



Court File No. A-152-23

(T-1062-21) 101

FEDERAL COURT
OF APPEAL 15

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	JUN 12 2023
	JULIA TANG
TORONTO, ON	<u>1</u>

BETWEEN:

BELL CANADA and BELL ALIANT

Appellants
(Defendants/Plaintiffs by Counterclaim)

- and -

**MILLENNIUM FUNDING, INC., OUTPOST PRODUCTIONS, INC.,
BODYGUARD PRODUCTIONS, INC., HUNTER KILLER PRODUCTIONS,
INC., and RAMBO V PRODUCTIONS, INC.**

Respondents
(Plaintiffs/Defendants by Counterclaim)

- and -

AIRD & BERLIS LLP

Respondent
(Defendant by Counterclaim)

NOTICE OF APPEAL

TO THE RESPONDENTS:

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

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.

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 341A prescribed by the *Federal Courts Rules* and serve it on the appellants' solicitor, or, if the appellants are self-represented, on the appellants, **WITHIN 10 DAYS** after 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 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, 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.**

**TODD DESANTI
SENIOR REGISTRY OFFICER
AGENT PRINCIPAL DU GREFFE**

June 12, 2023

Issued by:

Registry Officer
Federal Court of Appeal
Address of 180 Queen Street W, Suite 200
local office: Toronto, ON M5V 3L6

TO: AIRD & BERLIS LLP
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

Kenneth R. Clark
(kclark@airdberlis.com)
Lawrence Veregin
(lveregin@airdberlis.com)

Tel: 416-863-1500
Fax: 416-863-1515

Solicitors for the Respondents, Millennium Funding, Inc., Outpost
Productions, Inc., Bodyguard Productions, Inc., Hunter Killer Productions,
Inc. and Rambo V Productions, Inc.

AND TO: SPRIGINGS INTELLECTUAL PROPERTY LAW
148 Norseman Street
Toronto, ON M8Z 2R4

Dale E. Schlosser
(dschlosser@springs.com)

Tel: 416-777-0888
Fax: 416-777-0881

Solicitors for the Respondent, Aird & Berlis LLP

APPEAL

THE APPELLANTS (“Bell”) APPEAL to the Federal Court of Appeal from the Order of the Honourable Madam Justice Furlanetto dated May 31, 2023 in Federal Court File No. T-1062-21 (the “**Order Below**”).

THE APPELLANTS ASK that this Court grant an Order:

1. Allowing this appeal;
2. Setting aside the Order Below, which affirmed the Order of Case Management Judge Aalto dated June 23, 2022 (the “**Decision**”) striking significant portions of Bell’s defence and striking Bell’s counterclaim in its entirety, without leave to amend;
3. Dismissing Millennium Funding, Inc., Outpost Productions, Inc., Bodyguard Productions, Inc., Hunter Killer Productions, Inc., Rambo V Productions, Inc., and Aird & Berlis LLP’s (collectively, the “**Respondents**”) motion to strike the impugned paragraphs of Bell’s Amended Statement of Defence and Counterclaim;
4. In the alternative to 3, allowing the Respondents’ motion to strike only insofar as it struck the counterclaim against Aird & Berlis LLP;
5. In the further alternative to 3 and 4, allowing the Respondents’ motion to strike, but granting Bell leave to amend the Amended Statement of Defence and Counterclaim;
6. Granting Bell its costs throughout; and
7. Granting such further and other relief as Bell may request and as this Honourable Court may deem appropriate.

THE GROUNDS OF APPEAL are as follows:

1. Background to the Appeal

1. The notice and notice regime is part of the *Copyright Act* (the “**Notice & Notice Regime**”). It provides that when copyright owners detect online copyright infringement, they may send notices of claimed infringement (“**notices**”) to the alleged infringers.

Internet Service Providers (“ISPs”), and other intermediaries, who provide service to alleged infringers are required, with certain exceptions, to forward those notices to their customers. The *Copyright Act* provides for statutory damages if a person “fails to perform his or her obligations” under this regime.

2. The Respondents allege that Bell has failed to forward their notices, contrary to the Notice & Notice Regime. They are seeking approximately **\$400 million** in statutory damages from Bell. This is the first such action brought against an ISP, the first opportunity for a court to consider the scope of sections 41.25 and 41.26 of the *Copyright Act* in a claim for statutory damages against an ISP, and the first opportunity to assess what defences an ISP can raise against such a claim.

