



June 2, 2016

VIA FAX

Registrar

Federal Court of Canada
Toronto Office
180 Queen Street West
Toronto, ON, M5V 3L6

Dear Registrar

**Re: *Voltage Pictures LLC v Doe*, Federal Court File No: T-667-16
Intention to File Motion for Leave to Intervene**

We, the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC), write to inform the court of our intention to seek leave to intervene in a motion filed by Voltage Pictures LLC et al, the Plaintiffs in the above-referenced class action proceeding ("Plaintiffs" or Applicants" hereafter), filed with the court on May 25, 2016 (listed as Docket Record #4) and currently to be heard on Tuesday, June 7, 2016. In conjunction with our Motion for Leave to Intervene, we will request the Court to exercise its discretion under Rule 36 of the *Federal Court Rules*, SOR/98-106 (henceforth "Rules") to adjourn the matter in question as it raises complex matters of law and fact than cannot be addressed within the given time period. CIPPIC is not yet a party in this matter, yet we are filing this letter in advance of our motion for leave to intervene and request for adjournment so that the Court and parties may have additional notice, in light of the short timeframes at issue.

BACKGROUND

The underlying matter involves a 'reverse class action' against a class of currently anonymous individuals alleged to have infringed the Applicants' copyright in a number of works. This proposed 'reverse' or 'defendants' class action has not yet been certified, however, by order of Chief Justice Matter, dated June 1, 2016, Mr. Justice Keith M. Boswell has been appointed as Case Management Judge in the matter.

As an initial step in this matter, the Applicants seek an order for third party discovery (referred to by Canadian courts as a *Norwich* order) compelling an Internet Service Provider (ISP), Rogers Communications Inc ("Rogers") to disclose records facilitating the identification of an

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anonymous Rogers customer, John/Jane Doe #1, alleged to have infringed the Applicants' copyright. Doe #1 is identified by the Applicants on the basis of an IP address allegedly associated with the infringing activity at issue, and intended by the Applicants to be the representative respondent for their class of defendants.¹ The anticipation, evinced in the Applicants' materials, is that the current order for third party discovery will be followed by other, similar third party discovery requests affecting "thousands of [additional] Rogers' subscribers who will form part of the Defendant Class."² It is reasonable to presume that the Applicants will also seek comparable disclosures from other Canadian ISPs in order to identify customers thereof who also might form a part of the Defendant Class. The discovery process put in place here will therefore implicate many.

This is not the first time the Applicants have sought discovery in order to compel ISPs to identify large numbers of customers alleged to have infringed its copyright by means of anonymous online activity. In *Voltage Pictures LLC v Doe*, 2014 FC 161 (or "Voltage I"), which did not involve a 'reverse class action' but did involve a nominal lawsuit against a large number of named Does, this court found that a number of safeguards need to be in place in order to address the potential concerns raised by such discovery requests.

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC (CIPPIC)

CIPPIC is a legal clinic based at the Centre for Law, Technology & Society at the University of Ottawa's Faculty of Law. Our mandate is to advocate in the public interest in matters arising at the intersection of law and technology.

In the past, CIPPIC has been granted leave to intervene in several third party discovery motions similar to that sought by the Applicant in the above-referenced matter, including *BMG Canada Inc v Doe*, 2005 FCA 193, [2005] 4 FCR 81; *BMG Canada Inc v John Doe*, 2004 FC 488, [2004] 3 FCR 241; and *Warman v Wilkins-Fournier*, 2010 ONSC 2126, (2010) 100 OR (3d) 648 (Ont Div Ct), all of which involved motions for third party discovery sought for the purpose of identifying an anonymous customer of an Internet Service Provider for the purpose of facilitating a lawsuit.

Most recently, CIPPIC intervened in *Voltage Pictures LLC v Doe*, 2014 FC 161 (Voltage I), a third party discovery motion by the Applicant in a separate lawsuit but addressing substantially similar subject matter as that at issue in the above-referenced matter.

CIPPIC's expertise in this context extends beyond its past interventions before the courts on such matters. For example, CIPPIC drafted a white paper on copyright policy reform which was endorsed by several Canadian consumer protection groups.³ CIPPIC was also called upon to offer expert testimony before parliamentary committees reviewing elements of the *Copyright Act*, RSC 1985, c C-42, including section 41.25 of said Act and other related elements of

¹ Applicants' Motion for Third Party Discovery, filed May 25, 2016, written representations, para 2.

