The Parameters of Electronic Communication Discovery by Foreign Litigants

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Global use of U.S.-based electronic communication service providers (ECSPs) has proliferated[1] such that many foreign disputes necessarily involve communications sent or received through, for example, Gmail, Yahoo, and Hotmail. The ability to obtain discovery from these service providers in aid of foreign litigation thus has become a hotly litigated issue. This article first will discuss the legal framework of judicial assistance to foreign proceedings under 28 U.S.C. § 1782 ("Section 1782") and then explore how Section 1782 discovery from ECSPs may implicate privacy concerns under the Stored Communications Act (SCA)[2] and the First Amendment right to anonymous speech.

The Legal Framework of Section 1782 Discovery

Under Section 1782, a district court has discretion to order a person (individual or entity) within its jurisdiction to produce a testimony, statement, document, or other thing "for use" in foreign proceedings.[3] The federal statute thereby enables foreign litigants to gather evidence through the U.S. federal discovery system—the scope of which is "far broader than in most (maybe all) foreign countries."[4] Section 1782 has "twin aims" of furthering international comity: (1) providing efficient means of discovery to international litigants in federal courts, and (2) encouraging foreign countries by way of example to reciprocate such assistance to U.S. courts.[5] Foreign litigants frequently have sought Section 1782 discovery for use in various foreign fora, such as Canada, Australia, England, Japan, China, South Korea, Cambodia, the Netherlands, and Switzerland.

Upon a foreign litigant's Section 1782 application,[6] courts consider three statutory prerequisites and four discretionary factors. Section 1782 provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." The statute thus has the following three statutory prerequisites that district courts first evaluate (1) whether the person from whom discovery is sought "resides or is found" in the district; (2) whether the discovery is "for use" in the foreign proceeding; and (3) whether the application is made by the foreign tribunal or any "interested person."[7]

Once the statutory requirements are met, courts then may consider four discretionary factors, also known as the *Intel* factors: (1) whether the person from whom discovery is sought is "a participant in the foreign proceeding" or the evidence sought is "unobtainable absent" Section 1782 aid; (2) the nature of the foreign tribunal and proceedings, and the "receptivity" of the foreign government, court, or agency to Section 1782 assistance; (3) whether the Section 1782 request conceals an attempt to "circumvent foreign proof-gathering restrictions" or other foreign or U.S. policies; and (4) whether the subpoena contains "unduly intrusive or burdensome requests."[8]

Importantly, courts look to the Federal Rules of Civil Procedure to guide their Section 1782 analysis: "To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure."[9] For instance, the Second Circuit recently held that the "resides or is found" language should be broadly construed to reach the full limits of personal jurisdiction consistent with due process, pursu-

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ant to the Federal Rules of Civil Procedure.[10] The same court also echoed an earlier Eleventh Circuit ruling that Section 1782 discovery may reach evidence located overseas, because Rule 45 of the Federal Rules of Civil Procedure authorizes extraterritorial discovery as long as the information sought is within the subpoenaed parties' possession, custody, or control.[11]

Likewise, the "for use in a foreign tribunal" requirement mirrors the relevance requirement of Rule 26(b)(1) of the Federal Rules of Civil Procedure. That is, the evidence sought need not be admissible to be discoverable under Section 1782,[12] but the applicant still needs to show that it is "relevant" to the claims or defenses in the foreign proceeding.[13] This relevance requirement dovetails with the fourth *Intel* factor, or whether the subpoena contains "unduly intrusive or burdensome requests." Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery must be relevant and "proportional to the needs of the case," considering the importance of the issues at stake, the importance of the discovery in resolving them, and "whether the burden or expense of the proposed discovery outweighs its likely benefit."[14] Section 1782 requests thus are unduly intrusive and burdensome, if overbroad or fishing for irrelevant information.[15]

Several courts have invalidated Section 1782 subpoenas on ECSPs on the grounds of irrelevancy and over-breadth. In *Rainsy v. Facebook Inc.*, a court in the Northern District of California denied a Section 1782 application for third-party discovery from Facebook for use in defamation proceedings in Cambodia.[16] The court denied the application in part because several requests (e.g., Facebook users' advertising payment information, communications with Facebook, communications on unrelated topics) were unrelated to the defamation actions in Cambodia and included no temporal or topical limitations.[17] On similar grounds, another court in the same district granted anonymous non-party movants' motion to quash a Section 1782 subpoena served on Google, which sought their personal Google account information in connection with defamation claims in Canada.[18] The court engaged in a Rule 26(b) analysis, and quashed the subpoena because the applicant had failed to show any obvious connection between the subpoenaed Google accounts and the allegedly defamatory statements at issue in the Canadian litigation.[19]

The SCA and First Amendment Implications of Section 1782 Subpoenas on ECSPs

When ECSPs are involved, Section 1782 subpoenas may require additional considerations other than the above seven factors. Subpoenas on ECSPs seeking contents of electronic communications may implicate service users' right of privacy under the SCA. Subpoenas seeking to identify authors of online anonymous speech may also trigger scrutiny under the First Amendment.

