

ASSEMBLY BILL

No. 1143

Introduced by Assembly Member Simitian

February 21, 2003

An act to add Chapter 4 (commencing with Section 2040) to Title 3 of Part 4 of the Code of Civil Procedure, relating to Internet communications.

LEGISLATIVE COUNSEL'S DIGEST

AB 1143, as introduced, Simitian. Civil procedure: Internet communications.

Existing law establishes the procedures by which a party may seek to produce evidence in a civil action.

This bill would establish the Internet Communications Protection Act, governing civil proceedings in which a party requests a subpoena seeking identifying information from an Internet provider or community host. The bill would require a person seeking identifying information about an Internet user to file a copy of the subpoena, along with specified supporting documents, with the court. The bill would set forth the subpoena procedures a party is required to follow for serving the Internet service provider, and the procedures the Internet provider must follow in responding to a subpoena. The bill would also establish remedies, including attorney's fees and costs and unspecified statutory damages, for violations of the act and would enact other related provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. This act shall be known as, and may be cited as,
2 the Internet Communication Protection Act of 2003.

3 SEC. 2. Chapter 4 (commencing with Section 2040) is added
4 to Title 3 of Part 4 of the Code of Civil Procedure, to read:

5

6 CHAPTER 4. IDENTITY OF INTERNET USERS

7

8 2040. For the purposes of this chapter, the following
9 definitions apply:

10 (a) "Identifying information" includes the following
11 information regarding an Internet user:

12 (1) A first or last name.

13 (2) A pseudonym.

14 (3) A home or other physical address, including street name or
15 name of a city or town.

16 (4) An e-mail address.

17 (5) A telephone number.

18 (6) A social security number.

19 (7) Any other identifier that permits the physical or online
20 contacting of a specific individual.

21 (b) "Internet service provider" means a provider of online
22 services or the operator of online service facilities.

23 (c) "Community host" means the owner, moderator, or
24 operator of an online bulletin board, online newsgroup, or other
25 online discussion forum.

26 (d) "Internet user" means an individual who subscribes to or
27 uses the online services or facilities of an Internet service provider
28 or the forum of a community host.

29 2041. The following procedure governs civil proceedings in
30 which a party requests a subpoena seeking identifying information
31 from an Internet service provider or community host:

32 (a) A party seeking identifying information about an Internet
33 user shall file with the court a complete copy of the subpoena and
34 all items annexed or incorporated therein, along with the following
35 supporting materials:

36 (1) Evidence supporting each element of the cause of action,
37 which may include proof of economic harm.

38 (2) A statement establishing all of the following:



1 (A) That the subpoenaing party's claim can withstand a motion
2 to dismiss for failure to state a claim upon which relief can be
3 granted.

4 (B) Why the identity of the Internet user is directly and
5 materially relevant to a core claim or defense.

6 (C) That other reasonable efforts to identify the anonymous
7 communicator have proven fruitless.

8 (D) That the individuals or entities to whom the subpoena is
9 addressed are likely to have responsive information.

10 (b) After filing the subpoena and supporting materials with the
11 court, the subpoenaing party shall, at least 35 days before the date
12 of disclosure, serve two copies of each of all of the following:

13 (1) The subpoena.

14 (2) The supporting materials described in paragraphs (1) and
15 (2) of subdivision (a).

16 (3) The required notices described in subdivision (h), upon the
17 Internet service provider or community host along with sufficient
18 payment to cover postage for the Internet service provider or
19 community host to mail one copy of the served materials to the
20 Internet user, via international mail, return receipt requested.

21 (c) Within five days after receipt of a subpoena and supporting
22 materials calling for disclosure of identifying information or a
23 written objection, motion to quash, or motion for a protective order
24 in response to the subpoena from a party other than the Internet
25 user, the Internet service provider or community host shall provide
26 notice as follows:

27 (1) If a mailing address is on file with the Internet service
28 provider or community host, one copy of the materials described
29 in subdivision (a) shall be dispatched by registered mail or
30 commercial delivery service, return receipt requested, to the
31 Internet user.

32 (2) If an e-mail address is on file with the Internet service
33 provider or community host, an e-mail shall be sent to the Internet
34 user stating that the subpoena or the written objection, motion to
35 quash, or motion for a protective order has been received.