3. Some of the allegations in Bell’s statement of defence are uncontroversial. For example, that:

- (a) Bell delivered all of the proper notices;
- (b) many of the Respondents’ notices were deficient or improper;
- (c) the Respondents breached the express and implied obligations on copyright owners to ensure that the means used to generate notices of claimed infringement do not unduly risk incorrectly identifying a person, account, or online location as having engaged in an act of copyright infringement; or forwarding notices to members of the public who have not infringed copyright or wrongly accusing them of an infringement or threatening them with lawsuits; and
- (d) the Respondents are seeking inflated damages based on a misinterpretation of the *Copyright Act*.

4. In addition to these uncontroversial defences, Bell also pleaded that the Respondents misused the Notice & Notice Regime and engaged in “copyright misuse”. Copyright misuse is a developing doctrine in the United States whereby copyright holders may not enforce their copyrights if they have used those rights in a way that violates the

policy underlying copyright law. United States courts have found that, among other things, abusive or overly aggressive conduct to enforce copyrights can constitute copyright misuse. That is precisely what Bell pleaded the Respondents have done here.

5. The doctrine of copyright misuse is in its infancy in Canada. Pleadings of copyright misuse survived a motion to strike in another Federal Court case, but the doctrine has never been considered at trial. It was previously raised before the Supreme Court of Canada which concluded that its application in Canada was an issue “best left for another day”.¹

6. Bell pleaded material facts to support its copyright misuse pleading. For example, Bell pleaded that the Respondents:

- (a) are not using the Notice & Notice Regime as it was intended to be used and are abusing it;
- (b) have adopted a business model whereby they send unreliable notices to ISPs, falsely claiming that their customers have infringed copyright without a sufficient factual basis for doing so; and
- (c) are using the Notice & Notice Regime and the legal system to harass and intimidate ISPs’ customers for the purposes of extracting disproportionate and unjustified settlements.

7. More specifically Bell pleaded that:

- (a) The Copyright Enforcement Program (“CEP”) (as defined below) is used to send “extremely large numbers of unreliable and automatically generated notices to ISPs” (at para. 26);
- (b) The notices are sent indiscriminately in violation of the express or implied obligations under the Notice & Notice Regime not to unduly risk incorrectly

¹ *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, at para. 98.

accusing Internet users of copyright infringement or threatening them with lawsuits (at paras. 27-28);

- (c) The CEP's purpose is "to intimidate alleged infringers who receive notices into settling claims for much larger amounts than the damages actually suffered", and "to claim exorbitant amounts from ISPs ... that far exceed any damages actually suffered" (at para. 26);
- (d) The Respondents "send tens of thousands of notices, obtain Norwich orders against thousands of alleged infringers, make excessive settlement demands, and commence legal proceedings alleging copyright infringement" (at para. 28);
- (e) The CEP "is used for the purpose of extracting disproportionate and unjustified settlements from innocent parties or... parties whose liability should be only minimal" and "causes unwarranted harm and concern to Internet users who lack the ability to defend themselves" (at para. 28); and
- (f) The CEP is a misuse of the Notice & Notice Regime and "against public policy and the public interest and the purposes of the Act..." (at para. 30).

8. As such, Bell pleaded that the Plaintiffs – Millennium Funding *et al* – were engaging in copyright misuse for a host of reasons – including because they use their rights in a way that violates the policy underlying copyright law – and as such cannot enforce their rights under the *Copyright Act*.

9. Separately, and in addition, Bell further pleaded that the architect of the Respondents' abuse of the Notice & Notice Regime is Aird & Berlis LLP ("**Aird & Berlis**"). Aird & Berlis created the CEP that systematically engages in copyright misuse on behalf of copyright owners who have joined the CEP. Bell pleaded that Aird & Berlis used this program to engage in copyright misuse using the copyrights of members of the CEP to, among other things, extract disproportionate and unjustified settlements from ISPs' customers for the benefit of Aird & Berlis. Bell also pleaded that Aird & Berlis, as

the architect and the directing mind of the CEP, was not acting in a solicitor-client relationship in connection with the misuse and abuse of the Notice & Notice Regime.

2. The Motion to Strike and the Order Below

10. The Respondents brought a motion to strike all of Bell's pleadings except for the uncontroversial defences described in paragraph 3 above.

11. The Associate Judge granted the motion to strike without leave to amend. He struck necessary and significant aspects of Bell's defences, including Bell's copyright misuse defence and Bell's counterclaim. In doing so, he erred in law by interpreting the copyright misuse defence in a very narrow and unsupportable manner that is inconsistent with the developing caselaw.

