

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Julia Allison Baugher,  
10 Plaintiff,

11 v.

12 GoDaddy.com LLC,  
13 Defendant.  
14

No. MC-19-00034-PHX-JJT

**ORDER**

15 At issue is the Amended Motion to Quash Subpoena Issued Pursuant to 17 U.S.C.  
16 § 512(h) (Doc. 22, Mot.), to which Applicant Julia Allison Baugher filed a Response (Doc.  
17 24, Resp.) and Movants filed a Reply (Doc. 25, Reply).

18 **I. BACKGROUND**

19 Julia Allison Baugher is a writer whose work has been published in many  
20 periodicals and a commentator who has appeared in a variety of television programs. She  
21 has built a strong following online, including on social media platforms, and she claims  
22 she has a copyright in all her work and the images she has posted on social media. In 2019,  
23 a group of online bloggers (the “Does”) posted certain of Baugher’s images and work—  
24 including a book proposal with pre-publication manuscript—on their blog without her  
25 permission for the purpose of inviting criticism of it. Baugher claims these posts constituted  
26 copyright infringement. On September 24, 2019, after Baugher learned of the posts, she  
27 sent a take-down notice under the Digital Millennium Copyright Act (“DMCA”)—  
28 specifically, 17 U.S.C. § 512(c)—requesting that the blog’s registrar, GoDaddy.com, LLC,

1 remove the accused blog posts. GoDaddy took down the blog posts on September 27, 2019,  
2 without any DMCA counter-notification from the Does requesting put-back of the removed  
3 posts.

4 On October 7, 2019, Baugher filed an Application with this Court for Issuance of a  
5 Subpoena under 17 U.S.C. § 512(h) to uncover the identities of the Does (Doc. 1), and the  
6 Court issued the Subpoena (Doc. 2). The Does then filed a Motion to Quash (Doc. 4) and,  
7 with leave of Court, an Amended Motion to Quash (Doc. 22). The Court now resolves the  
8 Amended Motion to Quash.

## 9 **II. ANALYSIS**

10 Under 17 U.S.C. § 512(h), a copyright owner may seek a subpoena in U.S. District  
11 Court “for identification of an alleged infringer,” so long as the subpoena request includes  
12 a copy of the take-down notice made pursuant to § 512(c)(3)(A), a proposed subpoena, and  
13 a sworn declaration that the subpoena is sought “to obtain the identity of an alleged  
14 infringer and that such information will only be used for the purpose of protecting rights  
15 under this title.” Baugher met these requirements, and the Court issued the Subpoena.  
16 (Docs. 1, 2.)

17 The Does’ principal argument in their Amended Motion to Quash is that the Court  
18 should look behind Baugher’s § 512(c)(3)(A)(v) attestation of a good faith belief that the  
19 Does’ use of Baugher’s work and images infringed her copyright in them and examine  
20 whether the Does’ use was fair use and thus not infringing. As Baugher argues in her  
21 Response, §§ 512(c)(3)(A), (h)(1), and (h)(2) do not provide for such a review; attestation  
22 of a good faith belief of infringement is sufficient to send a take-down notice and, based  
23 on the notice, request that the Court issue a subpoena.<sup>1</sup>

24  
25  
26 <sup>1</sup> If the Does wished to challenge Baugher’s good faith belief that their use of Baugher’s  
27 work constituted copyright infringement at the take-down notice stage, the DMCA includes  
28 a provision allowing the Does to send a counter-notification to that effect to GoDaddy, in  
which instance GoDaddy would have been required to put back the material removed from  
the internet within 14 days unless Baugher filed an action in court. *See* 17 U.S.C. § 512(g).  
Baugher states the Does did not engage in the counter-notification process or challenge  
Baugher’s attestation of copyright infringement at the take-down notice stage.

1           **A. The Framework for Resolving a Fed. R. Civ. P. 45 Motion to Quash**  
2           **where the Movant Contends a DMCA Subpoena Seeks Information**  
3           **Protected by the First Amendment**

4           In their Motion, the Does also argue that disclosure of their identities in compliance  
5 with the Subpoena would violate their First Amendment right to speak anonymously, and  
6 they therefore request that the Court quash the Subpoena under Federal Rule of Civil  
7 Procedure 45(d)(3)(A)(iii). Section 512(h)(6) of the DMCA provides that “the procedure  
8 for issuance and delivery of the subpoena . . . shall be governed to the greatest extent  
9 practicable by those provisions of the Federal Rules of Civil Procedure governing the  
10 issuance, service, and enforcement of a subpoena duces tecum.” Rule 45(d)(3)(A)(iii)  
11 states that a district court must quash a subpoena that “requires disclosure of privileged or  
12 other protected matter.” Thus, as several District Courts in the Ninth Circuit have  
13 concluded, “a motion to quash a DMCA subpoena may properly raise an objection on the  
14 basis that the subpoena would require disclosure of matter protected by the First  
15 Amendment”—here, the Does’ identities. *Signature Mgmt. Team, LLC v. Automattic, Inc.*,  
16 941 F. Supp. 2d 1145, 1152 (N.D. Cal. 2013).

17           Whether the Does engaged in copyright infringement is relevant in resolving the  
18 Motion to Quash for several reasons. First, the title of § 512(h), “Subpoena to identify  
19 infringer,” indicates the purpose of the subpoena; if the Does were not infringers, the  
20 § 512(h) subpoena is not properly aimed at them.