36 (3) If the claim advanced by the plaintiff relates to an online
37 bulletin board posting by the Internet user, the Internet service
38 provider or community host shall post notice on the online bulletin
39 board where the posting has been made stating that the subpoena
40 or the written objection, motion to quash, or motion for a



1 protective order has been received, if any of the following
2 conditions are satisfied:

3 (A) Neither the e-mail address nor mailing address is on file.

4 (B) The Internet service provider or community host receives
5 notice that both the onfile e-mail and on file mailing address are
6 incorrect or out-of-date, such as via a returned mailing or bounced
7 e-mail.

8 (C) The Internet service provider or community host receives
9 notice that the onfile e-mail address is incorrect or out-of-date,
10 such as via a bounced e-mail, and the mailing address is not on file.

11 (D) The Internet service provider or community host receives
12 notice that the onfile mailing address is incorrect or out-of-date,
13 such as via a returned mailing, and the e-mail address is not on file.

14 (4) The Internet service provider or community host has no
15 responsibility to research the e-mail or mailing address of the
16 Internet user if either is not on file or if either is incorrect or
17 out-of-date.

18 (d) The Internet service provider or community host to whom
19 the subpoena is addressed may not release the information
20 requested by the subpoena in either of the following cases:

21 (1) Where a written objection, motion to quash, or motion for
22 a protective order has been filed in accordance with subdivision
23 (e).

24 (2) Where the subpoenaing party has not complied with
25 subdivision (a) or (b).

26 (e) At least five days prior to the date of disclosure as stated on
27 the subpoena, any interested person may file a written objection,
28 motion to quash, or motion for a protective order.

29 (1) Copies of any of the papers filed by the Internet user shall
30 be served on or before the date of filing upon the party seeking the
31 subpoena and the Internet service provider or community host.

32 (2) Copies of any of the papers filed by the Internet service
33 provider or community host shall be served on or before the date
34 of filing upon the party seeking the subpoena and the Internet user
35 whose subscriber identifying information is sought.

36 (3) A copy of any of the papers filed by any other interested
37 party shall be served on the subpoenaing party on or before the date
38 of filing. Two copies of those papers, including payment sufficient
39 to cover postage for the Internet service provider or community
40 host to mail one copy of the served materials to the Internet user,



1 via domestic registered mail, return receipt requested shall be
2 served upon the Internet service provider or community host. The
3 Internet service provider or community host shall provide notice
4 of those papers to the Internet user through the procedure
5 described in subdivision (c).

6 (4) For service pursuant to paragraphs (1) to (3), inclusive,
7 service is effective upon dispatch.

8 (f) Any written objection, motion to quash, or motion for a
9 protective order shall set forth all of the grounds relied upon for
10 denying the disclosure sought in the subpoena and shall also
11 address, to the extent feasible, the following:

12 (1) Whether the subpoena fails to allow a reasonable time for
13 compliance.

14 (2) Whether the subpoena complies with the requirements of
15 subdivision (a).

16 (g) When considering a written objection, motion to quash, or
17 motion for a protective order, the court shall examine whether the
18 subpoenaing party and the Internet service provider or community
19 host have substantially complied with the requirements set forth
20 in this chapter and all of the following factors:

21 (1) The defendant's First Amendment right of anonymous free
22 speech.

23 (2) The strength of the case presented in the supplemental
24 materials listed in subdivision (a).

25 (3) The necessity for disclosure of the Internet user's identity.

26 If the court determines that these elements weigh in favor of the
27 Internet user, the court shall quash the subpoena.

28 (h) The party requesting a subpoena for identifying
29 information shall serve, along with each copy of the subpoena to
30 the Internet service provider or community host, a copy of this
31 chapter of the California Code of Civil Procedure and notices in
32 boldface capital letters in substantially the following form:

