the
5 First Amendment's freedom of speech protections. This case is not about suppressing
6 Darkspilver's public criticism. He can say whatever he desires. However, he cannot infringe
7 Watch Tower's intellectual property in the process.

8 For years Darkspilver has been discussing and debating "matters related to the Jehovah's
9 Witnesses freely and openly with people who have a wide range of views." D.E. 8-1 at 2:25-26.
10 Watch Tower never took any legal action against his years of voicing "disagreement or doubts"
11 about Jehovah's Witnesses' "teachings and practices". *Id.* at 2:12, 15. However, when he
12 chose to infringe upon Watch Tower's intellectual property, he triggered legal protections
13 accorded copyright owners. Darkspilver now seeks the right to anonymously infringe that
14 property. If he prevails, he will effectively be immunized from all future copyright
15 infringements. Further, all other users within this Court's jurisdiction could similarly thwart the
16 plain intent of the Copyright Act by contending they too have a fear of reprisal. Thus, Watch
17 Tower would be stripped of its intellectual property rights in all such cases.

18
19
20 Darkspilver would have this Court believe that Watch Tower Bible and Tract Society of
21 Pennsylvania (hereinafter "Watch Tower")¹ has undertaken a witch hunt targeting the free
22 speech of the entire community of former and current Jehovah's Witnesses who criticize the
23 Jehovah's Witnesses religion using the Reddit service. Yet, of the 34.1 *thousand* members of
24 the r/exjw subreddit forum to which Darkspilver subscribes, only Darkspilver and one other
25 Reddit subscriber are the subjects of Watch Tower subpoenas to Reddit, Inc. This is because
26

27 ¹ Watch Tower Bible and Tract Society of Pennsylvania ("Watch Tower") is simply the corporate copyright holder
28 for the publications at issue. Watch Tower does not supervise or direct the activities of Jehovah's Witnesses or
congregations of Jehovah's Witnesses. Watchtower Bible and Tract Society of New York, the entity involved in
Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002), coordinated the
preaching activities of Jehovah's Witnesses in the United States at the time of that litigation.

1 only Darkspilver and one other subscriber are accused of infringing Watch Tower's copyrighted
2 works. If the Court denies Darkspilver's Motion to Quash, it will send no other message than
3 this: You can criticize Watch Tower as much as you want, as long as you do not infringe their
4 copyrights.

5 By way of a time-barred Motion to Quash, Darkspilver seeks to shield admitted
6 infringement of Watch Tower's copyrighted works by invoking First Amendment rights to
7 which he is not entitled, in a court that, by his own admission, does not have the requisite
8 personal jurisdiction to adjudicate the copyright infringement claim. Under the cloak of fair
9 use, Darkspilver's untimely Motion to Quash also invites this Court to foreclose copyright
10 protection to all non-commercial works. Should the Court accept this invitation, it would
11 essentially write non-commercial creative works out of the Copyright Act (17 U.S.C. § 100, et
12 seq.) altogether. Watch Tower respectfully urges the Court to honor Article 1, Section 8 of the
13 U.S. Constitution and the Digital Millennium Copyright Act (17 U.S.C. § 512) and deny
14 Darkspilver's Motion to Quash.
15
16

17 **II. STATEMENT OF ISSUES TO BE DECIDED**

18 The issues to be decided in the present matter are: 1) whether the First Amendment right
19 to anonymity protects copyright infringement in this instance; 2) whether a non-resident foreign
20 national with no presence in the United States is protected by the First Amendment; 3) whether
21 Darkspilver's Motion to Quash is time-barred; 4) whether Darkspilver as the movant has
22 satisfied his burden of proof on his Motion to Quash; 5) whether Watch Tower is entitled to
23 compliance with the DMCA subpoena; and 6) whether an evaluation of the Fair Use affirmative
24 defense is appropriate at this stage.
25

26 **III. STATEMENT OF RELEVANT FACTS**

27 Darkspilver reproduced and displayed several copyright-protected works owned by
28 Watch Tower on the r/exjw subreddit. One of the copyrighted works reproduced and displayed

1 by Darkspilver on the r/exjw subreddit was an article titled “What Gift Can We Give to
2 Jehovah?” that was published on JW.ORG² and that also appeared on the back cover of the
3 November 2018 issue of *The Watchtower* (hereinafter the “Article”). See Declaration of Paul
4 D. Polidoro, dated April 9, 2019 (hereinafter “Polidoro Decl.”) at ¶2. This infringement was
5 reported to Reddit, Inc. on December 19, 2018. *Id.* at ¶4. On December 19, 2018, Watch
6 Tower also reported the infringement of an internal document not intended for wide-spread
7 public dissemination titled C-5829Ca (hereinafter the “Chart”). *Id.*

9 Watch Tower conducted a good faith fair use analysis of several uses of Watch Tower’s
10 copyrighted works by u/Darkspilver on the r/exjw subreddit forum. See Polidoro Decl., at ¶3.
11 Watch Tower concluded that the two infringements reported to Reddit, Inc. on December 19,
12 2018 did not constitute fair use of Watch Tower’s copyrighted works. *Id.* While these are the
13 only two infringements that were reported to Reddit, Inc., the two infringements that are the
14 subject of the underlying subpoena do not constitute the universe of copyright infringements of
15 Watch Tower’s works by Darkspilver on Reddit’s site. *Id.* at ¶4.

17 As of April 9, 2019, there are 34.1 thousand reported subscribers to the “r/exjw”
18 subreddit community. See Polidoro Decl. at ¶ 6, Exhibit A. Watch Tower has issued DMCA-
19 compliant notices of infringement reporting copyright infringement by a total of two of these
20 subscribers because Watch Tower became aware that these two subscribers infringed Watch
21 Tower’s copyrighted works. *Id.* at ¶ 6.

23 Darkspilver’s speech was of no interest to Watch Tower until that speech turned from
24 critique to copyright infringement. Polidoro Decl. at ¶ 6. Darkspilver openly admits conduct
25 that satisfies all of the elements of a prima facie case of copyright infringement. See
26 Declaration of John Doe (Darkspilver) in Support of Motion to Quash Watchtower [*sic*] Bible &
27

28 ² Available at: [https://www.jw.org/en/publications/magazines/watchtower-study-november-2018/gift-we-can-give-to-jehovah/#?insight\[search_id\]=67011f2d-cb71-44b8-8086-ad0552952627&insight\[search_result_index\]=8](https://www.jw.org/en/publications/magazines/watchtower-study-november-2018/gift-we-can-give-to-jehovah/#?insight[search_id]=67011f2d-cb71-44b8-8086-ad0552952627&insight[search_result_index]=8) (last viewed: April 8, 2019)

1 Tract Society Inc.’s Subpoena to Reddit, Inc. Seeking Identityifying [*sic*] Information
2 (hereinafter “Darkspilver Decl.”) at ¶¶8, 10.

3 Darkspilver’s claim that honoring the DMCA’s subpoena provision (17 U.S.C. § 512(h))
4 will have a chilling effect on free speech is belied by the statements of several members of the
5 r/exjw subreddit community. In response to the filing of Darkspilver’s Motion to Quash,
6 members of the Ex-JW subreddit forum posted messages such as:
7

- 8 • “LMAO. ‘chilling effect’ my a\$\$\$. We’re always gonna fight, and always gonna
9 actually unconditionally support and defend our brethren that fight in enemy
10 territory” –u/Mindless Reception (Mar. 26, 2019); and
11 • “Good luck shutting us all up.” – u/TheGreatFraud (Mar. 27, 2019).

12 *See* Polidoro Decl., Ex. B. Members of the community have also started to counsel the r/exjw
13 subreddit community on how to use Watch Tower’s intellectual property or get away with
14 blatant infringement of it stating,
15

16 a general tip would be not to publish anything on social media that is a leak or
17 unpublished work of watchtower. or (*sic*) if you are doing that it must be done from a
18 neutral ip address and vpn. . . . to remove any danger of being outed take privacy steps
or don’t use their stuff. – u/kevinmcfree (Mar. 30, 2019)

19 *See* Polidoro Decl., Ex. B.

20 Darkspilver’s claim of a chilling effect on the speech of the Reddit community is
21 further belied by the increase in the size of the community. In November 2018, before the
22 present subpoena was issued to Reddit, Inc. there were approximately 29 thousand members of
23 the r/exjw subreddit community. *See* Polidoro Decl., Ex. C. As of April 9, 2019, the r/exjw
24 subreddit now has 34.1 thousand subscribers. *See* Polidoro Decl., Ex. A

25 Only 2,869 of the 34,100 subscribers to the r/exjw subreddit have contributed to the map
26 cited by Darkspilver that purports to show the alleged location of r/exjw subreddit community
27 members. *See* Polidoro Decl., Exhibit D. Of that number, no more than 1,944 community
28

1 subscribers *claim* to reside in the United States. *Id.*

2 Watch Tower is not Darkspilver’s local church and has no ability to excommunicate him
3 from his local congregation of Jehovah’s Witnesses. *See* Polidoro Decl., at ¶10. Not a single
4 person that has been the subject of a Watch Tower-sought DMCA subpoena has been
5 excommunicated from their local church as result of Watch Tower obtaining their identity from
6 a DMCA subpoena. *Id.* Watch Tower has never publicly disclosed the names of the individuals
7 who were the subject of DMCA subpoenas. *Id.* Some of the subjects of Watch Tower’s DMCA
8 subpoenas who were active Jehovah’s Witnesses before they became the subject of a Watch
9 Tower DMCA subpoena, remained active Jehovah’s Witnesses after Watch Tower received
10 identifying information about them. *Id.*

12 **IV. ARGUMENT**

13 ***A. There Is No Right to Anonymously Infringe Copyrighted Works.***

14 Were this case to be viewed through the prism of the United States Constitution, the
15 appropriate starting point would be Article 1, Section 8 Congressional power “[t]o promote the
16 Progress of Science and useful arts, by securing for limited Times to Authors...the exclusive
17 Right to their respective Writings.” As the United States Supreme Court observed “the Framers
18 intended copyright itself to be the engine of free expression.” *Harper & Row v. Nation*
19 *Enterprises*, 471 U.S. 539, 558 (1985).