21           Second, resolving a motion to quash under Rule 45 ordinarily requires a balancing  
22 of the need for disclosure of the requested information against the target of the subpoena’s  
23 interests in protecting disclosure. Here, the Does seek protection from disclosure under the  
24 First Amendment because, as a general proposition, the First Amendment protects the right  
25 to speak anonymously. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995); *see*  
26 *also In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (stating the  
27 right to speak anonymously applies equally to online speech). But “to the extent that  
28 anonymity is used to mask copyright infringement or to facilitate such infringement by

1 other persons, it is unprotected by the First Amendment.” *Arista Records, LLC v. Doe 3*,  
2 604 F.3d 110, 118 (2d Cir. 2010); *see also Harper & Row Publishers, Inc. v. Nation*  
3 *Enters.*, 471 U.S. 539, 568 (1985) (holding that First Amendment was not a defense to  
4 copyright infringement claim); *cf. In Re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244,  
5 260 (D.D.C. 2003) (stating “there is some level of First Amendment protection that should  
6 be afforded to anonymous expression on the Internet, even though the degree of protection  
7 is minimal where alleged copyright infringement is the expression at issue”) (*reversed in*  
8 *the outcome*, 351 F. 3d 1229 (D.C. Cir. 2003)); *Art of Living Found. v. Does 1-10*, 2011  
9 WL 5444622, at \*6 (N.D. Cal. Nov. 9, 2011) (stating “evidence of copyright infringement  
10 does not *automatically* remove the speech at issue from the scope of the First  
11 Amendment”).

12 The core framework question the Does’ Motion presents is whether § 512(h)(6) and  
13 its command for the Court to apply Rule 45 “to the greatest extent practicable” in enforcing  
14 DMCA subpoenas means that the Does’ Motion triggers a burden on Baugher to  
15 demonstrate a *prima facie* claim of copyright infringement, or, as Baugher argues (Resp.  
16 at 24-25), whether the text of the DMCA—in particular, §§ 512(c)(3)(A), (h)(1), and  
17 (h)(2)—relieves Baugher of any such burden by requiring only an attestation of a good  
18 faith belief of copyright infringement. As the court in *Signature Management Team* found,  
19 it is the former. 941 F. Supp. 2d at 1157-58 (stating that the court must determine whether  
20 the party seeking the information under the DMCA demonstrated a *prima facie* claim of  
21 copyright infringement as part of a balancing test applied to resolve a motion to quash).  
22 Indeed, even the case Baugher cites (Resp. at 12) to support her position that the Court  
23 should not analyze whether the target of the subpoena engaged in copyright infringement,  
24 *In re Subpoena Issued Pursuant to the Digital Millennium Copyright Act to:43SB.com*,  
25 stated that “[t]he party seeking a subpoena must also make a *prima facie* showing of  
26 copying” and proceeded to resolve that question. 2007 WL 4335441, at \*4 (D. Idaho  
27 Dec. 7, 2007).

28

1 Whether a movant engaged in copyright infringement is critical to assessing the  
2 scope of First Amendment protection the movant is entitled to as part of the balancing test  
3 used to resolve a motion to quash under Rule 45. And Congress explicitly directed courts  
4 to apply Rule 45 “to the greatest extent practicable” in § 512(h)(6). As the *Signature*  
5 *Management Team* court stated, the provisions of the DMCA “cannot be read to authorize  
6 enforcement of a DMCA subpoena in violation of the First Amendment.” 941 F. Supp. 2d  
7 at 1153. Put another way, construing §§ 512(h)(1) and (h)(2) as granting an automatic right  
8 to Baugher to obtain the Does’ identities by subpoena based on her attestation of a good  
9 faith belief of the Does’ copyright infringement would render the Does’ ability to quash  
10 the subpoena on constitutional grounds, as provided for in § 512(h)(6) and Rule 45, a  
11 nullity.

#### 12 **B. The Motion to Quash**

13 In instances in which online speech raises at least some constitutional protections,  
14 courts in the Ninth Circuit have applied “a two-part test for determining whether to allow  
15 discovery seeking the identity of an anonymous defendant: (1) The plaintiff must produce  
16 competent evidence supporting a finding of each fact that is essential to a given cause of  
17 action; and (2) if the plaintiff makes a sufficient evidentiary showing, the court must  
18 compare the magnitude of the harms that would be caused to the competing interests by a  
19 ruling in favor of the plaintiff and by a ruling in favor of the defendant.” *Art of Living*, 2011  
20 WL 5444622, at \*7 (citing *Highfields Cap. Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 975-  
21 76 (N.D. Cal. 2005)). Put more directly, if the Does’ speech raises First Amendment  
22 concerns, the Court will evaluate whether Baugher “demonstrated a *prima facie* case of  
23 copyright infringement” and conduct “a balancing of harms.” *Signature Mgmt. Team*, 941  
24 F. Supp. 2d at 1157. But “[t]he degree of scrutiny varies depending on the circumstances  
25 and the type of speech at issue.” *Id.* at 1154. Where the nature of the speech is public  
26 criticism, even if not explicitly political or religious, and disclosure of an anonymous  
27 speaker’s identity could have a chilling effect on such public criticism, then at least some  
28 First Amendment concerns are at stake. *Art of Living*, 2011 WL 5444622, at \*6-7.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.