

Uncertainty In IP Address-Based Identification: Protecting The Innocent Internet Service Subscriber

A general framework regarding when plaintiffs are entitled to subpoena an ISP for subscriber information has emerged. *See, e.g., Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). However, this framework does not address a key issue – the risk that ISP subscriber information will fail to identify a defendant with sufficient specificity to permit that defendant to be named in a civil suit.

An IP address identifies a router/modem. But it does not identify which computer was the source of an offending transmission; nor does it identify which human was using the computer at the relevant time – it cannot distinguish between the ISP subscriber and a household member, visitor, neighbor, employee, etc. There are 2.6 people, and often multiple computing devices, per household in the U.S., and the use of wireless routers that may be accessible to people outside the household is growing rapidly. Accordingly, the chance that an IP address identifies a particular person can often be less than 30%. Recent court decisions have denied early discovery (thereby ending cases before they begin) based in part on the uncertainty inherent in IP address identifications. Even in those cases that are allowed to proceed, courts may be inclined to limit the scope of discovery against a defendant who may be 70% likely to be innocent.

This problem is present any time an IP address is needed to prove a defendant's identity, but is particularly acute in the intellectual property context. For example, in bittorrent-based copyright infringement matters, the only information a copyright owner has about a defendant is their IP address.

In this article, I will propose an analytical framework that balances the risk that innocent internet subscribers may be subjected to burdensome litigation, against the need for plaintiffs harmed by anonymous internet users to pursue legal remedies. Denying early discovery may be an appropriate remedy in some cases; while in others staging/limiting discovery or encouraging early pre/post-suit investigation into the true identity of the defendant prior to naming them may serve to adequately mitigate harm to innocent subscribers. I will identify categories of evidence that may be helpful in narrowing down a defendant's identity, and propose approaches to gathering such evidence. Finally, I will look to analogous areas of the law to determine how uncertainty as to a defendant's identity is resolved in other contexts.