Court File No. T-662-16

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA, LLC, CLEAR SKIES NEVADA, LLC, GLACIER ENTERTAINMENT SARL OF LUXEMBOURG, GLACIER FILMS 1, LLC, AND FATHERS & DAUGHTERS NEVADA, LLC

APPLICANTS
(PLAINTIFFS)

- and -

JOHN DOE #1, proposed representative Respondent on behalf of a class of Respondents

RESPONDENT
(DEFENDANT)

- and -

ROGERS COMMUNICATIONS INC.

NON-PARTY RESPONDENT
(Applicants' Disclosure Motion Only)

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLNIC

INTERVENER

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PART I: BACKGROUND AND OVERVIEW

1. The Applicants in this proceeding seek third party discovery against a currently anonymous individual for the purpose of compelling that individual to serve as class representative on behalf of a class of defendants that it alleges have violated its copyrights by means of peer-to-peer file-sharing services. As the Applicants note, the defendant class action procedure they wish to advance in this proceeding is novel, and will constitute the first of its kind in Canada.

> **Applicants, Motion for Disclosure of John Doe #1's personal information, Federal Court File No T-662-16, Written Representations ["Applicants, WR"], para 1**

2. As the Applicants advance this mechanism as a means of monetizing online file-sharing activity. This will constitute the latest on a long list of attempts to exploit various procedural mechanisms in order to monetize online file-sharing activities. Each such attempt has raised its own challenges and issues, often requiring the imposition of its own distinct safeguards.

> **Applicants, WR, para 1**

3. A brief review of these historical attempts is necessary to place the current Application in its proper context and to understand the need for appropriate safeguards in the underlying third-party discovery request. It is also necessary to properly assess the nature and parameters of those safeguards. We point to three such attempts at monetization as in Canada as illustrative.

4. The first such monetization attempt relied on a tariff mechanism and sought to impose a royalty scheme onto Internet Service Providers ("ISPs") such as Rogers Communications Inc, the non-party Respondent in this matter (henceforth "Rogers") by which these ISPs would be responsible for compensating rights holders for copyright infringing activity of their customers. This attempt was ultimately rejected by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 ["*SOCAN v CAIP*"]:

> There is no doubt that the exponential growth of the Internet has created serious obstacles to the collection of copyright royalties. … Nevertheless, by enacting s. 2.4(1)(*b*) of the *Copyright Act*, Parliament made a policy distinction between those who abuse the Internet to obtain "cheap music" and those who are part of the infrastructure of the Internet itself. It is clear that Parliament did not want copyright

> disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.

While recognizing the challenges posed by ubiquitous online infringement, the Court also acknowledged the need to insulate Internet intermediaries such as ISPs from fallout arising from such disputes. It also generally recognized the need to balance end users and rights holders perspectives when addressing such monetization schemes.

> ***Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, 2004 SCC 45, paras 88-89, 129-132**

5. A second attempt involved a copyright infringement lawsuit launched against 29 anonymous Does, each accused of reproducing over 1,000 musical works without authorization. The first stage of this lawsuit was to seek third party discovery from a number of ISPs in order to connect ISP customers with the anonymous pseudonyms alleged to have carried out the offending online activity. This attempt culminated in *BMG Canada Inc v Doe*, 2005 FCA 193 ["*BMG v Doe*"], where the Federal Court of Appeal confirmed the *Norwich* test for third party discovery as the primary vehicle for assessing these types of third party discovery requests. The Federal Court of Appeal also found that the privacy interests of anonymous Does required evidence of sufficient quality to assure the Court that there is no "risk that innocent persons might have their privacy invaded and also be named defendants where it is not warranted." The Applicants in *BMG v Doe* had failed to produce such quality of evidence, relying instead on hearsay evidence from the President of a third party company that provides online anti-piracy protection services. The President in question had not personally conducted the underlying data gathering and, as such, could not offer sufficient assurance to the Court that the IP addresses the Applicants sought to connect to ISP subscribers were in fact those associated with the allegedly infringing copyright activity.