33

34

35 “(1) NOTICE TO INTERNET SERVICE PROVIDER OR
36 COMMUNITY HOST

37

38

39 WITHIN FIVE DAYS AFTER RECEIPT OF THIS SUBPOENA
40 CALLING FOR IDENTIFYING INFORMATION OF AN



1 INTERNET USER, YOU ARE REQUIRED BY SECTION 2041
2 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE TO
3 MAIL ONE COPY OF THE SUBPOENA AND ATTACHED
4 SUPPLEMENTAL MATERIALS, BY REGISTERED MAIL,
5 RETURN RECEIPT REQUESTED, TO THE INTERNET USER
6 WHOSE IDENTIFYING INFORMATION IS THE SUBJECT
7 OF THE SUBPOENA, IF YOU HAVE THE INTERNET
8 USER'S MAILING ADDRESS ON FILE. A COPY OF THE
9 SUBPOENA AND SUPPLEMENTAL MATERIALS IS
10 PROVIDED, ALONG WITH PAYMENT FOR POSTAGE. YOU
11 MUST ALSO NOTIFY THE INTERNET USER VIA E-MAIL,
12 IF YOU HAVE THE INTERNET USER'S E-MAIL ADDRESS
13 ON FILE. IF NEITHER MAILING NOR E-MAIL ADDRESS IS
14 ON FILE FOR THE INTERNET USER, YOU MAY BE
15 REQUIRED BY THIS STATUTE TO POST A NOTICE ON AN
16 ONLINE BULLETIN BOARD.

17
18 AT FIVE DAYS PRIOR TO THE DATE ON WHICH
19 DISCLOSURE IS SOUGHT YOU MAY, BUT ARE NOT
20 REQUIRED TO, FILE A WRITTEN OBJECTION, MOTION
21 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER.

22
23 COPIES OF ANY OBJECTION OR MOTION SHALL BE
24 SERVED UPON THE PARTY INITIATING THE SUBPOENA
25 AND UPON THE INTERNET USER WHOSE IDENTIFYING
26 INFORMATION IS SOUGHT.

27
28 IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA,
29 YOU MUST ALLOW TIME FOR THE INTERNET USER TO
30 FILE HIS OR HER OWN OBJECTION. THEREFORE, YOU
31 MUST NOT RESPOND TO THE SUBPOENA ANY EARLIER
32 THAN THE DATE ON WHICH DISCLOSURE IS DUE.

33
34 IF YOU RECEIVE NOTICE THAT THE INTERNET USER OR
35 ANOTHER INTERESTED PARTY HAS FILED A WRITTEN
36 OBJECTION, MOTION TO QUASH, OR MOTION FOR A
37 PROTECTIVE ORDER REGARDING THIS SUBPOENA, OR
38 IF YOU FILE A WRITTEN OBJECTION, MOTION TO
39 QUASH, OR MOTION FOR A PROTECTIVE ORDER,
40 DISCLOSURE PURSUANT TO THE SUBPOENA MAY NOT



1 BE MADE EXCEPT PURSUANT TO AN ORDER OF THE
2 COURT ON BEHALF OF WHICH THE SUBPOENA WAS
3 ISSUED.

4
5 (2) NOTICE TO INTERNET USER
6

7 THE ATTACHED PAPERS MEAN THAT (INSERT NAME OF
8 SUBPOENAING PARTY) HAS ASKED THE COURT TO
9 ISSUE A SUBPOENA (INSERT NAME OF INTERNET
10 SERVICE PROVIDER OR COMMUNITY HOST)
11 REQUIRING PRODUCTION OF INFORMATION
12 REGARDING YOUR IDENTITY. UNLESS A WRITTEN
13 OBJECTION, MOTION TO QUASH, OR MOTION FOR A
14 PROTECTIVE ORDER IS FILED IN ACCORDANCE WITH
15 SECTION 2041 OF THE CALIFORNIA CODE OF CIVIL
16 PROCEDURE, THE INTERNET SERVICE PROVIDER WILL
17 BE REQUIRED BY LAW TO RESPOND BY PROVIDING THE
18 REQUIRED INFORMATION. IF YOU BELIEVE YOUR
19 IDENTIFYING INFORMATION SHOULD NOT BE
20 DISCLOSED, YOU HAVE THE RIGHT TO FILE A DETAILED
21 WRITTEN OBJECTION, MOTION TO QUASH THE
22 SUBPOENA, OR MOTION FOR A PROTECTIVE ORDER.

23
24 YOU MAY ELECT TO CONTACT AN ATTORNEY TO
25 REPRESENT YOUR INTERESTS.