12. Bell appealed the Associate Judge's decision to the Federal Court. The Federal Court judge agreed with Bell that the Associate Judge erred in his analysis of the copyright misuse defense, but nonetheless dismissed Bell's appeal. In the Order Below, the Federal Court judge held that:

- (a) The Associate Judge erred "in taking too limited an approach to the misuse of copyright defence" (at paras. 3 and 29);
- (b) Copyright misuse is a developing doctrine even in the United States (at para. 30) and its scope is not settled. Ultimately, "[t]he full merits and intricacies of the doctrine are beyond the scope of a motion to strike such as this" (at para. 45);
- (c) Nonetheless, Bell pleaded "insufficient" material facts to support a copyright misuse defence. In particular, the Order Below held:
 - (i) *First*, while the jurisprudence does not "expressly" state such a requirement, copyright misuse includes an inquiry into purpose and motives, and Bell failed to plead sufficient material facts relating to that inquiry.

- (ii) **Second**, Bell pleaded material facts relating to the Respondent's CEP but failed to "sufficiently set out" how these constituted copyright misuse.
- (iii) **Third**, Bell's pleading does not contain "sufficient" factual foundation to support a finding of copyright misuse: For example, Bell should have "clarified" its basis for asserting that the Respondents' notices are not reliable and are unlawful, and what proportion of notices are affected.
- (d) The allegations against Aird & Berlis in managing the CEP were consistent with steps that counsel would take in a solicitor and client relationship and did not provide sufficient material facts to support a claim against Aird & Berlis; and
- (e) Bell should not be granted leave to amend since Bell did not indicate what amendments it would make. For example, Bell did not plead "on what basis it is asserted that there are large numbers of notices that are sent that are unreliable and which identify potential infringers that are not infringing".

3. The Errors in the Order Below

13. It was both an error of law and a palpable and overriding error to strike Bell's defence of copyright misuse for failure to plead material facts. Even if that decision could be upheld (which is denied), the decision to deny Bell leave to amend cannot.

a. Copyright Misuse

14. The decision to strike Bell's copyright misuse defence and counterclaim was an error for at least four reasons.

15. **First**, the test for copyright misuse has not been determined in Canada. As the Order Below correctly confirms, it is "yet to be adjudicated under Canadian law". "Its possible application as a defence to copyright infringement" has been left open.

16. The Order Below properly rejected the Associate Judge's exceedingly narrow view of the doctrine of copyright misuse. However, having rejected one narrow reading of this doctrine, the Order Below then imposed a different and unwarranted restriction by requiring that Bell must plead the Respondents' "purpose" and "motives" for engaging in copyright misuse.

17. There is no such restriction on the developing doctrine under United States law and no basis for such a restriction in the yet to be developed doctrine under Canadian law. Even if Canadian courts ultimately adopt such an element into the doctrine, that is a matter which should be determined at trial. As the Order Below recognized, the legal test and evidence that will be required to successfully assert copyright misuse in Canada have yet to be determined.

18. *Second*, the Order Below wrongly required Bell to plead with a much greater level of detail than what is required in the case law. The Order Below effectively required Bell to plead *evidence* in addition to material facts. For example, the Order Below calls for Bell to plead:

- (a) "how the CEP is set up to intimidate and harass alleged infringers and in turn to claim exorbitant amounts from ISPs";
- (b) "how the CEP is used to generate notices to members of the public who do not infringe or who are wrongfully accused of infringing";
- (c) "the basis for asserting the notices are unreliable and unlawful and what proportion of the notices the allegation relates to";
- (d) "how Aird & Berlis' actions in managing the CEP lead to the unreasonable and unfair conduct complained of"; and
- (e) "how Aird & Berlis, though the use of the CEP, fostered frivolous and improper litigation".

19. While Bell is certainly aware of customers who deny infringement and allegedly received faulty notices, the inner workings of the CEP are within the knowledge of Aird &

Berlis and the other CEP members. That is something which should be explored through the discovery process. To require Bell to plead the inner workings of a scheme to which it is not a party prevents Bell from raising a legitimate defence and departs from the well-established jurisprudence of this Court in *Enercorp* which held that:

In deciding whether pleadings are “manageable and fair”, the Court should consider the whole of the circumstances, including the relative knowledge and means of knowledge of the parties. Rules as to sufficiency of pleadings must not be allowed to become instruments of oppression in the hands of those who have knowledge of material facts at the expense of those who seek to rely on those facts without, however, having the means of knowing those facts so as to be able to plead them with specificity.²

20. Bell pleaded what the CEP does and why that conduct constitutes copyright misuse. To ask for more, when that knowledge is uniquely in the hands of the Respondents, transforms rules as to pleadings into “instruments of oppression”.

