

FEDERAL COURT OF APPEAL

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.,
ZOMBA RECORDING CORPORATION, EMI MUSIC SWEDEN AB,
CAPITOL RECORDS, INC., CHRYSALIS RECORDS LIMITED,
VIRGIN RECORDS LIMITED, SONY MUSIC ENTERTAINMENT INC.,
SONY MUSIC ENTERTAINMENT (UK) INC., UMG RECORDINGS, INC.,
MERCURY RECORDS LIMITED AND WEA INTERNATIONAL INC.

Appellants
(Plaintiffs)

- and -

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

(Defendants)

- and -

SHAW COMMUNICATIONS INC., ROGER CABLE COMMUNICATIONS INC.,
BELL CANADA, TELUS INC., AND VIDEOTRON LTEE.

Respondents
(Third Party Respondents)

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU
by the appellants. The relief claimed by the appellants appears on the following pages.

THIS APPEAL will be heard by the Court at a time and place to be fixed by
the Judicial Administrator. Unless the Court directs otherwise, the place of hearing

will be as requested by the appellants. The appellants request that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Court Rules, 1998* and serve it on the appellants' solicitor, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Court Rules, 1998* instead of serving and filing a notice of appearance.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 13, 2004

Issued by: _____

Registry Officer

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TO:

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Solicitors for Shaw Communications Inc.

AND TO: Mr. Joel Watson
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Solicitors for Telus Inc.

AND TO: Ms. Kathryn Podrebarac
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Solicitors for Bell Canada

AND TO: Ms. Laura Malloni
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Solicitors for Rogers Cable Communications Inc.

AND TO: Mr. Serge Sasseville
Strategies, Legal & Corporate Affairs & Corporate Secretary
Quebecor Media Inc
300 Viger Avenue East
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Solicitor for Vidéotron Ltée.

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Reasons for Order and Order of the Honourable Mr. Justice von Finckenstein dated March 31, 2004 (“the Order”). The Order dismissed five motions (the “Motions”) brought by the appellants to compel the third-party respondents Shaw Communications Inc., Roger Cable Communications Inc., Bell Canada, Telus Inc., and Vidéotron Ltée. for disclosure of the names and other particulars of un-named defendants in the action below (“the defendants”).

THE APPELLANTS ASK that:

1. The Order be set aside and that an order substantially as sought in the appellants’ Motions be granted as follows:
 - (a) the respondents shall each disclose to the appellants the last known name, address and e-mail address(es) in the business records of the respondent associated with the Internet Protocol (“IP”) addresses at the dates and times listed in the schedules to the Motions;
 - (b) the respondents shall each produce to the appellants copies of their records used to identify the information disclosed pursuant to subparagraph (a), which copies may be redacted prior to production to remove irrelevant information; and
 - (c) the period for service of the statement of claim under Rule 203(1) shall be extended, pursuant to Rule 8(1), to permit consequential amendment and service of the statement of claim to be made within 60 days of the disclosure and production as provided for in subparagraphs (a) and (b), above.
2. The respondents be ordered to pay to the appellants the costs of this appeal, as well as the appellants’ costs on the Motions; and
3. This Honourable Court grant such further and other relief as is just.

THE GROUNDS OF APPEAL are as follows:

1. The appellants are the owners of the copyright in certain sound recordings. The defendants are persons who, among other things, have made and distributed using the Internet unauthorized copies of the appellants' sound recordings.
2. In this action the appellants have alleged that the defendants' activities constitute the large-scale infringement of the appellants' rights under the *Copyright Act*.¹ The appellants seek various injunctive and monetary relief in the action.
3. The appellants have identified the defendants by user pseudonyms and the Internet Protocol addresses which the defendants have used to access the Internet. However, the appellants do not know the names and addresses of the defendants so identified. These names and addresses are known to the third-party respondents.
4. By the Motions, the appellants sought to compel the third-party respondents to reveal the names of the defendants the appellants had identified by user pseudonym and Internet Protocol address.
5. In dismissing the Motions, the Motions Judge made serious and reviewable errors of law, made overriding and palpable errors in his assessment of the factual record before him, and, in the end, purported to exercise his discretion on improper and irrelevant bases, and in a manner in excess of his jurisdiction. These errors are described in the following paragraphs.
6. The Motions Judge erred by failing to apply the proper legal test to the matter before him.

¹ R.S.C. 1985, c. C-42, as amended (“the *Act*”).

