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INTERNET LAW - Internet Search Engines And Privacy Under The Subpoena Power Of The United States Rules Of Civil Procedure

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May a search engine company be subpoenaed to produce documents (search inquiry terms and index of websites) as a third party to a civil litigation? A simplistic and short answer may be, yes. Yet within a litigation context, this question entails deep analysis of rules 26 and 45 of the United States ("U.S.") Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and the specific facts of each case. Some important questions to ask are the following. Is the government or a private party the one requesting the subpoena? What is the scope of the request for production? In what state is the litigation being held? What is the underlying cause of action?

U.S. case law shows that compelling a search engine company, as a third party, to produce documents about its users' inquiry terms, e-mail content, and URL indexes is a broad topic that has been solve in a case-by-case basis. In addition, some search engine companies like Google are more protective of its clients' information than others and may be willing to quash or request modification of the subpoena, which definitely changes the outcome of the case.

Since the subpoena power is a procedural question in nature, most U.S. Courts have avoided the privacy issue analysis when facing cases where Internet search engine companies have been subpoenaed to produce documents related to search activities. Thus, the issue of subpoena to Internet search engines and privacy is still in its developing stage.

Subpoena is a court order directing a party to testify or produce documents. Subpoenas may be directed to parties to the litigation or third parties.

In the U.S., a third party may be subpoenaed under Fed. R. Civ. P. 45. This rule governs the form of subpoenas, the service on the other party, duties of the parties, protection of the parties being subpoenaed, opportunity and terms to reply and opportunity to modify or quash a subpoena order. Subpoena to third parties must also comply with the general discovery limitations imposed by 26 Fed. R. Civ. P.

A well-known case about subpoena to an Internet search engine was Gonzales v. Google, 234 F.R.C. 674 (US Dist. N. CA 2006). In this case, the U.S. Department of Justice (USDOJ)

subpoenaed Google to produce a great amount of information to be used on a privacy case not involving Google as a party. Google initially refused production of these documents. After some litigation and request for modification of the subpoena, Google was ordered to provide some sample of Google's URL index but was not compelled to provide users' inquiry terms.

Search engines and Internet search providers are currently receiving a great number of subpoenas from government agencies and private parties. In most of these cases, search engines comply with these subpoena orders and do not get involved in costly litigation to defend their client's privacy. The moving party (government or private company) bears the costs implicated with providing the documents requested by the subpoena. In the Google case above, privacy won but only because of Google's willingness to protect its client's information.

Q: What are the most relevant considerations for subpoenas to Internet search engines under rule Fed. R. Civ. P. 45?

(1) The requesting party may not subject the Internet search engine to an 'undue burden.' Fed. R. Civ. P. 45(c)(3)(A). What is an undue burden will be considered in a case-by-case basis. Most courts will consider the time, costs and resources necessary to produce the requested documents. To decide on the proprietary of the subpoena, courts will balance the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena. See Gonzales v. Google.

(2) Fed. R. Civ. P. 45(c)(3)(B) establishes limitation on the request of 'trade secrets and confidential research, development, or commercial information from third parties. The third party may quash or request modification of the subpoena based on this limitation. The third party must show that this information is 'important proprietary information' and that the information has been historically protected by the company. It is important to note compelling production of trade secrets is not unreasonable when the court imposes safeguards.

Once the third party shows that the information requested is a trade secret or confidential commercial information, the requesting party must show substantial need for these documents and hardship if they are not provided (shift of the burden). The moving party may also offer compensation for the efforts involved in the production of the documents requested.

Upon consideration of these factors, courts would balance the substantial need of the moving party and possible hardship against the third party's claim of injury. Then, the court may order production of documents subject to the conditions it deems necessary.

Internet search engine companies quashing or requesting modification of a subpoena under this subsection (3)(B) have usually included the privacy issue for its users as a business necessity for them. They claim injury may result if private information is not protected. In other words, the approach should be: what are the damages suffered by the Internet search engine company if its users' private information is revealed. Discussion of substantive privacy law is irrelevant within the context of subpoena matters. Instead, business necessity and injury should be the focus.

