Court File No. T-292-04

FEDERAL COURT - TRIAL DIVISION

B E T W E E N :

BMG CANADA INC., EMI MUSIC CANADA, A DIVISION OF EMI GROUP CANADA INC., SONY MUSIC ENTERTAINMENT (CANADA) INC., UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA LTD., BMG MUSIC, ARISTA RECORDS, INC., EMI MUSIC SWEDEN AB, CAPITOL RECORDS, INC., CHRYSALIS RECORDS LTD, VIRGIN RECORDS LTD., ZOMBA RECORDING CORPORATION, SONY MUSIC ENTERTAINMENT INC., SONY MUSIC ENTERTAINMENT (UK) INC., UMG RECORDINGS, INC., WEA INTERNATIONAL INC.

Plaintiffs

- and -

JOHN DOE, JANE DOE AND ALL THOSE PERSONS WHO ARE INFRINGING THE PLAINTIFF'S COPYRIGHT IN SOUND RECORDINGS

Defendants

WRITTEN REPRESENTATIONS OF ROGERS CABLE COMMUNICATIONS INC.
(Motion Returnable March 12, 2004)

PART I – THE NATURE OF THIS MOTION

1. In this motion, the Plaintiffs seek an order requiring Rogers Cable Communications Inc. ("Rogers") to disclose personal information regarding nine of its account holders.[1] Similar motions have been brought against other Internet Service Providers, specifically Shaw Communications Inc., Bell Canada/Sympatico, Telus Communications Inc. and Videotron Ltee.

Notice of Motion, Plaintiffs' Motion Record, Tab 1

2. Pursuant to an order made February 16, 2004, this Honourable Court has directed that Rogers may make written submissions on at least the following issues:

(a) the ambit of the order sought in this motion;

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[1] Rogers records its account holders by reference to a dwelling unit and one individual's name.

(b) the ability of Rogers to comply with the order sought; and

(c) the interplay of Rule 233 and the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

3. The order sought by the Plaintiffs is an extraordinary one. The Court, therefore, must be satisfied that it has the jurisdiction to make such an order and that the Plaintiffs have established all prerequisites necessary for an order to issue. In considering whether an order is appropriate, the Court should have regard to the public policy for the protection of personal information as mandated in PIPEDA. If the court concludes that an order should be made, it should be restricted to require Rogers to disclose only the information that is necessary for the Plaintiffs' stated purpose in seeking the information. In this case, the form of order sought by the Plaintiffs is over-broad, fails to accord with the Rules, and, in any event, fails to compensate Rogers for its reasonable costs of compliance.

PART II – THE FACTS

4. Rogers is an Internet Service Provider ("ISP"), and is responding to a motion brought in this action by the plaintiff members of the Canadian Recording Industry Association, as set out in the title of proceedings above ("CRIA"). CRIA seeks disclosure of information and documents in connection with nine IP addresses, on specific dates and times, as listed in Schedule "A" of the CRIA notice of motion.

Notice of Motion, Plaintiffs' Motion Record, Tab 1

Data Available to Rogers

5. Rogers has some information about the account holders associated with eight out of the nine IP addresses. For these eight IP addresses, Rogers has records which identify a last known name and address of an account holder within about 6 days of the date sought in the CRIA motion. Rogers has no records which identify the account holders associated with these eight IP addresses from the exact date and time sought in the CRIA motion. Further, Rogers has no

records that contain the KaZaA pseudonyms listed in the CRIA motion or any information as to whom these pseudonyms relate.

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, paras. 4- 5

6. Rogers has no information about the account holder associated with the ninth IP address to which the CRIA motion relates (the account holder who is identified by CRIA with the KaZaA pseudonym "mr_socks@KaZaA"). That IP address relates to a specific type of modem, for which the requested data is not available from the relevant period of time.

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, para. 4

Time, Effort and Expense of Searching for Information Sought

7. Rogers took immediate steps to search for information that could be the subject of the requested order. The search was a time-consuming and resource-intensive process.