² Correspondence from the Applicants, by their Counsel, to Rogers Communications Inc, dated April 28, 2016, and attached as Exhibit "B" to the Affidavit of Danielle Muise, affirmed May 18, 2016, and filed in support of the Applicants' Motion for Third Party Discovery, filed May 25, 2016.

³ Canadian Internet Policy & Public Interest Clinic, Public Interest Advocacy Centre, Option consommateurs & Online Rights Canada, "Canadian Copyright Law: A Consumer White Paper", June 2008.

copyright policy that are at issue in this matter. CIPPIC additionally participated in the Government of Canada's notice-and-notice stakeholder consultations regarding regulations governing newly adopted section 41.25 of the *Copyright Act*,⁴ and regularly advises individuals and companies who are faced with discovery requests on a pro bono basis.

RATIONALE & RELIEF

As CIPPIC will elaborate in its motion for leave to intervene, which it intends to file on Friday, June 3, 2016, the third party discovery request sought by the Applicants raises complex and wide-ranging issues of law and fact. The Court will be better situated to address these issues if CIPPIC is granted leave to intervene and if a more comprehensive hearing of said issues is undertaken.

It is in the nature of *Norwich* orders that affected parties will rarely be present to represent their own interests before the Court. Only the intermediary (in this instance, Rogers) is in a position to oppose the scope and parameters of such an order, yet the interests of the affected parties are often broader than that of the service provider. For example, Rogers may challenge the Applicants' assertion that cost recovery is unavailable to it for its activities in correlating IP addresses to individual customer accounts. However, Rogers is not well-placed to advance its customers' interests in that regard and is under no obligation to do so. As service provider costs are ultimately paid by the service provider's customers, the latter question engages broader issues regarding whether the cost of enforcing intellectual property rights should fall to rights-holders or to customers of ISPs. That is all the more so the case here, where the Applicants are proposing what they describe as the "first ever" defensive copyright class action in Canada.

The service provider is not well placed to advance the full range of public interests implicated, nor is it under any obligation to do so. In a previous but similar proceeding (leading to the order of this court in *Voltage I*), a number of factors were adopted by this court in choosing to adjourn a comparable third party discovery motion by the Applicants and in granting CIPPIC leave to intervene in that proceeding.⁵ Many of the factors that animated those orders are applicable here as well, including that:

- unless the matter is adjourned and CIPPIC is granted intervention status, the motion is likely to proceed effectively unopposed, meaning that the interests of Doe #1 (and likely any future Does the Applicants will seek to identify by the same process) will not be represented. Unopposed motions of this type are risky and the Court "is better served in coming to a proper decision having heard from differing sides";⁶
- as noted by the Applicants, this matter constitutes the first extensive application of newly adopted legislative mechanisms in the *Copyright Act*. This constitutes "the early steps taken in adjudicating new legislation" and to properly conduct such adjudication,

⁴ See Affidavit of Meaghan Barrett, affirmed May 13, 2016, and filed in support of the Applicants' Motion for Third Party Discovery, filed May 25, 2016, paras 4-7 and related Exhibits; David Fewer, "Re: Consultations for Implementation of Notice and Notice Regime", November 8, 2013, *Canadian Internet Policy & Public Interest Clinic*.

⁵ *Voltage Pictures LLC v Doe*, order issued January 31, 2013, 2013 FC 112, paras 6-10.

⁶ *Voltage Pictures LLC v Doe*, order issued January 31, 2013, 2013 FC 112, para 6.

