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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
Before The Honorable Vince Chhabria, Judge

IN RE: ) No. 20MC80214-VC  
)  
DMCA SUBPOENA TO TWITTER, )  
INC. )  
\_\_\_\_\_ )

San Francisco, California  
Thursday, May 12, 2022

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
RECORDING 2:39 - 3:58 = 79 MINUTES

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1 Thursday, May 12, 2022

2:39 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Now calling 20-MC-8214, In Re DMCA  
5 Subpoena to Twitter, Inc.

6 Will all counsel please state your appearances for the  
7 record, starting with the petitioner.

8 MR. SCHOTTLAENDER (via Zoom): Good afternoon,  
9 your Honor. This is Hayden Schottlaender and Julie Schwartz  
10 from the firm Perkins Coie, here on behalf of Twitter.

11 MS. SCHWARTZ (via Zoom): Good afternoon, your  
12 Honor.

13 THE COURT: Afternoon.

14 MR. HADLEY (via Zoom): Good afternoon, your  
15 Honor. Lawrence Hadley of Grazer Wile for Bayside.

16 THE COURT: Hello.

17 MR. LEVY (via Zoom): And this is Paul Alan Levy  
18 from Public Citizen Litigation Group, appearing for Public  
19 Citizen, and thank you for hearing us.

20 THE COURT: Oh. You're welcome, although I'm not  
21 really sure how much I'm going to have to hear you because I  
22 have to say that your brief may be the most helpful brief  
23 I've ever read, and I agree -- agree with every -- I think I  
24 agree with everything in it except possibly one sentence,  
25 one minor issue in one sentence.

1       So, I -- I think it's going to be on both sides to  
2 explain why I shouldn't just follow the approach that you  
3 recommend.

4           MR. LEVY: I have one correction to a citation  
5 that I made in error that I --

6           THE COURT: Okay.

7           MR. LEVY: -- would like to call to the Court's  
8 attention at an appropriate time.

9           THE COURT: Go ahead.

10          MR. LEVY: So, on page -- let me get the right  
11 reference here. On page 12 and footnote five of our brief,  
12 I represented that there are no cases outside the Second  
13 Circuit that apply Sony, the Sony Music standard other than  
14 in a mass downloading case, and there are actually three  
15 counterexamples that I can cite to the Court. One is the --  
16 a copyright case filed over the posting of nude photographs  
17 for the alleged purpose of extortion, the M.C. Geiger case  
18 in the Middle District of Florida. Another is a suit about  
19 a bootlegging operation in the District of Minnesota,  
20 Paisley Clark v. Zianni (phonetic), and finally a defamation  
21 case. There's a long footnote in that case in the Eastern  
22 District of Pennsylvania, and I regret overlooking those  
23 cases when I looked at the 382 citations.

24          But, other than that, those are the only exceptions of  
25 which we're aware outside the Second Circuit.

1           THE COURT: Not a problem. The only -- the only  
2 -- since I have you, the only very slight issue that I had  
3 with one sentence in your brief was you -- you know, when  
4 you talk about the balancing stage, you -- you say that it  
5 should be treated like a -- a -- you know, like the  
6 balancing of hardships on a motion for preliminary  
7 injunction, and I think the problem with that is this may  
8 not have been true when you wrote the -- you first filed  
9 this -- you know, the first version of this brief way back  
10 when. But nowadays, you know, it's clear that the -- the  
11 burden is squarely on the Plaintiff to demonstrate that the  
12 balance of hardships tips in their favor, and I think you  
13 probably wouldn't say that -- that the burden is squarely on  
14 one side or the other in demonstrating that the balance of  
15 hardships tips in their favor in this context, right?

16           MR. LEVY: You know, we see the dendrite -- and I  
17 have to emphasize it's Dendrite and not Highfields that we  
18 contend for.

19           THE COURT: Right.

20           MR. LEVY: We think it's a -- the balancing  
21 affects the closed cases, and if the case is clear in one  
22 direction or the other, that side prevails. Whether it's a  
23 burden at -- the Petitioner who's the Petitioner here,  
24 Lawrence Hadley, Bayside or is the Petitioner the --  
25 following the motion to quash. I don't know how to answer

1 that question in light of the point that your Honor is  
2 making.

3 THE COURT: Well, and I think the problem, you  
4 know, is that, you know, there -- there are some things  
5 where, you know, the party seeking the subpoena, if the  
6 other -- you know, if the other side doesn't respond,  
7 there's -- there's some things where the -- the party  
8 seeking the subpoena isn't going to be able to, you know,  
9 "meet their burden" and that's not their fault.

10 MR. LEVY: Right.

11 THE COURT: And kind of vice versa, right. There  
12 are some things where the -- you know, where you may still  
13 need to consider the interests of the anonymous speaker,  
14 even if the anonymous speaker doesn't show up.

15 MR. LEVY: Right.

16 THE COURT: Obviously, they can't meet their  
17 burden, but the Court still has to consider it. And, so, it  
18 doesn't really make sense to speak in terms of who has the  
19 burden at the balancing stage I would say, and I think  
20 that's what you were saying in your brief.

21 MR. LEVY: I would agree.

22 THE COURT: Yeah. Okay.

23 MR. LEVY: I'm going silent.

24 THE COURT: Okay. Feel free to speak up if you  
25 have anything else to offer, but I guess maybe I should put

1 it first to Mr. Hadley and to Bayside. You know, why isn't  
2 Public Citizen exactly right on how, you know, this issue  
3 should be adjudicated?

4 MR. HADLEY: Your Honor, can I share my screen?  
5 I've prepared some slides that go through that.

6 THE COURT: As long as you're responding to my  
7 question and not just trying to shoehorn a pre-prepared  
8 presentation in to respond to my questions.

9 MR. HADLEY: Sure. Okay. My screen should be up.  
10 And, your Honor, in response to my question, the reason why  
11 -- I mean, certainly we agree with Public Citizen on the  
12 burden of proof issue, and -- and the main reason we do is  
13 because the speaker here did not show up to defend him or  
14 herself. And we think that Magistrate Judge Ryu was correct  
15 that without the -- the accused infringer here, there's  
16 really a lack of evidence.

17 In Twitter -- what we have from Twitter --

18 THE COURT: Well, that's not what Public Citizen  
19 said. So, don't -- don't say you agree with Public Citizen,  
20 because what Public Citizen says is that it's -- you know,  
21 that's not necessarily the end of the matter if the  
22 anonymous speaker doesn't show up. There are lots of  
23 reasons why anonymous speakers wouldn't -- wouldn't respond.  
24 And, you know, the fact that the anonymous speaker has not  
25 responded in this case I don't think is dispositive of

1 whether the motion to quash should be granted.

2 MR. HADLEY: Sure. I understand. But the -- the  
3 issue that Magistrate Judge Ryu --

4 THE COURT: You know, I'm reviewing this de novo.  
5 So, let's just speak in terms of what the right answer  
6 should be and not -- we don't need to work off of Judge  
7 Ryu's opinion. I'm just -- I'm supposed to review this de  
8 novo, and that's what I'm doing.

9 MR. HADLEY: And the right answer is one that  
10 we're dealing with, Section 512 of the DMCA. And under  
11 Section 512 of the DMCA, no court has ever found that a  
12 service provider has standing to assert First Amendment or  
13 Fair Use Rights on behalf of an anonymous speaker. In -- in  
14 opposing identification of that speaker under Section  
15 512(h) --

16 THE COURT: The Public Citizen briefs cites a  
17 litany case where a court allowed service providers like  
18 Twitter to assert the rights of users.

19 MR. HADLEY: Not in response to a Section 512  
20 subpoena.

21 THE COURT: Why should that be different?

22 MR. HADLEY: Because of the statutory language of  
23 Section 512. So, what -- what the Court -- what the Ninth  
24 Circuit has said in the Lenz case, is that a -- the  
25 anonymous user or the -- the alleged infringer can show up

1 and challenge fair use to the takedown notice on the grounds  
2 of fair use and that once that issue has been decided, there  
3 is -- in fact, I can go to the language here of Section 512,  
4 that in response to the takedown notice, the complaining  
5 party has to have -- provide a statement that it has a good  
6 faith belief that the use of the alleged infringing material  
7 is not authorized by law. That is clear under the Lenz case  
8 and the Lenz case, in fact --

9 THE COURT: What does that have to do with whether  
10 -- I don't understand what that has to do with whether  
11 Twitter has standing to oppose -- move to quash the subpoena  
12 based on, you know, the idea either that it's fair use or  
13 that the -- the party seeking a subpoena has not shown that  
14 the -- it's appropriate in this context for the -- for the  
15 speaker's identity to be deanonymized (sic).

16 MR. HADLEY: Two reasons, because once the -- once  
17 fair use has been raised, if it's been raised in response to  
18 the takedown, there's no option under Section H to raise  
19 fair use or any other defense by the service provider. The  
20 section specifically says that the service provider, once  
21 the issue has been resolved under the takedown notice of  
22 fair use and good faith belief and so forth, that the  
23 service provider shall expeditiously disclose the  
24 information requested, comply with the subpoena,  
25 notwithstanding any other provision of law.