20 To subvert the well-established Congressional protections accorded copyrights,
21 Darkspilver asserts the right of anonymous speech. In so doing, he ignores the fact that the U.S.
22 Supreme Court, in addition to courts in both the Ninth and Second Circuits, recognize that
23 “[t]he right to anonymous speech is not absolute.” *Signature Mgmt., LLC v. Automattic, Inc.*,
24 941 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (denying a pseudonymous infringer’s Motion to
25 Quash DMCA subpoena). “The First Amendment does not . . . provide a license for copyright
26 infringement.” *Arista Records, LLC v. Doe*, 604 F.3d 110, 118 (2d. Cir. 2010) *citing Harper &*
27
28

1 *Row Publishers*, 471 U.S. at 555-57, 569. “Thus, to the extent that anonymity is used to mask
2 copyright infringement or to facilitate such infringement by other persons, it is unprotected by
3 the First Amendment.” *Arista Records LLC*, 604 F.3d at 118; *see also Universal City Studios,*
4 *Inc. v. Reimerdes*, 82 F.Supp.2d 211, 220 (S.D.N.Y.2000) (the “Supreme Court ... has made it
5 unmistakably clear that the First Amendment does not shield copyright infringement”).

6
7 ***B. Advocates who are Not Citizens or Residents of the United States and Who are Not***
8 ***Physically Present in the United States Do Not Have First Amendment Rights.***

9 Assuming, *arguendo*, that the right of anonymous speech is properly presented in this
10 case, Darkspliver does not have standing to assert it. He is neither a citizen nor a resident of the
11 United States, and is not present in the United States. Were his position upheld, every person
12 on the planet would be granted the right to assert similar constitutional rights in federal court.
13 The Supreme Court has given no such elasticity to non-resident foreign nationals with no
14 physical presence in the United States.

15 Attempts by non-resident foreign nationals to assert constitutional rights are not new and
16 have been repeatedly rejected by the Supreme Court. In *Johnson v. Eisentrager*, foreign
17 nationals arrested in China and imprisoned in Germany after World War II attempted to “obtain
18 writs of habeas corpus in our federal courts on the ground that their convictions for war crimes
19 had violated the Fifth Amendment and other constitutional provisions.” *U.S. v. Verdugo-*
20 *Urquidez*, 494 U.S. 259, 269 (1990) *citing Johnson v. Eisentrager*, 339 U.S. 763 (1950). The
21 Court’s “rejection of extraterritorial application of the Fifth Amendment was emphatic.” *Id.*
22 The Court stated,

23
24
25 Such extraterritorial application of organic law would have been so significant an
26 innovation in the practice of governments that, if intended or apprehended, it could
27 scarcely have failed to excite contemporary comment. Not one word can be cited. *No*
28 *decision of this Court supports such a view. None of the learned commentators on our*
Constitution has even hinted at it. The practice of every modern government is opposed
to it.

Id. (emphasis added)(citation omitted).

1 In *U.S. v. Verdugo-Urquidez*, a foreign national who was arrested in Mexico and then
2 extradited to the United States claimed Fourth Amendment protection when his home in Mexico
3 was searched. *Id.* The defendant in that case pointed to a string of Supreme Court cases
4 providing constitutional protections for foreign nationals. *Id.* at 271. Yet, the *Verdugo-*
5 *Urquidez* Court noted, “These cases . . . establish only that aliens receive constitutional
6 protections *when they have come within the territory of the United States* and developed
7 substantial connections with this country.” *Id.* (emphasis added). The Court continued,
8 “Respondent is an alien who has had no previous significant voluntary connection with the
9 United States, so these cases avail him not.” *Id.* Thus the Court concluded that the Fourth
10 Amendment provided no protection for the non-resident foreign national. With respect to other
11 constitutional protections available to foreign nationals, the Court stated,
12

13 “the people” protected by the Fourth Amendment, and by the First and Second
14 Amendments, and to whom rights and powers are reserved in the Ninth and Tenth
15 Amendments, refers to a class of persons who are part of a national community or who
16 have otherwise developed sufficient connection with this country to be considered part
of that community.

17 *Id.* at 265. Thus, the Supreme Court has time and again reiterated its decision that non-U.S.
18 citizens who are not physically present in the United States have no constitutional rights.

19 The Ninth Circuit Court also attaches constitutional protection for non-U.S. citizens
20 only to people who are present within the United States. In *Sam Andrews’ Sons v. Mitchell*, the
21 Court held, “Any person *within the United States*, citizen or alien, resident or non-resident, is
22 protected by the guarantees of the Constitution.” 457 F.2d. 745, 749 (9th Cir. 1972) (emphasis
23 added). The other cases cited by Darkspilver point to the same requirement of physical
24 presence in the United States. Since he admits that he is “a foreign citizen, residing in the
25 country of my citizenship” he cannot avail himself of rights accorded under the U.S.
26 Constitution. Darkspilver Decl. at ¶ 6:5.
27
28

1 ***C. Darkspilver’s Motion to Quash is Time-Barred.***

2 Even if the Court were willing to disrupt decades-old Ninth Circuit and Supreme Court
3 precedent to provide constitutional rights to a non-resident foreign national with no presence in
4 the United States, Darkspilver’s Motion to Quash is time-barred. The Federal Rules stipulate a
5 limit on the time to file a Motion to Quash. Fed. R. Civ. P. 45(d)(3)(A)(“*On timely motion*, the
6 court . . . must quash or modify a subpoena”); *see* Fed. R. Civ. P. 45 advisory committee’s
7 note (“The 10-day period for response to a subpoena is extended to 14 days to . . . to allow a bit
8 more time for such objections to be made.”)

10 While courts may at times be skeptical of subpoenas that do not allow 14 days for
11 compliance or objections, when the underlying subpoena provides at least 14 days for
12 compliance, the deadline to file a Motion to Quash is the subpoena compliance deadline. *See*
13 *Dornell v. City of San Mateo*, No. CV 12-06065-CRB (KAW), 2013 WL 5443036, at *3, 2013
14 U.S. Dist. LEXIS 142335, at *8 (N.D.Cal. Sept. 30, 2013) (“Rule 45(c)(3) provides that a party
15 must file a ‘timely’ motion to quash or modify a subpoena While there may be a split on
16 the definition of ‘timely,’ [the movant] did not act before the time for compliance.”); *AmTrust*
17 *N. Am., Inc. v. Safebuilt Ins. Servs.*, No. 2:16-mc-0145 KJM AC, 2016 WL 5469257, 2016 U.S.
18 Dist. Lexis 134879 (E.D. Cal. Sept. 28, 2016) *citing Estate of Ungar v. Palestinian Auth.*, 451
19 F. Supp. 2d 607, 610 (S.D.N.Y 2006)(“It is well settled that, to be timely, a motion to quash a
20 subpoena must be made prior to the return date of the subpoena”); *see Signature Mgmt., LLC*,
21 941 F. Supp. 2d at 1153 (suggesting that the production deadline for a DMCA Subpoena
22 provides the deadline to file a Motion to Quash). The rules are no different when the subpoena
23 requires revealing the identity of a pseudonymous defendant. *See Patrick Collins, Inc. v. Doe*,
24 No. C 11-2766 MEJ, 2011 WL 4407172, at *8 (N.D. Cal. Sept. 22, 2011) (ordering “the
25 subpoenaed entity shall preserve any subpoenaed information pending the resolution of any
26 *timely-filed* motion to quash”) (emphasis added).
27
28

1 The subpoena in the present matter was served on Reddit, Inc. on January 24, 2019.
2 Polidoro Declaration, Ex. E (Affidavit of Service). The return date of the subpoena was
3 February 15, 2019. *Id.* Thus, the subpoena provided 22 days for Darkspilver to file a timely
4 Motion to Quash. Darkspilver admits that he received the subpoena on February 7, 2019.
5 Darkspilver Decl. at ¶7. Yet, Darkspilver did not file the present motion until March 26, 2019 –
6 almost 50 days after becoming aware of the subpoena and 30 days after retaining counsel.
7 Neither Darkspilver nor his counsel ever reached out to Watch Tower to negotiate an extended
8 deadline for the subpoena. Polidoro Decl. at ¶ 11. There is no excuse for such a delay and
9 Darkspilver’s Motion to Quash is simply time-barred. Darkspilver’s counsel provides no
10 excuse for its client’s 50-day delay in filing the motion. Counsel provides no excuse or
11 reasoning for why it took 30 days after being retained to file the motion. Most importantly,
12 Counsel states no reason why they never requested more time from the Court to file a Motion to
13 Quash.
14
15

16 ***D. Darkspilver Has Not Satisfied His Burden of Proof on His Motion to Quash.***

17 Contrary to the insinuation that Watch Tower bears the burden of proof on this Motion
18 to Quash, Darkspilver must prove that the subpoena should be quashed by a preponderance of
19 evidence. *See In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100 (1st Dist., Div. 4,
20 2005) (noting the burden of proof on a Motion to Quash is preponderance of evidence). “The
21 party who moves to quash a subpoena has the burden of persuasion under Rule 45(c)(3).”
22 *Freed v. Home Depot U.S.A., Inc.*, No. 18cv359-BAS (LL), 2019 WL 582346, at *2, U.S. Dist.
23 Lexis 23736, at *6 (S.D.Cal. Feb. 13, 2019). Accordingly, Darkspilver bears the burden to
24 prove by a preponderance of evidence that he is entitled to avail himself of First Amendment
25 protection, and that the harm he claims will result from compliance with the subpoena is more
26 than speculative.
27
28

First, Darkspilver points to no physical presence in the United States, and admits that he

1 is a non-resident foreign national. Darkspilver Decl. at ¶ 6. Citing *United States v. 18*
2 *Packages of Magazines*, 238 F. Supp. 846, 847-48 (N.D. Cal. 1964), he then seeks to create
3 some First Amendment right by way of an alleged United States-based audience of his works.
4 Darkspilver Decl. at ¶6. Darkspilver points to “a map that participants in the [Reddit]
5 community made and update themselves” as evidence of this United States connection. *Id.* at
6 6:6-7. Yet, Darkspilver admits “the map itself is likely imprecise.” *Id.* at 6:8. Furthermore, he
7 provides no additional evidence that the community’s self-made map is accurate. In other
8 words, any one of the community members could easily lie about where they live on the
9 community’s self-made map, and the Court would be none the wiser.

11 Darkspilver’s brief states that he posted the infringing material “for a group comprised
12 primarily of U.S. readers” when in fact, only 2,869 of the 34,100 subscribers to the r/exjw
13 subreddit have contributed to the map. D.E. 8, at 21:25; *see* Polidoro Decl., Exhibit D. Of that
14 number, no more than 1,944 community subscribers *claim* to reside in the United States. *See*
15 Polidoro Decl., Exhibit D. Thus, the evidence of Darkspilver’s United States-based audience
16 amounts to nothing more than a showing that approximately 5% of his audience *claims* to live
17 in the United States. He provides no verifiable proof that even one member of his audience
18 *actually* lives in the United States. With no evidence, much less a preponderance of evidence,
19 to prove that Darkspilver has a United States-based audience, Darkspilver’s claim to First
20 Amendment protection via U.S. readers of his posts falls flat.