26
27 IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION
28 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER, IT
29 SHOULD BE FILED AS SOON AS POSSIBLE, AND MUST IN
30 ALL INSTANCES BE FILED BEFORE THE DATE ON WHICH
31 DISCLOSURE IS DUE (LISTED IN THE SUBPOENA).

32
33 IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION
34 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER,
35 YOU MUST AT THE SAME TIME SERVE A COPY OF THAT
36 OBJECTION OR MOTION UPON BOTH YOUR INTERNET
37 SERVICE PROVIDER OR COMMUNITY HOST AND
38 SUBPOENAING PARTY. SERVICE IS EFFECTIVE UPON
39 DISPATCH.

40



1 IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN
2 WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY
3 FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR
4 MOTION FOR A PROTECTIVE ORDER. YOU MAY USE THE
5 FORM BELOW:

6
7 (Name of Court Listed on Subpoena)
8
9 (Name of Party Seeking Information)
10
11 (Case No. ____)

12
13
14 SAMPLE OBJECTION TO SUBPOENA DUCES TECUM

15
16 I object to the Subpoena Duces Tecum addressed to ____ for the
17 following reasons:

18
19 (Set forth, in detail, all reasons why the subpoena should not be
20 complied with, including the following: (1) whether the subpoena
21 fails to allow a reasonable time for compliance, and (2) whether
22 the subpoena fails to comply with the requirements of subdivision
23 (a).

24
25 (Name and address of Internet Service Provider or Community
26 Host)

27
28 (Enter e-mail nickname or other alias used in communicating via
29 the Internet service provider or community host to whom the
30 subpoena is addressed.)”

31
32 2042. (a) A prevailing Internet user, Internet service provider
33 or community host, or other interested party on a written objection,
34 motion to quash, or motion for a protective order pursuant to this
35 chapter shall be entitled to recover his or her attorney’s fees and
36 costs.

37 (b) An Internet user may bring a civil action pursuant to this
38 chapter against either or both the subpoenaing party and the
39 Internet service provider or community host in a California court
40 for damages caused by the release of identifying information by



1 the Internet service provider or community host that fails to
2 comply with this statute. A civil action under this section may not
3 be commenced later than one year after the date upon which the
4 claimant first has a reasonable opportunity to discover the
5 violation. The court may award the following to the Internet user:

6 (1) Reasonable attorneys' fees and other litigation costs
7 incurred.

8 (2) Actual damages, including economic loss and emotional
9 damages.

10 (3) Statutory damages, described as follows:

11 (A) Minimum statutory damages of ____ dollars (\$____) shall
12 be imposed upon the subpoenaing party for failure to comply with
13 subdivision (a) or (h) of Section 2041, leading to the release of
14 identifying information.

15 (B) Minimum statutory damages of ____ dollars (\$____) per
16 day shall be imposed for each day the Internet service provider or
17 community host is delayed, after five days from receiving the
18 subpoena, in providing notice to the Internet user, in violation of
19 subdivision (c) of Section 2041.

20 (C) Minimum statutory damages of shall be imposed on the
21 Internet service provider or community host for releasing
22 identifying information when a written objection, motion to
23 quash, or motion for a protective order is pending, in violation of
24 subdivision (d) of Section 2041.

25 (c) For a repeat violation of the statute by any party a minimum
26 penalty of ____ dollars (\$____) shall be imposed.

27 2043. The following defenses to an action for damages
28 pursuant to this chapter may apply:

29 (a) For the subpoenaing party, a good faith attempt by that party
30 to provide notice to the Internet service provider or community
31 host.

32 (b) For the Internet service provider or community host:

33 (1) A good faith attempt to provide notice to the Internet user
34 by complying with the notification procedures in subdivisions (c)
35 and (h) of Section 2041.

36 (2) A good faith reliance upon the notices provided by the
37 subpoenaing party.

38 (3) A reliance upon the lack of notice by the Internet user or
39 other interested parties, before the date on which disclosure is due,



1 that a written objection, motion to quash, or motion for protective
2 order has been filed with the court.

3 (4) After receiving notice of the subpoena from the Internet
4 service provider or community host, the Internet user submits a
5 signed letter to the Internet service provider or community host,
6 consenting to the release of his or her identifying information.

7 2044. Any federal or other state law that provides greater
8 protection of an Internet user's identity may supersede application
9 of this chapter in any particular case.