1 THE COURT: So, you're saying notwithstanding the  
2 First Amendment?

3 MR. HADLEY: Correct. And then if you go to the  
4 standing issue, so, standing has three elements.

5 THE COURT: Okay. Let's just take down the --  
6 let's just take down the slides, because you don't need to  
7 have a slide with the elements of Article 3 standing. I  
8 mean, I -- those are cited to me every day. Let's just have  
9 a conversation about it. Okay?

10 MR. HADLEY: Sure. So, the -- so, first of all,  
11 Twitter has not pointed to any actual imminent or non-  
12 conjectural injury that it will suffer if the subpoena is  
13 not granted. There's nothing in the record on any injury  
14 that Twitter is going to suffer. That's the first point.

15 The second point is that under the law of  
16 standing, you have to show a close relationship --

17 THE COURT: But hold on. You've issued a subpoena  
18 to Twitter, right?

19 MR. HADLEY: Right.

20 THE COURT: And then -- so -- so, the -- the harm  
21 to Twitter is that it -- the harm is compliance with the  
22 subpoena in a situation where it doesn't believe that it  
23 should be required to disclose the identity of one of its  
24 users, somebody who has -- it has a business relationship  
25 with.

1 I don't -- I don't understand. I mean, I have to  
2 say, I mean, I would not spend too much time focusing on the  
3 standing argument because I don't think you're going to  
4 convince me that Twitter doesn't have standing to -- to move  
5 to quash the subpoena.

6 MR. HADLEY: Well, I would just point out that in  
7 exchange for complying with the subpoena, Twitter gets  
8 immunity. So, it does get something in return. And the --  
9 and, again, there's no evidence of a close relationship.  
10 And the bottom line is that there's no case law authority  
11 that holds that a service provider has standing to assert  
12 fair use on behalf of an alleged copyright infringer in  
13 moving to quash a Section 412(h) subpoena. The --

14 THE COURT: Can we -- I don't -- I don't think  
15 you're going to convince me on the standing issue. Can we  
16 -- can we move to the question I asked, which is why isn't  
17 Public Citizen exactly right about the way I should approach  
18 this in applying the Dendrite test?

19 MR. HADLEY: Because if you apply the Dendrite  
20 test or the -- the Dendrite test and you balance the  
21 respective harms, there's nothing to balance on the side of  
22 -- of Twitter, because, first of all, there is no evidence  
23 of any obvious relationship between the photo -- copyrighted  
24 photographs at issue and the commentary or the work. That  
25 -- that is a prerequisite to --

1 THE COURT: Sorry. I didn't -- say that one more  
2 time. I want to make sure I -- I'm not sure I understood.  
3 So --

4 MR. HADLEY: So, the tweets at issue have two  
5 things. They have commentary about an individual. Flattery  
6 or not, that's not the issue. And then the second thing  
7 they have is a copyrighted photograph that belongs to  
8 Bayside.

9 In all of the cases dealing with fair use, there  
10 is some relationship, some reason to use the copyrighted  
11 material in connection with the speech, and the relationship  
12 is either obvious, you can see it or it's supplied by the  
13 accused infringer. Here there is no obvious relationship.  
14 There's no relationship apparent whatsoever between the  
15 photographs that belong to Bayside and the commentary.  
16 Whoever Moneybags is could have used a photo from any  
17 source. It could have used a photo of JLo or the Mona Lisa  
18 or anything else.

19 THE COURT: But whatever photo was used, I mean, I  
20 guess I don't quite understand your comment about it not  
21 having a relationship to the -- the post or the message of  
22 the -- of the speaker. I mean, the speaker is saying, Look,  
23 this person -- I can't -- what's this person's name, the  
24 billionaire?

25 MR. HADLEY: Mr. Seth or Sheth or something like

1 that.

2 THE COURT: Like Brian Sheth or something like  
3 that?

4 MR. HADLEY: Brian Sheth, Sheth, yeah.

5 THE COURT: Okay. The -- the speaker is saying  
6 that this billionaire, Brian Sheth, is using his billions to  
7 cheat on his wife with attractive young women, and his --  
8 the speaker is posting photos of attractive young women  
9 scantily clad. I mean, why is there no connection between  
10 the image and the message?

11 MR. HADLEY: Because we don't know whether there's  
12 any connection. I mean, the -- that's the problem.

13 THE COURT: Isn't -- doesn't it jump off the page?

14 MR. HADLEY: I don't think so at all. It's not  
15 even close. There -- first of all, there are many different  
16 pictures of different women in -- in different types of  
17 poses, and the speaker never says that this is a person in a  
18 relationship or this is some person that's somehow  
19 connected. It just says "Meet the future," undisclosed  
20 time, undisclosed place, undisclosed anything else, the  
21 future Ms. Sheth or Seth. Who knows what that --

22 THE COURT: And it has a picture of an attractive  
23 woman, right?

24 MR. HADLEY: And that picture of an attractive  
25 woman could have been anything. It could have been a dog.

1 It could have been -- it doesn't have to even be --

2 THE COURT: Well, if it were a picture of a dog,  
3 then I would -- then I might be more likely to -- to agree  
4 with you that there does -- there's no apparent connection  
5 between, you know, the -- the image of the dog and the  
6 message that the speaker is -- is trying to convey.

7 MR. HADLEY: Well, it could have been any person.  
8 it could have been JLO. It could have been Michelle  
9 Pfeiffer. It could have been any attractive woman, anybody  
10 who would license their rights. And, in fact, if the  
11 speaker had come to Bayside --

12 THE COURT: Could I ask you how do you know that  
13 there's no connection between the image of the women and the  
14 message?

15 MR. HADLEY: Well, I don't know Mr. Seth. So, I  
16 -- I can't tell. But what I do know and what ends up being  
17 the most important is that there --

18 THE COURT: I didn't ask you if you know him.  
19 You're sort of quick to say that. I didn't ask that. I  
20 said --

21 MR. HADLEY: I -- I --

22 THE COURT: I asked you how do you know that  
23 there's no connection between the -- the images and the --  
24 and the message by Money -- that Moneybags was articulating?

25 MR. HADLEY: Well, because -- I guess I say that

1 there is nothing in the tweets that jumps out at me or --  
2 you know, and I know that this is de novo review, but there  
3 was certainly nothing that jumped out at the Magistrate  
4 Judge that made that connection. But the bottom line is  
5 that there's no evidence.

6           So, Twitter -- and -- and this is maybe where the  
7 burden of proof comes from --

8           THE COURT: Well, where did -- where did the --  
9 where did -- who -- who are those people in those photos,  
10 and --

11           MR. HADLEY: We'd love to know. I don't know.

12           THE COURT: Well, wait a minute. You represent  
13 the copyright holder.

14           MR. HADLEY: Well, we represent the copyright  
15 holder that owns it, but the copyright owner doesn't  
16 actually know the names of the individuals. It bought the  
17 pictures for aesthetic reasons to licensing. And it doesn't  
18 have to know the subject of who is actually in the  
19 photograph or not to be able to have value of those  
20 photographs and to license them. They're -- Bayside owns  
21 hundreds and hundreds of photographs of all different sorts  
22 and doesn't know the names of every subject that is in the  
23 photographs. It is in the business of licensing those  
24 photos.

25           But I guess the --

1           THE COURT: We'll get to -- we'll get to Bayside  
2 more in a minute, but what -- I mean, it seems to me that  
3 there -- you know, there is a very -- you know, a fair use  
4 defense. I mean, if you're -- if you're engaging in issue  
5 spotting and you look at these images and you're told that  
6 these -- that these images are -- have copyright protection,  
7 the very first question you would ask is, hmm, this seems  
8 like it might be fair use. Need to learn more about this to  
9 figure out if this is fair use.

10           And it seems to me that you haven't done much of  
11 anything to, you know, explain why it's not fair use. And,  
12 you know, if we're applying sort of the approach that Public  
13 Citizen is suggesting, which seems quite right, it's -- you  
14 know, that's part of what you need to do in kind of  
15 satisfying me that you have a legitimate colorable claim  
16 here that you -- that you have a legitimate chance of  
17 winning. I don't know if I'd go so far as to say you have  
18 to show that you have a likelihood of success on the merits.  
19 Maybe -- maybe you do, but at a minimum, you got to show  
20 that you have a legitimate colorable claim here that has a  
21 legitimate chance of winning, and you've -- you've said very  
22 little about fair use.

23           MR. HADLEY: Well, you're correct in that under  
24 Section 512(c), before sending the takedown notice, that  
25 Bayside had to make an evaluation and satisfy itself that it

1 had a legitimate prima facie copyright claim, including  
2 under the Lenz case, that there was no fair use. And it did  
3 that. And, in fact, it provided the requisite affidavit  
4 explaining why that there was a prima face of copyright  
5 infringement which included a good faith determination of no  
6 fair use.