23 Even if the Court were to find that Darkspilver was entitled to First Amendment
24 protection, he has not satisfied his burden to prove that his claims of hardship are anything more
25 than pure speculation. Darkspilver would like for the Court to believe that the minute Watch
26 Tower learns his true identity, he will be unceremoniously excommunicated from his local
27 church and all communication with his family and friends will forever cease. The fact of the
28 matter is that Watch Tower is not Darkspilver’s local church and has no ability to

1 excommunicate him from his local congregation of Jehovah’s Witnesses. Additionally,
2 Darkspilver presents no evidence that a single person that has been the subject of a Watch
3 Tower-sought DMCA subpoena has been excommunicated from their local church as result of
4 Watch Tower discovering their true identity. Finally, Darkspilver points to no proof that Watch
5 Tower has ever publicly disclosed the names of the individuals who were the subject of DMCA
6 subpoenas. To the contrary, the subjects of Watch Tower’s DMCA subpoenas who were
7 Jehovah’s Witnesses before Watch Tower learned their identities via DMCA subpoenas
8 continue to be Jehovah’s Witnesses.

10 Evidence submitted in support of Darkspilver’s Motion to Quash even acknowledges
11 that Darkspilver’s claim of eternal isolation from friends and family is not accurate. The
12 Declaration of Alexandra Moss attaches multiple statements by former Jehovah’s Witnesses that
13 rebut Darkspilver’s sweeping assertion. Some acknowledge that communication with family
14 members continued after they left the church. *See* Declaration of Alexandra Moss, Ex. A at 5
15 (“With some ex-Witnesses, some of their families will still talk to them” ; *see also id.* at 22
16 (acknowledging that former Jehovah’s Witness continued to communicate and live with
17 Jehovah’s Witness family members after leaving the church).

19 Finally, Darkspilver claims that compliance with the subpoena will result in complete
20 social isolation causing overwhelming negative effects on his physical and mental wellbeing.
21 Yet, Darkspilver acknowledges that there is a large community of supporters of his views.
22 Darkspilver Decl., at ¶ 5. Contrary to Darkspilver’s insinuation that the present subpoena
23 threatens Darkspilver’s entire social livelihood, members of the Reddit community vow support
24 of Darkspilver. *See* Polidoro Decl., Exhibit B at 6 (“we all got your back u/darkspilver!” –
25 posted by FrodeKommode, dated March 27, 2019). Furthermore, Darkspilver provides no proof
26 that his physical and mental state will actually be affected by compliance with the subpoena.
27

28 It is clear that Darkspilver’s claims of harm that will necessarily result from compliance

1 with the subpoena are nothing more than speculation. Whatever their intended purpose, the
2 declarations that Darkspilver submits in support of his claims of harm actually prove that
3 compliance with the subpoena in this matter will not result in the complete obliteration of all of
4 Darkspilver’s relationships. Darkspilver fails to meet his burden to prove that his identity is
5 privileged information protected by the First Amendment and that compliance with the
6 subpoena will result in actual harm. If Darkspilver’s Motion to Quash is granted, it will allow
7 all anonymous infringers to avoid copyright infringement liability simply by claiming that
8 revealing their identity will result in harm – however remote or unlikely.

10 ***E. Watch Tower Is Entitled to Compliance With the DMCA Subpoena.***

11 The DMCA and the Federal Rules lay out the appropriate standard for evaluating a
12 motion to quash on a DMCA subpoena. As the owner of the infringed works, Watch Tower is
13 entitled to seek redress from the court for what it, in good faith, believes is an infringement of
14 its work. *See* 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a
15 copyright is entitled . . . to institute an action for any infringement of that particular right
16 committed.”). In order for Watch Tower to seek judicial redress in such an action, it must know
17 the identity of the individual responsible for the infringement. *See Signature Mgmt., LLC*, 941
18 F. Supp. 2d at 1157 (“TEAM has an interest in obtaining Amthrax's identity to facilitate a
19 copyright infringement action against Amthrax. . . . as personal service will facilitate discovery,
20 including a potential pre-trial deposition, and prevent TEAM from being forced to rely on
21 Amthrax’s good faith engagement in the litigation to move forward.”); *see also Sony Music*
22 *Entm’t, Inc. v. Does 1-40*, 326 F. Supp. 2d. 556, 566 (S.D.N.Y. 2004) (“Ascertaining the
23 identities and residences of [anonymous] defendants is critical to plaintiffs’ ability to pursue
24 litigation, for without this information, plaintiffs will be unable to serve process”).
25
26

27 Section (h) of the DMCA allows a “copyright owner or a person authorized to act on the
28 owner’s behalf [to] request the clerk of any United States district court to issue a subpoena to a

1 service provider for identification of an alleged infringer.” 17 U.S.C. §512(h)(1). Provided that
2 the copyright owner meets the requirements of 17 U.S.C. §512(h)(2)(A-C), the copyright owner
3 is not required to provide any further evidence of entitlement to learn the infringer’s identity.

4 The test laid out in *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D.
5 Cal. 2004) is not the appropriate test to be applied in the present matter. First, the *Highfields*
6 case is factually distinguishable from the present case. On the most basic level, the *Highfields*
7 *Capital Management* case has nothing to do with copyright infringement or a DMCA subpoena.
8 The *Highfields* case involved claims for trademark infringement, false designation of origin,
9 defamation, and commercial disparagement. Additionally, unlike the subpoena at issue in
10 *Highfields*, the subpoena issued in the present matter does not stem from a John Doe case for
11 which a complaint has already been filed. Most importantly, the defendant in *Highfields* did not
12 admit to being a non-resident foreign national with no physical presence in the United States
13 and thus no First Amendment protection.

14 Even if the Court chooses to apply the *Highfields* test, Watch Tower’s claim of
15 infringement satisfies that test. The *Highfields* Court required that the Plaintiff first show “real
16 evidentiary basis for believing that the defendant has engaged in wrongful conduct that has
17 caused real harm to the interests of the plaintiff that the laws plaintiff has invoked were intended
18 to protect.” *Highfields Capital Mgmt. L.P.*, 385 F. Supp. 2d at 975. To establish a prima facie
19 case of copyright infringement, a party must show (1) ownership of a valid copyright and (2)
20 violation by the alleged infringer of at least one of the exclusive rights granted to copyright
21 owners by the Copyright Act. *See* 17 U.S.C. § 501(a); *UMG Recordings, Inc. v. Augusto*, 628
22 F.3d 1175, 1178 (9th Cir. 2011). “As courts have noted, the DMCA essentially requires the
23 party seeking a subpoena to plead a prima facie case of copyright infringement for a subpoena
24 to issue.” *Signature Mgmt., LLC*, 941 F. Supp. 2d at 1157. Watch Tower laid out a prima facie
25 case of copyright infringement in its application for a DMCA subpoena, which included a copy
26
27
28

1 of the underlying DMCA-compliant notice of infringement. Furthermore, Darkspilver
2 submitted evidence to support Watch Tower’s copyright claim. His Motion to Quash admits
3 that “Darkspilver reproduced the Ad and Chart in their entirety.” D.E. 8, at 17:18.

4 While Darkspilver does not contest Watch Tower’s ownership of the Article because he
5 was able to find the copyright registration record for it, he contests the viability of Watch
6 Tower’s infringement claim for the chart because he cannot find a copyright registration
7 certificate.³ Curiously, he never explains how he came to be in possession of this unpublished
8 internal document. Nonetheless, the argument based on lack of a copyright registration
9 certificate is a mere distraction from the real issue.

10
11 Whether Watch Tower registered for a copyright certificate for the works is of no
12 consequence for purposes of identifying an infringer. “[A]n owner’s rights exist apart from
13 registration” *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881, 889
14 (2019). The DMCA does not require that copyright owners register a work before submitting
15 an infringement notice. It only requires that copyright owners swear “under penalty of perjury,
16 that the complaining party is authorized to act on behalf of the owner of an exclusive right that
17 is allegedly infringed.” 17 U.S.C. §512(c)(3)(A)(vi).

18
19 When Watch Tower obtains sufficient information to identify the defendant, it can easily
20 apply for copyright registration and “can recover for infringement that occurred both before and
21 after registration.” *Fourth Estate Pub. Ben. Corp.*, 139 S. Ct. at 887. Simply put, copyright
22 registration does not confer ownership of a work, and Darkspilver never contests Watch
23 Tower’s ownership of either of the works at issue.
24

25
26 ³ Unlike the Article, which was intended for public distribution, the chart was an internal document not intended for
27 public distribution. For that reason, the Article was registered with the Copyright Office. Once the infringer is
28 identified and personal jurisdiction over the infringer is established, the chart can be registered via the U.S.
Copyright Office’s special handling process designed specifically for expedited processing of copyright registration
applications for pending or prospective litigation. See Special Handling, available at:
<https://www.copyright.gov/help/faq/faq-special.html> (last seen: April 8, 2019)(“Once a request for special handling
is received and approved, every attempt is made to process the claim or recordation within five working days.”)

1 The *Highfields* Court next required a comparison of “the magnitude of the harms that
2 would be caused to the competing interests” by granting a Motion to Quash or denying it.
3 *Highfields Capital Mgmt. L.P.*, 385 F. Supp. 2d at 976. The decision in *Signature Mgmt., LLC.*,
4 941 F. Supp. 2d at 1145 is instructive on this point. Like Darkspilver, the pseudonymous
5 infringer in *Signature Mgmt.* claimed that the copyright owner-petitioner would “retaliate
6 against him for his critical speech, either by bringing a defamation suit or through some other
7 means.” *Id.* at 1157. The infringer in that case, referred to as Amthrax, further claimed that
8 “such retaliatory action could chill the speech of other anonymous critics, who will fear
9 retaliation if they continue to express their beliefs.” The court weighed that interest against
10 copyright owner’s interest “in obtaining Amthrax’s identity to facilitate a copyright
11 infringement action . . . as personal service [would] facilitate discovery, including a potential
12 pre-trial deposition, and prevent TEAM from being forced to rely on Amthrax’s good faith
13 engagement in the litigation to move forward.” *Id.* Despite the fact that Amthrax offered to
14 accept service of process and defend the action anonymously, the court held, “The minimal
15 potential harm to Amthrax of disclosure of his identifying information for the purposes of the
16 DMCA does not justify the burden placed on TEAM by granting Amthrax’s Motion.” *Id.* at
17 1157-58.

20 Similarly, Watch Tower has the right to pursue the infringement of its copyrighted
21 works in the courts. It is entitled to discovery and a final decision on the merits by a court with
22 proper jurisdiction. Darkspilver’s unsubstantiated and contradicted claims of retaliation and
23 emotional distress should not outweigh Watch Tower’s interest in the adjudication of the
24 underlying infringement claims by a trier of fact.

