

Brief of Federal Court of Appeal decision in *BMG Canada v. Doe*, 2005 FCA 193

The Issue

The Federal Court of Appeal (FCA) summarized the central issue in the case as follows: “This case illustrates the tension existing between the privacy rights of those who use the Internet and those whose rights may be infringed or abused by anonymous Internet users.” (para 1)

In setting the context for its decision regarding the central issue in the case, the FCA expressly recognized the significance of online privacy in modern society:

“Citizens legitimately worry about encroachment upon their privacy rights. The potential for unwarranted intrusion into individual personal lives is now unparalleled. In an era where people perform many tasks over the Internet, it is possible to learn where one works, resides or shops, his or her financial information, the publications one reads and subscribes to and even specific newspaper articles he or she has browsed. This intrusion not only puts individuals at great personal risk but also subjects their views and beliefs to untenable scrutiny. Privacy advocates maintain that if privacy is to be sacrificed, there must be a strong prima facie case against the individuals whose names are going to be released. Whether this is the correct test will be addressed in this decision.” (para 4)

The FCA reviewed the facts of the case as found by the trial judge, and then briefly outlined the different arguments and responses of the ISPs, along with the findings of the trial judge.

Finding regarding Rule 233

The FCA agreed with the trial judge that CRIA cannot rely on Rule 233. This is a discovery rule for the production of documents from third parties. However, the court found that the rule does not contemplate the very production of documents, which is what the ISPs would have to do in this case.

Finding regarding hearsay evidence and Rule 81

The FCA agreed with the trial judge that CRIA’s evidence was largely hearsay and that no grounds existed for accepting hearsay evidence. The court placed particular emphasis on the lack of evidence connecting pseudonyms to IP addresses, finding that this gap alone was a sufficient reason to reject CRIA’s motion:

“In particular, the evidence purporting to connect the pseudonyms with the IP addresses was hearsay thus creating the risk that innocent persons might have their privacy invaded and also be named as defendants where it is not warranted. Without this evidence there is no basis upon which the

motion can be granted and for this reason alone the appeal should be dismissed.” (para 21)

Finding regarding Rule 238

Despite its findings regarding Rule 233, the FCA found that CRIA could rely on Rule 238 to obtain examination for discovery of a representative of the ISPs in order to obtain the identity information it sought. The court noted that discovery could be limited to questions about identity only and that the service requirement in the rule – which requires service of the motion on the individual defendants – could be dispensed with, or be met by a form of substituted service, like publication in a newspaper.

Finding regarding equitable bills of discovery: The Threshold Test

The FCA agreed with the trial judge that the criteria for issuing an equitable bill of discovery would be applicable under Rule 238. In other words, the FCA held that CRIA would have to meet the requirements of an equitable bill of discovery whether the application was for an equitable bill, or for an order under Rule 238.

The FCA disagreed with the trial judge regarding the first element of the equitable bill test. Based on the arguments of all the parties, the trial judge had held that CRIA must show a “prima facie” case of infringement. The FCA, on the other hand, held that CRIA must only show that it has a “bona fide” claim against the proposed defendant:

“It is sufficient if they show a bona fide claim, i.e. that they really do intend to bring an action for infringement of copyright based upon the information they obtain, and that there is no other improper purpose for seeking the identity of these persons”. (para 34)

Finding regarding equitable bills of discovery: Other Factors

The FCA agreed with the trial judge that the other requirements of the equitable bill of discovery test would have to be met by CRIA, including “clear evidence to the effect that the information cannot be obtained from another source such as the operators of the named websites (KaZaA, et al).” (para 35) The FCA also noted that “if an order for disclosure were granted, consideration would have to be given to the costs incurred by the respondents in assembling the information”. (para 35).

Findings regarding privacy

The FCA agreed with the trial judge that privacy interests must be considered and stated that “privacy is an important consideration” (para 37) and that “Privacy rights are significant and they must be protected” (para 38).

However, the FCA pointed out that intellectual property rights are also important and held that “in cases where plaintiffs show that they have a bona fide claim that unknown

persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action. However, caution must be exercised by the courts in ordering such disclosure, to make sure that privacy rights are invaded in the most minimal way.” (para 42).

The FCA noted that CRIA’s delay in bringing the motion was significant and may be grounds for refusing an order because of the chance that an innocent person could be exposed to a lawsuit:

“If there is a lengthy delay between the time the request for the identities is made by the plaintiffs and the time the plaintiffs collect their information, there is a risk that the information as to identity may be inaccurate. ... Therefore it is possible that the privacy rights of innocent persons would be infringed and legal proceedings against such persons would be without justification. Thus the greatest care should be taken to avoid delay between the investigation and the request for information. Failure to take such care might well justify a court in refusing to make a disclosure order.” (para 43)

The FCA expressly recognized and adopted CIPPIC’s argument regarding the scope of information that would be revealed in the disclosure sought by CRIA. The FCA noted that CRIA must limit its investigation to relevant issues regarding copyright infringement, and if it does not do so, the court may reject disclosure:

“Also, as the intervener, Canadian Internet Policy and Public Interest Clinic, pointed out, plaintiffs should be careful not to extract private information unrelated to copyright infringement, in their investigation. If private information irrelevant to the copyright issues is extracted, and disclosure of the user's identity is made, the recipient of the information may then be in possession of highly confidential information about the user. If this information is unrelated to copyright infringement, this would be an unjustified intrusion into the rights of the user and might well amount to a breach of PIPEDA by the ISPs, leaving them open to prosecution. Thus in situations where the plaintiffs have failed in their investigation to limit the acquisition of information to the copyright infringement issues, a court might well be justified in declining to grant an order for disclosure of the user's identity.” (para 44)

The FCA noted that in cases where an order for disclosure is made, the court should give directions regarding the information to be disclosed and the manner in which it can be used. The court should also protect privacy by making a confidentiality order over the proceedings, or by ordering that the defendant be identified by initials only.

Findings regarding copyright law

The FCA made some comments regarding copyright which indicated that the trial judge's findings on that issue were premature. However, the FCA did not reverse those findings, but merely left the question of copyright law and file-sharing for a future case:

“In my view, conclusions such as these should not have been made in the very preliminary stages of this action. They would require a consideration of the evidence as well as the law applicable to such evidence after it has been properly adduced. Such hard conclusions at a preliminary stage can be damaging to the parties if a trial takes place and should be avoided.”
(para 47)

Conclusion

In the result, the FCA dismissed CRIA's appeal (without prejudice to CRIA's ability to make another application in light of the FCA's various findings) and refused to make an order for disclosure.

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