21. The Order Below likewise applies the same unreasonably high standard of pleading to Bell’s counterclaim and was wrong to strike the counterclaim for the same reasons.

22. **Third**, the unreasonably high standard for particularity imposed by the Order Below is especially inappropriate because the scope and applicability of the defence is yet to be determined.

23. Given that the copyright misuse is a developing doctrine, the precise contours of which have yet to be determined by any Canadian Court, it is premature to decide on a pleadings motion what facts are or are not material. It is not appropriate to impose restrictive pleadings requirements on a developing doctrine without any legal basis for concluding that such precise pleadings are relevant, much less required.

24. **Fourth**, even if it were correct that Bell had not pleaded sufficient material facts (which is denied), the Order Below erred in refusing leave to amend. The Order Below is wrong to conclude that further amendment would not cure the “defects”.

² *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215, at para. 36.

25. The two decisions below make the legal framework for the doctrine of copyright misuse a moving target. In addition, the level of specificity required for pleading the doctrine of copyright misuse is unprecedented. Bell had no prior notice that this level of specificity would be required. Bell was never previously asked to provide this level of specificity nor did Bell ever indicate that it would be unable to do so. Indeed, the Plaintiffs have never even demanded particulars from Bell regarding its copyright misuse pleading.

26. If Bell had notice of the exceedingly high level of specificity required by the Order Below, Bell could and would have pleaded in greater detail which would more than meet the standard articulated by the Federal Court Judge for pleading copyright misuse. For example, Bell could have pleaded the following (although Bell maintains this level of particularity is not required when pleading material facts):

- (a) The forensic software used by the Respondents to monitor BitTorrent was not designed or verified to reliably and accurately identify copyright infringers;
- (b) The forensic software lacks written technical documentation and specifications and its design falls below generally accepted standards used for developing and validating critical software that could harm or damage the reputations and livelihoods of persons it misidentifies;
- (c) The forensic software has not been tested to ensure that only notices with a reliable and accurate basis for asserting claimed infringements against identified parties are sent to ISPs;
- (d) The forensic software has not been designed to, and does not meet, software standards and controls accepted by the scientific community or generally accepted standards for forensic software tools including standards promulgated by the U.S. National Institute of Standards and Technology (NIST), Daubert principles for ensuring the relevance and reliability of scientific evidence, ANSI/IEEE software development standards, and the

Software Engineering Institute's (SEI's) Capability Maturity Model (CMM);

- (e) The forensic software has not been systematically and comprehensively tested (i.e. tested properly) or independently validated to verify that critical software defects were removed and allegedly infringing digital media content (i.e. "pieces" of a movie allegedly seeded into a BitTorrent swarm) can be explicitly traced to a user in possession of copyrighted content;
- (f) The forensic software does not, or is unable, to detect whether it generates duplicate notices of claimed infringement, which the Respondents send to ISPs to forward to their customers;
- (g) Users of the forensic software do not employ validated manual and automated processes for audio-visually verifying that an allegedly infringing copy of a movie shared over a BitTorrent swarm is a true copy of a movie claimed to be owned by the Respondents;
- (h) The forensic software does not maintain any metrics about the accuracy of the notices on its system;
- (i) The forensic software reports false positives at a very high rate (falsely reporting IP addresses, and users of IP addresses, purportedly involved in copyright infringement);
- (j) The forensic software reports false positives in other scenarios including where a user may initiate but cancel a download or where a router reset causes a previously used infringing IP address to be assigned to the subscriber;
- (k) The Respondents have at all times been aware that the forensic software reports numerous "false positives". The forensic software cannot identify individuals infringing copyright. In particular, it is well known to them, that, at best, the forensic software, with the cooperation of the ISP, can only

identify the accounts of ISP customers associated with IP addresses detected by the software. The forensic software has no way of telling if a customer was the individual using his or her account to perform the act of alleged infringement. This is partly because IP addresses are typically shared by multiple people in ways that make it impossible to know, or in the alternative, to be sure, who is responsible for what activity (i.e. transactions through the IP address). For example, the forensic software is unable to identify the individual using the ISP customer's account, with or without permission, in a number of potential ways, including:

- (i) through the use of passwords shared with family members, roommates, guests, tenants, and neighbours;
- (ii) through the use of unsecured guest accounts that are created and then forgotten;
- (iii) through cracked passwords;
- (iv) through phishing or other social engineering techniques whereby, among other things, a hacker may access an ISP customer's account by employing "reused" passwords fraudulently obtained in connection with unrelated accounts or services can be obtained; or gains the trust of account holders or other individual to exploit other security vulnerabilities;
- (v) through accessing "backdoors" to unsecured devices created using malware;
- (vi) through routers inadvertently left unsecured or with factory default security settings; and
- (vii) through concealing their own IP address by "piggybacking" on the IP address used by someone else's Virtual Private Network (VPN).

