

Court File No.: T-2062-12

FEDERAL COURT

BETWEEN:

**NGN PRIMA PRODUCTIONS INC.
AND RIDING FILMS INC.**

Plaintiffs

- and -

JOHN DOE AND JANE DOE

Defendants

**WRITTEN REPRESENTATIONS OF DISTRIBUTEL COMMUNICATIONS LIMITED
(Response to motion for leave to conduct examination for discovery of non-party)**

I. STATEMENT OF FACTS

A. Overview and summary of issues

1. Distributel Communications Limited (“Distributel”) opposes the motion to compel Distributel to disclose personal information about some of its customers to NGN Prima Productions Inc. and Riding Films Inc. (the “Moving Parties”). The Moving Parties allege that certain Internet Protocol (“IP”) addresses assigned to Distributel customers may have been involved in unauthorized copying and sharing of three movies through peer-to-peer (“P2P”) Internet networks.

2. Distributel has provided customers with telecommunications services since 1988. Technological advances, including the Internet, are a significant benefit to society but technology should not be employed as a tool to obliterate the privacy rights our society also deems so important. Distributel stands as the protector of its customers' private information in the face of the Moving Parties' failure to meet the required legal standard for such disclosure and the Moving Parties' improper purpose for wanting the information.

3. Distributel's opposition is well founded in law. The Moving Parties have failed to abide by the established standard that must be met for the Court to order such disclosure. The Moving Parties have failed to demonstrate that they have a *bona fide* claim. Furthermore, the Moving Parties' motion is prejudiced by the improper purpose for which they seek the information. Finally, an order based on the Moving Parties' motion and evidence would result in an unjustified violation of the privacy rights of Distributel customers.

B. The Parties

4. Distributel is a telecommunications company operating in Canada that offers services including home phone, long distance, and Internet. Distributel has offered Internet services to its customers since 1997.

Distributel's Motion Record, Affidavit of Daniel Puckett, sworn February 7, 2013 ("Puckett Affidavit") para 3, at TAB 1.

5. The Moving Parties are two film companies who are the Plaintiffs in a Simplified Action at the Federal Court in Court file no. T-2062-12. The Defendants are unknown and referred to as John Doe and Jane Doe. The Statement of Claim was filed on November 14, 2012.

An Amended Statement of Claim, adding Riding Films as a Plaintiff, was filed on January 10, 2013.

6. The Moving Parties state they own the copyright to the films *Recoil*, *Crash Site* and *Dawn Rider*. They allege that their films have been unlawfully copied and distributed over the Internet by the Defendants. The Moving Parties allege that they have identified the IP addresses associated with the copyright infringement. They are seeking disclosure of the names and addresses of persons who are associated with Distributel IP addresses.

Moving Parties' Motion Record, Written Representations, paras 2, 4, TAB 3.

Moving Parties' Motion Record, Notice of Motion, para 2 of the grounds, TAB 1.

7. The Moving Parties hired Canipre Inc. ("Canipre"), an Ontario corporation, which provides forensic investigation services to copyright owners. Barry Logan is the owner and principle forensic consultant of Canipre. His affidavit is the only evidence tendered by the Moving Parties in support of this motion.

Moving Parties' Motion Record, Affidavit of Barry Logan, sworn January 10, 2013 ("Logan Affidavit") paras 1, 4, TAB 2.

8. On November 19, 2012, NGN Prima Productions Inc. ("NGN"), moved for an almost identical order from the Court in relation to *Recoil* (the "November Motion"). That motion requested customer information from the same respondents, including Distributel.

Distributel's Motion Record, Puckett Affidavit, paras 37-40, TAB 4.

C. How the IP address protocol works

9. The Moving Parties allege that certain IP addresses were used in the transmission of the works over the Internet.

10. An IP address is an essential component in order for a computer to access the Internet. It refers to the numerical identifier that an Internet Service Provider (“ISP”), such as Distributel, assigns to a computer or computers in order for them to connect over a network using IP.

Distributel’s Motion Record, Puckett Affidavit, para 13, TAB 1.

11. An IP address does not identify a specific individual or even a specific computer. As such, it is not analogous to a driver's licence, a Social Insurance Number, or a fingerprint. On the contrary, an IP address can be used as a shared component to access the internet for multiple users. For example, it may be used to create a wireless network shared by multiple persons in a household, or in an office local area network, or an Internet coffee shop.

