

Unmasking Anonymous Copyright Infringers: Where the DMCA, First Amendment, and Fair Use Meet

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Can internet service providers necessarily be compelled to unmask anonymous copyright infringers? In an opinion touching on Digital Millennium Copyright Act (DMCA) subpoenas, First Amendment concerns, and fair use, the Northern District of California said, in this one particular instance, no, granting Twitter's motion to quash a subpoena seeking to reveal information behind an anonymous poster. ([*In re DMCA § 512\(h\) Subpoena to Twitter, Inc.*](#), No. 20-80214 (N.D. Cal. June 21, 2022)). The anonymous figure at the center of the dispute is @CallMeMoneyBags, an anonymous Twitter user who posts criticisms of wealthy people—particularly those working in tech, finance, and politics. Some such criticism lies at the heart of this dispute.

In October 2020, @CallMeMoneyBags tweeted six times about private equity billionaire Brian Sheth. The tweets contained critiques about Sheth's wealth and lifestyle, as well as certain salacious allegations; the tweets also included certain images related to the affair.

Soon after @CallMeMoneyBags posted the series of tweets about Sheth, a company called Bayside Advisory LLC—whose connection, if any, to Sheth or his associates remains unclear—contacted Twitter asserting it owned the copyrights in those aforementioned images. Further, Bayside demanded that Twitter remove the photographs. In response to Bayside's demand, Twitter removed the challenged images, but left the accompanying text of the tweets in place.

In November 2020, Bayside requested that the clerk of Northern District of California issue a DMCA Section 512(h) subpoena to Twitter to compel the social media website to release identifying information about @CallMeMoneyBags. Section 512(h) of the DMCA (17 U.S.C. § 512(h)) provides that “a copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer.” Upon receipt of the issued subpoena, “the service provider shall expeditiously disclose” the required information to the copyright owner, “notwithstanding any other provision of law.” 17 U.S.C. § 512(h)(5). Section 512(h) provides that the procedure for issuance and delivery of the subpoena shall be governed by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum. 17 U.S.C. § 512(h)(6). This provision incorporates Federal Rule 45, under which a court must “quash or modify” a subpoena that “requires disclosure of privileged or other protected matter.” Fed. R. Civ. P. 45(d)(3)(A)(iii). A recipient of a DMCA subpoena may therefore move to quash on the basis that the subpoena would require disclosure of material protected by the First Amendment. Thus, as is common in such disputes, although the subpoena request in this case was issued to obtain information identifying an alleged copyright infringer under the DMCA, the court framed the issue as a matter of First Amendment rights for anonymous online speech and whether the copyright holder could make its requisite showing to compel the online provider to comply with the subpoena.

In response to Bayside’s request, Twitter filed a motion to quash the subpoena, arguing that releasing such information on the anonymous poster would constitute a violation of their First Amendment rights. The magistrate initially handling the case issued an order in which it offered @CallMeMoneyBags an opportunity to file evidence or appear anonymously in support of Twitter’s motion to quash. Further, the Court ordered Twitter to serve @CallMeMoneyBags a copy of that order to the email address associated with their Twitter account. After @CallMeMoneyBags did not respond to the order, the magistrate in November 2021 [granted](#) Bayside’s motion to compel. The district court judge reviewed the magistrate’s ruling de novo and came to a different conclusion.

In its June 2022 [ruling](#) granting Twitter's motion to quash, the California district court noted that, in deciding whether to compel the unmasking of an anonymous speaker, courts must engage in a two-step analysis. The first step requires the party seeking to compel the unmasking to demonstrate a prima facie case of its underlying claim, which was, in this case, a copyright infringement claim. The second step involves a balancing test which weighs, on the one hand, the potential harm to the party seeking disclosure against, on the other hand, the speaker's interest in anonymity. As the court noted, even though @CallMeMoneyBags declined to appear in the action, Ninth Circuit precedent allows internet platforms to assert the First Amendment rights of their users, based on the close relationship between the platform and its users and the "genuine obstacles" users face in asserting their rights to anonymity.