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7. The Motions Judge erred in holding, on the preliminary motions before him, that s. 80(1) of the *Act* precluded a finding that the defendants infringed the rights of the appellants under s. 18(1) and s. 27(1) of the *Act* by reproducing the appellants' sound recordings, despite the following:
 - a. s. 80(1) of the *Act* does not permit a person to make a copy of a copyrighted work onto an audio recording medium for uses beyond the person's private use, and the appellants' *prima facie* showing that the defendants' copying of the appellants' sound recordings into the defendants' shared directories was not merely for the personal or private use of the various defendants; and
 - b. s.80(2) of the *Act* provides that s. 80(1) of the *Act* does not apply where the copying is done for the purpose of either distributing or communicating to the public by telecommunications, and the appellants' *prima facie* showing that the copying of sound recording files into a shared directory was done for the purpose of distribution or communication to the public.

 8. The Motions Judge erred in holding, on the preliminary motions before him, that the defendants' actions could not constitute infringement of the appellants' authorization rights under s. 18(1) and s. 27(1) of the *Act*, despite the appellants' *prima facie* showing that, among other activities:
 - a. The defendants installed, on their computers, file sharing software designed to facilitate the reproduction, transmission and distribution of sound recordings to a network of other users of the same file sharing software (a "peer-to-peer network");
 - b. The defendants placed the appellants' sound recordings in shared directories on their computers; and
 - c. the defendants connected to a peer-to-peer network using the file sharing software, thus displaying to a vast number of Internet users the

contents of the shared directories as being freely available for reproduction, transmission and distribution upon request and thereby facilitating such reproduction, transmission and distribution of the appellants' sound recordings upon request by other peer-to-peer network users.

9. The Motions Judge erred in how he applied the *prima facie* or *bona fide* standard to these preliminary motions in holding that the evidence of the appellants was insufficient to support the showing of a *prima facie* or *bona fide* case. In particular:
 - a. he erred in holding that there was no *prima facie* or *bona fide* case of infringement when there was indeed evidence that the appellants' sound recordings had been knowingly copied and distributed by the defendants without the authorization of the appellants;
 - b. he erred in holding that there was no *prima facie* or *bona fide* case of infringement of the appellants' distribution rights under s. 27(2)(b) of the *Act* on the basis that there was no evidence of positive acts by the owners of shared directories, such as sending out copies of the appellants' sound recordings or advertising that the appellants' sound recordings located on their shared directories are available for copying, despite evidence of such copies having actually been "sent out" and of the existence of such copies on shared directories, which are available to any user of the peer to peer service, and by the very nature of a shared directory, being effectively advertised to millions of potential copiers;
 - c. he erred in holding that there was no *prima facie* or *bona fide* case of infringement of the s. 27(2) rights of the appellants (possession and distribution) on the basis that there was no evidence of knowledge on the part of the infringers, despite evidence that notification of such infringing activity had been repeatedly provided to the infringers;

- d. he erred in holding that the appellants' affidavit evidence was deficient, including that it was deficient on the basis that it contravened the "best evidence rule" and was "remote", despite the detailed and voluminous evidence filed to support the existence of a cause of action; and
 - e. he erred in holding that there was no evidence linking user pseudonyms to the IP addresses, despite evidence having been provided on this very point.
10. The Motions Judge erred in holding that there was insufficient evidence to conclude that the respondents (Internet Service Providers or "ISPs") were a suitable source for the identifying information sought, despite the evidence that the only practical source was the ISPs and the absence of any evidence to suggest that another source existed for the information sought on the Motions.
11. The Motions Judge erred in stating that it was common ground that ISP subscriber defendants had an expectation that their identity would be kept private and confidential under the circumstances of this case. The Motions Judge further erred in holding that, in light of the age of the data, the privacy concerns of the ISP subscriber defendants outweighed the public interest in disclosure, despite the evidence that the ISPs had obtained and retained data that was not stale.
12. The Motions Judge erred in holding that Rule 233 of the *Federal Court Rules, 1998* presupposes the existence of specified documents and that ISP documents that show links between IP addresses and ISP subscribers do not "pre-exist", despite the evidence that computer data is available in the computer systems of the ISPs to establish these linkages between IP addresses and the defendants.

April 13, 2004

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Court File No. A-
(T-292-04)

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AB, CAPITOL RECORDS, INC., CHRYSALIS RECORDS
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**NOTICE OF APPEAL
(FILED THIS 13TH DAY OF APRIL, 2004)**

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