



December 14, 2012

VIA FACSIMILE (416) 954-5068

Registrar
Federal Court of Canada
Toronto Office
180 Queen St. W.
Toronto, ON M5V 3L6

Dear Sir:

Re: *Voltage Pictures LLC v. John Doe and Jane Doe*
Fed. Ct. No. T-2058-12

We write this letter in respect of a motion in the above noted action, set down to be heard on 17 December, 2012, for an Order, pursuant to Rule 238, for discovery of a non-party.

We request that the motion not go forward on December 17, but instead be set forward to a future date in order to give defendants to this action sufficient time to learn of the motion, retain and be advised by counsel, and participate in the hearing of the motion if they so desire.

We also intend to apply to intervene in the hearing of the motion, but cannot do so in the short time that has elapsed between the filing of the motion on December 11 and the proposed hearing date, six days later.

It is our understanding that Teksavvy Solutions Inc., the third party whose subscriber information the applicant seeks, does not intend to oppose the motion. We also regard it as unlikely that defendants will have had sufficient time to retain, be advised by and instruct counsel on opposition to this motion. Accordingly, our intervention may prove to be the only critical evaluation of the applicant's materials and legal argument that this Honourable Court is likely to receive.

It is our view that this motion raises extraordinary issues that ought to be brought to the

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attention of the court

Legal Issues

It has been seven years since the Federal Court of Appeal's decision in *BMG v. Doe*, 2005 FCA 193, the last contested motion to compel a third party internet service provider to identify alleged file sharers. Since that time, a number of courts have considered similar motions in other contexts, and arrived at more nuanced test formulations for disclosure than that articulated by the Federal Court of Appeal. In particular, the question of whether to require of the applicants in the present case merely demonstrate a *bona fide* intent to pursue the case or, instead, whether they must also establish a *prima facie* case, ought to be considered in light of these subsequent authorities. In addition, we note that both the Ontario and Saskatchewan Courts of Appeal have recently concluded that identifying anonymous online users implicates serious privacy concerns (*R. v. Ward*, 2012 ONCA 660; *R. v. Trapp*, 2011 SKCA 143, respectively).

On the question of *bona fides*, the plaintiff has identified literally thousands of John Does and Jane Does. *BMG v. Doe* involved only 29 potential defendants. It is worth asking the plaintiff if it holds a *bona fide* intent to bring 2000 actions for copyright infringement. As will be noted below, this plaintiff has a track record in the United States of demanding subscriber data of internet service providers for the purposes of demanding exorbitant payments to settle under threat of litigation, with no *bona fide* intent to prosecute such litigation. In CIPPIC's view, this scheme does not meet the requirements of the need to show a *bona fide* claim, but instead is evidence of another purpose. We address the propriety of this purpose below.

Finally, it is worth noting that the plaintiff has pleaded that the John and Jane Does have engaged in commercial infringement. We suggest that even a generous reading of the applicant's materials fail to make out even a *bona fide* case of commercial infringement.

The Statement of Claim raises other issues, as well, including:

- The first interpretation of new elements of the Copyright Act;
- Jurisdiction issues in relation to non-statutory claims; and
- The question of joinder.

Evidentiary Issues

It is worth remembering that the applicants in *BMG v. Doe* lost their application, among other reasons, because of evidentiary deficiencies including heavy reliance on hearsay evidence.

Again, even a generous reading of the applicant's motion materials discloses abundant reliance on hearsay evidence, including the key paragraphs in Mr. Logan's affidavit

describing the gathering of the evidence of infringement (paras. 10-11, at page 10 of the Applicant's Motion record).

We note, as well, that the applicant has tendered evidence about the functioning of peer-to-peer networks using the BitTorrent protocol. As noted above, the Court is not likely to benefit from adverse evidence at the hearing of this motion on the 17th of December. Undoubtedly, the court's understanding of this technology would benefit from a critical assessment of the applicant's description. Moving the date of the hearing of the motion would, at the least, permit defendants a chance to consider whether they wish to oppose the motion and challenge this evidence.

The applicant's materials raise other factual issues, such as the nature of liability of individual Does for participation in a "swarm" of torrents, and given the nature of BitTorrent protocol the conditions under which individual defendants can be shown to have engaged unlawfully with any substantial part of the work.

Administration of Justice and the Propriety of the Applicant's Purpose

As noted above, the applicant has in the past engaged in similar mass litigation in the United States. The applicant's business model for such litigation has earned it the label of "copyright troll". Trolls' business model involves alleging that consumers are liable for copyright infringement, and demanding compensation under threat of litigation. The compensation demanded invariably grossly exceeds the damages a troll might expect if the troll were to actually litigate and obtain judgement and a damages award. However, such compensation does not typically exceed the cost to a defendant of defending the action. Enough defendants will choose to pay rather than defend to make the scheme profitable to the troll. The troll typically never litigates through to a judgement, since the costs of doing so would render the scheme as a whole less profitable. The troll's business model, thus, is an arbitrage game, exploiting judicial resources to leverage defendants' fear and the costs of defending into a revenue stream. And, of course, no part of these revenues finds its way back to the court to offset costs borne by the taxpayer as the judiciary plays its inadvertent role in this scheme. In CIPPIC's view, such a purpose is improper and bars the applicant from establishing a *bona fide* claim.

The Applicant's materials offer no insights into its particular scheme, apart from the involvement of Canipre Inc. Canipre's financial interest in this scheme is not disclosed in the applicant's materials.

It is CIPPIC's view that Canadian Courts ought to be apprised of *exactly* how their resources are being exploited by applicants in cases such as the present. The courts are funded by Canadian taxpayers. These resources ought not to be burdened pursuant to administration of an arbitrage scheme. In CIPPIC's view, the applicants owe a duty of full disclosure to this Honourable Courts to satisfy the Court that applicant is not making a tool of the Court.

No Prejudice

The applicant will suffer no prejudice by pushing off the hearing of this motion until after the holidays. The copyright infringements alleged are not continuing torts. There is not danger of evidence spoiling. On the contrary, moving the date will give the applicant the opportunity to address the evidentiary and other shortcomings alluded to in this letter.

* * *

Felix Tang, acting as our agent, intends to appear at the scheduled hearing of this motion on Monday, December 17, 2012, and is available, if it please the Court, to speak to the contents of this letter.

Yours truly,

[original signed by]

David Fewer
Director, CIPPIC

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