7       There was no apparent --

8               THE COURT: Provided to -- to Twitter?

9               MR. HADLEY: Correct. And there was -- and -- and  
10 that is because, in looking at the text of the tweets -- and  
11 there was only one tweet that even came close to linking the  
12 commentary to the photograph, and that is the one that said  
13 "Meet the future Ms. Brian Sheth." I mean, that could be 20  
14 years in the future. There was nothing in that that said  
15 anything about the photograph and the commentary, and that's  
16 sort of the problem that we have here is that if -- Twitter  
17 doesn't provide any evidence of the -- the question --

18               THE COURT: But this is a special case because  
19 this is a case in which a company is seeking to obtain the  
20 identity of an anonymous speaker, and you can't just treat  
21 it like a straight, you know, copyright fair use issue when  
22 -- well, you can't -- I should put it this way. You can't  
23 treat it like a straight DMCA subpoena without any sort of  
24 additional overlay to protect the anonymous speaker. And,  
25 you know, maybe what you did is adequate in the -- in the

1 typical copyright case, but here we have -- first of all, we  
2 have a motion to quash, and we have an anonymous speaker,  
3 and that's an interest that I have a responsibility to, you  
4 know, protect to the extent it's appropriate to protect it.  
5 And part of protecting that interest, it seems to me, is you  
6 making some kind of showing to me that it's not fair use.  
7 And I'm just -- it's not clear to me that you've done that.  
8 All you keep saying is we don't have enough -- we don't have  
9 information. We don't know. We don't know. But I don't  
10 think that's enough in that context. I mean, it's -- you've  
11 got a -- you've got to make a showing that you have a valid  
12 copyright claim, a legitimate copyright claim, and because  
13 fair use jumps off the page, I think you have to make some  
14 kind of showing that there's -- you know, that the -- the --  
15 the prospective Defendant is not likely to win on fair use.

16 MR. HADLEY: Well, we -- first of all, in terms of  
17 a prima facie case, there's no dispute that I'm aware of on  
18 that. There's no dispute that Bayside owns the copyright,  
19 and there's no dispute that there was copying. And, so,  
20 that gets us directly into the prior use issue. And I would  
21 start with the premise that -- that --

22 THE COURT: I mean, I don't even have a complaint,  
23 right. I mean, I don't -- and I'm not -- I'm not saying  
24 you're required to draft a complaint, but in response to a  
25 motion to quash, you've got a -- you know, in a situation

1 where we have an anonymous speaker whose identity you're  
2 trying to uncover, you've got a -- you've got to show how  
3 you're going to win this case or how you are likely or --  
4 or, you know, there's a significant possibility that you're  
5 going to win this case, and I just don't know if you've done  
6 that.

7 MR. HADLEY: And we can't bring a copyright case.  
8 We can't even draft one until we know who this person is.

9 THE COURT: That's not true.

10 MR. HADLEY: I mean, we can leave the person out I  
11 suppose.

12 THE COURT: It happens all the time. I mean, we  
13 -- it happens all the time in this District where a  
14 copyright holder will file a lawsuit against a Doe  
15 Defendant, and they'll lay out with significant specificity  
16 the claim that they have against the Doe Defendant, and then  
17 they will seek a subpoena in connection with that complaint  
18 they've filed.

19 I do wonder in a situation where we have an anonymous  
20 speaker if we should be even more concerned when the person  
21 seeking the subpoena has not even bothered to file a  
22 complaint. I mean, I know you have the right to not file a  
23 complaint under the -- under the DMCA, but when you have an  
24 anonymous -- but oftentimes people do, you know. And -- and  
25 -- and then they -- you know, they seek the identity of the

1 person who's posting the allegedly infringing images after  
2 they filed a lawsuit against a Doe Defendant.

3 MR. HADLEY: And in almost every one of those  
4 cases, the Doe Defendant comes in anonymously if they are  
5 going to raise fair use. And in every one of those cases,  
6 fair use is raised as a defense. It's not an affirmative  
7 obligation in the complaint to plead no fair use on the --

8 THE COURT: In the normal -- in the normal case  
9 that's true. But, just like in the statute of limitations  
10 context -- excuse me. Sorry about that.

11 MR. LEVY: Glad it's you, your Honor, and not me.

12 THE COURT: I was just going to say whoever's  
13 phone that was, get out of the courtroom right now.

14 You know, this happens with some frequency with  
15 affirmative defenses, right. If -- if, you know, somebody  
16 files a complaint and a statute of limitations issue jumps  
17 off the page, right. It's, yes, statute of limitations is  
18 an affirmative defense. But, occasionally, you can -- you  
19 can resolve the issue on the pleadings in response to a  
20 motion to dismiss. You know, there are other -- you know, I  
21 -- I think the courts sometimes resolve fair use on the  
22 pleadings as well, again, if it's sort of obvious that --  
23 form the allegations in the complaint that fair use applies,  
24 and the -- you know, the additional overlay we have in this  
25 case that I keep repeating is that we have an anonymous

1 speaker, and there are, you know, questions about why this  
2 subpoena has been issued, and there are questions about what  
3 is going to be done if the -- if -- if Bayside and whoever  
4 is connected with Bayside learns the identity of the  
5 speaker, and you have -- so, you have this very real first  
6 amendment concern overlaying the adjudication of this motion  
7 to quash. And in that context and when fair use jumps off  
8 the page, I don't see what's wrong with saying one of the  
9 things you have to do to get this subpoena is explain why,  
10 you know, my initial react that fair use applies here is --  
11 is probably wrong.

12 MR. HADLEY: Well, we may have a potential fair  
13 use issue or First Amendment Rights issue because we don't  
14 even know if this speaker is a U.S. citizen or otherwise  
15 entitled to First Amendment Rights. We know nothing about  
16 this speaker at all, and that really leads back to the  
17 problem. We're looking at all of the fair use factors --

18 THE COURT: I wonder if Twitter can tell us that.  
19 Does Twitter know if -- does Twitter know if this speaker is  
20 U.S. based? Are you dividing yourself up among countries?

21 MR. SCHOTTLAENDER: Your Honor, I'd have to talk  
22 to our client a bit more about that. Of course, determining  
23 location would be quite difficult I believe, just because of  
24 how IP addresses can be bounced and modes and VPI's and  
25 stuff like that.

1 But this issue of -- of citizenship was one -- was one  
2 sentence, I believe, in Bayside's opposition, and so --

3 THE COURT: Well, I mean, it's not -- it's -- it's  
4 not really worth the time. I mean, if you look at all the  
5 person's tweets, it seems rather unlikely that they're not a  
6 U.S. citizen -- or not a U.S. resident. So, anyway, I -- I  
7 just -- what -- Mr. Hadley, I don't know if you're -- I'm  
8 not sure you're answering my question.

9 What is wrong -- the question again is what is wrong in  
10 a context like this where we have legitimate serious First  
11 Amendment concerns with requiring you to, you know,  
12 alleviate concerns about whether you really have a chance of  
13 winning this lawsuit?

14 MR. HADLEY: I don't think there is anything wrong  
15 with inquiring about that. In fact, that's te -- what we  
16 had to do before we even served the takedown notice.

17 THE COURT: Okay. So, have you briefed all the  
18 various factors of fair use?

19 MR. HADLEY: We have extensively, your Honor.

20 THE COURT: To me?

21 MR. HADLEY: Yes. They're all in our -- in our  
22 brief, and they're briefed extensively.

23 THE COURT: Okay. What did you say about the  
24 amount and sustainability of the portion used -- let's go to  
25 the next one. What did you say about the effect of the use

1 upon the potential market for or value of the copyrighted  
2 work?

3 MR. HADLEY: What we --

4 THE COURT: What did you say about that?

5 MR. HADLEY: What we said about that is that under  
6 Ninth Circuit law, regardless of whether you're dealing with  
7 a 512 situation or even if you're dealing with the situation  
8 where we filed the copyright claim and you're dealing with  
9 fair use, under any circumstance, the burden on the market  
10 is always on the person asserting fair use. In this case,  
11 on the speaker. And, in fact, that applies even when the  
12 speaker is anonymous.

13 And what we have here is an utter absence of any  
14 evidence whatsoever.

15 THE COURT: Well, how can they do that? I mean,  
16 we know nothing about -- how could -- even if -- even if --  
17 even if Moneybags appeared and even if they appeared  
18 anonymously, right, with -- as a Doe, how could they  
19 possibly address of the use upon the potential market for or  
20 value of the copyrighted work? You haven't told us anything  
21 about Bayside or what the market is or -- that's all stuff  
22 that you know, not stuff that Moneybags knows.

23 MR. HADLEY: We have included that in the brief,  
24 your Honor. We've said what Bayside is. We've said that  
25 it owns a catalog of copyrighted photos. We've said that it

1 licenses those photos, and we've said that by this anonymous  
2 speaker or alleged infringer helping himself or herself --

3 THE COURT: Has Bayside ever licensed these photos  
4 to anybody?

5 MR. HADLEY: I'm not sure if it's licensed these  
6 particular photos, but it has licensed similar photos to  
7 others.