The SCA Protection of Contents of Communications

Civil subpoenas on ECSPs are subject to the SCA, or Title II of the Electronic Communications Privacy Act (ECPA) of 1986, which prohibits ECSPs from knowingly disclosing contents of electronically stored communications. The SCA mandates that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[20] Congress legislated the SCA in 1986, in response to potential privacy concerns left unaddressed by the Fourth Amendment in the advent of the Internet.[21] The SCA applies to Section 1782 subpoenas, including ones seeking discovery from foreign citizens.[22]

The key question is whether a given subpoena would force an ECSP to disclose the "contents of a communication" in violation of the SCA. The term "contents" is defined as "any information concerning the substance, purport, or meaning."[23] The Ninth Circuit held that the term refers to the "intended message conveyed" *by* the communication, and excludes the automatically generated "record information" *about* the communication (e.g., subscriber number or identity, names, addresses).[24] The same court, however, also agreed with a First Circuit decision that subscription information may constitute the contents of the subscribers' communications *to* ECSPs, where the subscribers "enter[ ] their personal [ ] information into a form provided by a website."[25] Likewise, the court acknowledged, Google search URLs may reveal the contents of the searchers' communications *to* Google (e.g., choice of search engine, search terms).[26]

Two rulings from the Northern District of California further illuminate on the scope of the SCA's reach.[27] First, in *Optiver v. Tibra*, the court partially granted the foreign defendant's motion to quash a Section 1782 subpoena on Google, which sought information about Gmail communications for use in a commercial litigation in Australia.[28] The court allowed discovery of purely non-content metadata, but it quashed the requests seeking (1) subject lines of communications and (2) information about communications narrowed by specific search terms. In so doing, the court held that the SCA forbade discovery of communicative contents "no matter how insignificant."[29] Second, in the aforementioned case of *Rainsy*, the court ruled that the SCA prohibited Section 1782 discovery from Facebook of (1) communications between and among certain users and (2) identities of users who "liked" a certain Facebook page.[30] Notably, the court reasoned that "liking" is a form of speech that communicates the substantive message of approval, and the speaker's identity is an "important component" of this message.[31]

The First Amendment Protection of Online Anonymous Speech

Where a Section 1782 subpoena on an ECSP specifically seeks identifying information of anonymous speakers (akin to Facebook "likers" in *Rainsy*), courts also may evaluate the subpoena's "potential chilling effect" on First Amendment rights under the fourth *Intel* factor.[32]

It is well established that the First Amendment protects anonymous speech.[33] In the Ninth Circuit, online anonymous speech "stands on the same footing" as other traditional forms of anonymous speech.[34] Anonymous speech is subject to varying degrees of protection, depending on whether it is political, religious, or literary speech (highest), commercial speech (intermediate), or unprotected speech such as fighting words, obscenity, and defamation.[35] Courts have devised a variety of First Amendment standards to assess whether the requested discovery merits unmasking an anonymous speaker's identity. Several of these standards require a showing that the underlying claim would survive a motion to dismiss; a *prima facie* showing of the underlying claim; or a showing that the claim would survive a hypothetical motion for summary judgment.[36]

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In evaluating the First Amendment implications of Section 1782 discovery, courts in the Northern District of California have routinely applied two standards known as the *Jommi* test and the *Highfields* test. Under the *Jommi* standard, courts evaluate whether there is "good cause" to permit identification of an anonymous speaker under Rule 26(d) of the Federal Rules of Civil Procedure.[37] Under the *Jommi* test, courts consider whether the Section 1782 applicant (1) identifies "a real person subject to suit" with sufficient specificity; (2) identifies "all previous steps" taken to identify this party; (3) demonstrates that the foreign action can "withstand a motion to dismiss"; and (4) shows that the discovery is likely to reveal identifying information.[38] The third "motion to dismiss" factor is of central importance, as it invites substantive albeit preliminary analysis of the anonymous statements at issue and the governing law.[39]

