

## Publications

### Subpoenas, Court Orders and the ‘Cable Privacy Act’: Identifying Anonymous Online Posters

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We have written about subpoenaing internet service providers (ISPs) for identifying information relating to internet protocol (IP) addresses used by their subscribers. In that post, we mentioned that securing identifying information from cable operator ISPs generally requires obtaining a court order authorizing disclosure of the subscriber information.

To briefly illustrate, say a party serves a valid subpoena on an entity (operating a website or other forum) to identify the unknown author of defamatory online content and that author does not object to the subpoena.

In response to the subpoena, the entity produces some information, most helpful of which is an IP address. The party determines through an online search the ISP that owns the IP address is a cable operator.

That party then seeks to subpoena the cable operator for identifying information pertaining to the subscriber assigned the relevant IP address on the date and time in question.

To proceed with the subpoena to the cable operator in this hypothetical (assuming that the party can satisfy the standards for issuing a subpoena to the non-party), the Cable Communications Policy Act of 1984 essentially requires the party to obtain an order authorizing the ISP to disclose the requested subscriber information

Under this federal statute, often referred to as the “Cable Privacy Act,” a cable operator may not disclose a subscriber’s personally identifying information to a private party (i.e. a non-government entity) absent subscriber consent or the issuing party providing a court order. See 47 U.S.C. § 551.

Specifically, section 551 (c)(1) provides that cable operators must receive “prior written or electronic consent of the subscriber concerned,” unless—pursuant to section 551(c)(2)(b)—the cable operator receives a “court order authorizing such disclosure, if the subscriber is notified of such

order by the person to whom the order is directed.”

In other words—especially given the unlikelihood of obtaining subscribers’ consent—parties who receive (from a prior subpoena production) IP addresses registered to cable operators generally must obtain court orders authorizing those cable operators to disclose of the desired subscribers’ personally identifying information.

### *Preparing to subpoena cable operator ISPs*

Obtaining a valid court order involves filing a “motion to authorize disclosure” with the court in which the action is pending.

Courts have typically applied a “good faith” standard in determining whether to authorize disclosure, pursuant to 47 U.S.C. § 551(c)(2)(B).

Accordingly, moving parties will need to demonstrate “(1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought [is] directly and materially related to their claim; and (3) that the information [can]not be obtained from any other source.” *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 444, 966 A.2d 432, 450 (2009) (quoting *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

Many cable operators only maintain IP logs for up to 180 days (some for 90 days or less). And moving for an order authorizing disclosure (even if the court ultimately grants the order and the subscriber would not object to the subpoena) can take some time, particularly given the uncertainty of a court’s schedule.

Therefore, parties intending to subpoena cable operator ISPs must be time-conscious. If necessary, they might want to submit preservation requests to the ISPs to maintain the desired records. Such requests can also serve to confirm that the records still exist.

Even though a party can subpoena a cable operator prior to obtaining an order, many cable operators will not start the notification period for the subscribers until the party actually provides the order. Thus, absent an emergency, the best practice is to obtain the order before serving the subpoena.

Despite the extra work involved with obtaining a court order, valid subpoenas issued to cable operator ISPs often leads to the production of helpful identifying information. This can potentially include names, addresses, and/or phone numbers of subscribers.

In short, for parties seeking to identify the authors of defamatory content published about them online, subpoenaing ISPs can prove to be fruitful – even when it is necessary to first receive court authorization.

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