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, para. 3

8. A number of Rogers employees were required to devote time and effort to determine whether or not any information sought in the CRIA motion was available, and then to locate that information. This included a network security analyst, a database administrator, the Manager of Network Security, the Director of High Speed Data, Information Technology, a Platform Specialist, and the Director of Network Operations.

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, para. 7

9. A total of 4 man days of time was spent by these Rogers' employees to locate information in response to the CRIA motion. In addition, a number of other employees at Rogers were involved and additional costs incurred.

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, paras. 8-9

10. The cost to Rogers of attempting to identify information sought is substantial, even on a cost recovery basis. At the standard inter-company rate charged by the Rogers I.T. department to other operating entities within the Rogers group of companies and to some third parties, Rogers has incurred at least $3,000 in total (or $333 per IP address) to search for the information.

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, para. 10
>
> Cross-Examination of Andrew Ho, Responding Motion Record, Tab 2, p. 28 of the transcript, Q. 119

11. CRIA has asserted in its notice of motion that no undue harm, delay, inconvenience or expense will be caused to Rogers if it was required to comply with the order sought, however, on cross-examination CRIA's affiant admitted that he had no personal knowledge of the data that Rogers does or does not have with respect to the nine IP addresses, nor did he have any personal knowledge of the time required by Rogers employees to search for and locate such information.

> Cross-examination of Gary Millen, Responding Motion Record, Tab 3, pp. 66-68 of the transcript, Q. 236, 238-239

Notice to the Account Holders

12. Rogers has sent notices to all eight of the Rogers account holders who it has identified as last associated with the eight IP addresses. Seven out of the eight notices were delivered by courier and received. For the eighth account holder, Rogers' records indicate that the account holder moved and terminated Rogers' internet service shortly after the date to which the CRIA request relates. Rogers sent notice by registered mail to this account holder, in order to attempt to take advantage of any available forwarding address on file with the post office. That package was returned to Rogers marked "moved".

> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, para. 6

PART III – SUBMISSIONS

13. The following issues are addressed in these submissions:

(a) the form of the order requested by the Plaintiffs;

(b) Rogers' entitlement to costs to comply with an order if made; and,

(c) Rogers' ability to comply with an order if made.

Threshold Issue

14. The order sought is an extraordinary one. Accordingly, the Court must be satisfied that it has jurisdiction to make any order and that it is appropriate to do so in the circumstances. In particular, the Court should be satisfied that:

(a) the Rules relied on by the Plaintiffs do provide jurisdiction to make the order sought;

(b) the Plaintiffs have adduced evidence necessary for an order of this extraordinary nature to be granted; and

(c) the disclosure of personal information pursuant to any order made has regard for the principles of PIPEDA, which mandates that personal information be protected.

Glaxo Wellcome PLC v. M.N.R., [1998] 4 F.C. 439 (F.C.A.), Responding Book of Authorities, Tab 1

Personal Information Protection and Electronic Documents Act (PIPEDA), 2000, S.C. 2002, Chap. 5, Responding Book of Authorities, Tab 2, Preamble, s. 7(3)(c)

The Form of Order Requested

15. If the Court is satisfied that it has jurisdiction to make an order and that the Plaintiffs have met the burden of establishing that such an order is appropriate on the evidence, Rogers submits that the order, if issued, should be more restrictive than that sought.

16. With regard to paragraph 1 of the proposed order, the Plaintiffs' use of the term "forthwith", strictly speaking, removes any appeal rights that Rogers would be entitled to under

the Rules. The requirement to produce documents "forthwith", therefore, is prejudicial to Rogers, unfair in the circumstances, and ought not issue.

17. Further, the personal information sought by the Plaintiffs in subparagraph 1(a) of the proposed order should be narrowed and restricted to the available last known name and address of the Rogers' account holder associated with the IP addresses. This is consistent with the requirements in analogous situations under the Rules, for example Rule 240(b), that requires a party on examination for discovery to disclose only the name and address of any person who might reasonably be expected to have knowledge relating to a matter in question in the action. The additional information sought on this motion by the Plaintiffs - business addresses, telephone numbers, facsimile numbers, and email addresses - is overbroad, excessive, and should not be required. Moreover, ordering disclosure of this information goes far beyond that which is necessary for the Plaintiffs' stated purpose in seeking the information. As such, ordering its disclosure would be inconsistent with the principles enshrined in PIPEDA that require only the personal information reasonably necessary for a particular purpose be collected, used or disclosed.