Under the *Highfields* test, courts evaluate the potential chilling effect of Section 1782 discovery on the First Amendment right to anonymous *commercial* speech.[40] To satisfy this test, the plaintiff-applicant must show the following: (1) "a real evidentiary basis" for believing that the defendant has engaged in wrongful conduct that has caused real harm to the plaintiff; and (2) that the balance of each party's "competing interests" weighs in favor of discovery.[41] For the first prong, the applicant must go beyond mere pleadings and allegations, and must adduce "*competent evidence* [that,] if unrebutted, tend[s] to support a finding of *each* fact that is essential to a given cause of action."[42] "[I]f, but only if," the applicant makes this evidentiary showing does the court proceed to assess the balance of harms to each party that would be caused by the discovery.[43]

The Northern District of California case in *In re Yasuda* is illustrative. The court denied, on reconsideration, Twitter's motion to quash a Section 1782 subpoena seeking the anonymous defendant's identity for use in defamation proceedings in Japan.[44] In the prior order granting Twitter's motion, the court initially held the *Jommi* test unsatisfied because the applicant Yasuda had provided no support that his defamation claim could withstand a motion to dismiss under Japanese law.[45] The *Highfields* test also had not been satisfied because the anonymous tweets at issue were found legitimate commercial speech, the First Amendment implications of which would outweigh any harm to Yasuda.[46] On reconsideration, however, the court reversed course upon a newly-submitted Tokyo district court order finding that the anonymous statements were defamatory under Japanese law. The court found that this foreign judicial order not only satisfied the "motion to dismiss" threshold, but also demonstrated that the tweets were in fact defamatory speech, in which the anonymous defendant had no protectable First Amendment interest to outweigh the now-proven real harm to Yasuda.[47]

Conclusion

Section 1782 can be a broad discovery tool for foreign litigants, especially because it can provide access to electronic communications and information from U.S.-based ECSPs. Section 1782 discovery from ECSPs, however, has well-defined and multi-layered boundaries. Litigants seeking to obtain Section 1782 discovery or defend against subpoenas for such discovery must become familiar with the articulated standards for such discovery, and be guided by the limiting principles of the Federal Rules of Civil Procedure, the SCA, and the First Amendment.

Endnotes

1. Google alone accounted for 1.5 billion global email users as of late 2019. *Google's Rocky Path to Email Donation*, CNBC (Oct. 26, 2019), https://www.cnbc.com/2019/10/26/gmail-dominates-consumer-email-with-1point5-billion-users.html?.
2. 18 U.S.C. §§ 2701, *et seq.*
3. 28 U.S.C. § 1782(a).
4. *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011).
5. *Mees v. Buiter*, 793 F.3d 291, 297–98 (2d Cir. 2015) (quotation omitted).
6. Applicants may submit an *ex parte* application for Section 1782 subpoenas. The subpoenaed parties (or potential intervenors) then can raise objections or bring motions to quash the subpoenas. *In re Frontier Co., Ltd.*, No. 19-MC-80184-LB, 2019 WL 3345348, at *2 (N.D. Cal. July 25, 2019) (citation omitted).
7. 28 U.S.C. § 1782(a).
8. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