“a Court needs to be as informed as it can be about the matter”.⁷ In addition, the ‘reverse class action’ mechanism adopted by the Applicants in this instance is novel with respect to Copyright infringement and has not been addressed in Canada;⁸

- the use of forensic software such as that at issue here has been found to raise complex evidentiary problems flagged by a number of courts in the past.⁹ Courts have held that basic evidentiary flaws can be a bar to the issuing of a *Norwich* order;¹⁰
- third party discovery of this kind generally raises complex issues and engages the interests of affected parties in a manner that cannot be resolved in the generally short timeframe allotted to a standard motion.¹¹ Moreover, once any individual is identified to the Applicants, the underlying issues in question are “not likely to be contested or revisited by the Court at the request of the newly identified and served Defendants” as at their identity will already be revealed.¹²

As a result of that proceeding, this Court adopted a number of safeguards to secure the interests of the anonymous Does sought to be identified and incorporated these into the order itself.¹³

The *Norwich* request at issue here, while raised in the context of a ‘reverse class action’ as opposed to more direct litigation, nonetheless engages many of the same issues. For example, a number of the concerns addressed in *Voltage I* revolved around the need to ensure identification orders do not become an avenue for abusive or misleading settlement demands imposed on those identified.¹⁴ As there is a high likelihood likely that most Does identified in this defendant class action will lack the resources or incentive to rigorously defend this class action,¹⁵ the majority of identified Does (if not all) may well become the object of the same mass settlement process that invoked the safeguards imposed in *Voltage I* after exercising their right to opt out of the class.¹⁶ Yet the Applicants have not included any of the safeguards proposed by this Court in *Voltage I* in the order they seek herein. In spite of these and other

⁷ *Voltage Pictures LLC v Doe*, order issued January 31, 2013, 2013 FC 112, para 7.

⁸ Applicants’ Motion for Third Party Discovery, filed May 25, 2016, written representations,

⁹ See, for example, *Voltage Pictures LLC v Doe*, order issued January 31, 2013, 2013 FC 112, para 8. See also: *Voltage Pictures LLC v Doe*, Federal Court File No: T-2058-12, order of Madam Prothonotary Tabib granting CIPPIC leave to intervene, issued February 13, 2013.

¹⁰ *BMG Canada Inc v Doe*, 2005 FCA 193, para 21.

¹¹ *Voltage Pictures LLC v Doe*, order issued January 31, 2013, 2013 FC 112, para 10.

¹² *Voltage Pictures LLC v Doe*, Federal Court File No: T-2058-12, order of Madam Prothonotary Tabib granting CIPPIC leave to intervene, issued February 13, 2013.

¹³ *Voltage Pictures LLC v Doe*, 2014 FC 161, para 134, items a) through n) and see conditions on order issued therein, appended to 2014 FC 161.

¹⁴ See, for example, *Voltage Pictures LLC v Doe*, 2014 FC 161, para 134, items b, c, e, g, i, j, k, l, m and n.

¹⁵ *Voltage v Doe*, 2014 FC 161, paras 93-100, 134.

¹⁶ *Federal Court Rules*, SOR/98-106, s 334.21; *1250264 Ontario Inc v Pet Valu Canada Inc*, 2013 ONCA 279, para 41; *Bédard v Kellogg Canada Inc*, 2007 FC 516, para 128; *Sutherland v Hudson’s Bay Co*, [2005] 74 OR (3d) 608 (ONSC), paras 85-87; *Chippewas of Sarnia Band v Canada (Attorney General)*, [1996] 29 OR (3d) 549 (ONSC) (“all of the proposed representative defendants have delivered a statement of defence and evidenced an intention to vigorously defend the Band’s claim. No one has indicated a lack of resources to defend this action. Counsel experienced in actions involving aboriginal land disputes have been retained.”).

potential similarities, the *Norwich* order sought by the Applicants includes none of the safeguards this Court found necessary to impose in Voltage I.¹⁷

Our motion for leave to intervene and requesting an adjournment of the matter currently set to be heard on Tuesday, June 7, 2016, will elaborate on these reasons. We intend to serve it on all parties by Friday, June 3, 2016 and to file it with the Court by Monday, June 6, 2016.

Yours truly,

A handwritten signature in black ink that reads "Tamir Israel". The signature is written in a cursive, slightly slanted style.

Tamir Israel
Staff Lawyer, CIPPIC

CC: Kenneth R Clark, Aird & Berlis LLP, Counsel for the Applicants *VIA Fax: 416-863-1515*
James Gotowiec, Torys LLP, Counsel for Rogers Communications Inc, *VIA FAX: 416-865-7380* (courtesy copy)

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¹⁷ See: Applicants' Motion for Third Party Discovery, filed May 25, 2016, Written Representations, Schedule A (found at pp 80-81 of the Applicants' Motion Record).