Distributel’s Motion Record, Puckett Affidavit, para 14, TAB 1.

12. As an ISP, Distributel reserves certain blocks of IP addresses for use by its residential customers. These include:

- (a) Digital Subscriber Line (DSL) Internet customers;
- (b) Dial access (DA) Internet customers; and
- (c) Cable Internet customers served under Third Party Internet Access (TPIA) agreements.

Distributel's Motion Record, Puckett Affidavit, paras 15-17, TAB 1.

13. IP addresses are assigned to customers in such a way that they may receive any available Distributel IP address at any time. This means that any particular IP address can be assigned to multiple customers over a period of time.

Distributel's Motion Record, Puckett Affidavit, para 20, TAB 1.

14. Where the IP address has been reserved for use by DSL or DA services, Distributel may be able to identify the customer account associated with an IP address. This, however, can only be done if Distributel is provided with accurate and reliable information linking a Distributel IP address to an exact date and time.

Distributel's Motion Record, Puckett Affidavit, para 19, TAB 1.

15. In some circumstances, Distributel may be unable to provide the customer information when the records associated with the identification of the customer have been purged. As a policy, Distributel purges records when they are no longer required for business purposes.

Distributel's Motion Record, Puckett Affidavit, para 21, TAB 1.

16. In addition, where the IP address has been reserved for use by cable Internet customers, the IP address assignment is done by the TPIA cable operator. In such a case, Distributel has no ability to identify the customer account associated to that IP address. Only the TPIA operator may have that information.

Distributel's Motion Record, Puckett Affidavit, para 22, TAB 1.

17. Distributel requires certain information in order to accurately match an IP address to its customer information including exact date and time.

18. The timing of the recording of the IP address is a crucial matter for accurate identification of a customer. Computer clocks are known to drift. Distributel has not considered the logs it employs to correlate IP addresses to customer accounts to be a critical measure, since these records are not used for billing purposes.

Distributel's Motion Record, Puckett Affidavit, paras 25-26, TAB 1.

19. Only if Distributel knows the exact time differential between the clock on the computer used at Canipre and the clock used by Distributel could an accurate correlation be made. No information as to the clock synchronization state at the time of creation of the logs in Exhibit "A" of the Logan Affidavit has been provided. Without this information Distributel is not able to reliably identify the customer account assigned that IP address at the time of the log's creation.

Distributel's Motion Record, Puckett Affidavit, paras 27-28, TAB 1.

20. The Logan Affidavit also provides city information that could assist in matching the IP address to Distributel records. However, the geographic location of the subscriber associated with the IP address matched the geographic location provided in Exhibit "A" to the Logan Affidavit in only one instance. In all other cases, the geographic location provided in the Logan Affidavit does not match the geographic location of the subscriber associated with the IP address on the date and at the time provided.

Distributel's Motion Record, Puckett Affidavit, para 30, TAB 1.

D. How Distributel retrieves customer information

21. In order to determine the customer information associated with an IP address at any one time, Distributel must conduct sequential queries of four servers and an IP address allocation database.

Distributel's Motion Record, Puckett Affidavit, para 32, TAB 1.

22. The queries and analysis of the results must be performed by a trained technician. That technician's results must be re-verified by a separate independent set of queries performed by another technician. If a result is found, it is then passed to a separate staff member in the Privacy Office.

Distributel's Motion Record, Puckett Affidavit, paras 33-35, TAB 1.

23. This Privacy Office member then performs additional queries of Distributel's customer administration systems. The result will form a hypothesis as to which customer was associated with the specific IP address at the date and time provided. Once additional checks have been done, and the information gathered in accordance with policies and practices, the customer identification can be provided pursuant to an order.

Distributel's Motion Record, Puckett Affidavit, paras 35-36, TAB 1.

E. How BitTorrent works

24. The Moving Parties allege that works were transmitted via a file-sharing protocol known as BitTorrent.

25. BitTorrent is a protocol ("Protocol") designed to allow for the efficient distribution of files over the Internet between multiple computers. Each computer is known as a

Peer. The advantage of using the Protocol is that it allows multiple computers to efficiently download a file without requiring a central server. This is because the files are transferred in pieces with each Peer sharing the workload.

