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## Voltage meets resistance from Federal Court: new safeguards imposed on disclosure order to combat copyright trolling

[David Elder](#) -

In a ground-breaking order, the Federal Court of Canada has for the first time included, in an order compelling third party disclosure of subscriber information, new conditions intended to better balance subscriber privacy rights and dissuade abuse of disclosure orders by copyright owners.

In the case of *Voltage v. Doe*, film production company Voltage Pictures LLC had sought from internet service provider TekSavvy Solutions Inc. the disclosure of the contact information of some 2,000 internet service customers that Voltage alleged had illegally downloaded movies in which it holds copyright. TekSavvy refused to disclose the records in question, and Voltage brought a motion for an order requiring TekSavvy to disclose the information in question.

Orders requiring an ISP to disclose the contact information of subscribers alleged to have improperly downloaded copyright-protected material are not new in Canada; however, the order sought by Voltage requested identity information for an unprecedented number of subscribers, and raised serious concerns about "speculative invoicing," a practice whereby internet subscribers are pressured or misled into quick, and sometimes excessive settlements of infringement claims, even if they were not involved in infringement.

The [Reasons for Order and Order](#) in the *Voltage* case address important issues with respect to the applicable test for granting such disclosure orders, as well as the limitations that a court should impose to protect or minimize the privacy rights of subscribers.

The leading case in Canada for dealing with such disclosure orders is [BMG Canada Inc. v. Doe](#), which suggests that an order is generally warranted where a plaintiff has a *bona fide* claim and meets other requirements of the Federal Court Rules.

The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), which was granted leave to intervene in the *Voltage* motion, argued that in more recent jurisprudence, Canadian courts have refined the *BMG* test so as to require copyright owners seeking disclosure to meet the higher evidentiary standard of establishing a *prima facie* case of copyright infringement. The Court rejected the argument that the courts have moved to the higher standard, and applied the *bona fide* test from the *BMG* case.

CIPPIC further argued that Voltage's true intentions were not motivated by simple enforcement of copyright, but rather by a business model of "speculative invoicing", which seeks to intimidate individuals into settlements by way of demand letters and threats of litigation. It was alleged that under this approach, the cost, uncertainty and stigma often coerces individuals into making payments, often well in excess of any amounts that would likely be recovered in damage awards for copyright infringement, and often from individuals that were not involved in the unauthorized copying and distribution of films on the internet. TekSavvy argued that, as is the case in other jurisdictions, safeguards were required to help ensure that copyright owners did not misuse court-ordered discovery mechanisms

While the Court found some evidence that Voltage "had been engaged in litigation which may have an improper purpose," it declined to make any definitive finding to that effect in the case at hand. However, after reviewing the approaches of courts in the U.K. and the U.S. to the phenomenon of "copyright trolls", the Court added a number of significant new conditions to its disclosure order that are intended to balance the rights of internet users who are alleged to have downloaded copyrighted works against the rights of a copyright owner to enforce its rights in those works. Conditions to the order include the following:

- Only names and addresses are required to be disclosed (Voltage had also sought disclosure of phone numbers and email addresses)
- The names and addresses in question are to remain confidential, not be disclosed to any other parties with further order of the Court, and be used by Voltage only in connection with the copyright claims in question
- Any correspondence sent by Voltage to any TekSavvy customer must include a copy of the order, and must clearly state that the no court has yet made a determination that the subscriber has infringed or is liable in any way for payment of damages
- Such correspondence is subject to prior review and approval by the Court

- Upon request, Voltage must provide any subscriber with a full copy of the Reasons for Order and Order, at no charge to the subscriber
- Voltage's action for copyright infringement, and any other actions it may commence against any of the subscribers will continue as a specially managed proceeding, subject to ongoing oversight by a Case Management Judge, who takes active role in supervising the conduct of proceedings, so as to improve efficiency and encourage fair and timely resolution

The foregoing conditions would appear likely to discourage the practice of "speculative invoicing," particularly due to restrictions imposed on the content of any demand letters and the ongoing supervision of the Court.

The decision promises to be significant not only for ISPs, but for a range of other third party service providers from which litigants in copyright and other civil causes may seek disclosure of customer identity information.

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