> ***BMG Canada Inc v Doe*, 2005 FCA 193, Applicants' Book of Authorities, Tab 10, paras 6-15, 21**

6. By contrast to *BMG v Doe*, which involved small numbers of Does each alleged to have infringed large numbers of works, current attempts at monetizing online file-sharing activities involved naming large numbers of Does each accused of infringing a small number of

cinematographic works. This new 'mass monetization' approach has raised concerns in various jurisdictions for a number of reasons. A core concern arises from the tendency of some of those advancing this monetization model to avoid adjudication of any individual claims, relying instead on the disproportionate cost inherent in mounting a legal or factual defence in light of any potential damages that could reasonably be obtained. The resulting risk is that even innocent Does will, in the end, pay rather than mount a costly defence. This is particularly concerning in light of the reality that the forensics in question identify 'subscribers' of Internet services, but at least some of these subscribers will be innocent of any infringing activities.

> ***Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, paras 6, 35, 104, 106**

7. Additionally, Courts have been concerned with the propensity of this monetization model to shift rights-enforcement costs to other parties by engaging significant resources of the Courts, innocent ISPs, and public interest organizations that become entangled in their discovery processes. In Canada, *Voltage Pictures LLC v Doe*, 2014 FC 161 ["*Voltage II*"], engaged the Court, an innocent ISP (Teksavvy Solutions Inc, "Teksavvy") and a public interest organization (CIPPIC) in months of litigation. The innocent third party ISP in question incurred $33,400 in recoverable costs as a result of the discovery process initiated by the Applicant therein. However, as payment of these fees is only required if the Applicant seeks the underlying identifying data, the ISP never recovers any of its costs if the Applicant decides it no longer requires that data. In addition, the innocent ISP incurred $177,820.98 in non-recoverable legal fees.

> ***Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, footnote 1 and paras 112; *Voltage Pictures LLC v Doe*, 2015 FC 1364, generally and paras 2-4, 82-84, 88**

8. As a result of these concerns, some Courts have alternatively applied the test for obtaining *Norwich* discovery so as to preclude such actions or imposed significant safeguards "to protect the privacy rights of individuals, and ensure that the judicial process is not being used to support a business model intended to coerce innocent individuals to make payments to avoid being sued." For example, the test for *Norwich* discovery requires that an applicant to demonstrate a *bona fide* intent to bring an action forward and the lack of an improper purpose for doing so. Some courts have found a lack of *bona fide* intent, an improper purpose or an abuse of process and have refused to issue discovery requests in such matters. In *Voltage II*, by contrast, the Court found "some

evidence that Voltage is engaged in litigation which may have an improper purpose", yet this evidence was insufficient to prove lack of *bona fides*. The applicant in *Voltage II* therefore met the *Norwich* test criteria, but the Court still saw fit to impose additional safeguards to preclude any abuse and to minimize the impact on privacy rights as much as possible.

BMG Canada Inc v Doe, 2015 FCA 193, Applicants' Book of Authorities, Tab 10; _Voltage Pictures LLC v Doe_, 2014 FC 161, Applicants' Book of Authorities, Tab 8, paras 34, 40, 57, 106, 110-112, 133-135

9. Against this contextual history, the Applicants now seek to employ another novel mechanism – a reverse class action – to monetize online file-sharing activities of its cinematographic works. As an initial step in its proposed class action proceeding, the Applicants bring the underlying motion to identify a single Doe (Doe #1) for the purpose of naming Doe #1 as a defendant class representative. CIPPIC has been granted leave to intervene in this matter for the sole purpose of addressing the need for safeguards were the underlying *Norwich* order granted. CIPPIC does not concede, but does therefore presume in its remaining submissions, that the Applicants meet the criteria of the *Norwich* test, including the need to demonstrate *bona fides*. In proposing its safeguards, CIPPIC will draw on the historical case law surrounding online copyright infringement monetization attempts, as outlined above.