- (l) The forensic software is unreliable with respect to IP addresses which are notoriously insecure when used in the BitTorrent context since the BitTorrent protocol was designed to allow high-bandwidth connections including non-source IP address validation. Thus, the header information transmitted by a peer user participating in a BitTorrent swarm can display someone else's IP address. This problem is compounded by the fact that users of BitTorrent can inject random IP addresses into their swarm list results.
- (m) This Court acknowledged the limitations of the forensic software used by the Millennium Producers in *Voltage Holdings, LLC v. Doe #1*, 2022 FC 827 in which the Federal Court refused to grant default judgment to Voltage Holdings, LLC, one of the members of the CEP, based on its inability to establish that ISP account holders authorized infringement or committed secondary copyright infringement.
- (n) The forensic software incorrectly infers that ISPs' customers who obtain a few fragments of a copyrighted movie (and not all or a substantial part of a movie) that were seeded into a BitTorrent swarm ("peers"), as having engaged in an act of infringement. However, these peers can only share/upload fragments (pieces/blocks) of a file (movie) they hold at any given instant in time. Peers that only obtain and offer to make available small fragments of a movie cannot and do not offer to upload complete files (copies of movies) to other peers in a BitTorrent swarm and, by so doing, they do not reproduce, upload, download, or otherwise infringe copyright because these fragments represent an insubstantial portion of the movie. This has led to thousands of incorrect and wrongful claims of copyright infringement;
- (o) The forensic software does not, and is unable to, assess whether the ISPs' customers may be engaged in a use that does not infringe copyright such as a fair dealing with the work section 29 of the *Copyright Act*, or non-

commercial user-generated content under section 29.21 of the *Copyright Act*;

- (p) Yet, to the knowledge of the Respondents, the forensic software identifies peers and ISPs' customers as alleged infringers and automatically generates and sends notices of claimed infringements to Bell and other ISPs to forward under the Notice and Notice Regime to persons who have not infringed, or likely have not infringed, copyright, or without knowledge as to whether they have infringed or not infringed, all the while knowing or recklessly disregarding the fact that the notices are making, or likely making, false or unsubstantiated claims of infringement;
- (q) The forensic software operates autonomously and without any human supervision to determine or detect whether the individuals to whom notices are to be sent have infringed copyright. For example, no personnel have been assigned to verify the individual claims of infringement nor examine the pieces of the allegedly infringing movies in issue.
- (r) Further, no such oversight is possible because only small and insubstantial number of fragments of files are downloaded from alleged infringers which is an insufficient basis for concluding that any person has infringed copyright. It is also impossible for the Respondents to compare the small fragments downloaded with copies of the copyrighted movies to verify or determine if a substantial part of a movie has been infringed since they cannot be viewed;
- (s) The Respondents' notices of claimed infringement also assert causes of action against individuals that do not exist in law. For example, notices allege "that utilizing the BitTorrent peer-to-peer network, you, or someone using your internet account, downloaded and/or unlawfully offered to upload the Work in contravention of the Claimant's copyright in respect of same." Yet, the Supreme Court of Canada ruled in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software*

Association, 2022 SCC 30 and confirmed in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 that “offering to upload a work” does not violate the communication to the public right and, in any event, the notices did not claim infringement by authorizing other peers to download a copy of movies, or infringement by downloading or offering to upload parts or insubstantial fragments of movies. Further, uploading and downloading are not any of the enumerated rights of copyright holders under section 3(1) of the *Copyright Act*. As a result, the notices of claimed infringement also failed to specify, or properly specify, the infringement that is claimed as is required by section 41.25(2)(e) of the *Copyright Act*;