   For the first factor, the dispositive question is whether discovery is unobtainable but for Section 1782 aid, rather than who provides such discovery. *In re Ex Parte App. of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1039-40 (N.D. Cal. 2016). The second factor generally does not weigh against discovery, unless the foreign tribunal or government has expressed unwillingness to receive Section 1782 assistance. *See, e.g., id.* at 1040-41 (finding this factor weighing against discovery where the foreign agency filed an amicus brief stating no need or use for requested discovery). The third factor also tends to favor discovery where there is "nothing to suggest" otherwise. *In re Google Inc.*, No. 14-MC-80333-DMR, 2014 WL 7146994, at *3 (N.D. Cal. Dec. 15, 2014).
9. 28 U.S.C. § 1782(a).
10. *In re del Valle Ruiz*, 939 F.3d 520, 527-28 (2d Cir. 2019).
11. *Id.* at 533 (citing *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016)).
12. It also need not be admissible in the *foreign* proceeding. *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 77, 82 (2d Cir. 2012).
13. *Rainsy v. Facebook Inc.*, 311 F. Supp. 3d 1101, 1110 (N.D. Cal. 2018).
14. *In re Ex Parte App. of Qualcomm Inc.*, 162 F. Supp. 3d at 1043 (quoting Fed. R. Civ. P. 26(b)(1)).
15. *Id.*
16. 311 F. Supp. 3d at 1116.
17. *Id.* at 1113.
18. Order Granting Mot. to Quash at 13, *In re App. of West Face Capital Inc.*, No. 3:19-mc-80260-LB, (N.D. Cal. Mar. 22, 2020), ECF No. 33.
19. *Id.* at 12 (finding that "under Rule 26(b), the discovery is not obviously relevant to a claim or defense, proportional, or important").
20. 18 U.S.C. § 2702(a)(1).
21. *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.* ("*Optiver v. Tibra*"), No. C 12-80242-EJD (PSG), 2013 WL 256771, at *1 (N.D. Cal. Jan. 23, 2013) (quotation omitted).
22. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 727-28 (9th Cir. 2011).
23. 18 U.S.C § 2510(8).
24. *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1106-1107 (9th Cir. 2014); *see also, e.g., Obodai v. Indeed, Inc.*, No. 13-80027-MISC-EMC, 2013 WL 1191267, at *3 (N.D. Cal. Mar. 21, 2013) (finding that subscriber information and IP address data of Google accounts are non-content).
25. *Id.* at 1107 (citing *In re Pharmatrak, Inc.*, 329 F.3d 9, 15, 18-19 (1st Cir. 2003)).
26. *Id.* at 1108 (citation omitted).
27. Because prominent ECSPs, such as Google, Yahoo, Facebook, and Twitter, are headquartered in the Northern District of California, this article necessarily largely cites case law from this district and the Ninth Circuit.
28. 2013 WL 256771, at *1.
29. *Id.* at *2.
30. 311 F. Supp. 3d at 1114-15.
31. *Id.* (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994)). *Gilleo* is a freedom-of-speech case, and the *Rainsy* court's reliance thereon suggests potentially relevant interactions between the SCA and the First Amendment right to anonymous speech. *Rainsy*, however, did not entertain this possibility.
32. *In re PGS Home Co. Ltd.*, No. 19-MC-80139-JCS, 2019 WL 6311407, at *3 (N.D. Cal. Nov. 25, 2019).
33. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).
34. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).
35. *Id.* at 1773, 1777; *In re Yasuda*, No. 19-MC-80156-TSH, 2020 WL 759404, at *6 (N.D. Cal. Feb. 14, 2020) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002)).
36. *In re Anonymous Online Speakers*, 661 F.3d at 1175-76.
37. Some courts have framed the *Jommi* test as a Rule 26(d) (rather than First Amendment) standard by which courts may authorize early discovery of unknown parties. *See, e.g., In re Hoteles City Express*, No. 18-MC-80112-JSC, 2018 WL 3417551, at *3 (N.D. Cal. July 13, 2018) (citations omitted); *but see In re Yasuda*, 2020 WL 759404, at *5 (noting that "the First Amendment protects the [unknown] speaker from being unmasked" unless the *Jommi* test is satisfied).
38. *In re Ex Parte App. of Jommi*, No. C 13-80212-CRB (EDL), 2013 WL 6058201, at *4 (N.D. Cal. Nov. 15, 2013) (quoting *Columbia Ins. v. Seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999)).
39. *See, e.g., In re Hoteles City Express*, 2018 WL 3417551, at *3 (denying a Section 1782 application because of insufficient information regarding the statements at issue and the governing law in foreign defamation proceedings).
40. *Music Grp. Macao Commer. Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 983 (N.D. Cal. 2015).
41. *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005).
42. *Id.*
43. *Id.* at 976.
44. *In re Yasuda*, 2020 WL 759404, at *1; *see also In re Frontier Co., Ltd.*, 2019 WL 3345348, at *3, *5 (granting a Section 1782 application for discovery from Cloudflare for use in Japanese defamation litigation because the anonymous statements at issue were defamatory *per se*); *but see In re PGS Home Co. Ltd.*, 2019 WL 6311407, at *1, *6 (granting Twitter's motion to quash a Section 1782 subpoena on Twitter for use in Japanese defamation litigation because the anonymous statements at issue were legitimate commercial speech protected by the First Amendment).
45. *In re Yasuda*, No. 19-MC-80156-TSH, 2019 WL 7020211, at *4 (N.D. Cal. Dec. 20, 2019), *on reconsideration*, 2020 WL 759404 (N.D. Cal. Feb. 14, 2020).
46. *Id.* at *6.
47. *In re Yasuda*, 2020 WL 759404, at *6.