Distributel's Motion Record, Affidavit of David Zvekic ("Zvekic Affidavit"), paras 10, 16, TAB 2.

26. Since BitTorrent specifies the transfer of information between computers as Peers it is commonly referred to as a "peer-to-peer" protocol. The transfer of data is also commonly referred to as "file sharing" because computers transfer the data amongst each other rather than download from a single specific source such as a file server.

Distributel's Motion Record, Zvekic Affidavit, paras 10, 11, TAB 2.

27. The Protocol requires that each file being transmitted be subdivided into multiple pieces. Each piece is a small fragment, comprising as little as 0.1% of the entire file. Each Peer must collect all of the pieces before it has succeeded in obtaining a complete file.

Distributel's Motion Record, Zvekic Affidavit, paras 10, 12, TAB 2.

28. Multiple pieces can be downloaded independently from multiple Peers concurrently. If there is a missing piece, no one can succeed in downloading the complete file unless a Peer possessing that missing piece joins the network.

Distributel's Motion Record, Zvekic Affidavit, para 14, TAB 2.

29. Peers do not offer pieces to each other. They only request them from each other. The protocol does not allow for Peers to spontaneously upload data to each other without a request.

Distributel's Motion Record, Zvekic Affidavit, para 14, TAB 2.

30. Peers may join or disconnect from the network at any time, and join or disconnect from each other at any time. The presence of a Peer does not establish that it has possession of any piece of the file.

Distributel's Motion Record, Zvekic Affidavit, para 15, TAB 2.

31. In order to download a file using the Protocol a BitTorrent client software must be obtained first ("Client"). Then a torrent file is downloaded that contains meta-info ("Torrent"). Every computer attempting to download or upload a piece of the same file requires a copy of the same Torrent data.

Distributel's Motion Record, Zvekic Affidavit, paras 18, 22, TAB 2.

32. The Torrent does not contain any part of the actual file. Instead, it contains information about the file including the file name, size, a 160 bit message known as a hash ("SHA1"), how many pieces make up the complete file, the size of the pieces that the file is separated into, and the Internet name of a Tracker or multiple Trackers.

Distributel's Motion Record, Zvekic Affidavit, para 20, TAB 2.

33. A Tracker does not distribute any copies of a file either but is essential to allow one computer to locate another computer distributing the same file in whole or in part using the SHA1 information. The Client communicates with the Tracker to exchange the IP address through which the computer is connected, enabling the transfer of data between the computers.

Distributel's Motion Record, Zvekic Affidavit, para 22, TAB 2.

34. Peers with complete copies of the file are known as Seeders. Seeders upload, piece by piece, copies of a file when requested by a Peer.

Distributel's Motion Record, Zvekic Affidavit, para 23, TAB 2.

35. Each computer with partial or no copies of the file is known as a Leecher. A Leecher may request a piece of a file from a Peer. Even though a Leecher does not possess a complete copy of a file, a Leecher should respond to requests of other Peers to share whatever piece or pieces that they may have.

Distributel's Motion Record, Zvekic Affidavit, paras 24-25, TAB 2.

36. As part of the transfer process, each Peer will transmit a bitfield message to the other Peers. That message will show exactly how many pieces of the file the Peer has and what pieces are missing. The Protocol specifies that Peers must track bitfield information and update it during file transfer. In addition, when a Peer downloads an additional piece of a file, it transmits out a "have" message to the other Peers. This allows all Peers to track the progress of the download in order to maximize efficiency.

Distributel's Motion Record, Zvekic Affidavit, para 27, TAB 2.

37. Since each transfer includes a bitfield message, each transfer includes information that shows exactly how much of a file was provided by a particular Peer and how much of the file that particular Peer has. This information can be obtained prior to the Client commencing a download.

Distributel's Motion Record, Zvekic Affidavit, paras 28, 33 TAB 2.

38. Exhibit "A" of the Logan Affidavit does not indicate the amount of each file that a specific Peer using the recorded IP address possessed. As noted above, that information is contained in a bitfield message and would have been exchanged as part of the normal operation of the Protocol.

Distributel's Motion Record, Zvekic Affidavit, para 34, TAB 2.

