[CA] Motion to Seek Disclosure from ISPs Dismissed

IRIS 2004-4:1/12

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On 31 March 2004, the Federal Court (Canada's national trial court) denied a motion to seek disclosure from five Canadian internet service providers (ISPs), of the identity of certain customers who allegedly infringed copyright laws by sharing music through P2P networks. The plaintiffs, members of Canadian Recording Industry Association (CRIA), could not identify the infringers but affirmed that these individuals used Internet Protocol addresses (IP addresses) registered with the ISPs which are the respondents to this motion.

The court established that the test applicable to this case involved five criteria: a) the applicant must establish 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; e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.

The court concluded that plaintiffs did not meet the test as regards criteria a, c, and e. Concerning the first criterion, the judge affirmed that the plaintiffs' affidavit evidence was deficient, since it relied on information based on belief and that the grounds for the belief were not stated. Therefore there was no evidence before the court as to whether or not the files offered for downloading were actually copyrighted files belonging to the plaintiffs. The court also found no evidence of connection between the pseudonyms used by the alleged infringers and the IP addresses. More importantly, the court found no evidence of infringement of copyright. Plaintiffs had argued that the activities pursued by the alleged infringers amounted to infringement of the Canadian Copyright Act on the grounds of reproduction, authorisation, distribution and possesion of unauthorised copies for the purpose of distribution. Here, the court followed a recent decision of the Copyright Board of Canada on private copying, and considered that the act of downloading songs from the Internet for personal use does not amount to copyright infringement.

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The Court also found no evidence that the alleged infringers either distributed or authorized the reproduction of sound recordings. In the view of the court, merely placing personal copies into their shared directories and making them accessible by other computer users via a P2P service would not amount to distribution or to authorising infringement. Here the court compared this situation to a library that places a photocopy machine in a room full of copyrighted material, considering that in both cases the preconditions to copying and infringement are set up but the element of authorization is missing. It is important to know that Canada has not yet implemented the WIPO Performances and Phonograms Treaty (WPPT, see IRIS 19971: 5), and therefore the exclusive right of making available included therein is not part of the Canadian Copyright Law. Finally, the court also dismissed the accusation of secondary infringement by the unknown P2P users given that the evidence of knowledge on the part of the infringer was not proved.

Besides, according to the court the plaintiffs neither succeeded in establishing that the ISPs are the only practical source for the identity of the P2P pseudonyms (criterion c) nor established that the public interest for disclosure outweighs the privacy concerns in light of the age of the data, its unreliability and the possibility of an innocent account holder being identified (criterion e).

On 13 April 2004, the CRIA filed an appeal of the Federal Court decision.

Decision of the Federal Court of Canada, BMG Canada Inc. et al v. Jane Doe et al, 2004 FC 488, 31 March 2004

http://decisions.fct-cf.gc.ca/fct/2004/2004fc488.shtml

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