8 THE COURT: Uh-huh.

9 MR. HADLEY: And we've explained that in the  
10 brief, and we have --

11 THE COURT: So, we don't even know if Bayside has  
12 even licensed any of these photos to anybody?

13 MR. HADLEY: Not these particular photos. I'm not  
14 sure about these particular photos.

15 THE COURT: And then how -- then doesn't that say  
16 a lot about the effect of the use of -- of these photos upon  
17 the potential market for or value of the copyrighted work?

18 MR. HADLEY: Not at all. They're -- they're --  
19 because of the licensing activity that Bayside has engaged  
20 in with other photos, it suggests that there may very well  
21 have been a market to this photo. In fact, had the speaker  
22 come to Bayside and asked to license these photos, Bayside  
23 would have considered it. The problem is that Bayside never  
24 had the chance --

25 THE COURT: Did Bayside even exist when -- when

1 the speaker was posting these photos? I thought Bayside was  
2 -- Bayside was -- the speaker -- Moneybags was posting these  
3 photos in October of 2020, and Bayside was formed in October  
4 2020, right?

5 MR. HADLEY: Bayside existed -- was -- was --  
6 Bayside was in existence prior to these photos being posted.

7 THE COURT: Okay. So, how soon? How long prior  
8 to those being posed?

9 MR. HADLEY: I'm not sure. It was a --

10 THE COURT: Public Citizen says that based on  
11 their search, Bayside was formed in October 2020, which was  
12 the same month that Moneybags started posting these photos,  
13 right? And, by the way, if you go to Bayside's website and  
14 you -- let's say -- let's just say that Moneybags wanted to  
15 get a license from Bayside to use these photos, you go to  
16 Bayside's website, there is no address. There is no contact  
17 information. There is no name of a single human being.  
18 Frankly, it looks -- it appears at first glance to be a sham  
19 website.

20 So -- so, what -- do you -- do you really want to  
21 contend that Moneybags could have gone to Bayside to get a  
22 -- a license for these photos? How would Moneybags have  
23 done that?

24 MR. HADLEY: I -- my understanding is that there  
25 was contact information some place. I don't have the

1 website up in front of me.

2 THE COURT: Really? Well, let's pull it up.

3 Let's go. What's it called Bayside Advisory, LLC?

4 MR. HADLEY: Yes.

5 THE COURT: All right. Baysideadvisory.com. Go  
6 ahead. Pull it up. You've got a computer there?

7 MR. HADLEY: I do. Let me --

8 THE COURT: So, I pull that up, and it says  
9 Bayside Advisory, LLC, and it has a few photos, kind of I  
10 guess somewhat comparable to the ones that Moneybags was  
11 using, and then it says, "Issues, campaigns, supporting  
12 creativity." And then it says "Supporting independent  
13 creators." And then it says, "Website copyright 2021, 2022  
14 Bayside Advisory LLC." And then it says "Page updated  
15 January 2022."

16 I don't see anywhere I can -- any link I can click  
17 onto. I don't see any -- any link to any contact  
18 information. I don't see any name. I don't see any  
19 address. I don't see any location. I mean, this seems like  
20 just a sham website to me.

21 Can you explain this -- this website and why this  
22 website doesn't have any location information or contact  
23 information or names of people behind the company or  
24 anything?

25 MR. HADLEY: I -- I don't know why it doesn't.

1 THE COURT: So how is -- how is -- and it says  
2 copyright 2021. So, maybe it wasn't even up. Maybe it was  
3 too early in October 2020 for the website even to be up  
4 because the company was just formed. Maybe it was formed  
5 hurriedly. Maybe they weren't ready to have a website up.  
6 But are you really telling me that Moneybags could have  
7 contacted Bayside Advisory to get a license for the photo?

8 MR. HADLEY: Well, all I know is that Bayside has  
9 licensed some of its photos. So, somebody was able to  
10 figure out how to contact them.

11 THE COURT: Who -- who is Bayside? When did --  
12 so, that might be -- for example, if when you're getting to  
13 the balancing section of the Dendrite test, those might be  
14 the kinds of questions we would ask, right? I might say,  
15 "Really? Bayside has licensed other photos? Let me see the  
16 license agreements. Why don't you file them under seal, and  
17 I'll -- or I'll look at them in camera. Let's see the  
18 license agreements. Let's see if that's really true."

19 You know, I might -- we might have an evidentiary  
20 hearing, for example, to inquire who is really behind  
21 Bayside and why it was formed hurriedly, apparently without  
22 a website in October 2020, the same month that Moneybags  
23 started posting these photos anonymously.

24 MR. HADLEY: Just one other point on the -- on the  
25 market, potential market is that the -- under Ninth Circuit

1 law, there is a presumption that a copyright infringement --  
2 that when you meet the prima facie case of ownership and  
3 copying, that there is market harm, and one of the problems,  
4 again, is that --

5 THE COURT: But you didn't even -- but Bayside  
6 didn't even obtain copyright protection for these images  
7 until after Moneybags took them down. Isn't that true?

8 MR. HADLEY: Yes. And that's very common, your  
9 Honor, that you have copyright protection beforehand. The  
10 -- the only thing that registration gets you is an ability  
11 to sue. So, once we saw that these were being used without  
12 authorization, we copyrighted them, and that --

13 THE COURT: Well, what about damages? Do you --  
14 do you -- are you able to seek damages given that Moneybags  
15 took down the images before you obtained copyright  
16 registration?

17 MR. HADLEY: Royalty damages I believe. We can't  
18 seek statutory damages.

19 THE COURT: Okay. And what's your -- what's your  
20 basis for -- what -- what would my basis be for thinking  
21 that you would have any royalty damages in this case? I  
22 mean, you say you don't even -- you don't even think that  
23 Bayside licensed the -- licensed the images to anybody.

24 MR. HADLEY: Well, that goes far beyond any fair  
25 use analysis, regardless of whose burden it is on. But the

1 way you would do that --

2 THE COURT: You're right -- you're right about  
3 that. I mean, I think it goes more to the question -- goes  
4 more to the balancing part of the test, right, where you're  
5 balancing -- you know, you're asking under these particular  
6 circumstances, you know, does it make sense. Does it --  
7 does it make sense to sacrifice this First Amendment  
8 interest in favor of the -- you know, the interest in this  
9 mysterious company Bayside to assert its -- it's copyrights.  
10 And that -- I think there are a lot of questions to be asked  
11 during the balancing portion of the inquiry, including  
12 whether Bayside has made any -- whether there's any real  
13 possibility that Bayside could make any money from these  
14 images, who's behind Bayside, what is -- you know what --  
15 which people does Bayside have connections to, et cetera.

16 MR. HADLEY: You're correct, your Honor, provided  
17 you get to the balancing. Again, our position is that you  
18 don't get there. That's explained in our briefs. The Ninth  
19 Circuit has never adopted balancing. It's not in  
20 Highfields. It is in Art of Living, but that is the only  
21 case, and it's in a State Court of New Jersey case. But,  
22 assuming you get to balancing and you look at the harm to  
23 Bayside and you want to put a money -- you want to look at  
24 the monetary side of it, even though these specific photos  
25 have not been licensed, the way you would do it is look at

1 similar photos that have been licensed, and you would see  
2 what the license rate was for that, and you would do an  
3 analysis. That is the way it always happens in copyright  
4 cases. And I (audio glitch) include the other factors as  
5 well. But, you know, again, part of the problem with --  
6 with these factors is that we don't have the anonymous  
7 speaker or the alleged infringer here, and that alleged  
8 infringer was given an opportunity to come and explain all  
9 of this twice and did not take advantage of it. It --

10 THE COURT: I don't mean to -- I don't mean to  
11 suggest that that's not relevant. I do -- I do think that  
12 that is part of -- when you're doing the balancing, you  
13 know, and when you're -- when you're discussing -- you know,  
14 you're weighing this First Amendment interest against the --  
15 you know, against the -- the interest in this company,  
16 Bayside, that this company has in its copyrights, you know,  
17 I think that if -- if the speaker is given a real chance to  
18 -- to appear and appear anonymously, I -- I think that --  
19 and they don't, I think -- I think that has to be one factor  
20 that's taken into consideration. But I only think it's one  
21 factor. I mean, I think, you know, to the extent that you  
22 are suggesting that the failure of the anonymous speaker to  
23 appear in the litigation means automatically that you win, I  
24 don't agree with that at all. I mean, I think that as  
25 Public Citizen, you know, explains, you know, the Court has

1 an independent authority to back -- independent obligation  
2 to balance these two interests, one of which is this very  
3 important First Amendment interest.

4 MR. HADLEY: But I want to emphasize that this  
5 could have been done -- you know, Twitter could have hired a  
6 lawyer for Moneybags, and Moneybags could have come in and  
7 made the fair use -- provided the information needed to  
8 conduct a proper fair use --

9 THE COURT: What makes you think Twitter could  
10 have -- could Twitter really have hired a lawyer for them?  
11 I mean, is -- maybe it could have. Wouldn't that be a  
12 conflict of interest?