26 ***F. An Evaluation of Fair Use At This Stage Would Be Premature.***

27 An evaluation of the merits of the underlying claim – much less an affirmative defense
28 such as fair use is premature. *See Authors Guild v. Google*, 804 F.3d 202, 213 (2d Cir. 2015)

1 (“As the Supreme Court has designated fair use an affirmative defense, the party asserting fair
2 use bears the burden of proof”) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590
3 (1994)); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 933 (N.D. Cal. 1996)(“Because fair use is
4 an affirmative defense, [the defendant] Sherman carries the burden of demonstrating it”).
5 Making a ruling on whether Darkspilver’s use of Watch Tower’s intellectual property
6 constitutes fair use would effectively be a ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss
7 for a case in which no pleadings have ever been filed. Neither 17 U.S.C. § 512, nor Fed. R. Civ.
8 P. 45 requires or permits such a course.

10 However, even if the Court were willing to make such a ruling, Darkspilver’s use of
11 Watch Tower’s copyrighted works does not constitute fair use. The first fair use factor
12 evaluates “the purpose and character of the use, including whether such use is of a commercial
13 nature or is for nonprofit educational purposes.” 17 U.S.C. § 107 (1). “In addressing the first
14 factor, the court asks whether the new work merely supersedes the objects of the original
15 creation, or instead adds something new, with a further purpose or different character; in other
16 words, whether and to what extent the new work is ‘transformative.’” *Disney Enters. v.*
17 *VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017).

19 Darkspilver admits that the first image that he posted is “a copy” of Watch Tower’s
20 Article. Darkspilver Decl., at ¶ 8:19. Darkspilver makes no claim that he, in any way, added to
21 or transformed Watch Tower’s work in his post. With respect to the chart, Darkspilver admits
22 to reproducing a copy of the entire copyrighted work. D.E 8, at 17:18. Darkspilver claims that
23 he “re-formatted [the chart] to make it more visually appealing and easy to read on screen.” Yet
24 Darkspilver admits that the original file was an Excel file that necessarily had to be viewed and
25 read on screen. Thus, Darkspilver concedes that his use of the work merely replaced the object
26
27
28

1 of the original creation – rather than adding a further purpose or different character.⁴

2 Darkspilver’s uses of Watch Tower’s works, whether commercial or non-commercial, were
3 clearly not transformative, and do not favor a finding of fair use.

4 The second fair use factor requires an examination of “the nature of the copyrighted
5 work.” 17 U.S.C. § 107(2). With respect to the Article, Darkspilver acknowledges that the
6 creative “design” of the Article is one of the reasons that he reproduced it on Reddit.

7 Darkspilver Decl., at 3:28; *see also* D.E. 8, at 16:28. Moreover, the illustrations, layout, and
8 word choice in the article “What Gift Can We Give to Jehovah?” are all creative in nature.

9 With respect to the chart, the layout, design, and word choice are all creative aspects of the
10 work making the work, as a whole, creative in nature. *See Edwin K. Williams & Co., Inc. v.*
11 *Edwin K. Williams & Co. – East*, 542 F.2d 1053, 1061 (9th Cir. 1976) (“the instructions and the
12 blank forms constituted an integrated work entitled to copyright protection”); *see also Cont’l*
13 *Cas. Co. v. Beardsley*, 253 F.2d 702, 703-704 (2d Cir. 1958) (holding that forms are entitled to
14 copyright protection); *Kregos v. Associated Press*, 937 F.2d 700, 708 (2d. Cir. 1991) (same).

15 Thus, the second fair use factor weighs against a finding of fair use.

16 The third fair use factor looks to the “the amount and substantiality of the portion used
17 in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). Darkspilver admits,
18 “Darkspilver reproduced the Ad and Chart in their entirety”. D.E. 8, at 17:18. Darkspilver
19 claims that he had to use the entire works because the entire works were “relevant to Doe’s
20 purpose.” D.E. 8 at 12:26. Relevance of the entire work to one’s purpose is not the standard for
21 fair use. *See Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (“this factor will
22 not weigh against an alleged infringer, even when he copies the whole work, if he takes no more
23
24
25

26 ⁴ Even if a Court decides that the factual information communicated in the document is not copyrightable, the
27 creative way in which that information is described and presented is protectable. Indeed there is no reason why the
28 information in the first row had to appear first, and the information in the last row necessarily had to be last. *See*
Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 342 (1991) (finding that for copyright protection to attach
to facts, the “originality is not a stringent standard; it does not require that facts be presented in an innovative or
surprising way.”)

1 than is *necessary* for his intended use”) (emphasis added). Doe provides no reason why his
2 purpose could not have been accomplished by linking to the Article and summarizing the chart.

3 The fourth fair use factor requires an evaluation of “the effect of the use upon the
4 potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Courts decide
5 “whether unrestricted and widespread conduct of the sort engaged by the defendant . . . would
6 result in a substantially adverse impact on the potential market for the original.” *Disney Enters.*,
7 869 F.3d at 861. If widespread unauthorized reproduction and display of Watch Tower’s works
8 online were permitted, there would be virtually no need to visit Watch Tower’s website –
9 JW.ORG. Diverting traffic away from Watch Tower’s website could result in a significant
10 decline in readership of Watch Tower’s content. *See Ass’n of Am. Med. Colleges v. Cuomo*, 928
11 F.2d 519, 526 (2d Cir. 1991) (“This case does not present the relatively straightforward situation
12 in which the potential harm to a copyrighted work flows from direct competition with the
13 assertedly fair use. In such circumstances, we have noted our concern that ‘creation will be
14 discouraged if demand can be undercut by copiers.’”) Therefore, Watch Tower contends that
15 the fourth fair use factor also weighs in favor of a finding of infringement.
16
17

18 **V. CONCLUSION**

19 As the owner of the copyrighted material, Watch Tower has the right to pursue legal
20 recourse for what it, in good faith, believes is the infringement of its intellectual property.
21 Watch Tower also has the right to litigate that infringement claim in a court having personal
22 jurisdiction over Watch Tower and the alleged infringer. Watch Tower has made proper use of
23 the DMCA’s subpoena provision.
24

25 Darkspilver’s unsupported claim that Watch Tower is misusing the DMCA in order to
26 silence religious dissenters and critics is simply not true. The fact of the matter is that over
27 34,000 other r/exjw subreddit subscribers have been able to openly express their views without
28 interference by Watch Tower. Darkspilver’s speech only became of concern to Watch Tower

1 when his speech crossed the line to copyright infringement. Granting Darkspilver's Motion to
2 Quash will effectively extend constitutional rights far beyond the current limits set by the Ninth
3 Circuit and Supreme Court. It will also effectively immunize all infringements of copyrighted
4 works by anonymous infringers all over the world that make a claim of potential harm in this
5 jurisdiction. Denying Darkspilver's Motion to Quash, on the other hand, will send no other
6 message than this: You can criticize an organization as much as you want, as long as you do not
7 infringe their copyrights. Watch Tower respectfully moves this Court to deny Darkspilver's
8 Motion to Quash.
9

10 Dated: April 9, 2019

Respectfully submitted,

11
12 **LAW OFFICE OF ANTHONY V. SMITH**
13 204 East Second Avenue, #331
14 San Mateo, CA 94401-3904
15 Telephone: 650-548-0100
16 California Bar No.: 124840

**WATCH TOWER BIBLE AND
TRACT SOCIETY OF
PENNSYLVANIA
LEGAL DEPARTMENT**
100 Watchtower Drive
Patterson, NY 12563
Telephone: 845-306-1000
Facsimile: 845-306-0709
Email: inboxLGLip@jw.org

15 /S/ Anthony V. Smith
16 Anthony V. Smith, Esq.

17
18 /S/ Paul D. Polidoro
19 Paul D. Polidoro
(admitted *pro hac vice*)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 9, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a notice of the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

Alexandra Helen Moss
Counsel for John Doe (Darkspilver)
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Fax: (415) 436-9993
Email: alex@eff.org

/s/ Paul D. Polidoro_____

Paul D. Polidoro (admitted pro hac vice)
Watch Tower Bible and Tract Society
of Pennsylvania, Legal Department
100 Watchtower Drive
Patterson, NY 12563
ppolidor@jw.org
Tel.: (845) 306-1000
Fax: (845) 306-0709
Anthony V. Smith (SBN 124840)
Law Office of Anthony V. Smith
204 East Second Avenue, #331
San Mateo, CA 94401-3904
Telephone: 650-548-0100
Counsel for Plaintiff

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

In Re DMCA Subpoena to Reddit, Inc.

)
:)
:) CASE NO. 3:19-mc-80005-SK
:)
:)
:) Watch Tower Bible and Tract Society of
:) Pennsylvania's Opposition to
:) Darkspilver's Motion to Quash Subpoena
:) to Reddit, Inc. Pursuant to 17 U.S.C. §
:) 512(h) to Identify Alleged Infringer

APPEARANCE DATE: 5/6/2019

TIME: 11:00 AM

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION..... 1

II. STATEMENT OF ISSUES TO BE DECIDED 2

III. STATEMENT OF RELEVANT FACTS 2

IV. ARGUMENT..... 5

 A. There Is No Right to Anonymously Infringe Copyrighted Works. 5

 B. Advocates who are Not Citizens or Residents of the United States and Who are
 Not Physically Present in the United States Do Not Have First Amendment
 Rights..... 6

 C. Darkspilver’s Motion to Quash is Time-Barred..... 8

 D. Darkspilver Has Not Satisfied His Burden of Proof on His Motion to Quash. 9

 E. Watch Tower Is Entitled to Compliance With the DMCA Subpoena. 12

 F. An Evaluation of Fair Use At This Stage Would Be Premature. 15

V. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

1

2

3 *AmTrust N. Am., Inc. v. Safebuilt Ins. Servs.*, No. 2:16-mc-0145 KJM AC, 2016 WL
5469257, 2016 U.S. Dist. Lexis 134879 (E.D.Cal. Sept. 28, 2016)..... 8

4 *Arista Records LLC v. Doe*, 604 F.3d 110 (2d. Cir. 2010)..... 5, 6

5 *Ass'n of Am. Med. Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991) 18

6 *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015)..... 16

7 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)..... 16

8 *Cont'l Cas. Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1957)..... 17

9 *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017)..... 16, 18

10 *Dornell v. City of San Mateo*, No. CV 12-06065-CRB (KAW), 2013 WL 5443036, 2013
11 U.S. Dist. LEXIS 142335 (N.D.Cal. Sept. 30, 2013) 8