- (t) Further, and to the knowledge of the Respondents, users of BitTorrent networks, or at least many of them, share only fragments of files as the BitTorrent network operates to enable individuals seeking a copy of a movie to obtain pieces from numerous peers on the network. Accordingly, under the operation of BitTorrent networks, individuals, or at least some of them, could possibly only “offer” or share insubstantial portions of files, and therefore to the knowledge of the Respondents, do not download and/or unlawfully offer to upload the work (or movie) alleged to be infringed;
- (u) Further, the forensic software only collects fragments of movies held by peers. It does not generate notices based on evidence that peers uploaded or downloaded copies of movies or even fragments of movies held by individuals;
- (v) Despite all of the foregoing, to their knowledge, the Respondents knowingly send out hundreds of thousands of notices of claimed infringement and base the entire CEP on the false premise that notices of claimed infringement are being sent to ISPs to forward to innocent individuals, or to individuals that likely do not infringe copyright, or without knowledge as to whether they have infringed or not infringed, that *Norwich* orders are obtained, and that settlement demands are made and are entered into, and that legal

proceedings including class action proceedings are commenced against individuals that they know have not or are likely not to have infringed copyright, or without knowledge as to whether they have infringed or not infringed, or in the alternative are willfully blind to such facts;

- (w) The Respondents are fully aware their forensic software is unreliable, and that unfounded claims of infringement are being made against individuals that do not infringe or likely have not infringed copyright, or where they have no knowledge as to whether they have infringed or not infringed;
- (x) The Respondents have received countless denials from affected individuals. For example:
 - (i) The Respondents are aware of public articles and posts on public forums where individuals (including an 89-year-old grandmother) have denied infringing copyright as alleged in notices of claimed infringement, where individuals have described paying to settle alleged infringement claims even when they denied the allegations, and where what Bell alleges to be abuse of the Notice & Notice Regime is described. By way of example, see *U.S. cancels internet piracy notices while Canadians still get notices demanding settlement fees*, CBC News, February 1, 2017; *A shakedown against Canadians: Hollywood still telling internet pirates to pay up*, CBC News June 20, 2016, *Millions of piracy notices coming to Canada can no longer demand cash*, CBC News, January 27, 2019;
 - (ii) News articles refer to Mr. Ken Clark of Aird & Berlis as suing hundreds of internet users leading to “raising concerns that Canada’s copyright regime is being used to take advantage of consumers who feel compelled to agree to settlements of up to \$5,000 rather than racking up legal fees to defend themselves”, among other concerns (*Hollywood studio looks to sue thousands of Canadians in movie piracy lawsuits*, The Globe and Mail, April 28, 2019). See also

Hundreds of Eastlink customers face lawsuit for "illegal" downloads of Hellboy, CTV News, March 5, 2020, etc.;

- (y) The Respondents and other members of the CEP have made settlement demands that exceed the statutory damages permitted under the *Copyright Act* including by making multiple claims of infringements against the same individuals for alleged infringement including of different works that exceed the recoverable statutory damages under the *Copyright Act*, or have recklessly made claims without assessing whether those limits have been exceeded, or in the alternative, have knowingly made claims that are excessive and punitive relative to the real damages they have suffered;
- (z) The Respondents know that the notices of claimed infringement they send out have no, or extremely limited, effect on stopping copyright infringement. This was expressly admitted by Aird & Berlis in the reverse class action litigation against Mr. Robert Salna ongoing in the Federal Court where Aird & Berlis stated in its written submissions to the Court (Reply Factum at para. 25) that "a notice is largely ineffective" without litigation to back it up. Yet, the Respondents continue to send notices rather than seek blocking orders to prevent the alleged infringements of works, or dispensing with sending notices and instead seeking *Norwich* orders against the alleged infringers;
- (aa) In fact, Mr. Ken Clark of Aird & Berlis wrote in a published article that companies like the Respondents and other members of the CEP could apply for orders against ISPs to block the BitTorrent sites from being accessed from Canada;³
- (bb) The forensic software used by the Respondents is operated by private investigators and their employers who are not licensed, and who do not

³ See, Ken Clark et al, *The Beginning of the End of Online Piracy in Canada?*, June 7, 2021 online @: <https://www.airdberlis.com/insights/blogs/thespotlight/post/ts-item/the-beginning-of-the-end-of-online-piracy-in-canada>.

carry licenses, in Ontario or other Canadian provinces contrary to Sections 2, 5, 6, 10, 30, 31, 33, 34, and 53 of the *Private Security and Investigative Services Act*, 2005, S.O. 2005, c. 34 (the “*Ontario Private Security and Investigative Services Act*”) and the regulations made pursuant thereto and under similar provincial laws in other provinces and territories (the “*Private Security Laws*”). The failure to comply with these laws impairs the reliability, legitimacy, and integrity of the CEP and furthers the misuse and abuse of the CEP and the notices sent pursuant thereto. In particular:

- (i) The Respondents and their agents failed to register as employers of the private investigators and employ or use individuals who are not licensed under the *Private Security Laws*;
- (ii) The operators of the Respondents’ forensic software are not entitled to work in Canada, and have not successfully completed all prescribed training and testing required under the *Private Security Laws*;
- (iii) The operators and their employers fail to comply with the regulations prescribed under the *Private Security Laws* such as under the *Ontario Private Security and Investigative Services Act*, including failing to comply with the *Code of Conduct*, O Reg 363/0;
- (iv) These violations of the *Private Security Laws* are offenses (such as an offense under Section 43(1)(d) of the *Ontario Private Security and Investigative Services Act*);
- (v) All of the Respondents’ forensic investigations have been conducted illegally in Canada; and
- (vi) The Respondents’ collection and use of the data collected and compiled by the investigators and their employers and used to send notices of claimed infringement and to obtain *Norwich* orders was illegal and contrary to law in Canada and the Respondents and other

members of the CEP failed to notify the courts of such facts when obtaining *Norwich* orders.

- (cc) The misuse and abuse of the Notice & Notice Regime is further compounded because the notices sent are false and misleading and are contrary to sections 52(1) and 52.01(2) of the *Competition Act*, R.S.C. 1985, c. C-34. In particular, the Respondents and other members of the CEP send out notices of claimed infringement (electronic messages) for the purpose of promoting, directly or indirectly, the copyright trolling businesses they engage in or their interests in copyrights, if any, and these messages are sent knowingly and recklessly making material false and misleading claims of copyright infringement, as described above. They send these notices to Bell and other ISPs, and to individuals knowing or being reckless to the facts that the individuals have likely not infringed copyright or that the vast majority of them have likely not infringed copyright or without knowing if they infringed or not;
- (dd) The misuse and abuse of the Notice & Notice Regime is further compounded because the Respondents and their forensic investigators' activities in carrying out the CEP violate Canada's privacy law, *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5 ("*PIPEDA*"). In particular, they use automated forensic software to collect, use, and disclose electronic addresses of individuals and other personal information about the online activities of individuals contrary to paragraphs 7(1)(a) and (b.1) to (d) and (2) (a) to (c.1) and 7.1(1)-(3) of *PIPEDA*. The forensic software collects, on an automated basis, IP addresses (electronic addresses), such software is a computer program that is designed and marketed primarily for use in generating or searching for, and collecting, such electronic addresses, and the software uses individuals' electronic addresses by forwarding same in notices of claimed infringements sent to ISPs to be forwarded to individuals; and

- (ee) Further, the forensic software used by the Respondents generate inordinately huge volumes of email messages to Bell that has all the attributes of harmful spam. These volumes of notices were sent knowing, or with reckless disregard, to the damage they would cause to Bell networks and systems. As a result, a large quantity of Asserted Notices allegedly sent to Bell were automatically blocked to protect Bell networks by third party spam filters and never reached Bell.

27. As the foregoing demonstrates, there are ample details which Bell could have pleaded if the law required it to do so, and it was inappropriate to deny leave to amend on the basis that further amendment would not cure the “defects”. Moreover, the nature of the foregoing highlights that the Order Below imposed an obligation on Bell to plead the *evidence* by which *material facts* would be proven. The points above could be characterized as material facts which demonstrate “how” the CEP was used for copyright misuse, but are more properly characterized as examples of types of evidence by which Bell’s pleadings would be proved.

28. Finally, the Order Below is wrong that “when Bell amended its pleading, it knew of many of the Respondents’ concerns, yet failed to rectify the issues”. Before it amended its pleading, Bell was only aware that the Respondents objected to Aird & Berlis being named as a party. The Respondents had not at that time listed specific concerns in their letters, and raised many new issues in briefing their motion and responding to Bell’s appeal. As indicated, the Respondents never made a demand for particulars and Bell never refused to provide further particulars. Had the Respondents made such a request, Bell could have and would have provided the further particulars as described above.

29. Moreover, Bell amended its pleading before the Associate Judge heard and decided the motion to strike in which he erroneously decided that copyright misuse is a very narrow doctrine which does not engage public policy concerns and is not available except to those accused of infringement. Having overturned those findings – and having found that the doctrine could be broad enough to cover the wrongs complained of here by Bell, the Order Below ought to have given Bell an opportunity to plead additional material facts if it had additional facts to plead.

30. Indeed, at no time did the Associate Judge or the Federal Court Judge even ask Bell or its counsel whether Bell had additional material facts to plead if it was required to do so.