> PIPEDA, *supra*, Responding Book of Authorities, Tab 2, s. 3, Schedule 1, ss. 4.2.2, 4.4.1
>
> *Federal Court Rules*, 1998, SOR/98-106, Responding Book of Authorities, Tab 3, Rule 240(b)

18. The 5 day period for production of information of the kind sought by the Plaintiffs is too short having regard to the scope of internal inquiries necessitated by such a request. An appropriate and commercially feasible time frame for Rogers to comply with an order of the sort sought here is at least 10 days. This affords time to locate information and to give notice of the request to the affected account holders.

19. Rogers should not be ordered to deliver an affidavit as set out in paragraph 2 of the proposed order. There is no jurisdiction for such an order under the Rules relied on by the Plaintiffs. Rule 233 only authorizes a Court to order production of documents from a non-party. While Rule 238 permits examination of a third party witness, it clearly does not permit pre-action discovery of a third party such as that sought by the Plaintiffs. Further, the Plaintiffs have not demonstrated any bases for an equitable order of discovery. Rather, disclosure of the

name and last known address of the Rogers' account holder provides to the Plaintiffs sufficient information for their purposes.

> *Bayside Towing Ltd. v. Canadian Pacific Railway*, [2000] F.C.J. No. 1122 (Q.L.) (F.C.T.D.) aff'd [2000] F.C.J. No. 1534 (Q.L.) (F.C.T.D.), Responding Book of Authorities, Tab 4, para. 25

20. The Plaintiffs should not be granted relief from the implied undertaking rule or applicable privacy legislation to use the information and documents disclosed pursuant to the order to commence and prosecute one or more applications or actions against any or all of the persons whose particulars are listed in Schedule "A". The request set out in paragraph 3 of the proposed order is overbroad and should not be granted. The Plaintiffs should be limited to using the information sought to amend their pleading in this proceeding to name the affected account holders as defendants and for no other purpose.

Costs of Compliance to Rogers

21. The Federal Court of Appeal has affirmed the view that non-party respondents should have their reasonable costs of discovery when responding to a motion to compel production. That practice should be followed here.

> *Glaxo Wellcome PLC v. M.N.R.*, *supra*, Responding Book of Authorities, Tab 1, paras. 24, 66-67

22. Rogers has been required to engage in a time-consuming and resource-intensive process as a result of the Plaintiffs' motion as described above in paragraphs 7-10. CRIA has adduced no evidence to the contrary. Rogers should be awarded its reasonable operational and legal costs of this motion. Paragraph 4 of the proposed order, therefore, should be amended so as to compensate Rogers, as a non-party respondent, for the reasonable expenses it incurred in responding to the Plaintiffs' motion.

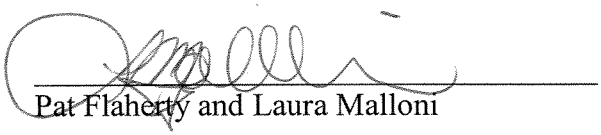
> Affidavit of Andrew Ho, P. Eng., Responding Motion Record, Tab 1, para. 3

Rogers' Ability to Comply

23. As discussed above, Rogers has some data with respect to all but one of the nine IP addresses listed in Schedule "A". Rogers can identify a last known name and address for the

account holders associated with those eight IP addresses, but not for the exact date and time referred to in the CRIA motion however. The data relates to a Rogers' account holder, but the account holder may or may not be the end user who is allegedly infringing copyright. Rogers maintains no account holder records that would match the KaZaA pseudonyms listed in the CRIA motion. As a result, Rogers can make no representation as to whether the last known account holder name and address attached to an IP address, at a different date and time, is the actual end user of a KaZaA pseudonym who was allegedly infringing copyright.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Pat Flaherty and Laura Malloni

Of counsel for Rogers Cable Communications Inc.