39. In addition, in order to communicate and transfer a piece of a file, it is essential that Peers be connected over the same period of time. While downloading a file, a Client may observe any number of other Peers that appear on the Tracker. The Client may communicate with those Peers, without knowing if any of them ever possessed a substantial portion of the file, unless reference is made to the bitfield and "have" messages those Peers are transmitting.

Distributel's Motion Record, Zvekic Affidavit, paras 35-36, TAB 2.

40. The information about how many pieces are required to make a full copy of a particular file using the Protocol is readily available online if the file identifier is known. From this information and the size of the three films at issue, it can be shown that a piece of a film transferred using the Protocol may consist of as little as 8 seconds of the feature-length films.

Distributel's Motion Record, Zvekic Affidavit, paras 37-38, TAB 2.

F. The adverse market effect on Distributel

41. The ISP sector is dominated by a few large incumbent telephone and cable companies. Independent ISPs as whole, including Distributel, Access Communications Co-operative Limited and ACN Inc., together garner only 6.7% of the residential Internet revenues

from 7.6% of the total Canadian Internet subscribers. Independent ISPs therefore face significant competition from very powerful competitors.

Distributel's Motion Record, Puckett Affidavit, para 43, TAB 2.

42. The Moving Parties only seek the identities of customers of three independent ISPs. Furthermore, in Distributel's response to the November order granted as a result of the previous motion brought by NGN, 17 IP addresses were identified as requiring further investigation from the cable companies. No steps were taken to obtain an order for disclosure from the cable companies in this court file. The current motion is a request for additional independent ISP customer identities only.

Distributel's Motion Record, Puckett Affidavit, paras 44-46, TAB 2.

43. Distributel is concerned with the Moving Parties' apparent selectivity. Motions for disclosure of confidential customer information have been well publicized, and will likely continue to be so. Canadians value their privacy. Should the independent ISPs appear to be disproportionate targets for disclosure motions, it could negatively impact the ability of independent ISPs to compete in an already tough market. This is of significant concern to Distributel.

Distributel's Motion Record, Puckett Affidavit, paras 44-46, TAB 2.

II. POINT IN ISSUE

44. The sole point in issue is whether or not this Court should exercise its discretion to grant the motion for leave to conduct examination for discovery in writing of a non-party pursuant to Rule 238.

45. Distributel submits that the Moving Parties have failed to meet the established legal requirements and therefore the Court must deny the motion.

III. SUBMISSIONS

A. The Moving Parties have failed to meet the required criteria

46. In *BMG Canada Inc. v. John Doe*, 2005 FCA 193 (“BMG”), the Federal Court of Appeal established the test that a Court should apply to determine if an ISP should be ordered to disclose the identity of its subscribers. The BMG case involved a motion for leave to examine a non-party to uncover the identities of customers attached to various IP addresses that were alleged to have been used to engage in the file sharing of recorded music. The case is important because it set out the requirements for when such an order can be sought and the evidentiary standard required in order for the Court to grant the motion.

47. The Court in BMG made two major determinations. First, the Court conclusively approved the use of a motion under Rule 238 as broad enough to permit discovery of an ISP in a copyright infringement case. Second, the Court held that the principles applicable to an equitable bill of discovery are equally applicable to a motion under Rule 238.

Moving Parties’ Motion Record, BMG, paras 25, 30-31, TAB 5.

48. The following are the criteria required. The Moving Parties must show:

- (a) That the evidence demonstrates a *bona fide* claim against the defendants;
- (b) That the public interest in the disclosure of the information is outweighed by the legitimate privacy concerns of the affected persons;

- (c) That the information in possession of the ISP companies must be relevant information on an issue in the action and the non-party more than a mere bystander;
- (d) That the information cannot be otherwise obtained in an informal manner or from another source;
- (e) That the action cannot be furthered until the requested information is obtained;
- (f) That only the required information will be extracted; and
- (g) That the order will not cause undue inconvenience or expense and that there will be reasonable compensation provided to the ISP company.

Moving Parties' Motion Record, BMG, paras 32, 34-37, 44, TAB 5.

49. In order to succeed, the Moving Parties must demonstrate that they meet each of the above criteria. They have failed to do so. Most notably, they have not demonstrated that they have a *bona fide* claim and they have failed to show that the interest in disclosure outweighs the privacy interests of the affected person. As such the motion should be dismissed.