13 MR. HADLEY: I don't know. Twitter is here  
14 asserting fair use rights on behalf of one of its users.  
15 So, I don't see how it would be any different. But this  
16 person, we don't know that -- who this person is or where  
17 they are or if they could afford a lawyer or not afford a  
18 lawyer or anything else. But Twitter hasn't told us. We  
19 have no way of knowing, and the bottom line is that -- that  
20 these fair use factors, again, I come back to the fact that  
21 there is only one tweet that could even arguably connect the  
22 photo with -- with the subject of the commentary. None of  
23 the others come even close, and without some sort of at  
24 least obvious relationship, we need that speaker to tell us  
25 why. Twitter can't tell us why. Twitter just guesses. We

1 have no evidence in the record whatsoever from which a  
2 proper fair use analysis can be done. And in that  
3 situation, whenever you're looking at the factor of the --  
4 of the purpose and character of the use, the nature of the  
5 copyrighted work, the evidentiary burden on the -- on the  
6 substantiality of the portion copied. We don't know why  
7 this speaker used six photos. We don't know why they picked  
8 those particular photos and not other photos. We don't know  
9 why they didn't use just parts of the photos instead of the  
10 entire.

11 Without the speaker coming in --

12 THE COURT: Do we know that they used the entire  
13 photos?

14 MR. HADLEY: I'm sorry?

15 THE COURT: Do we know that they used the entire  
16 photos?

17 MR. HADLEY: Yes, they used the entire -- they  
18 used six complete photos. They didn't just crop it. They  
19 didn't do anything else. They used six complete photos that  
20 belong to Bayside. And without the speaker coming in  
21 anonymously, which, by the way, happens in a lot of cases,  
22 particularly in cases where the lawsuits are filed first  
23 outside of -- just subpoena cases outside of the DMCA area,  
24 the speakers come in sometimes anonymously, and they can  
25 defend this action or they can defend and provide the

1 information that is needed to conduct a fair use analysis.  
2 But when we are given the burden, in order to unmask or to  
3 determine who the speaker is so we can exercise our  
4 copyright rights and take some action, we're essentially in  
5 handcuffs without the speaker coming in and explaining why  
6 these factors support a fair use defense when the speaker  
7 hasn't done it, when Twitter hasn't gone to the speaker and  
8 found out the information and at least provided an affidavit  
9 saying --

10 THE COURT: Well, I -- I --

11 MR. HADLEY: -- we don't --

12 THE COURT: I agree with you that it is a  
13 disadvantage to -- to you and to Twitter and to the Court to  
14 not have the speaker participating in the discussion about  
15 fair use, but to say that we're in handcuffs, I'm not sure I  
16 would agree with that. I mean, there -- you know, we can --  
17 we can conduct some sort of analysis on -- on fair use I  
18 think.

19 Let me -- let me give -- I know that Twitter --  
20 Twitter's lawyers have been sitting there silently for quite  
21 a while. Do you want to kind of jump in and respond to  
22 anything that's been said so far?

23 MR. SCHOTTLAENDER: Thank you, your Honor. And,  
24 no, I don't have a significant amount to add. It sounds  
25 like the Court is aligned with Public Citizen and with

1 Twitter on substantive areas of the law or substantive areas  
2 of the law that Twitter cares most about, which is the  
3 protection of anonymous online speech and Twitter's ability  
4 to raise those arguments on behalf of its users. And, so, I  
5 don't have a ton to add.

6       Very briefly, I want to remark on only two points.  
7 First is this question of the user not appearing, and I  
8 think the way that you phrased it, your Honor, was -- was  
9 exactly right. Twitter agrees that the user's participation  
10 would be helpful in fair use analysis. I don't think  
11 there's any denying that. But it's absolutely not  
12 essential, and several courts around the country, multiple  
13 appellate courts have held that fair use can be analyzed  
14 just on the -- the speech or the content alone. And, so,  
15 going forward, even if the Court were to find that there was  
16 not fair use for these particular tweets, I do think it's an  
17 important holding going forward to establish that tweets  
18 alone could establish fair use in -- in other cases.

19       The second is this idea of a user not appearing and --  
20 and how that affects the balancing test. I don't -- the  
21 point I want to make here is that that factor should not  
22 singularly benefit Bayside. And, as Public Citizen pointed  
23 out, the user appears --

24               THE COURT: Sorry. What -- I want to make sure I  
25 understand what you're saying. You said what factors should

1 not singularly benefit Bayside?

2           MR. SCHOTTLAENDER: Yes, your Honor. There's a  
3 lot of discussion about the user having not appeared in this  
4 case or not defending themselves in this case. And -- and a  
5 lot of that discussion centered on essentially whether that  
6 should impact -- like benefit Bayside. But I think Public  
7 Citizen's point on this is very compelling. This user has  
8 not touched their Twitter account or appeared in this  
9 litigation since a court ordered notice went out. And that  
10 alone should singularly show the sort of chilling concerns  
11 that Twitter has here that -- that dragging users into  
12 litigation like this to defend their speech will impact  
13 further speech, anonymous speech on Twitter's platform.  
14 And, so, I would just ask that the Court not singularly  
15 think that -- that the user not appear in here or walking  
16 away from their Twitter account actually benefits Bayside.  
17 It's a -- a very gray area, and I think Twitter's position  
18 would be that that actually shows the balancing test weighs  
19 against Bayside in this case.

20           The very last point -- sorry, your Honor -- is  
21 just that I want to make clear this Lenz case and how it --  
22 it ties in with the prima facie elements. The Ninth Circuit  
23 in Lenz held very clearly that fair use is not a defense as  
24 everybody's referred to earlier in -- in this hearing.  
25 Instead, fair use is a non-infringing use. It is an

1 inherent part of Bayside establishing that it has a prima  
2 facie case consistent with Dendrite or Highfields analysis.

3 And, so, your Honor, I just want to make --

4           THE COURT: Does it matter? I mean, I'm not --  
5 I'm not really sure that it matters because what the -- the  
6 point I'm trying to make is that a -- whether it's a defense  
7 -- whether you call it an affirmative defense or, you know  
8 -- I was just reading -- I think it was Copyright in a  
9 Nutshell, you know. It describes fair use as an affirmative  
10 defense, but -- but my -- my point is I don't think it  
11 matters in this context because you've got the -- you know,  
12 this -- the whole thing, you know, the whole inquiry has  
13 this First Amendment overlay to it, this -- this need to --  
14 potential need to protect anonymous speech. Maybe not,  
15 right. But the -- the potential is there. And in light of  
16 that, you know, court -- you know, and each case is very  
17 different, and the Court has to do a bunch of balancing.  
18 And, as part of that -- and a bunch of analysis of a bunch  
19 of different things, and part of that analysis should be  
20 whether, you know, the -- you know, the -- the potential  
21 lawsuit, which hasn't even been filed is, you know -- you  
22 know, likely foreclosed by a fair use defense or whatever  
23 you want to call it.

24           MR. SCHOTTLAENDER: Yes, your Honor. No  
25 disagreement at all. That's -- that's exactly right.

1 THE COURT: Okay. Anything else from Twitter  
2 before it looks like Mr. Levy does want to say something.  
3 Do you have any -- do you have anything else?

4 MR. SCHOTTLAENDER: No, your Honor.

5 THE COURT: Okay. Mr. Levy?

6 MR. LEVY: You know, it's hard to speak when you  
7 said such nice things about our brief.

8 THE COURT: No. You can -- please, disagree with  
9 me. Tell me I've got something wrong. I hate it when  
10 people --

11 MR. LEVY: To the -- so there are two main reasons  
12 why Does don't appear. Sometimes the notice isn't  
13 defective. I -- I was in a situation in which I was  
14 representing a newspaper defending -- this is the Brody case  
15 in Maryland. And, you know, while the case was pending in  
16 the court of -- Maryland Court of Appeals, we suddenly heard  
17 from the Doe that hadn't heard about the case even though it  
18 had been discussed. There was a Trial Court opinion, and we  
19 were up in the Court of Appeals, which in Maryland is the  
20 highest court. And I was flabbergasted, you know, just  
21 hadn't got notice.

22 Now, if Twitter's -- if the inference that Twitter asks  
23 you to draw that the notice from Judge Ryu has effectively  
24 had a chilling effect, that would actually tend to suggest  
25 that Doe did get notice. But the other main reason why

1 Doe --

2 THE COURT: But we don't know.

3 MR. LEVY: We don't know. We actually have no  
4 idea. The other main reason why Does don't appear is, you  
5 know, expensive to appear in Federal Court. This is a  
6 particular problem in the Northern District of California  
7 because all the platforms -- most of the major platforms are  
8 in the Northern District, and the cases often actually are  
9 pending elsewhere, but the platforms won't accept subpoena  
10 jurisdiction any place except in California.

11 And, so, Does, you know, this Doe, I mean, this  
12 speculation about whether the Doe is in New Zealand aside, I  
13 mean, this Doe could be in Washington State or could be in  
14 Alaska or whatever. And if you don't know any lawyers in  
15 San Francisco, it's hard to come in. And this has been a  
16 long-standing thing of mine. These issues come up in the ND  
17 Cal all the time.