31. The failure to provide Bell an opportunity to amend its pleading was an error of law and/or a palpable and overriding error and should be reversed by this Court.

b. Counterclaim Against Aird & Berlis

32. The Order Below erred in upholding the Associate Judge's decision to strike Bell's counterclaim against Aird & Berlis. The Order Below erred in doing so, including because:

- (a) The Order Below weighs the evidence and comes to conclusions incompatible with the pleadings, which must be taken as true. The Order Below concludes that the actions of Aird & Berlis are simply the actions of counsel. But Bell pleaded that Aird & Berlis were not merely counsel to the Plaintiffs but also the *creators* of the CEP; managed and carried out the acts of copyright misuse; have acted in concert with members of the CEP pursuant to a common design and concerted action to engage in copyright misuse including to violate and/or abuse sections 41.25 and 41.26 of the *Copyright Act*; knowingly induced, incited, persuaded, and procured copyright misuse by members of the CEP; fostered and improperly supported and controlled frivolous and improper litigation; acquired beneficial interests in the copyrights of members of the CEP; and unreasonably, unfairly and/or disproportionately share in any profits from the CEP. The factual findings made in the Order Below are inappropriate and irreconcilable with the pleadings, which must be taken as true.
- (b) The Order Below again applies too stringent a standard by requiring Bell to plead "how AB's actions in managing the CEP lead to the unreasonable and unfair conduct complained of, or how AB, through the use of the CEP, fostered frivolous and improper litigation". For the same reasons as set out above in paragraph 19, the Federal Court Judge erred in applying this standard.

- (c) The Order Below again errs in determining that the cause of action cannot succeed even if Bell is granted leave to amend. Bell sets out above extensive additional material facts (which Bell says are unnecessary and instead are evidence to support Bell's allegations) which go to the role that Aird & Berlis takes in administering the CEP and sending the impugned notices, and "how" its actions lead to unfair and unreasonable conduct.

c. Abuse of Process and Unlawful Means Conspiracy

33. The Order Below holds that: "Bell has not established that the CMJ erred in finding that there were no material facts alleged to establish the torts of abuse of process and unlawful means conspiracy". Bell maintains that its pleading contains sufficient material facts, which must be taken as true, to support these pleas.

34. In any event, the Order Below ought to have granted leave to amend the pleading to assert additional material facts. Bell could and would add the following unlawful means used by the Respondents to its pleading:

- (a) The Respondents' forensic software violates sections 2, 5, 6, 10, 30, 31, 33, 34, and 53 of the *Private Security and Investigative Services Act*, 2005, S.O. 2005, c. 34 and similar provincial laws in other provinces, as further described above;
- (b) The Respondents' notices of claimed infringement violate sections 52(1) and 52.01(2) of the *Competition Act*, RSC 1985, c C-34, as further described in above; and
- (c) The Respondents' and their forensic investigators' activities in carrying out the CEP violate the *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5, including paras. 7(1)(a), (b.1) to (d); 7(2)(a) to (c.1); and 7.1(1)-(3), as further described above.

d. Declaratory Relief

35. The Order Below erred in upholding the Associate Judge's decision to strike out all of Bell's requests for declaratory relief. The Order Below erred in doing so, including because:

- (a) Striking the request for declaratory relief was premised on striking the copyright misuse defense which, for the reasons above, was an error of law or palpable and overriding error;
- (b) Concluding that the remaining declarations were "nothing more than statements of fact" which would not add value. However such declarations would clarify Bell's (and other ISPs') obligations in respect of forwarding new notices sent under the CEP;
- (c) Concluding that the request for a declaration that the Respondents breached section 41.25 and 41.26 of the *Copyright Act* was nothing more than a claim for a statutory breach misconstrued that these declarations. These declarations support Bell's misuse of copyright argument and declarations that a party has breached the *Copyright Act* are well-established forms of relief approved by this Court and the Supreme Court of Canada.

4. Statutory Basis

36. *Federal Courts Act*, R.S.C. 1985, c. F-7, including section 27;

37. *Federal Courts Rules*, SOR/98-106, including Rules 3, 51, 64, 174, 175, 176, 177, 190, 191, 221, 335, 336, and 337;

38. *Copyright Act*, R.S.C. 1985, c. C-42;

39. Such further and other grounds as counsel may advise and this Honourable Court may permit.

40. Bell proposes that the appeal be heard at Toronto or Ottawa, or remotely by videoconference.

Date: June 12, 2023



McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Steven G. Mason (smason@mccarthy.ca)
Barry Sookman (bsookman@mccarthy.ca)
Richard Lizius (rlizius@mccarthy.ca)
Kendra Levasseur (klevasseur@mccarthy.ca)
Tel: 416-362-1812
Fax: 416-868-0673

Solicitors for the Appellants, Bell Canada and
Bell Aliant