B. The Moving Parties have failed to demonstrate a *bona fide* claim

50. The Moving Parties' are required to adduce evidence to show they meet the threshold of a *bona fide* claim against the proposed defendant. A *bona fide* claim must comply with the following:

- (a) there must be adequate evidence to support the Moving Parties' allegations;

- (b) the Moving Parties must not have an improper purpose for seeking the information requested; and
- (c) the Moving Parties must intend to bring an action.

Moving Parties' Motion Record, BMG, para 34, TAB 5

51. The Moving Parties must comply with all three elements of the test above. In this case, they have failed to provide adequate evidence and have brought their motion on the basis of what appears to be an improper purpose.

a) Failure to produce adequate evidence

52. The evaluation of the Moving Parties' evidence is not one of likely success at trial, but the requirement of demonstrating a *bona fide* claim does allow the Court to weigh the strength of the Moving Parties' evidence.

53. The affidavit evidence submitted by the Moving Parties contains numerous errors, inconsistencies and missing links. These factual problems throw the reliability of all the evidence into question.

54. Mr. Logan has sworn that he used "a proprietary technology platform that provides effective means to detect unauthorized distribution of movies." This proprietary technology platform is not identified. Nor is there a description of how it works or how prone it is to error.

Moving Parties' Motion Record, Logan Affidavit, para 3, TAB 2.

55. Exhibit "A" of the Logan Affidavit contains a column marked "city". Mr. Logan states that his software can track an IP address to a particular geographic region. Again, the process by which this is done is not shown or explained.

Moving Parties' Motion Record, Logan Affidavit, para 23, Exhibit A, TAB 2.

56. Distributel examined the IP addresses listed and determined that the listed geographic locations in the Logan Affidavit were erroneous in all but one entry if the date and IP address were assumed to be correct. In other words, when Distributel matched the IP address at the time noted in column "HitDateUTC", it came up with an almost entirely different set of data for the "city" column.

Distributel's Motion Record, Puckett Affidavit, para 30, TAB 1.

57. This indicates any or all of the following possibilities:

- (a) The city information is incorrect;
- (b) The IP address information is incorrect;
- (c) The time information is incorrect; and/or
- (d) The date information is incorrect.

58. Evidence of the proper functioning of the platform is necessary for the Court to evaluate the claim. Distributel has determined that the Moving Parties' evidence of geographic locations is almost entirely erroneous. This calls into question the validity of all the evidence provided by the Moving Parties.

59. The Moving Parties' evidence also includes several inconsistencies. For example, the Notice of Motion and the Logan Affidavit allege that each Peer copied and distributed all three of the films.

Moving Parties' Motion Record, Notice of Motion, para 1 of the grounds, TAB 1.

Moving Parties' Motion Record, Written Representations, para 12, TAB 3.

Moving Parties' Motion Record, Logan Affidavit, paras 14, 24, 27, TAB 2.

60. In comparison, other aspects of the Moving Parties' motion record indicate that each Peer may be accused of unauthorized copying of just one of the films.

Moving Parties' Motion Record, Logan Affidavit, paras 15-16, 30, TAB 2.

61. The most troubling aspect of the evidence submitted, however, is not the weakness of what was provided, but the significant evidence that was not provided.

62. The Moving Parties' omitted to introduce the following crucial evidence:

- (a) They have not indicated how much of the work is in the possession of each Peer for which an Distributel IP address was recorded;
- (b) They have not shown that a substantial portion of a film was infringed by any one of the Peers for which a Distributel IP address was recorded;
- (c) They have not shown how many pieces made up the Protocol for each film and how many of those pieces each Peer possessed;

- (d) They have not described the process by which the proprietary software identifies the IP address that was allegedly involved in the unauthorized sharing;
- (e) They have not identified, in contrast to the November Motion, the P2P networks through which the file transfers were occurring;
- (f) They have not identified for the Court the Peer's pseudonym or network name even though that information was collected; and
- (g) They have not identified the video files' metadata including the size of the files that were transferred, even though they must have this information based on how the Protocol works.

63. Therefore, on the totality of the evidence adduced and lack thereof, the Moving Parties have failed to demonstrate a *bona fide* claim.

b) An improper purpose

64. The Moving Parties have also pursued this motion for what appears to be an improper purpose and cannot therefore succeed.