18 THE COURT: There is a third possibility, right?  
19 The third possibility is that the -- this -- the person got  
20 the notice and they simply would prefer not to participate.

21 MR. LEVY: That's right. That's also a  
22 possibility, but one of the problems -- so, you -- the Court  
23 has a pro bono panel, and I think there are probably many  
24 lawyers in the ND Cal that would be willing to accept pro  
25 bono appointments to do these cases.

1           THE COURT: Oh, yeah, a case like this,  
2 absolutely.

3           MR. LEVY: And if a court gets to the situation  
4 where it feels it needs the Doe's participation in order to  
5 make a fair adjudication of this case -- and I think Twitter  
6 has argued that you don't need the Doe's participation, and  
7 my -- I -- I really don't take a position on that for Public  
8 Citizen. One thing the Court could do is refer the case to  
9 the Pro Bono Panel, and the Pro Bono Panel really ought to  
10 form a cadre of lawyers who are willing to take cases like  
11 this. Obviously, EFF and the ACLU Northern California often  
12 do, we often do, although it obviously costs a lot for us to  
13 appear in the ND Cal because we're not -- I'm not eligible  
14 to join the Bar of this Court. And, so, every time I  
15 appear, there's a pro bono fee. But my guess is there are  
16 lots of lawyers out here that would do this work.

17          And, so, I would urge the Court, whether for this case  
18 or otherwise, to sort of talk -- for the judges to talk  
19 among themselves about whether there's a way to meet this  
20 problem. I mean, I've sometimes reached out to some of my  
21 friends who practice out there and said "You should raise  
22 this with the Court." But I raised this with your Honor  
23 because your Honor is obviously sensitive to this problem.

24          THE COURT: Could I ask you another -- this sort  
25 of makes me think of another question that I wanted to ask

1 you, and it doesn't really -- it doesn't relate so much to  
2 this case as to how, you know, you talk about how so many of  
3 these subpoenas are in this District, right.

4 I think the way courts usually handle subpoenas,  
5 rightly or wrongly, right, is you know, you get a -- you get  
6 a request for a subpoena to Twitter, and you look at it, and  
7 you say, well, I don't really know if this is appropriate,  
8 but Twitter's a big boy, and so I'm going to sign off on the  
9 subpoena request -- I'm actually not sure if -- does a judge  
10 even need -- for one of these DMCA subpoenas, does a judge  
11 even need to sign off on it?

12 MR. LEVY: It's the clerk, isn't it?

13 THE COURT: Maybe it's just the clerk.

14 MR. HADLEY: Clerk.

15 THE COURT: Yeah. So, okay, so, even -- even more  
16 to my point, right. The -- the -- you know, the clerk  
17 issues the subpoena. It automatically goes out. Sometimes  
18 there's a motion to quash. Sometimes there's not a motion  
19 to quash. Presumably, a lot of times -- presumably there's  
20 a concern that there's not a -- the service provider may not  
21 file a motion to quash, and someone's -- someone's identity  
22 gets revealed maybe in circumstances where it shouldn't.  
23 And then -- but any -- in any event, it's not until somebody  
24 files a motion to quash that we really make the -- the party  
25 requesting the subpoena sort of go through the -- the -- you

1 know, go through -- you know, surpass the hurdles and  
2 justify, you know, the subpoena.

3 I mean, is there an argument that, you know -- and I  
4 don't know whether this would be consistent with the DMCA,  
5 but is there an argument that in the -- in a case where  
6 it's, you know, seeking, you know, the identity of somebody  
7 who's posting anonymously that the -- you know, the party  
8 seeking the subpoena has to make a showing up front with  
9 like a detailed declaration, you know, sort of applying the  
10 Dendrite test and explaining why they should get the  
11 subpoena.

12 MR. LEVY: In the context of a plaintiff versus  
13 doe complaint, we have on occasion argued that at the motion  
14 for early discovery stage, the burden is on the plaintiff to  
15 make an appropriate showing and to -- to disclose the  
16 authority that requires a showing that to fail to give that  
17 kind of disclosure in an ex parte context raises ethical  
18 issues. And no judge has wanted to sort of put it into  
19 ethical terms, for understandable reasons. But we think  
20 that for a plaintiff in one of those cases, it is  
21 appropriate to require the plaintiff to make a showing.

22 So, I have a three-part answer, and that's part of it.  
23 I think under the text of the DMCA, I don't know how you  
24 would do that given that it's a mandatory duty on the part  
25 of the clerk to issue it.

1 THE COURT: Okay.

2 MR. LEVY: I would say that platforms like Twitter  
3 have been extremely responsible, and I want to praise -- I  
4 come to praise Twitter. Yelp and Glass Door are platforms  
5 that consistently tell subpoenaing parties we want you to  
6 make a Dendrite type showing, and they spend good money to  
7 do so. And, you know, some of them -- you know, they're  
8 rich companies obviously, but the fact that they spend their  
9 money on a firm like Perkins Coie to do this work really is  
10 praiseworthy. But just sort of depend -- and, of course,  
11 they give notice to the Doe's, and that's really key. Early  
12 on in this process, we and the ACLU and EFF got together on  
13 a set of -- set of standards for ISP's, which we call them I  
14 think platform are pretty good about providing notice, and  
15 sometimes they actually -- the notice actually says, oh,  
16 and, you know, Public Citizen, ACLU, and the EFF are  
17 available. You might consult them. I know that Yelp does  
18 that because we do get these things out of the blue in some  
19 cases.

20 But I think that's the best response I could give  
21 to your question.

22 THE COURT: How common is it for any -- in a  
23 copyright infringement context, how common is it for a  
24 company to merely get a subpoena from the clerk's office as  
25 opposed to filing a lawsuit first? As I was saying earlier,

1 a lot of times we get lawsuits against doe defendants.

2 MR. LEVY: I mean, there is one particular entity.  
3 It's not a company. It's actually the Jehovah's Witnesses,  
4 which has a -- an egregious track record of obtaining DMCA  
5 subpoenas. Jehovah's Witnesses tend to be poor people. It  
6 is a religious organization that appeals particularly to low  
7 information citizens and people abroad for that matter, and  
8 they almost always get the identity. And then they "talk"  
9 to the user, and these are users who face shunning if  
10 they're identified, and it's a really terrible situation.  
11 And that actually -- they don't do that here. They do that  
12 in the SDNY, and they do that in the White Plains Division  
13 of the SDNY because that's where they're located.

14 Beyond that, you know, I don't know how many companies  
15 routinely -- or entities routinely use the DMCA as -- as  
16 opposed to Doe complaints. I mean, obviously, there are  
17 lots of situations in which it's completely appropriate to  
18 use the DMCA because there's genuine infringement going on.  
19 And, you know, we don't stand for that. I mean, we --  
20 Public Citizen has copyrights, and we enforce them,. and we  
21 don't stand for infringing.

22 THE COURT: So, it seems to me -- I guess this is  
23 maybe a question for Mr. Hadley. It seems to me that there  
24 are, you know, kind of two things -- two things that could  
25 happen in this case. One -- one thing that could happen is

1 that I could rule on the motion to quash now based on the  
2 information -- pretty limited information that I've been  
3 given so far and, you know, decide, you know -- and I think,  
4 you know, sort of applying the approach that we've been  
5 articulating here today, that would mean that I would grant  
6 the motion to quash because I would -- you know, based on  
7 the information I have and based on sort of a glaring  
8 absence of information from -- from you, particularly about  
9 this Bayside and, you know, what's going on here with  
10 Bayside, partly also about the fair use, I -- I think I  
11 would have to, you know, grant the motion to quash.

12 Another option is the one that -- that Public Citizen  
13 suggests, right, which is get more information. And Public  
14 Citizen says, "We don't know who's right here because you  
15 haven't gotten enough information." And -- and you -- you  
16 know, you could -- you could try to get more information  
17 from the anonymous speaker, and Mr. Levy has suggested maybe  
18 issuing another notice and making clear in that notice that  
19 we would likely be able to appoint pro bono counsel for the  
20 anonymous speaker if they wished to appear as a Doe in this  
21 -- in this lawsuit, in this action to -- to sort of defend  
22 their position and then get a heck of a lot more information  
23 from you and whoever are the people who are paying your  
24 check about Bayside. and sort of who's behind Bayside and  
25 whether there are any -- is any connection at all between

1 Bayside or the people who run Bayside and this person,  
2 Sheth, and we could have -- we could even have an  
3 evidentiary hearing. We could have, you know, witness  
4 testimony on this. We could have a period of discovery on  
5 this if -- if Twitter is willing and if the -- if the pro  
6 bono counsel is willing, if somebody -- if somebody shows up  
7 as pro bono counsel. There could be discovery. There could  
8 be deposition testimony. There could be, you know, much  
9 more fulsome exploration of just who Bayside is and what  
10 they're up to.