12 *Edwin K. Williams & Co. v. Edwin K. Williams & Co. – East*, 542 F.2d 1053 (9th Cir.
13 1976)..... 17

14 *Estate of Ungar v. Palestinian Auth.*, 451 F. Supp. 2d 607 (S.D.N.Y 2006) 8

15 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) 17

16 *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019)..... 14

17 *Freed v. Home Depot U.S.A., Inc.*, No. 18cv359-BAS (LL), 2019 WL 582346, U.S. Dist.
Lexis 23736 (S.D.Cal. Feb. 13, 2019) 9

18 *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) 5, 6

19 *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004)..... 13, 15

20 *In re Automobile Antitrust Cases I&II*, 135 Cal. App. 4th 100 (Ct. of Appeal of Cal., 1st
21 App. Dist., Div. 4, Dec. 22, 2005)..... 9

22 *Johnson v. Eisentrager*, 339 U.S. 763 (1950) 6

23 *Kregos v. AP*, 937 F.2d 700 (2d. Cir. 1991) 17

24 *Patrick Collins, Inc. v. Doe*, No. C 11-2766 MEJ, 2011 WL 4407172 (N.D. Cal. Sept. 22,
2011)..... 8

25 *Sam Andrews' Sons v. Mitchell*, 457 F. 2d. 745 (9th Cir. 1972) 7

26 *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013)..... 17

27 *Signature Mgmt, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145 (N.D.Cal. 2013) 5, 8, 12, 13

28 *Sony Music Entm't, Inc. v. Doe*, 326 F. Supp. 2d. 556 (S.D.N.Y. 2004) 12

1 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990)..... 6, 7
 2 *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011)..... 13
 3 *United States v. 18 Packages of Magazines*, 238 F. Supp. 846 (N.D.Cal. 1964)..... 10
 4 *Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp.2d 211 (S.D.N.Y.2000) 6
 5 *Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150
 6 (2002)..... 1

7 **Statutes**

8 17 U.S.C. § 107..... 16, 17, 18
 9 17 U.S.C. § 501..... 12, 13
 10 17 U.S.C. §512..... 13, 14, 16

11 **Other Authorities**

12 Fed. R. Civ. P. 45 Advisory Committee’s Note 8

13 **Rules**

14 Fed. R. Civ. P. 12..... 16
 15 Fed. R. Civ. P. 45..... 8, 16

16 **Constitutional Provisions**

17 Article 1, Section 8 5
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

1
2 **I. INTRODUCTION**

3 To defeat the clear intent of the law protecting copyright holders, Darkspilver attempts
4 to convert this intellectual property matter into a religious dispute by seeking refuge behind the
5 First Amendment's freedom of speech protections. This case is not about suppressing
6 Darkspilver's public criticism. He can say whatever he desires. However, he cannot infringe
7 Watch Tower's intellectual property in the process.

8 For years Darkspilver has been discussing and debating "matters related to the Jehovah's
9 Witnesses freely and openly with people who have a wide range of views." D.E. 8-1 at 2:25-26.
10 Watch Tower never took any legal action against his years of voicing "disagreement or doubts"
11 about Jehovah's Witnesses' "teachings and practices". *Id.* at 2:12, 15. However, when he
12 chose to infringe upon Watch Tower's intellectual property, he triggered legal protections
13 accorded copyright owners. Darkspilver now seeks the right to anonymously infringe that
14 property. If he prevails, he will effectively be immunized from all future copyright
15 infringements. Further, all other users within this Court's jurisdiction could similarly thwart the
16 plain intent of the Copyright Act by contending they too have a fear of reprisal. Thus, Watch
17 Tower would be stripped of its intellectual property rights in all such cases.

18
19
20 Darkspilver would have this Court believe that Watch Tower Bible and Tract Society of
21 Pennsylvania (hereinafter "Watch Tower")¹ has undertaken a witch hunt targeting the free
22 speech of the entire community of former and current Jehovah's Witnesses who criticize the
23 Jehovah's Witnesses religion using the Reddit service. Yet, of the 34.1 *thousand* members of
24 the r/exjw subreddit forum to which Darkspilver subscribes, only Darkspilver and one other
25 Reddit subscriber are the subjects of Watch Tower subpoenas to Reddit, Inc. This is because
26

27 ¹ Watch Tower Bible and Tract Society of Pennsylvania ("Watch Tower") is simply the corporate copyright holder
28 for the publications at issue. Watch Tower does not supervise or direct the activities of Jehovah's Witnesses or
congregations of Jehovah's Witnesses. Watchtower Bible and Tract Society of New York, the entity involved in
Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002), coordinated the
preaching activities of Jehovah's Witnesses in the United States at the time of that litigation.

1 only Darkspilver and one other subscriber are accused of infringing Watch Tower's copyrighted
2 works. If the Court denies Darkspilver's Motion to Quash, it will send no other message than
3 this: You can criticize Watch Tower as much as you want, as long as you do not infringe their
4 copyrights.

5
6 By way of a time-barred Motion to Quash, Darkspilver seeks to shield admitted
7 infringement of Watch Tower's copyrighted works by invoking First Amendment rights to
8 which he is not entitled, in a court that, by his own admission, does not have the requisite
9 personal jurisdiction to adjudicate the copyright infringement claim. Under the cloak of fair
10 use, Darkspilver's untimely Motion to Quash also invites this Court to foreclose copyright
11 protection to all non-commercial works. Should the Court accept this invitation, it would
12 essentially write non-commercial creative works out of the Copyright Act (17 U.S.C. § 100, et
13 seq.) altogether. Watch Tower respectfully urges the Court to honor Article 1, Section 8 of the
14 U.S. Constitution and the Digital Millennium Copyright Act (17 U.S.C. § 512) and deny
15 Darkspilver's Motion to Quash.
16

17 **II. STATEMENT OF ISSUES TO BE DECIDED**

18 The issues to be decided in the present matter are: 1) whether the First Amendment right
19 to anonymity protects copyright infringement in this instance; 2) whether a non-resident foreign
20 national with no presence in the United States is protected by the First Amendment; 3) whether
21 Darkspilver's Motion to Quash is time-barred; 4) whether Darkspilver as the movant has
22 satisfied his burden of proof on his Motion to Quash; 5) whether Watch Tower is entitled to
23 compliance with the DMCA subpoena; and 6) whether an evaluation of the Fair Use affirmative
24 defense is appropriate at this stage.
25

26 **III. STATEMENT OF RELEVANT FACTS**

27 Darkspilver reproduced and displayed several copyright-protected works owned by
28 Watch Tower on the r/exjw subreddit. One of the copyrighted works reproduced and displayed

1 by Darkspilver on the r/exjw subreddit was an article titled “What Gift Can We Give to
2 Jehovah?” that was published on JW.ORG² and that also appeared on the back cover of the
3 November 2018 issue of *The Watchtower* (hereinafter the “Article”). See Declaration of Paul
4 D. Polidoro, dated April 9, 2019 (hereinafter “Polidoro Decl.”) at ¶2. This infringement was
5 reported to Reddit, Inc. on December 19, 2018. *Id.* at ¶4. On December 19, 2018, Watch
6 Tower also reported the infringement of an internal document not intended for wide-spread
7 public dissemination titled C-5829Ca (hereinafter the “Chart”). *Id.*

9 Watch Tower conducted a good faith fair use analysis of several uses of Watch Tower’s
10 copyrighted works by u/Darkspilver on the r/exjw subreddit forum. See Polidoro Decl., at ¶3.
11 Watch Tower concluded that the two infringements reported to Reddit, Inc. on December 19,
12 2018 did not constitute fair use of Watch Tower’s copyrighted works. *Id.* While these are the
13 only two infringements that were reported to Reddit, Inc., the two infringements that are the
14 subject of the underlying subpoena do not constitute the universe of copyright infringements of
15 Watch Tower’s works by Darkspilver on Reddit’s site. *Id.* at ¶4.

17 As of April 9, 2019, there are 34.1 thousand reported subscribers to the “r/exjw”
18 subreddit community. See Polidoro Decl. at ¶ 6, Exhibit A. Watch Tower has issued DMCA-
19 compliant notices of infringement reporting copyright infringement by a total of two of these
20 subscribers because Watch Tower became aware that these two subscribers infringed Watch
21 Tower’s copyrighted works. *Id.* at ¶ 6.

23 Darkspilver’s speech was of no interest to Watch Tower until that speech turned from
24 critique to copyright infringement. Polidoro Decl. at ¶ 6. Darkspilver openly admits conduct
25 that satisfies all of the elements of a prima facie case of copyright infringement. See
26 Declaration of John Doe (Darkspilver) in Support of Motion to Quash Watchtower [*sic*] Bible &
27

28 ² Available at: [https://www.jw.org/en/publications/magazines/watchtower-study-november-2018/gift-we-can-give-to-jehovah/#?insight\[search_id\]=67011f2d-cb71-44b8-8086-ad0552952627&insight\[search_result_index\]=8](https://www.jw.org/en/publications/magazines/watchtower-study-november-2018/gift-we-can-give-to-jehovah/#?insight[search_id]=67011f2d-cb71-44b8-8086-ad0552952627&insight[search_result_index]=8) (last viewed: April 8, 2019)

1 Tract Society Inc.’s Subpoena to Reddit, Inc. Seeking Identityifying [*sic*] Information
2 (hereinafter “Darkspilver Decl.”) at ¶¶8, 10.

3 Darkspilver’s claim that honoring the DMCA’s subpoena provision (17 U.S.C. § 512(h))
4 will have a chilling effect on free speech is belied by the statements of several members of the
5 r/exjw subreddit community. In response to the filing of Darkspilver’s Motion to Quash,
6 members of the Ex-JW subreddit forum posted messages such as:
7

- 8
- “LMAO. ‘chilling effect’ my a\$\$\$. We’re always gonna fight, and always gonna
9 actually unconditionally support and defend our brethren that fight in enemy
10 territory” –u/Mindless Reception (Mar. 26, 2019); and
 - “Good luck shutting us all up.” – u/TheGreatFraud (Mar. 27, 2019).