In its analysis of whether Bayside successfully demonstrated a prima facie case of copyright infringement, the Court considered whether @CallMeMoneyBags's six tweets in question and use of the protected images constituted fair use. Despite the fact that fair use is an affirmative defense, the Court analyzed it as though a showing of its absence is required to establish a prima facie copyright infringement case. After analyzing all four fair use factors, the Court found that @CallMeMoneyBags's use of the images was in fact fair use and, as such, Bayside was unsuccessful in establishing its prima facie case. In weighing the fair use factors, the court found that @CallMeMoneyBags's use of the images in the context of comments about Sheth gave the photos a new meaning (i.e., "an expression of the author's apparent distaste for the lifestyle and moral compass of one-percenters"), and thus was a transformative use that "fits squarely within [the Copyright Act's] examples of fair use, particularly 'criticism' and 'comment'". When it came to the fourth factor, which asks what effect the use has "upon the potential market for or value of the copyrighted work," Bayside had argued that it is a "communications and strategic advisory firm" that "licenses photographs for commercial exploitation." The court concluded the factor did not weigh in Bayside's favor due to its "vague explanation of its business model," the "suspicious circumstances" surrounding Bayside's business formation and this motion to compel, and its failure to explain what the potential market for these licenses is, let alone how that market could be impacted by tweets like @CallMeMoneyBags's.

Even with the fair use finding on the first step, and in spite of Bayside's objections, the court engaged in step two of the balancing test, again finding for @CallMeMoneyBags and Twitter. Here, the Court stated that the nature of @CallMeMoneyBags's speech is satirical and critical commentary which implicates significant First Amendment interests given that unmasking the Twitter user could subject them to retaliation (economic or otherwise) by Sheth or his associates. This is exacerbated by the fact that, as the court stated, Bayside's connection to Sheth is unclear. The Court stated that perhaps a limited disclosure subject to a protective order could be feasible if the court was certain there was no connection between Bayside and Sheth, which it was not – on this issue, the court commented that Bayside was not formed until the month that the tweets about Sheth were posted on Twitter, had not previously registered any copyrights, and that no public information could be found about Bayside's principals, staff, physical location, or formation. As such, the Court found that the balancing test weighed in favor of @CallMeMoneyBags's interests in anonymity.

Some questions in this case remain unanswered, but with both steps in the inquiry weighing in favor of Twitter and @CallMeMoneyBags, the Court definitively answered one question: Can Bayside compel the unmasking of the anonymous copyright infringer in this case? The court said no, granting Twitter's motion to quash and denying Bayside's motion to compel.

This outcome gave all parties involved a small victory: @CallMeMoneyBags maintained their anonymity and avoided a potential infringement suit; Twitter advanced the First Amendment rights of its users; and Bayside, through a series of legal maneuvers, compelled Twitter to remove the images in question (albeit, not the text of the posts) and maintained a bit of its own anonymity. While @CallMeMoneyBags's anonymity lives to see another day, it is important to recognize that the DMCA subpoena process *does* afford copyright holders the potential to unmask anonymous infringers. This process is particularly powerful in that it allows copyright owners to directly request subpoenas outside of the confines of a lawsuit, and it requires service providers to promptly comply with such requests. However, as this particular case demonstrates, the power of the DMCA subpoena process does not go unchecked; courts may examine the merits of a copyright claim and they will weigh a defendant's First Amendment right to remain anonymous against a plaintiff's right to use the judicial process to pursue a meritorious copyright infringement claim (similar balancing tests are used with subpoenas issued in other instances involving anonymous defendants, such as cases involving online defamation). Further, the court's opinion in this case serves as a reminder that efforts to pursue an end run around fair use or other legal protections will be scrutinized. Thus, the case of @CallMeMoneyBags makes clear that the DMCA subpoena process to unmask anonymous infringers is powerful, but not unrestrained.

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