

Steps To Find An Internet Defendant

1. Assuming the defendant cannot be found conventionally....
2. File the complaint
3. Move for early discovery. Federal (required) State (advised)
4. Obtain subpoena for local jurisdiction for Relevant Internet Service. Usually N.D. Cal.
 - a. Twitter
 - b. Facebook
 - c. Google
5. Route returned data to local ISP
 - a. Comcast
 - b. Century Tel
 - c. Some locals
6. Subpoena local ISP to obtain an address
7. Remember: An address is like an address to a home. It does not say who did it, just where they were.

Discovery Memo Outline & Issues

PLAINTIFF'S *EX PARTE* MOTION TO EXPEDITE DISCOVERY

Pursuant to Federal Rule of Civil Procedure 26 and 45, plaintiffs move the Court *ex parte* for an order permitting plaintiffs to take limited discovery to ascertain the identity of the defendant in the complaint. Limited Discovery prior to the Rule 26(f) conference is necessary as per the reasons stated in the accompanying Memorandum of Law.

MEMORANDUM

II. ARGUMENT

Federal Rule of Civil Procedure 26(d)(1) authorizes a court to permit discovery before the Rule 26(f) conference upon a showing of “good cause” for the party’s need for expedited discovery. *See, e.g., Renaud v. Gillick*, No. 06-1304, 2004 WL 98465, at *2-3 (W.D. Wash. Jan. 8, 2007) (analyzing the Ninth Circuit standard of “good cause” and cases permitting expedited discovery); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 280 F.R.D. 273, 276 (N.D. Cal. 2002) (“Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.”)

Courts routinely allow discovery to identify “Doe” defendants operating through the Internet. *See generally Voltage, et. al v. Does*: 3:14-cv-01241-AC, 3:14-cv-01242-AC, 6:14-cv-01243-AC, and 6:14-cv-01244-AC; *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (“where the identity of alleged defendants [are not] known prior to the filing of a complaint . . . the plaintiff should be given an opportunity through discovery to identify the unknown

defendants”); *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (error to dismiss unnamed defendants given possibility that identity could be ascertained through discovery).

Courts consider the following factors when granting motions for expedited discovery to identify anonymous internet users: (1) whether the plaintiff can identify the missing party with sufficient specificity such that the court can determine that the defendant is a real person or entity who could be sued in federal court; (2) all previous steps taken by the plaintiff to identify the Doe defendant; and (3) whether the plaintiff’s suit could withstand a motion to dismiss.

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578-580 (N.D. Cal. 1999)

Specifically, plaintiff has alleged sufficient facts to support a plausible right to relief well above any general level of mere speculation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Good cause to allow expedited discovery in this case clearly exists because the ISP / Internet Service used to commit the acts [***] is the only source that can supply the information necessary to identify the defendant.

If plaintiff is denied the ability to subpoena the ISP / Internet Service, the identity of the defendant will remain hidden and defendant will be able to continue to freely violate plaintiff’s rights and commit other acts causing injury with impunity. As such it is clearly in the interest of preserving justice and order that this court should grant Plaintiff’s motion. *Semitoool, Inc.*, 280 F.R.D. at 276 (“Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party).

OPPOSITION / MOTION TO QUASH ISSUES

A. Burden

“The party moving to quash a subpoena bears the burden of persuasion.” *Webster v. Northwest Cancer Specialists, P.C.*, No. 11-1543 (D. Or., 2012), citing *Green v. Baca*, 226 F.R.D. 624, 653 (C.D. Cal. 2005).

B. Subscriber lacks standing to oppose the subpoena.

Subscriber is a non-party. As such Subscriber lacks standing to challenge the issued subpoena unless there is a personal interest or privilege in the sought after material. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 973-74 (C.D. Cal. 2010) (subpoenas served on MySpace, Facebook, etc.; collecting cases). In the present case Subscriber claims no privilege and as argued below there is no protected personal interest at issue.

C. Subscriber has no right to appear anonymously.

Generally a party’s desire to appear anonymously does not outweigh an opposing party’s right to present their case and requires a showing of “special circumstances.” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th Cir. 2000). Such special circumstances are balanced against the public interests which are best served when litigant’s identities are revealed. *Id.*; *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006).

Courts unanimously hold that a plaintiff’s First Amendment right under the petition clause to bring a suit for infringement outweighs any possible First Amendment right to remain anonymous. *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F.Supp.2d 556 (S.D.N.Y. 2004) (and the cases citing thereto).