11       So, I guess, Mr. Hadley, let me ask you, what do you  
12 want -- do you want to have the opportunity to undergo  
13 further proceedings to try to justify your subpoena request  
14 or do you want me to just deny it now, because those are  
15 really the two choices, and I think you absolutely -- I  
16 mean, I -- you know, it appears that Bayside holds the  
17 copyright to these images, and you absolutely have the right  
18 to pursue this, but I don't believe that you've -- I don't  
19 believe that you've made -- you know, when I'm conducting  
20 the balancing that needs to be conducted in a situation like  
21 this, I don't believe that you've justified the subpoena.  
22 You've not given me enough information to justify the  
23 subpoena. And, so, I'm happy to give you an opportunity to  
24 -- to conduct further factual development and justify, you  
25 know, Bayside's effort to -- to uncover the identity of this

1 person and, you know, issue a ruling after we do some more  
2 factual development. Or do you want me to rule on the -- on  
3 the existing record?

4 MR. LEVY: Well, this particular alleged infringer  
5 has already been given an opportunity to come to court and  
6 has --

7 THE COURT: And I -- I want you to answer my  
8 question directly. Okay. Do you want me to rule on the  
9 record that I've been given on the motion to quash, the --  
10 on the information, the limited information that I've been  
11 given? Do you want me to rule on it now or do you want the  
12 opportunity to conduct further factual development and  
13 perhaps an evidentiary hearing to do a better job of  
14 justifying your subpoena request? Which one? Which is the  
15 -- which option do you -- do you want? Do you want to think  
16 about it and let me know?

17 MR. HADLEY: I don't think I have to think about  
18 it. I don't think that -- that spending more money on this  
19 for further evidence is going to be a help. So --

20 THE COURT: Really? Why not? You've spent so  
21 much money on it already. I mean, it wouldn't be that hard,  
22 I would think, to -- to provide, you know, some more  
23 detailed evidence on who Bayside is and what it's up to.  
24 You really don't want to -- I mean, you've already spent so  
25 much. Or whoever is paying your bills has already spent so

1 much.

2 MR. HADLEY: We already have an extensive  
3 affidavit in the record on who Bayside is and what Bayside  
4 does. The alleged infringer has been given an opportunity  
5 to come to court and --

6 THE COURT: Vague. It's pretty vague, and it  
7 doesn't really explain the timing of everything that Bayside  
8 did. I mean, those are the questions that I would ask, some  
9 of the questions that I would ask Bayside's people, whoever  
10 they are.

11 MR. HADLEY: I think that this person kept  
12 tweeting. We didn't -- we didn't take down the speech, and  
13 in terms of fair use, I just don't think that fair use and  
14 balancing, to the extent that it's required is -- and we  
15 don't think that it is required.

16 THE COURT: Okay. Let me make clear that you have  
17 the opportunity to make a stronger showing to get your  
18 subpoena. You're saying you do not want to take the  
19 opportunity to make a stronger showing and address some of  
20 the questions that I've raised here at this hearing? You do  
21 -- you decline that opportunity?

22 MR. HADLEY: Correct.

23 THE COURT: Okay. But why? I just don't  
24 understand why, except maybe because you don't want an  
25 investigation into the identity of the Bayside people and

1 whether they have any connection with Sheth.

2 MR. HADLEY: That's the -- and, as far as -- I can  
3 say that -- that the subject of the tweets has no ownership  
4 interest in Bayside. This is all set forth in an affidavit.

5 THE COURT: I know. That is a very --

6 MR. HADLEY: I'm not sure what else --

7 THE COURT: -- carefully worded and slippery  
8 statement that you just made. Do you -- let me ask does the  
9 subject of the tweets -- Mr. Sheth, does he know anybody who  
10 is connected into Bayside?

11 MR. HADLEY: I don't know. I don't know who the  
12 person is, and I don't know who they know.

13 THE COURT: Okay. Who -- can you name a person  
14 who is connected to this company called Bayside? Can you  
15 name -- can you give me some names of people who operate or  
16 work for Bayside?

17 MR. HADLEY: My client contact is a person named  
18 Mr. Kaufman.

19 THE COURT: Mr. Kaufman?

20 MR. HADLEY: That's all I know.

21 THE COURT: What's his first name?

22 MR. HADLEY: Burt I believe.

23 THE COURT: Burt Kaufman. And that's your client  
24 contact. What's his -- what's his title? What's his  
25 position at Bayside?

1 MR. HADLEY: I believe he's the head of Bayside.

2 THE COURT: Okay. Does Bayside have a -- does --  
3 and that's your client contact?

4 MR. HADLEY: Correct. That's who I send my bills  
5 to.

6 THE COURT: Uh-huh. And are there any other  
7 employees at Bayside?

8 MR. HADLEY: I don't know.

9 THE COURT: Okay. And do you have any idea why  
10 Bayside was formed in October of 2020, around the time of  
11 these tweets?

12 MR. HADLEY: My understanding is to hold  
13 photographs and to license them and to advise copyright  
14 owners and people that might be interested in selling their  
15 copyrights.

16 THE COURT: And when did Bayside acquire the  
17 copyright in these -- in these photos?

18 MR. HADLEY: Before they were used in the tweets.  
19 I'm not sure how long before.

20 THE COURT: Okay. Well, so -- so, Bayside  
21 registered the copyright in the photos on like November 2nd,  
22 right, something like that?

23 MR. HADLEY: The registration -- what I do know is  
24 that the registration happened after the initial tweets were  
25 posted.

1 THE COURT: And taken down, right?

2 MR. HADLEY: And taken down -- well, I'm not sure  
3 about taken down. What I do know is --

4 THE COURT: Take down -- let's go through the  
5 timeline. I'm interested in the timeline. So, in -- so --  
6 so, in October of 2020, Moneybags starts posting these  
7 tweets, right?

8 MR. HADLEY: That's my understanding.

9 THE COURT: In October of 2020, Bayside Advisory  
10 is formed, right?

11 MR. HADLEY: I believe that was the -- there may  
12 have been a foreign registration earlier, but that's when it  
13 was formed as a Delaware company.

14 THE COURT: But you're saying they may have  
15 started filing documents before then?

16 MR. HADLEY: In a foreign jurisdiction, they might  
17 have.

18 THE COURT: But you don't know?

19 MR. HADLEY: I'm not sure.

20 THE COURT: Okay. The -- the -- Bayside issued a  
21 takedown notice to Twitter in -- on October 29th of 2020,  
22 right?

23 MR. HADLEY: Correct.

24 THE COURT: And then the images came down  
25 promptly, yes?

1 MR. HADLEY: Yes, and the speaker kept tweeting  
2 well past that time, and there was never any --

3 THE COURT: About Sheth?

4 MR. HADLEY: -- never any request to -- yes.

5 THE COURT: Sorry. About Sheth?

6 MR. HADLEY: About Sheth and other people, yes,  
7 other people in the -- as I understand it, other people in  
8 the financial industry. There was never any request to take  
9 down any speech whatsoever. And, in fact --

10 THE COURT: I understand. Okay. And, so, then on  
11 November 2nd or 3rd or something like that, Bayside  
12 registers a copyright in the six photos --

13 MR. HADLEY: Yes.

14 THE COURT: -- that were used by Moneybags, right?

15 MR. HADLEY: Yes.

16 THE COURT: And then that's when it requested a  
17 subpoena from the clerk's office?

18 MR. HADLEY: Correct.

19 THE COURT: And then when did Bayside acquire the  
20 -- when did Bay -- it sounds like Bayside was not the  
21 creator of these images but it acquired the copyright in  
22 these images?

23 MR. HADLEY: It acquired the copyright in these  
24 images from one or more photographers that Bayside I -- I  
25 think was familiar with. I can't -- I'm not exactly sure

1 how Bayside --

2 THE COURT: Do you know when?

3 MR. HADLEY: -- the photographer.

4 THE COURT: Do you know when?

5 MR. HADLEY: I don't know the exact date.

6 THE COURT: Do you know an approximate date?

7 MR. HADLEY: Actually, I -- I don't know if it was  
8 before Bayside originally registered in Delaware or not.

9 THE COURT: Okay. I mean, it would be weird for  
10 Bayside to acquire the copyrights -- acquire the rights in  
11 the photos before Bayside was Bayside, right?

12 MR. HADLEY: Not necessarily. I mean, Bayside  
13 could -- I mean, somebody affiliated with Bayside could have  
14 acquired the rights and then formed Bayside as a company.  
15 That happens frequently. I --

16 THE COURT: Say that one more time. Sorry.

17 MR. HADLEY: People acquire rights in photographs  
18 and then later incorporate -- the only reason to really  
19 incorporate -- if I go and acquire a right in a photograph,  
20 I don't have to incorporate it. In fact, I could -- I could  
21 own a lot of photographs. If I want to license them,  
22 sometimes it's to an advantage to incorporate as an LLC.  
23 And, so, my --

24 THE COURT: And, so, it might be -- it might be  
25 that somebody was -- had the rights to these photos and they

1 -- and they -- had the rights to the photos for a long time  
2 and then they formed Bayside and they -- and then they --  
3 and then they transferred the rights to Bayside and Bayside  
4 registered them?