11
12 See Polidoro Decl., Ex. B. Members of the community have also started to counsel the r/exjw
13 subreddit community on how to use Watch Tower’s intellectual property or get away with
14 blatant infringement of it stating,
15

16 a general tip would be not to publish anything on social media that is a leak or
17 unpublished work of watchtower. or (*sic*) if you are doing that it must be done from a
18 neutral ip address and vpn. . . . to remove any danger of being outed take privacy steps
or don’t use their stuff. – u/kevinmcfree (Mar. 30, 2019)

19 See Polidoro Decl., Ex. B.

20 Darkspilver’s claim of a chilling effect on the speech of the Reddit community is
21 further belied by the increase in the size of the community. In November 2018, before the
22 present subpoena was issued to Reddit, Inc. there were approximately 29 thousand members of
23 the r/exjw subreddit community. See Polidoro Decl., Ex. C. As of April 9, 2019, the r/exjw
24 subreddit now has 34.1 thousand subscribers. See Polidoro Decl., Ex. A

25 Only 2,869 of the 34,100 subscribers to the r/exjw subreddit have contributed to the map
26 cited by Darkspilver that purports to show the alleged location of r/exjw subreddit community
27 members. See Polidoro Decl., Exhibit D. Of that number, no more than 1,944 community
28

1 subscribers *claim* to reside in the United States. *Id.*

2 Watch Tower is not Darkspilver's local church and has no ability to excommunicate him
3 from his local congregation of Jehovah's Witnesses. *See* Polidoro Decl., at ¶10. Not a single
4 person that has been the subject of a Watch Tower-sought DMCA subpoena has been
5 excommunicated from their local church as result of Watch Tower obtaining their identity from
6 a DMCA subpoena. *Id.* Watch Tower has never publicly disclosed the names of the individuals
7 who were the subject of DMCA subpoenas. *Id.* Some of the subjects of Watch Tower's DMCA
8 subpoenas who were active Jehovah's Witnesses before they became the subject of a Watch
9 Tower DMCA subpoena, remained active Jehovah's Witnesses after Watch Tower received
10 identifying information about them. *Id.*

12 **IV. ARGUMENT**

13 ***A. There Is No Right to Anonymously Infringe Copyrighted Works.***

14 Were this case to be viewed through the prism of the United States Constitution, the
15 appropriate starting point would be Article 1, Section 8 Congressional power "[t]o promote the
16 Progress of Science and useful arts, by securing for limited Times to Authors...the exclusive
17 Right to their respective Writings." As the United States Supreme Court observed "the Framers
18 intended copyright itself to be the engine of free expression." *Harper & Row v. Nation*
19 *Enterprises*, 471 U.S. 539, 558 (1985).

20 To subvert the well-established Congressional protections accorded copyrights,
21 Darkspilver asserts the right of anonymous speech. In so doing, he ignores the fact that the U.S.
22 Supreme Court, in addition to courts in both the Ninth and Second Circuits, recognize that
23 "[t]he right to anonymous speech is not absolute." *Signature Mgmt., LLC v. Automattic, Inc.*,
24 941 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (denying a pseudonymous infringer's Motion to
25 Quash DMCA subpoena). "The First Amendment does not . . . provide a license for copyright
26 infringement." *Arista Records, LLC v. Doe*, 604 F.3d 110, 118 (2d. Cir. 2010) *citing Harper &*
27
28

1 *Row Publishers*, 471 U.S. at 555-57, 569. “Thus, to the extent that anonymity is used to mask
2 copyright infringement or to facilitate such infringement by other persons, it is unprotected by
3 the First Amendment.” *Arista Records LLC*, 604 F.3d at 118; *see also Universal City Studios,*
4 *Inc. v. Reimerdes*, 82 F.Supp.2d 211, 220 (S.D.N.Y.2000) (the “Supreme Court ... has made it
5 unmistakably clear that the First Amendment does not shield copyright infringement”).

6
7 ***B. Advocates who are Not Citizens or Residents of the United States and Who are Not***
8 ***Physically Present in the United States Do Not Have First Amendment Rights.***

9 Assuming, *arguendo*, that the right of anonymous speech is properly presented in this
10 case, Darkspliver does not have standing to assert it. He is neither a citizen nor a resident of the
11 United States, and is not present in the United States. Were his position upheld, every person
12 on the planet would be granted the right to assert similar constitutional rights in federal court.
13 The Supreme Court has given no such elasticity to non-resident foreign nationals with no
14 physical presence in the United States.

15 Attempts by non-resident foreign nationals to assert constitutional rights are not new and
16 have been repeatedly rejected by the Supreme Court. In *Johnson v. Eisentrager*, foreign
17 nationals arrested in China and imprisoned in Germany after World War II attempted to “obtain
18 writs of habeas corpus in our federal courts on the ground that their convictions for war crimes
19 had violated the Fifth Amendment and other constitutional provisions.” *U.S. v. Verdugo-*
20 *Urquidez*, 494 U.S. 259, 269 (1990) *citing Johnson v. Eisentrager*, 339 U.S. 763 (1950). The
21 Court’s “rejection of extraterritorial application of the Fifth Amendment was emphatic.” *Id.*
22 The Court stated,

23
24
25 Such extraterritorial application of organic law would have been so significant an
26 innovation in the practice of governments that, if intended or apprehended, it could
27 scarcely have failed to excite contemporary comment. Not one word can be cited. *No*
28 *decision of this Court supports such a view. None of the learned commentators on our*
Constitution has even hinted at it. The practice of every modern government is opposed
to it.

Id. (emphasis added)(citation omitted).

1 In *U.S. v. Verdugo-Urquidez*, a foreign national who was arrested in Mexico and then
2 extradited to the United States claimed Fourth Amendment protection when his home in Mexico
3 was searched. *Id.* The defendant in that case pointed to a string of Supreme Court cases
4 providing constitutional protections for foreign nationals. *Id.* at 271. Yet, the *Verdugo-*
5 *Urquidez* Court noted, “These cases . . . establish only that aliens receive constitutional
6 protections *when they have come within the territory of the United States* and developed
7 substantial connections with this country.” *Id.* (emphasis added). The Court continued,
8 “Respondent is an alien who has had no previous significant voluntary connection with the
9 United States, so these cases avail him not.” *Id.* Thus the Court concluded that the Fourth
10 Amendment provided no protection for the non-resident foreign national. With respect to other
11 constitutional protections available to foreign nationals, the Court stated,
12

13 “the people” protected by the Fourth Amendment, and by the First and Second
14 Amendments, and to whom rights and powers are reserved in the Ninth and Tenth
15 Amendments, refers to a class of persons who are part of a national community or who
16 have otherwise developed sufficient connection with this country to be considered part
of that community.

17 *Id.* at 265. Thus, the Supreme Court has time and again reiterated its decision that non-U.S.
18 citizens who are not physically present in the United States have no constitutional rights.

19 The Ninth Circuit Court also attaches constitutional protection for non-U.S. citizens
20 only to people who are present within the United States. In *Sam Andrews’ Sons v. Mitchell*, the
21 Court held, “Any person *within the United States*, citizen or alien, resident or non-resident, is
22 protected by the guarantees of the Constitution.” 457 F.2d. 745, 749 (9th Cir. 1972) (emphasis
23 added). The other cases cited by Darkspilver point to the same requirement of physical
24 presence in the United States. Since he admits that he is “a foreign citizen, residing in the
25 country of my citizenship” he cannot avail himself of rights accorded under the U.S.
26 Constitution. Darkspilver Decl. at ¶ 6:5.
27
28

1 ***C. Darkspilver’s Motion to Quash is Time-Barred.***

2 Even if the Court were willing to disrupt decades-old Ninth Circuit and Supreme Court
3 precedent to provide constitutional rights to a non-resident foreign national with no presence in
4 the United States, Darkspilver’s Motion to Quash is time-barred. The Federal Rules stipulate a
5 limit on the time to file a Motion to Quash. Fed. R. Civ. P. 45(d)(3)(A)(“*On timely motion*, the
6 court . . . must quash or modify a subpoena”); *see* Fed. R. Civ. P. 45 advisory committee’s
7 note (“The 10-day period for response to a subpoena is extended to 14 days to . . . to allow a bit
8 more time for such objections to be made.”)

10 While courts may at times be skeptical of subpoenas that do not allow 14 days for
11 compliance or objections, when the underlying subpoena provides at least 14 days for
12 compliance, the deadline to file a Motion to Quash is the subpoena compliance deadline. *See*
13 *Dornell v. City of San Mateo*, No. CV 12-06065-CRB (KAW), 2013 WL 5443036, at *3, 2013
14 U.S. Dist. LEXIS 142335, at *8 (N.D.Cal. Sept. 30, 2013) (“Rule 45(c)(3) provides that a party
15 must file a ‘timely’ motion to quash or modify a subpoena While there may be a split on
16 the definition of ‘timely,’ [the movant] did not act before the time for compliance.”); *AmTrust*
17 *N. Am., Inc. v. Safebuilt Ins. Servs.*, No. 2:16-mc-0145 KJM AC, 2016 WL 5469257, 2016 U.S.
18 Dist. Lexis 134879 (E.D. Cal. Sept. 28, 2016) *citing Estate of Ungar v. Palestinian Auth.*, 451
19 F. Supp. 2d 607, 610 (S.D.N.Y 2006)(“It is well settled that, to be timely, a motion to quash a
20 subpoena must be made prior to the return date of the subpoena”); *see Signature Mgmt., LLC*,
21 941 F. Supp. 2d at 1153 (suggesting that the production deadline for a DMCA Subpoena
22 provides the deadline to file a Motion to Quash). The rules are no different when the subpoena
23 requires revealing the identity of a pseudonymous defendant. *See Patrick Collins, Inc. v. Doe*,
24 No. C 11-2766 MEJ, 2011 WL 4407172, at *8 (N.D. Cal. Sept. 22, 2011) (ordering “the
25 subpoenaed entity shall preserve any subpoenaed information pending the resolution of any
26 *timely-filed* motion to quash”) (emphasis added).
27
28

1 The subpoena in the present matter was served on Reddit, Inc. on January 24, 2019.
2 Polidoro Declaration, Ex. E (Affidavit of Service). The return date of the subpoena was
3 February 15, 2019. *Id.* Thus, the subpoena provided 22 days for Darkspilver to file a timely
4 Motion to Quash. Darkspilver admits that he received the subpoena on February 7, 2019.
5 Darkspilver Decl. at ¶7. Yet, Darkspilver did not file the present motion until March 26, 2019 –
6 almost 50 days after becoming aware of the subpoena and 30 days after retaining counsel.
7 Neither Darkspilver nor his counsel ever reached out to Watch Tower to negotiate an extended
8 deadline for the subpoena. Polidoro Decl. at ¶ 11. There is no excuse for such a delay and
9 Darkspilver’s Motion to Quash is simply time-barred. Darkspilver’s counsel provides no
10 excuse for its client’s 50-day delay in filing the motion. Counsel provides no excuse or
11 reasoning for why it took 30 days after being retained to file the motion. Most importantly,
12 Counsel states no reason why they never requested more time from the Court to file a Motion to
13 Quash.
14

15
16 ***D. Darkspilver Has Not Satisfied His Burden of Proof on His Motion to Quash.***