Oregon standards. Article I, section 10, of the Oregon Constitution, provides, in part: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay[.]" “Section 10 is written in absolute terms; there are no explicit

qualifications to its command that justice shall be administered openly. In order to be constitutional, a proceeding must either not be secret or not ‘administer justice’ within the meaning of section 10.” *Oregonian Pub. Co. v. O’Leary*, 303 Or. 297, 302 (Or., 1987)

"[A]ll actions or suits shall be prosecuted in the name of the real party in interest. There can be no question about the wisdom of this rule, and it should be strictly adhered to in all cases which do not come within the exceptions to it, as declared by statute.” *Hendrickson’s Estate v. Warburton*, 557 P.2d 224, 276 Or. 989 (Or., 1976), quoting *King v. Boyd*, 4 Or. 326 (1873),

D. No confidential information is sought. (FRCP 45(d)(3)(A)(iii))

Plaintiffs’ subpoena seeks no confidential information; only the identity of the party assigned a specific IP address. In the 9th Circuit, an IP address and even the “to/from” fields for email do not carry an expectation of privacy as these are the same as the address on a public package. *United States v. Forrester*, 495 F.3d 1041, 1049 (9th Cir. 2007), citing *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577 (1979). Indeed, Subscriber in this case has already caused its IP address to be broadcast repeatedly in communications and requests for data and has through its ISP designated where the deliveries of requested data are to be made. “[T]here is no expectation of privacy in Internet subscriber information because it has already been exposed to a third party, the Internet Service Provider.” *Courtright v. Madigan*, 2009 WL 3713654 at *2 (S.D. Ill., 2009); see also *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

a. 47 U.S.C. § 551 - Protection of subscriber privacy.

Subscriber might argue the more on point and specific statute 47 U.S.C. § 551, titled, “Protection of subscriber privacy” which governs subscriber privacy interests in this case. However 47 U.S.C. § 551(c)(2) specifically permits disclosure, and 47 U.S.C. § 551(c)(2)(B) specifically permits disclosure pursuant to court order without advance notice to the subscriber. To the extent there is a notice requirement of U.S.C. § 551(c)(2)(C), this requirement is not to create a privacy interest to limit disclosure, but to permit a legitimate privacy interest or privilege

to be asserted.¹ To the extent there are protections afforded the Subscriber they have been provided as per the notice that brings them to this court. But being given the right to assert claims of privilege does not create a privilege. Neither 18 U.S.C. § 2710 nor 47 U.S.C. § 551 create a privacy interest. As such, there is no basis for Subscriber 's Motion to Quash based on a privacy interest.

E. There is no “undue burden” at issue.

Subscriber faces no undue burden related to this subpoena. The subpoena at issue is directed at [Internet Service / ISP]. A “Doe defendant lacks standing to quash a subpoena on the ground of undue burden when the subpoena is directed to the ISP rather than to him.” *Voltage Pictures, LLC v. Does 1-5,000*, 818 F. Supp. 2d 28, 36 (D.D.C. 2011); accord, *Crispin*, 717 F. Supp. 2d at 973-74.

F. The subpoena should not be quashed.

Plaintiffs are entitled to seek information “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). This rule is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 351 (1978).

The 9th Circuit has consistently held an IP address and the related subscriber information is useful and relevant. See *United States v. Craighead*, 539 F.3d 1073, 1080–81 (9th Cir. 2008) (probable cause existed where the IP address from which content was shared was traced to the defendant); *United States v. Hay*, 231 F.3d 630, 634–35 (9th Cir. 2000). See also *United States v. Forrester*, 495 F.3d 1041, 1049 (9th Cir. 2007) (comparing an IP address to a telephone

¹ Identity and basic subscriber information, defined by statute, does not include content which may be protected by Stored Communications Act 18 U.S.C. §§ 271 et seq. and is not at issue in this case.

number). See also *AF Holdings LLC v Does 1-1,058*, 2012 WL 3204917 (D.D.C. 2012); *Malibu Media v. Does 1-14*, No. 12-263 (N.D. Ind., 2012).

Draft Letter to Local Court

United States District Court
Attn: Clerk of the Court
450 Golden Gate Avenue, Box 36060
San Francisco, CA 94102-3489

Re: Civil Subpoena - Twitter
Good Company v. Evil Twitter User ; USDC Oregon, 6:14-cv-XXXXX

Dear Sir or Madam:

Enclosed please find three copies of a civil subpoena in the matter of Good Company v. Evil Twitter User ; USDC Oregon, 6:14-cv-XXXXX. It is requested the United States District Court for the Northern District of California issue these subpoenas, to be returned in the enclosed self addressed envelope for service on the named parties. A check for the fee of \$46.00 is enclosed.

By my signature below, under penalty of perjury, I declare the information requested pursuant to this subpoena is material to the pending Oregon U.S. District Court Case 6:14-cv-XXXXX in that it is necessary in ascertaining the true identities of the Evil Twitter User in the pending Oregon case as supported by the Order of the Judge, true copy enclosed.

Sincerely,

Carl D. Crowell
carl@crowell-law.com
503-581-1240

encls

Some Basic IP Tools (There are many)

Email Header Decoders:

<https://toolbox.googleapps.com/apps/messageheader/>

<http://mxtoolbox.com/EmailHeaders.aspx>

IP Whois Lookup:

<http://www.networksolutions.com/whois>

<http://www.tucowsdomains.com/whois/>

Geolocation Tools:

<http://www.ipligence.com/freetools/>

<http://whatismyipaddress.com/ip-lookup>