65. The Moving Parties appear to be engaged in a practice to profit by engaging in zealous copyright enforcement, a practice referred to as "copyright trolling". It involves sending letters to customers demanding significant financial compensation for the alleged copyright infringement. The amount of money demanded far exceeds any potential damages to the Plaintiff arising from the alleged breach. The customers are threatened with legal action if they do not comply. Following the November Motion, at least one Distributel customer received such a letter.

Distributel's Motion Record, Puckett Affidavit, Exhibit A, TAB 1A.

66. In the November Motion, the Plaintiff NGN stated in its written representations that once addresses and names were provided the company would "send them cease and desist letters and, if required, to add them as named Defendants to this action." This exact same sentence is repeated in the Moving Parties' current representations before this Court. The correspondence a customer shared with Distributel showed that the customer did not merely receive a cease and desist letter. Instead the customer was faced with a demand for settlement that misrepresented and exaggerated the amounts in statutory damages that NGN was entitled to recover under existing copyright law.

Moving Parties' Motion Record, Written Representations, para 4, TAB 3.

Distributel's Motion Record, Puckett Affidavit, Exhibit A, TAB 1A.

67. On November 7, 2012, a majority of the provisions of the *Copyright Modernization Act* came into force, including amendments to the provisions establishing statutory damages for non-commercial infringement. During parliamentary debate surrounding the legislation, the previous statutory damage regime for non-commercial infringements was criticized as being completely disproportionate. Consequently, a significant reduction in the statutory damages for non-commercial copyright infringements was a key amendment made in order to deter a class of plaintiffs from litigating claims like the one presently before this Court.

Distributel's Motion Record, Excerpt from the House of Commons Debates, Hansard, October 18, 2011, TAB 4.

Distributel's Motion Record, Industry Canada Fact Sheet on Copyright Remedies, TAB 5.

68. However, in the letter sent to the Distributel customer, dated November 27, 2012, NGN made the following statement:

Should you not agree to these terms, NGN Prima Productions Inc reserves its right to seek a higher amount by adding you as a defendant in Court File T-2062-12. The Copyright Act allows the court to assess statutory damages anywhere between \$1000 and \$20,000. We are aware of two cases where the court awarded \$5000 per film for compensation for copyright infringement, and of one case where the court awarded \$1000 for each of 14 films that were copied and distributed without authorization. In each case, the court also ordered that additional amounts be paid to cover costs and interest.

In addition, a bill before the Canadian Parliament would allow copyright owners to recover up to \$5000 for non-commercial infringements. (emphasis added)

Distributel's Motion Record, Puckett Affidavit, Exhibit A, TAB 1A.

69. The implication in the letter is that the Distributel customer could be facing statutory damages of up to \$20,000 and an additional \$5,000 from the new provision for a total of \$25,000. This is a misrepresentation of the law.

70. The amendments referred to had in fact already been passed by Parliament and was in force 20 days prior to the date of the letter. Furthermore the effect of the amendments was to reduce the maximum statutory damages for non-commercial infringement to a maximum of \$5,000. As s. 38.1(b) states:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes. (emphasis added)

Distributel's Motion Record, Copyright Act (RSC 1985, c. C-42), s. 38.1, TAB 6.

71. In addition to copyright trolling, the Moving Parties are affecting the market for ISP services by unfairly targeting small independent ISP companies such as Distributel. These ISP companies represent only 7% of the ISP market in Canada. Yet the Moving Parties have not

sought a similar motion for discovery for customers of the larger ISP companies representing the other 93% of the population.

Distributel's Motion Record, Puckett Affidavit, para 43, TAB 1.

72. The Moving Parties' choice to pursue independent ISP companies is unfair and adversely affects the highly-competitive market for residential Internet access services. If the public perceives their privacy rights to be diminished due to their purchase of services through a smaller company, then those customers may opt for larger companies. The perception that the subscriber may be more of a target and therefore more likely to have their privacy infringed may be enough to negatively affect consumer choice.

Distributel's Motion Record, Puckett Affidavit, paras 43-46, TAB 1.

C. The Moving Parties have failed to show disclosure outweighs privacy interests

73. One of the most important criterion established by BMG requires the Court to determine whether the public interest of disclosure outweighs the legitimate privacy concerns of the person who would be identified should the order be granted.