17 Contrary to the insinuation that Watch Tower bears the burden of proof on this Motion
18 to Quash, Darkspilver must prove that the subpoena should be quashed by a preponderance of
19 evidence. *See In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100 (1st Dist., Div. 4,
20 2005) (noting the burden of proof on a Motion to Quash is preponderance of evidence). “The
21 party who moves to quash a subpoena has the burden of persuasion under Rule 45(c)(3).”
22 *Freed v. Home Depot U.S.A., Inc.*, No. 18cv359-BAS (LL), 2019 WL 582346, at *2, U.S. Dist.
23 Lexis 23736, at *6 (S.D.Cal. Feb. 13, 2019). Accordingly, Darkspilver bears the burden to
24 prove by a preponderance of evidence that he is entitled to avail himself of First Amendment
25 protection, and that the harm he claims will result from compliance with the subpoena is more
26 than speculative.
27

28 First, Darkspilver points to no physical presence in the United States, and admits that he

1 is a non-resident foreign national. Darkspilver Decl. at ¶ 6. Citing *United States v. 18*
2 *Packages of Magazines*, 238 F. Supp. 846, 847-48 (N.D. Cal. 1964), he then seeks to create
3 some First Amendment right by way of an alleged United States-based audience of his works.
4 Darkspilver Decl. at ¶6. Darkspilver points to “a map that participants in the [Reddit]
5 community made and update themselves” as evidence of this United States connection. *Id.* at
6 6:6-7. Yet, Darkspilver admits “the map itself is likely imprecise.” *Id.* at 6:8. Furthermore, he
7 provides no additional evidence that the community’s self-made map is accurate. In other
8 words, any one of the community members could easily lie about where they live on the
9 community’s self-made map, and the Court would be none the wiser.

11 Darkspilver’s brief states that he posted the infringing material “for a group comprised
12 primarily of U.S. readers” when in fact, only 2,869 of the 34,100 subscribers to the r/exjw
13 subreddit have contributed to the map. D.E. 8, at 21:25; *see* Polidoro Decl., Exhibit D. Of that
14 number, no more than 1,944 community subscribers *claim* to reside in the United States. *See*
15 Polidoro Decl., Exhibit D. Thus, the evidence of Darkspilver’s United States-based audience
16 amounts to nothing more than a showing that approximately 5% of his audience *claims* to live
17 in the United States. He provides no verifiable proof that even one member of his audience
18 *actually* lives in the United States. With no evidence, much less a preponderance of evidence,
19 to prove that Darkspilver has a United States-based audience, Darkspilver’s claim to First
20 Amendment protection via U.S. readers of his posts falls flat.

23 Even if the Court were to find that Darkspilver was entitled to First Amendment
24 protection, he has not satisfied his burden to prove that his claims of hardship are anything more
25 than pure speculation. Darkspilver would like for the Court to believe that the minute Watch
26 Tower learns his true identity, he will be unceremoniously excommunicated from his local
27 church and all communication with his family and friends will forever cease. The fact of the
28 matter is that Watch Tower is not Darkspilver’s local church and has no ability to

1 excommunicate him from his local congregation of Jehovah’s Witnesses. Additionally,
2 Darkspilver presents no evidence that a single person that has been the subject of a Watch
3 Tower-sought DMCA subpoena has been excommunicated from their local church as result of
4 Watch Tower discovering their true identity. Finally, Darkspilver points to no proof that Watch
5 Tower has ever publicly disclosed the names of the individuals who were the subject of DMCA
6 subpoenas. To the contrary, the subjects of Watch Tower’s DMCA subpoenas who were
7 Jehovah’s Witnesses before Watch Tower learned their identities via DMCA subpoenas
8 continue to be Jehovah’s Witnesses.

10 Evidence submitted in support of Darkspilver’s Motion to Quash even acknowledges
11 that Darkspilver’s claim of eternal isolation from friends and family is not accurate. The
12 Declaration of Alexandra Moss attaches multiple statements by former Jehovah’s Witnesses that
13 rebut Darkspilver’s sweeping assertion. Some acknowledge that communication with family
14 members continued after they left the church. *See* Declaration of Alexandra Moss, Ex. A at 5
15 (“With some ex-Witnesses, some of their families will still talk to them” ; *see also id.* at 22
16 (acknowledging that former Jehovah’s Witness continued to communicate and live with
17 Jehovah’s Witness family members after leaving the church).

19 Finally, Darkspilver claims that compliance with the subpoena will result in complete
20 social isolation causing overwhelming negative effects on his physical and mental wellbeing.
21 Yet, Darkspilver acknowledges that there is a large community of supporters of his views.
22 Darkspilver Decl., at ¶ 5. Contrary to Darkspilver’s insinuation that the present subpoena
23 threatens Darkspilver’s entire social livelihood, members of the Reddit community vow support
24 of Darkspilver. *See* Polidoro Decl., Exhibit B at 6 (“we all got your back u/darkspilver!” –
25 posted by FrodeKommode, dated March 27, 2019). Furthermore, Darkspilver provides no proof
26 that his physical and mental state will actually be affected by compliance with the subpoena.
27

28 It is clear that Darkspilver’s claims of harm that will necessarily result from compliance

1 with the subpoena are nothing more than speculation. Whatever their intended purpose, the
2 declarations that Darkspilver submits in support of his claims of harm actually prove that
3 compliance with the subpoena in this matter will not result in the complete obliteration of all of
4 Darkspilver’s relationships. Darkspilver fails to meet his burden to prove that his identity is
5 privileged information protected by the First Amendment and that compliance with the
6 subpoena will result in actual harm. If Darkspilver’s Motion to Quash is granted, it will allow
7 all anonymous infringers to avoid copyright infringement liability simply by claiming that
8 revealing their identity will result in harm – however remote or unlikely.

10 ***E. Watch Tower Is Entitled to Compliance With the DMCA Subpoena.***

11 The DMCA and the Federal Rules lay out the appropriate standard for evaluating a
12 motion to quash on a DMCA subpoena. As the owner of the infringed works, Watch Tower is
13 entitled to seek redress from the court for what it, in good faith, believes is an infringement of
14 its work. *See* 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a
15 copyright is entitled . . . to institute an action for any infringement of that particular right
16 committed.”). In order for Watch Tower to seek judicial redress in such an action, it must know
17 the identity of the individual responsible for the infringement. *See Signature Mgmt., LLC*, 941
18 F. Supp. 2d at 1157 (“TEAM has an interest in obtaining Amthrax's identity to facilitate a
19 copyright infringement action against Amthrax. . . . as personal service will facilitate discovery,
20 including a potential pre-trial deposition, and prevent TEAM from being forced to rely on
21 Amthrax’s good faith engagement in the litigation to move forward.”); *see also Sony Music*
22 *Entm’t, Inc. v. Does 1-40*, 326 F. Supp. 2d. 556, 566 (S.D.N.Y. 2004) (“Ascertaining the
23 identities and residences of [anonymous] defendants is critical to plaintiffs’ ability to pursue
24 litigation, for without this information, plaintiffs will be unable to serve process”).
25
26

27 Section (h) of the DMCA allows a “copyright owner or a person authorized to act on the
28 owner’s behalf [to] request the clerk of any United States district court to issue a subpoena to a

1 service provider for identification of an alleged infringer.” 17 U.S.C. §512(h)(1). Provided that
2 the copyright owner meets the requirements of 17 U.S.C. §512(h)(2)(A-C), the copyright owner
3 is not required to provide any further evidence of entitlement to learn the infringer’s identity.

4 The test laid out in *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D.
5 Cal. 2004) is not the appropriate test to be applied in the present matter. First, the *Highfields*
6 case is factually distinguishable from the present case. On the most basic level, the *Highfields*
7 *Capital Management* case has nothing to do with copyright infringement or a DMCA subpoena.
8 The *Highfields* case involved claims for trademark infringement, false designation of origin,
9 defamation, and commercial disparagement. Additionally, unlike the subpoena at issue in
10 *Highfields*, the subpoena issued in the present matter does not stem from a John Doe case for
11 which a complaint has already been filed. Most importantly, the defendant in *Highfields* did not
12 admit to being a non-resident foreign national with no physical presence in the United States
13 and thus no First Amendment protection.

14 Even if the Court chooses to apply the *Highfields* test, Watch Tower’s claim of
15 infringement satisfies that test. The *Highfields* Court required that the Plaintiff first show “real
16 evidentiary basis for believing that the defendant has engaged in wrongful conduct that has
17 caused real harm to the interests of the plaintiff that the laws plaintiff has invoked were intended
18 to protect.” *Highfields Capital Mgmt. L.P.*, 385 F. Supp. 2d at 975. To establish a prima facie
19 case of copyright infringement, a party must show (1) ownership of a valid copyright and (2)
20 violation by the alleged infringer of at least one of the exclusive rights granted to copyright
21 owners by the Copyright Act. *See* 17 U.S.C. § 501(a); *UMG Recordings, Inc. v. Augusto*, 628
22 F.3d 1175, 1178 (9th Cir. 2011). “As courts have noted, the DMCA essentially requires the
23 party seeking a subpoena to plead a prima facie case of copyright infringement for a subpoena
24 to issue.” *Signature Mgmt., LLC*, 941 F. Supp. 2d at 1157. Watch Tower laid out a prima facie
25 case of copyright infringement in its application for a DMCA subpoena, which included a copy
26
27
28

1 of the underlying DMCA-compliant notice of infringement. Furthermore, Darkspilver
2 submitted evidence to support Watch Tower’s copyright claim. His Motion to Quash admits
3 that “Darkspilver reproduced the Ad and Chart in their entirety.” D.E. 8, at 17:18.

4 While Darkspilver does not contest Watch Tower’s ownership of the Article because he
5 was able to find the copyright registration record for it, he contests the viability of Watch
6 Tower’s infringement claim for the chart because he cannot find a copyright registration
7 certificate.³ Curiously, he never explains how he came to be in possession of this unpublished
8 internal document. Nonetheless, the argument based on lack of a copyright registration
9 certificate is a mere distraction from the real issue.

10
11 Whether Watch Tower registered for a copyright certificate for the works is of no
12 consequence for purposes of identifying an infringer. “[A]n owner’s rights exist apart from
13 registration” *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881, 889
14 (2019). The DMCA does not require that copyright owners register a work before submitting
15 an infringement notice. It only requires that copyright owners swear “under penalty of perjury,
16 that the complaining party is authorized to act on behalf of the owner of an exclusive right that
17 is allegedly infringed.” 17 U.S.C. §512(c)(3)(A)(vi).