5 MR. HADLEY: And started to -- well, not these  
6 particular photographs, but -- but along with other  
7 photograph, Bayside started to exploit them in terms of  
8 licensing.

9 THE COURT: And but -- but you don't know? You  
10 don't know whether --

11 MR. HADLEY: I don't know. I can't --

12 THE COURT: Even though this is your client and  
13 the litigation is all about these photographs?

14 MR. HADLEY: Well, the litigation is about these  
15 photographs, but under the DMCA, the standards under the  
16 DMCA (sic) and, respectfully, I -- you know, I understand  
17 the Court has its view regarding the circumstances, but --  
18 but, frankly, there's nothing in the DMCA other -- actually,  
19 nothing in the DMCA that would make what Bayside is and when  
20 it acquired the photographs relevant except for the purposes  
21 of eventually bringing a lawsuit, which is the purpose of  
22 seeking the Section 512(h) subpoena. And, actually, 512(h)  
23 has built-in protections even for anonymous speakers. Once  
24 -- once you find out who this is, even assuming -- there's  
25 no guarantee that if Twitter responds to the subpoena, that

1 we -- that Bayside would be able to even find out who this  
2 speaker is. But, even if it could, under 512(h), Bayside  
3 can't share that with anybody. Bayside can only use that  
4 for purposes of bringing a -- a lawsuit against this --

5 THE COURT: Which is why one of the most important  
6 questions, which hasn't been answered yet, is does Bayside  
7 have any connection with Sheth and do the people at Bayside  
8 have any connection with Sheth. And that is a question that  
9 has gone unanswered in this -- in this record. And, you've  
10 -- and the strong suspicion is that Sheth does have a  
11 connection to these people because of how carefully you  
12 worded your -- your statements about Sheth not having any  
13 controlling ownership interest in Bayside or Sheth not, you  
14 know, having -- owning the copyrights or whatever --  
15 whatever it is. I don't remember exactly what you said, but  
16 I remember it was very studiously carefully worded, which  
17 raises more suspicion about whether -- whether there's any  
18 connection between Bayside and Sheth.

19 Mr. Levy?

20 MR. LEVY: I also note I'm a member of the New  
21 York Bar as well as the D.C. Bar, and in New York, lawyers  
22 have somewhat different standards about what they say in  
23 affidavits. But, as I read it, this was an affidavit by  
24 counsel from -- outside counsel from Bayside, and when I  
25 looked at it, I wondered how outside counsel had personal

1 knowledge of the statements that were made. How would  
2 outside counsel know whether Brian Sheth ever had interest  
3 in these photographs?

4 THE COURT: It's not even a declaration that I  
5 should be considering actually. I mean, it's not even --  
6 I'm not even sure it's appropriate to consider a declaration  
7 from outside counsel along these lines. I mean, it's it's  
8 just not -- it's not reliable. I hadn't thought of that,  
9 but thank you for reminding me.

10 Let me -- let me ask Twitter and Mr. Levy what -- what  
11 they think I should do under the -- under the circumstances.  
12 Maybe I'll start with Mr. Levy.

13 You know, Mr. Hadley has made very clear he wants me to  
14 rule on the current record. He does not want further  
15 factual development. He declines the opportunity to further  
16 develop the record in support of his effort to get a  
17 subpoena.

18 Does that -- does that mean I'm stuck? Like, what if I  
19 said I really want further factual development before ruling  
20 on this issue because I'm not sort of in a position -- I  
21 haven't been given enough information to conduct the kind of  
22 balancing test that we've been talking about here. What  
23 should I do in that situation?

24 MR. LEVY: So, as a neutral, it's hard for me to  
25 say you should rule one way or the other, but I actually do

1 respect the right of a potential plaintiff to bring a case,  
2 to construct a particular record, perhaps for the purpose of  
3 making certain legal arguments and to take that to the Ninth  
4 Circuit if they strongly feel that they're right. And, you  
5 know, Public Citizen is a plaintiff-oriented firm, and --  
6 and I respect Bayside's right to take this case to the Ninth  
7 Circuit based on the current record if that's what they  
8 think is the appropriate contact. I was my guess that some  
9 of their amici would love to do that, and they might even do  
10 it without charging Bayside because they think the  
11 principle's important. I don't know. But reading -- I  
12 mean, the amicus briefs on Bayside's side are very strong  
13 and take a position, and I respect their right to get to the  
14 Ninth Circuit based on the current record.

15       So, I don't want to say that you should impose on  
16 Bayside the obligation to provide further information if  
17 Bayside has made a determination that that's not what they  
18 want to do. I mean, you know, they decide how much  
19 resources they want to put into a particular case at a  
20 certain level of judicial system, and I think that deserves  
21 some level of respect from the Court.

22       Certainly, further exploration could be interesting.

23               THE COURT: What about -- I appreciate your  
24 comments. I mean, what if -- what if I'm concerned that  
25 there has been -- there's been -- may have been an abuse of

1 process in this case? Under those circumstances, might I  
2 have, you know, sort of an independent obligation to, you  
3 know, develop the facts more? I guess it wouldn't be  
4 developing the facts in connection with the motion to quash.  
5 If Bayside says, "No, we want you to decide the motion to  
6 quash on the current record," and if Twitter agrees, I  
7 decide that's what I do. And then if I -- if I feel like I  
8 have an independent duty to explore whether the -- Bayside  
9 has abused the -- the judicial process and committed Rule 11  
10 violations, then -- then I could do that on my own.

11 MR. LEVY: Yeah, it could come up in two contexts.  
12 One is I suppose -- I mean, I haven't looked at this  
13 question in advance of this hearing. Certainly, a court has  
14 the ability to sua sponte address potential Rule 11 issues  
15 without a motion, and I -- I have to assume there's been no  
16 safe harbor letter sent here. There's been no reference to  
17 it. I haven't heard about that. And I haven't looked at  
18 the question about whether Twitter could make a Section 505  
19 motion for attorney fees based on a 512(h) proceeding. I  
20 actually -- this idea is occurring to me only in response to  
21 your Honor's question.

22 THE COURT: Right. Then there's also the --

23 MR. LEVY: Whether it would want to invest its  
24 resources in that, you know, is a -- as opposed to just  
25 standing up for its user is a different question.

1           THE COURT: Yeah. There's also a -- there's also  
2 the Court's inherent authority, and you have the ability to,  
3 you know, sanction somebody pursuant to the Court's inherent  
4 authority, but, you know, requires extensive fact finding  
5 and investigation and, you know --

6           MR. LEVY: And you would think you would want  
7 counsel assisting the Court to pursue those issues, and if  
8 there's nobody on the D side who wants to do that, that's  
9 taking a significant burden on the Court, and, you know, I  
10 certainly respect -- I mean, I've certainly been in  
11 situations where courts felt that the processes had been  
12 abused and took various steps to vindicate those processes.  
13 And, you know, I've done Rule 11 cases for lawyers too, and  
14 I hate to speak --

15          THE COURT: Okay. Appreciate it. Twitter I  
16 assume -- I assume Twitter would say Mr. Hadley wants you to  
17 rule on the motion to quash on the current record, does not  
18 want to do any further factual development. I assume you  
19 agree with that?

20          MR. SCHOTTLAENDER: Yes, your Honor. The motion  
21 to quash should be granted.

22          THE COURT: Okay. All right. Well, I'll give it  
23 -- I'll give this all a little bit more thought and then  
24 issue a ruling.

25          MR. HADLEY: Your Honor, if I could just add one

1 thing. We believe strongly as a matter of law that Twitter  
2 has no standing, that no court has ever allowed a service  
3 provider to assert a --

4 THE COURT: Well, you don't need to repeat what's  
5 in your -- you don't need to repeat what's in your briefs.  
6 I mean, if there's something important you need to say that  
7 wasn't in your briefs and that this discussion was brought  
8 out, go ahead. But you don't need to just intone what  
9 you've already said in your briefs.

10 MR. HADLEY: Understood. My point is simply that  
11 we believe as a matter of law that fair use isn't  
12 appropriate or balancing isn't part of the test, and we're  
13 prepared to go to the Ninth Circuit on that.

14 THE COURT: Great.

15 MR. HADLEY: And that's why -- that's why I took  
16 the position that I took.

17 THE COURT: Okay. Terrific. Thank you very much.

18 MR. LEVY: Thank you, your Honor.

19 MR. HADLEY: Thank you.

20 MR. SCHOTTLAENDER: Thank you, your Honor.

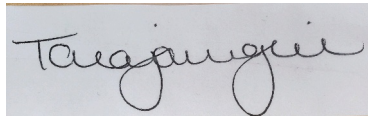
21 MS. SCHWARTZ: Thank you, your Honor.

22 (Proceedings adjourned at 3:58 p.m.)  
23  
24  
25

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A handwritten signature in cursive script, appearing to read "Taggungui", is centered within a light gray rectangular box.

Echo Reporting, Inc., Transcriber

Monday, May 23, 2022