***Voltage Pictures LLC et al v Doe #1*, 2016 FC 681**

PART II: POSITION ON ISSUES

10. In granting CIPPIC's motion for leave to intervene, CIPPIC was limited to addressing three issues:

    (i) the type and quantity of identification data to be provided by Rogers;

    (ii) limits that may be imposed on the use of such information [*sic*] data;

    (iii) the form of notice that may be required to be provided to the Respondent when served with the Notice of Application.

CIPPIC will address these issues below.

PART III: SUBMISSIONS

11. CIPPIC submits that the privacy interest in anonymous online activity is high. This, in turn, requires safeguards in place to ensure the impact on the privacy of anonymous Does is minimized. In particular, it is important to limit the use of any data obtained by means of this third party discovery. Finally, follow up correspondence to identified Does should include language ensuring it is clear that no determinations of fact or law have been made against the Doe. Overall, the mechanism adopted herein should strike a balance between rights holders and individuals.

> ***Infra*, para 4; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, 2004 SCC 45, paras 88-89, 129-132**

12. The Applicants argue that "there is no reasonable expectation of privacy for an ISP to withhold the personal contact information associated with an IP address", drawing on examples from the criminal search and seizure context. The Applicants further claim that "contact information is generally available in public directories, which weighs against there being an expectation of privacy in it." The Applicants generally suggest that there is little or no privacy interest when an ISP is called upon to identify a customer linked to otherwise anonymous online activity.

> **Applicants WR, para 64-65; *R v Trapp*, 2011 SKCA 143, per Ottenbreit, JA, paras 134-135, Applicants' Book of Authorities, Tab 11; *R v Ward*, 2012 ONCA 660, Applicants' Book of Authorities, Tab 12**

13. However, the Supreme Court of Canada has expressly rejected the notion that ISP customer identification implicates low expectations of privacy. Quite to the contrary, the Court held in *R v Spencer*, 2014 SCC 43, that online activity attracts high privacy

> These divergent views were reflected in the decisions of the Saskatchewan courts. … Ottenbreit J.A. in the Court of Appeal was of largely the same view. For him, the information sought by the police in this case simply established the identity of the contractual user of the IP address. The fact that this information might eventually reveal a good deal about the activity of identifiable individuals on the Internet was, for him, "neither here nor there" … In contrast to this approach, Caldwell J.A. (Cameron J.A. concurring on this point) held that in characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information such as name and address (para. 22). The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered …

> I am in substantial agreement with Caldwell and Cameron JJ.A. on this point. While, in many cases, defining the subject matter of the search will be uncontroversial, in cases in which it is more difficult, the Court has taken a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake. The Court has looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals.

The Court unanimously concluded in *Spencer* that "the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy."

***R v Spencer*, [2014] 2 SCR 212, 2014 SCC 43, paras 24-26, 51 and 66**

14. In the civil discovery context, courts have found that while litigation is inherently a privacy invasive process, participation in the litigation process does not amount to a waiver of privacy rights. Discovery processes must account for privacy rights and courts are obligated to ensure that the resulting "invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone". In the *Norwich* context, specifically, courts have similarly found the need to impose adequate safeguards so that the impact on Does' privacy is limited as much as possible.

***AB v Bragg Communications Inc*, 2012 SCC 46; *Juman v Doucette*, [2008] 1 SCR 157, 2008 SCC 8, paras 24-25; *BMG Canada Inc v Doe*, 2015 FCA 193, Applicants' Book of Authorities, Tab 10, paras 42-45; *Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, para 57**

15. The amount of data to be disclosed to the Applicants by Rogers, should the *Norwich* order be granted, must therefore be minimized to what is strictly necessary for the purpose of identifying Doe #1. It should not exceed the name and physical address of the individual subscriber associated with the IP address alleged to be associated with the infringing activity highlighted by the Applicants.

***Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, paras 134 f) and 138**

16. Further, use of the data obtained should remain tied to the purpose for which it is obtained. Here, the Applicants state that they seek to identify Doe #1 for the purpose of appointing a class representative for this proceeding. As noted above, one of the recognized 'harms'

courts seek to avoid in this context is the sending of unreasonable settlement demand letters without the supervision of the Court. The *Norwich* disclosure order sought here should therefore, following its predecessor in *Voltage II*, preclude the Applicants from sending settlement demands to the identified Doe absent without first seeking the Court's permission and approval of any such demand letter. Including this safeguard will preclude the Applicants herein, or any future parties, from using this reverse class action mechanism as a means of obtaining the form of discovery sought in *Voltage II*, while avoiding the safeguards imposed therein. Further, any resulting *Norwich* order should include safeguards to realize the imperative that information so obtained should "not be disclosed to the public and be used only in connection with the action." *Norwich* applicants should always be prevented from using obtained data outside of the underlying proceeding in question, and safeguards relating to public should be proportionate to the implicated privacy interest in question.

> ***Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, paras 134 c), g), h), i), j); *Juman v Doucette*, [2008] 1 SCR 157, 2008 SCC 8, paras 24-25, 51; *Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, para 74, 102, 107; *AB v Bragg Communications Inc*, [2012] 2 SCR 567, 2012 SCC 46**

17. Additionally, there should be an upper limit to how long the intermediary ISP (in this instance, Rogers) must retain the information sought by the Applicants. As noted above, *Voltage II* imposed a seemingly unlimited obligation onto the ISP, Teksavvy, to retain the underlying identifying information sought in that instance until it receives payment for its costs. If the applicant in that case decides never to provide said payment, Teksavvy is presumptively obligated to retain the data indefinitely. Such indefinite retention impacts disproportionately on the privacy rights of the affected individuals, increasing the risk of ancillary unrelated privacy harms such as from data breaches, which are increasingly common. The need for such limits should be recognized, to avoid a situation of permanent retention obligation.

> ***Infra*, paras 6-7; *Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, footnote 1 and paras 112; *Voltage Pictures LLC v Doe*, 2015 FC 1364, paras 2-4, 82-84, 88 and generally**

18. Finally, courts have recognized the need to ensure post-*Norwich* recipients of documents should not be left with the impression that the issuance of a *Norwich* order has in any way made determinations of law or fact against them. A Notice of Application served on Doe #1 following

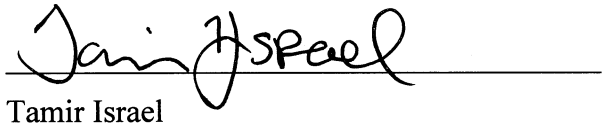
identification, served for the purpose of compelling Doe #1 to act as defendant class representative, should likewise make it clear that while the Court has approved the Applicants' motion for third party discovery it has not yet determined that any infringing activity has occurred, that the identified subscriber in question is the Doe responsible for the allegedly infringing activity associated with the IP address, and that the Court has not yet determined whether Doe #1 will be compelled to defend the action on behalf of the class. Such conditions imposed into the form of the Notice of Application are particularly important in light of the reality that these types of orders tend to affect ordinary customers who may not be guilty of infringement and who are unlikely to have access to specialized legal services.

***Voltage Pictures LLC v Doe*, 2014 FC 161, Applicants' Book of Authorities, Tab 8, paras 93-94, 134 k), l)**

PART IV: ORDER SOUGHT

19. CIPPIC requests that the disposition of this matter take its submissions into account.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2016.



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PART V: LIST OF AUTHORITIES

1. *AB v Bragg Communications Inc*, [2012] 2 SCR 567, 2012 SCC 46
2. *BMG Canada Inc v Doe*, 2005 FCA 193
3. *Juman v Doucette*, [2008] 1 SCR 157, 2008 SCC 8
4. *R v Spencer*, [2014] 2 SCR 212, 2014 SCC 43
5. *R v Trapp*, 2011 SKCA 143
6. *R v Ward*, 2012 ONCA 660
7. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, 2004 SCC 45
8. *Voltage Pictures LLC v Doe*, 2014 FC 161
9. *Voltage Pictures LLC v Doe*, 2015 FC 1364
10. *Voltage Pictures LLC et al v Doe #1*, 2016 FC 681

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