Q: What are the most relevant considerations for subpoenas to Internet search engines under rule Fed. R. Civ. P. 26?

(1) Fed. R. Civ. P 26 imposes limitations to discovery methods that are likewise applicable to subpoena to third parties. Fed. R. Civ. P 26(b)(2)(i), (ii) and (iii) says the discovery method

should be limited when, (i) the discovery method is unreasonably cumulative or duplicative, or may be obtained from other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery had ample opportunity during the discovery period to obtain the information sought; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the relevance of the proposed discovery in resolving the issues.

Some of the documents requested from Internet search companies may be cumulative, time consuming and expensive. This is an excellent rule for search engines to try to modify subpoena requirements. Yet, the court will decide these issues under its discretionary powers.

(2) The evidence sought must be reasonable calculated to lead to admissible evidence. Fed. R. Civ. P 26(b). This means, any information sought through subpoena from third parties must be relevant to the claims and defenses in the underlying case. Overbroad subpoenas containing request for irrelevant evidence may be quashed or modified. Indeed, even request for relevant evidence may be quashed or modified under the undue burden principle in rule 45.

(3) Fed. R. Civ. P 26(c) provides an opportunity for the Internet search engine (or any subpoenaed party) to argue public interest, need of confidentiality and privacy interests as elements to be considered by the court when performing its balancing test.

Q: May the government subpoena a search engine company as a third party?

Yes, the government may subpoena Internet search engine companies like any other private party. A good example of this is found in Gonzales v. Google. The USDOJ subpoenaed Google to gather and produce a great amount of documents from Google's search index and to turn significant number of search queries from Google's users. The same request was made to Yahoo, American Online (AOL), and Microsoft, Inc. Google objected and USDOJ filed an action to compel Google to comply with the subpoena.

The USDOJ required these documents to prove its case in ACLU v. Gonzales, a case in the Eastern District of Pennsylvania, where ACLU (American Civil Liberties Union) and other plaintiffs had sued the government arguing that the Child Online Protection Act (COPA) was unconstitutional.

Q: What are the interests involved and the holding in this action to compel against Google?

The Court considered that this action to compel raised three vital interests, (i) "the national interest in a judicial system to reach informed decisions through the power of subpoena to compel a third party to produce relevant information; (ii) the third party's interest in not being compelled by a subpoena to reveal confidential business information and devote resources to a distant litigation; (3) the interest of individuals in freedom from general surveillance by the Government of their use of the Internet or other communication media."

These are important issues to be measured by a search engine company because they clearly set the factors considered by courts in their balancing test when deciding the propriety of a subpoena.

Google was ordered to confer with the USDOJ to develop a protocol of random selection of 50,000 URLs in Google's database provided that certain conditions were met. The Court denied the USDOJ request to compel Google to disclose search queries of its users.

The Court held that the USDOJ did not prove 'substantial need' for the information contained in the users' queries and that this could constitute duplicative discovery if combined with the sample of URLs. Faced with duplicative discovery, the court held, "the marginal burden of loss of trust by the search engine's users based on the search engine's disclosure of its users' search queries to the government outweighed the duplicative disclosure's likely benefit to the government's case."

Q: May an Internet service provider or search engine company oppose to a subpoena as direct party claiming protection under the safe harbor provisions of 17 U.S.C §512?

Yes, in Charter Communications, Inc., 393 F.3d 771 (Ct. App. 8th Cir. 2005), the court held for the Internet service provider (ISP) stating that subpoena to the ISP was only authorized after notification in accordance with the provisions of §512(c)(3)(A), which provided 'safe harbors' for certain ISPs that had the opportunity to remove stored infringing material.

This was a copyright infringement case where the ISP was subpoenaed to produce documents showing the infringement. The ISP had not been notified of the infringing activity and claimed to be a mere conduit for the transmission of data. Therefore, applying the principles of the Digital Millennium Copyright Act (DMCA), the ISP first must have been notified under 17 U.S.C. §512(c)(3)(A) before any subpoena could have been granted.

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