

Federal Court of Canada Orders Internet Service Provider to Identify Alleged Copyright Violators, Subject to Conditions

Date: February 25, 2014

Original Newsletter(s) this article was published in: International Business Bulletin: February 2014

Introduction

On February 20, 2014, the Federal Court of Canada (the “Federal Court”) issued an order compelling Teksaavy Solutions Inc. (“Teksaavy”), an Internet Service Provider (“ISP”), to disclose the names and addresses of approximately 2,000 of its subscribers to Voltage Pictures, LLC. (“Voltage”).¹ Voltage is a film production company that has produced several movies (the “Intellectual Property”), including the Oscar-nominated film *The Hurt Locker*. An overview of the decision appears below.

Relevant Facts

Using a forensic investigation company called Canipre Inc. (“Canipre”) Voltage had previously identified the Internet Protocol (“IP”) addresses of several Teksaavy subscribers, who had downloaded copies of its Intellectual Property over peer to peer (“P2P”) networks using the BitTorrent file sharing protocol.² Voltage was seeking the names and addresses of those subscribers in order to pursue litigation against them under the *Copyright Act*.³

The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) was granted intervenor status in the motion in order to provide arguments and evidence to assist the court in rendering its decision. CIPPIC filed evidence by way of affidavit, cross examined Voltage’s main deponent, and submitted extensive written representations. Teksaavy itself took no formal position on the motion.

CIPPIC alleged that Voltage’s true intentions were not motivated by a desire to protect any rights that it may have held in the Intellectual Property. Instead, it characterized Voltage and

Canipre as “copyright trolls” engaged in “speculative invoicing,” a strategy that involves intimidating individuals into making small settlements by way of demand letters and threats of litigation. CIPPIC further alleged that the cost and uncertainty or stigma of litigation coerced most individuals into making payments whether or not they were actually involved in the unauthorized copying and distribution of intellectual property on the Internet. It urged the court not to inadvertently assist copyright trolls who were engaged in this conduct.

According to evidence submitted by CIPPIC, there were 22 file-sharing lawsuits in the United States Federal Court where Voltage was listed as plaintiff; the majority involved unknown alleged infringers, as in the present case. Voltage also appeared to have a prior history of engaging in speculative invoicing. In one Oregon case, Voltage was strongly criticized for its “underhanded business model” aimed at raising profits. The Oregon judge found that Voltage’s tactic in these BitTorrent cases was not to litigate against the unidentified defendants but rather to utilize the court’s subpoena powers to drastically reduce litigation costs and obtain settlement amounts that exceeded any actual damage that may have occurred.

The Position of Voltage

Voltage relied primarily on *BMG Canada Inc. v. John Doe*⁴ (the “BMG Case”), a leading case on file-sharing in Canada. In that case, the Canadian Recording Industry Association (“CRIA”) and several major record labels filed an application in the Federal Court to compel a number of Canadian ISPs to disclose the subscriber information for 29 IP addresses that were believed to have downloaded approximately 1,000 copyrighted music files through file-sharing software.

In the BMG Case, the Federal Court of Appeal affirmed the lower court’s decision to deny the application but modified the conditions that would need to be satisfied before an ISP could be compelled to disclose subscriber information:

- a. The applicant must establish a *bona fide* case (rather than a *prima facie* case) against the unknown alleged wrongdoer;
- b. The person from whom discovery is sought must be in some way involved in the matter under dispute (he must be more than an innocent bystander);
- c. The person from whom discovery is sought must be the only practical source of information available to the applicants;
- d. The person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs; and
- e. The public interests in favour of disclosure must outweigh the legitimate privacy concerns.

Voltage claimed that it had satisfied all of the conditions described in the BMG case and was therefore entitled to disclosure of the subscriber information.

Findings of the Prothonotary

After considering the evidence of the parties and as well as the jurisprudence in United States, the United Kingdom, and Canada, the Prothonotary described several principals intended to weigh and balance the privacy rights of potentially innocent users of the Internet with the right of copyright holders to enforce their rights. He also indicated that, where evidence suggests that an improper motive may be lurking in the actions of a copyright holder plaintiff, the more stringent the order should be. However, it would only be in a case where there was compelling evidence of improper motive on behalf of the plaintiff that a court might consider denying the motion entirely.

The Prothonotary concluded that Voltage had established a *bona fide* claim. He also concluded that the enforcement of Voltage's rights as a copyright holder outweighed the privacy interests of the affected Internet users. Although there was some evidence that Voltage had engaged in litigation that may have had an improper purpose, it was not sufficiently compelling for the court to make any definitive determination of motive.

In order to properly balance the rights of Internet users who were alleged to have downloaded the copyrighted Intellectual Property against the rights of Voltage to enforce its rights in that Intellectual Property, the Prothonotary imposed the following conditions:

- a. In order to ensure that the court maintains control over the implementation of the order, court action will continue as a specially managed proceeding and a Case Management Judge will be appointed to monitor the conduct of Voltage in its dealings with the alleged infringers.
- b. In order to ensure that there is no inappropriate language contained in any demand letter sent to the alleged infringers, the draft demand letter must be provided to the court for review.
- c. The demand letter should contain a statement that no court has yet found any recipient of the letter liable for infringement and that recipients should seek legal assistance.
- d. The reasonable legal costs, administrative costs, and disbursements incurred by Teksaavy in providing the information must be paid prior to the information being released to Voltage.
- e. The information disclosed by Teksaavy will be limited only to the names and addresses of the IP addresses described in the affidavit submitted on behalf of Voltage.
- f. The release of information by Teksaavy will remain confidential and such information shall not be disclosed to any other parties without further order of the court and may only be used by Voltage in connection with the claims in the present action.
- g. Voltage shall undertake not to disclose any information obtained from Teksaavy to the general public by making a statement to the media.

Conclusion

The above court order appears to strike a fair balance between the interests of legitimate copyright holders and the privacy interests of Internet users. The safeguards imposed should help to discourage Voltage and other copyright holders from engaging in copyright trolling in Canada, while still allowing them to pursue legitimate copyright infringement claims.

¹ *Voltage Pictures v. Does*, 2014 FC 161.

² Canipre was able to identify the P2P network used, the IP addresses of both seeder and peer, the date and time the files were distributed, and the file's metadata (including the name of the file and its size).

³ R.S.C., 1985, c. C-42.

⁴ 2005 FCA 193.