18
19 When Watch Tower obtains sufficient information to identify the defendant, it can easily
20 apply for copyright registration and “can recover for infringement that occurred both before and
21 after registration.” *Fourth Estate Pub. Ben. Corp.*, 139 S. Ct. at 887. Simply put, copyright
22 registration does not confer ownership of a work, and Darkspilver never contests Watch
23 Tower’s ownership of either of the works at issue.
24

25
26 ³ Unlike the Article, which was intended for public distribution, the chart was an internal document not intended for
27 public distribution. For that reason, the Article was registered with the Copyright Office. Once the infringer is
28 identified and personal jurisdiction over the infringer is established, the chart can be registered via the U.S.
Copyright Office’s special handling process designed specifically for expedited processing of copyright registration
applications for pending or prospective litigation. See Special Handling, available at:
<https://www.copyright.gov/help/faq/faq-special.html> (last seen: April 8, 2019)(“Once a request for special handling
is received and approved, every attempt is made to process the claim or recordation within five working days.”)

1 The *Highfields* Court next required a comparison of “the magnitude of the harms that
2 would be caused to the competing interests” by granting a Motion to Quash or denying it.
3 *Highfields Capital Mgmt. L.P.*, 385 F. Supp. 2d at 976. The decision in *Signature Mgmt., LLC.*,
4 941 F. Supp. 2d at 1145 is instructive on this point. Like Darkspilver, the pseudonymous
5 infringer in *Signature Mgmt.* claimed that the copyright owner-petitioner would “retaliate
6 against him for his critical speech, either by bringing a defamation suit or through some other
7 means.” *Id.* at 1157. The infringer in that case, referred to as Amthrax, further claimed that
8 “such retaliatory action could chill the speech of other anonymous critics, who will fear
9 retaliation if they continue to express their beliefs.” The court weighed that interest against
10 copyright owner’s interest “in obtaining Amthrax’s identity to facilitate a copyright
11 infringement action . . . as personal service [would] facilitate discovery, including a potential
12 pre-trial deposition, and prevent TEAM from being forced to rely on Amthrax’s good faith
13 engagement in the litigation to move forward.” *Id.* Despite the fact that Amthrax offered to
14 accept service of process and defend the action anonymously, the court held, “The minimal
15 potential harm to Amthrax of disclosure of his identifying information for the purposes of the
16 DMCA does not justify the burden placed on TEAM by granting Amthrax’s Motion.” *Id.* at
17 1157-58.

20 Similarly, Watch Tower has the right to pursue the infringement of its copyrighted
21 works in the courts. It is entitled to discovery and a final decision on the merits by a court with
22 proper jurisdiction. Darkspilver’s unsubstantiated and contradicted claims of retaliation and
23 emotional distress should not outweigh Watch Tower’s interest in the adjudication of the
24 underlying infringement claims by a trier of fact.

26 ***F. An Evaluation of Fair Use At This Stage Would Be Premature.***

27 An evaluation of the merits of the underlying claim – much less an affirmative defense
28 such as fair use is premature. *See Authors Guild v. Google*, 804 F.3d 202, 213 (2d Cir. 2015)

1 (“As the Supreme Court has designated fair use an affirmative defense, the party asserting fair
2 use bears the burden of proof”) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590
3 (1994)); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 933 (N.D. Cal. 1996)(“Because fair use is
4 an affirmative defense, [the defendant] Sherman carries the burden of demonstrating it”).
5 Making a ruling on whether Darkspilver’s use of Watch Tower’s intellectual property
6 constitutes fair use would effectively be a ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss
7 for a case in which no pleadings have ever been filed. Neither 17 U.S.C. § 512, nor Fed. R. Civ.
8 P. 45 requires or permits such a course.

10 However, even if the Court were willing to make such a ruling, Darkspilver’s use of
11 Watch Tower’s copyrighted works does not constitute fair use. The first fair use factor
12 evaluates “the purpose and character of the use, including whether such use is of a commercial
13 nature or is for nonprofit educational purposes.” 17 U.S.C. § 107 (1). “In addressing the first
14 factor, the court asks whether the new work merely supersedes the objects of the original
15 creation, or instead adds something new, with a further purpose or different character; in other
16 words, whether and to what extent the new work is ‘transformative.’” *Disney Enters. v.*
17 *VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017).

19 Darkspilver admits that the first image that he posted is “a copy” of Watch Tower’s
20 Article. Darkspilver Decl., at ¶ 8:19. Darkspilver makes no claim that he, in any way, added to
21 or transformed Watch Tower’s work in his post. With respect to the chart, Darkspilver admits
22 to reproducing a copy of the entire copyrighted work. D.E 8, at 17:18. Darkspilver claims that
23 he “re-formatted [the chart] to make it more visually appealing and easy to read on screen.” Yet
24 Darkspilver admits that the original file was an Excel file that necessarily had to be viewed and
25 read on screen. Thus, Darkspilver concedes that his use of the work merely replaced the object
26
27
28

1 of the original creation – rather than adding a further purpose or different character.⁴

2 Darkspilver’s uses of Watch Tower’s works, whether commercial or non-commercial, were
3 clearly not transformative, and do not favor a finding of fair use.

4 The second fair use factor requires an examination of “the nature of the copyrighted
5 work.” 17 U.S.C. § 107(2). With respect to the Article, Darkspilver acknowledges that the
6 creative “design” of the Article is one of the reasons that he reproduced it on Reddit.

7 Darkspilver Decl., at 3:28; *see also* D.E. 8, at 16:28. Moreover, the illustrations, layout, and
8 word choice in the article “What Gift Can We Give to Jehovah?” are all creative in nature.

9 With respect to the chart, the layout, design, and word choice are all creative aspects of the
10 work making the work, as a whole, creative in nature. *See Edwin K. Williams & Co., Inc. v.*
11 *Edwin K. Williams & Co. – East*, 542 F.2d 1053, 1061 (9th Cir. 1976) (“the instructions and the
12 blank forms constituted an integrated work entitled to copyright protection”); *see also Cont’l*
13 *Cas. Co. v. Beardsley*, 253 F.2d 702, 703-704 (2d Cir. 1958) (holding that forms are entitled to
14 copyright protection); *Kregos v. Associated Press*, 937 F.2d 700, 708 (2d. Cir. 1991) (same).

15 Thus, the second fair use factor weighs against a finding of fair use.

16 The third fair use factor looks to the “the amount and substantiality of the portion used
17 in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). Darkspilver admits,
18 “Darkspilver reproduced the Ad and Chart in their entirety”. D.E. 8, at 17:18. Darkspilver
19 claims that he had to use the entire works because the entire works were “relevant to Doe’s
20 purpose.” D.E. 8 at 12:26. Relevance of the entire work to one’s purpose is not the standard for
21 fair use. *See Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (“this factor will
22 not weigh against an alleged infringer, even when he copies the whole work, if he takes no more
23
24
25

26
27
28

⁴ Even if a Court decides that the factual information communicated in the document is not copyrightable, the creative way in which that information is described and presented is protectable. Indeed there is no reason why the information in the first row had to appear first, and the information in the last row necessarily had to be last. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342 (1991) (finding that for copyright protection to attach to facts, the “originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way.”)

1 than is *necessary* for his intended use”) (emphasis added). Doe provides no reason why his
2 purpose could not have been accomplished by linking to the Article and summarizing the chart.

3 The fourth fair use factor requires an evaluation of “the effect of the use upon the
4 potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Courts decide
5 “whether unrestricted and widespread conduct of the sort engaged by the defendant . . . would
6 result in a substantially adverse impact on the potential market for the original.” *Disney Enters.*,
7 869 F.3d at 861. If widespread unauthorized reproduction and display of Watch Tower’s works
8 online were permitted, there would be virtually no need to visit Watch Tower’s website –
9 JW.ORG. Diverting traffic away from Watch Tower’s website could result in a significant
10 decline in readership of Watch Tower’s content. *See Ass’n of Am. Med. Colleges v. Cuomo*, 928
11 F.2d 519, 526 (2d Cir. 1991) (“This case does not present the relatively straightforward situation
12 in which the potential harm to a copyrighted work flows from direct competition with the
13 assertedly fair use. In such circumstances, we have noted our concern that ‘creation will be
14 discouraged if demand can be undercut by copiers.’”) Therefore, Watch Tower contends that
15 the fourth fair use factor also weighs in favor of a finding of infringement.
16
17

18 **V. CONCLUSION**

19 As the owner of the copyrighted material, Watch Tower has the right to pursue legal
20 recourse for what it, in good faith, believes is the infringement of its intellectual property.
21 Watch Tower also has the right to litigate that infringement claim in a court having personal
22 jurisdiction over Watch Tower and the alleged infringer. Watch Tower has made proper use of
23 the DMCA’s subpoena provision.
24

25 Darkspilver’s unsupported claim that Watch Tower is misusing the DMCA in order to
26 silence religious dissenters and critics is simply not true. The fact of the matter is that over
27 34,000 other r/exjw subreddit subscribers have been able to openly express their views without
28 interference by Watch Tower. Darkspilver’s speech only became of concern to Watch Tower

1 when his speech crossed the line to copyright infringement. Granting Darkspilver's Motion to
2 Quash will effectively extend constitutional rights far beyond the current limits set by the Ninth
3 Circuit and Supreme Court. It will also effectively immunize all infringements of copyrighted
4 works by anonymous infringers all over the world that make a claim of potential harm in this
5 jurisdiction. Denying Darkspilver's Motion to Quash, on the other hand, will send no other
6 message than this: You can criticize an organization as much as you want, as long as you do not
7 infringe their copyrights. Watch Tower respectfully moves this Court to deny Darkspilver's
8 Motion to Quash.
9

10 Dated: April 9, 2019

Respectfully submitted,

11
12 **LAW OFFICE OF ANTHONY V. SMITH**
13 204 East Second Avenue, #331
14 San Mateo, CA 94401-3904
15 Telephone: 650-548-0100
16 California Bar No.: 124840

**WATCH TOWER BIBLE AND
TRACT SOCIETY OF
PENNSYLVANIA
LEGAL DEPARTMENT**
100 Watchtower Drive
Patterson, NY 12563
Telephone: 845-306-1000
Facsimile: 845-306-0709
Email: inboxLGLip@jw.org

15 /S/ Anthony V. Smith
16 Anthony V. Smith, Esq.

17
18 /S/ Paul D. Polidoro
19 Paul D. Polidoro
(admitted *pro hac vice*)
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 9, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a notice of the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

Alexandra Helen Moss

Counsel for John Doe (Darkspilver)

Electronic Frontier Foundation

815 Eddy Street

San Francisco, CA 94109

Tel.: (415) 436-9333

Fax: (415) 436-9993

Email: alex@eff.org

/s/ Paul D. Polidoro_____