Moving Parties' Motion Record, BMG, para 36, TAB 5.

74. The Moving Parties' motion presents a threat to the privacy rights of Distributel subscribers. As the Court stated in BMG:

Modern technology such as the Internet has provided extraordinary benefits for society, which includes faster and more efficient means of communication to wider audiences. This technology must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights. (emphasis added)

Moving Parties' Motion Record, BMG, para 41, TAB 5.

75. Until sufficient evidence is submitted that adheres to the standard required by the Court, Distributel remains the protector of its subscribers' privacy rights. That protection can only be waived when sound evidence is provided to justify the loss of those rights.

76. Even if a *bona fide* claim is presented, the Court must exercise caution in ordering disclosure so that privacy rights are invaded only in the most minimal way.

Moving Parties' Motion Record, BMG, para 42, TAB 5.

77. Companies are not at liberty to voluntarily disclose personal information such as identities, unless they have the customers consent, or are required to disclose pursuant to a court order.

Moving Parties' Motion Record, BMG, para 37, TAB 5.

78. Subscribers have an expectation that their identity will be kept private. That expectation is legally supported by section 3 of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"):

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

79. ISP companies such as Distributel are also bound by PIPEDA to retain the private information of their subscribers for as long as is necessary to allow an affected subscriber to exhaust available recourses under PIPEDA.

Moving Parties' Motion Record, BMG, para 37, TAB 5.

Distributel's Motion Record, PIPEDA s. 7(3)(c), 8(8) and s. 28, TAB 7.

80. The standard of evidence required to support a *bona fide* claim is not just a response to the high value our society places on the protection of privacy, but is also aimed at protecting the innocent.

81. In BMG, the Court of Appeal stated that the greatest care should be taken to avoid delay between the investigation and the request for information. This was a factor that might justify a court in refusing to make a disclosure order, for the very reason that it could affect the rights of the innocent:

"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. Apparently this is because an IP address may not be associated with the same individual for long periods of time. 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." (emphasis added)

Moving Parties' Motion Record, BMG, para 43, TAB 5.

82. In the case at hand, Exhibit "A" of the Logan Affidavit shows that the retrieval dates ranged from October 20, 2012 to December 5, 2012. The motion was brought on January 10, 2013. The moving parties provided no explanation for the lengthy delay.

Moving Parties' Motion Record, Logan Affidavit, Exhibit A, TAB 2.

83. For all the above reasons, the Moving Parties have failed to show that the public interest of disclosure outweighs the legitimate privacy concerns of the person who would be identified should the order be granted.

D. The Moving Parties have failed to show no other way to obtain the information

84. Clear evidence must be adduced to show that the information requested by the Moving Parties cannot be obtained from another source.

Moving Parties' Motion Record, BMG, para 35, TAB 5.

85. No such evidence or statements were made by the Moving Parties to prove that the identities sought could be not be established through other means. In order to satisfy this criterion, the Court should require evidence from the Moving Parties that that the ISPs, including Distributel, are the only practical source of the information required by the Moving Parties.

E. The Moving Parties have failed to include the payment of reasonable compensation in the draft order

86. In *Voltage Pictures LLC v. Jane Doe and John Doe*, 2011 FC 1024 (“Voltage”), an uncontested Rule 238 motion judgement relied on by the Moving Parties’, the Plaintiff proposed, and the Court ordered, that the Plaintiff reimburse any reasonable expense incurred by the ISP companies in collecting the information requested.

Moving Parties' Motion Record, Voltage, para 26, and judgment, TAB 4.

87. In this case, the Moving Parties have not provided for reasonable compensation in the draft order. The Court is required to order compensation for reasonable expenses incurred by the non-party.

Distributel's Motion Record, Rule 238(3)(d), TAB 8.

IV. RELIEF SOUGHT

88. For all of the foregoing reasons, Distributel respectfully requests that the motion for leave to conduct an examination for discovery of Distributel be denied.

89. In the alternative, should the Court order disclosure, Distributel requests that the order require the Moving Parties to provide reasonable compensation for the information extraction.

90. As a non-party and regardless of the outcome of the motion, Distributel requests costs of this motion on a substantial basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF FEBRUARY,
2013



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