15 Copyright and Privacy
Pre-trial Discovery of User Identities

David Lindsay[*]

15.1 Introduction

The relationship between copyright and privacy is complex: copyright and privacy may be mutually reinforcing or may conflict.[1] This chapter explores the relationship between copyright and privacy in the context of discovery of identities of internet users allegedly committing copyright infringements by use of peer-to-peer (P2P), principally BitTorrent, networks.

The open internet facilitates mass copyright infringement and mass surveillance.[2] The prevalence of online infringement has seen the emergence of a copyright surveillance industry.[3] Monitoring P2P networks enables detection of Internet Protocol addresses (IP addresses), but not identities. An identity associated with an IP address can be ascertained only with assistance of an internet service provider (ISP), which maintains logs matching IP addresses to subscribers. To bring actions against alleged infringers, rights holders may need court orders requiring ISPs to disclose identities.

[*] Sam Ricketson introduced me to copyright in the LLM program at Melbourne Law School in the early 1990s and has been a mentor and colleague since. He was chief investigator on an Australian Research Council–funded project on data privacy law that I was fortunate to contribute to. Given Sam's formidable body of work in intellectual property law, readers may be less familiar with his contributions to privacy law and policy. For example, from 2001 to 2010 Sam was a commissioner of the Victorian Law Reform Commission (VLRC), where he had responsibility for its workplace privacy reference.

[1] David Lindsay and Sam Ricketson, 'Copyright, privacy and digital rights management (DRM)' in Andrew T Kenyon and Megan Richardson (eds.), *New Dimensions in Privacy Law* (Cambridge: Cambridge University Press, 2006), p. 121.

[2] Shoshana Zuboff, *The Age of Surveillance Capitalism* (London: Profile Books, 2019); Sonia K Katyal, 'The new surveillance' (2003) 54(2) *Case Western Reserve Law Review* 297; Sonia K Katyal, 'Privacy vs piracy' (2004) 7 *Yale journal of Law & Technology* 222.

[3] Mike Zajco, 'The copyright surveillance industry' (2015) 3(2) *Media and Communication* 42; Ramon Lobato and Julian Thomas, 'The business of anti-piracy: New zones of enterprise in the copyright wars' (2012) 6 *International Journal of Communication* 606.

Common law jurisdictions have procedures for pre-trial identity discovery from non-parties.[4] Due to the risk of 'speculative invoicing' courts have imposed limits on the use of disclosed identities. Speculative invoicing involves collecting identities linked to IP addresses ostensibly for the purpose of litigation, then issuing letters of demand offering to settle for less than the costs of defending litigation but more than is recoverable in an infringement suit.[5] There is no intention to litigate, as the strategy is designed to create an incentive to settle to avoid litigation costs.[6] While courts acknowledge that, in this context, identity disclosure entails conflicts between copyright and privacy, preventing speculative invoicing has been the main express reason given for imposing limits on identity discovery.

This chapter examines the extent to which courts granting identity disclosure from ISPs satisfactorily address conflicts between copyright and privacy. The chapter is confined to discovery in the UK, Canada and Australia, as there are similarities in the law but also significant differences, especially in the recognition of rights. The chapter argues that the protection of rights in this context casts light on how common law courts take account of rights, and balance rights, in exercising judicial discretions.

15.2 Rights Balancing and Proportionality

Before the relationship between copyright and privacy is addressed, we must clarify one point: if there is a conflict, what is in conflict? This chapter assumes that copyright and privacy laws protect rights. 'Rights' terminology is used normatively, even in relation to Australian law (where there is no bill of rights), as it recognises the special weight or moral force of rights: regardless of the theoretical perspective, 'rights' are a distinctive form of moral or legal obligation, conventionally given greater weight than 'interests' which, unlike rights,

[4] Other jurisdictions have similar procedures: Frederica Giovanella, *Copyright and Information Privacy* (Cheltenham, UK: Edward Elgar, 2017), p. 29.

[5] David D'Amato, 'BitTorrent copyright trolls: A deficiency in the federal rules of civil procedure?' (2014) 40 *Rutgers Computer and Technology Law Journal* 190; Matthew Sag, 'Copyright trolling, an empirical study' (2015) 100 *Iowa Law Review* 1105.

[6] Patience Ren, 'The fate of BitTorrent John Does: A civil procedure analysis of copyright litigation' (2013) 64 *Hastings Law Journal* 1343.

are subject to utilitarian trade-offs.[7] Internationally, 'rights balancing' is the preferred means for addressing conflicts between copyright and privacy.[8]

There are many ways to analyse rights conflicts.[9] For example, some rights, such as the right not to be tortured, may be given 'lexical priority'[10] over other rights, such as freedom of expression.[11] In a book-length analysis of the balance between copyright and privacy in identity disclosure orders, Giovanella has argued that courts faced with rights conflicts apply 'conceptual balancing', giving priority to the right 'to which the legal system as a whole attaches more importance'.[12] But, while courts often seem influenced by some form of rights ordering, judicial reasoning is not as systematic as Giovanella suggests, commonly being no more than an implicit ranking. Moreover, in practice, as the UK Supreme Court has observed, applying balancing (in the form of proportionality analysis) 'depends to a significant extent upon the context'.[13] Therefore, this chapter does not pursue comparative ranking of copyright and privacy – such as might arise from conceiving copyright as protecting 'economic rights' and privacy as protecting 'personality rights' – but assumes that, in general, the rights should be given equal weight, with outcomes depending on context.

What, then, does the context of applications for identity disclosure from ISPs tell us about the relationship between copyright and privacy rights? On the one hand, as a right entails its vindication, a copyright holder should have a right to discover the identity of alleged infringers, as a prerequisite to vindicating its rights. On the other hand, the right to (data) privacy generally prohibits disclosure of personal information held by a third party, unless justified.[14] The issue facing courts is therefore not

[7] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); Jeremy Waldron, 'Rights in conflict' (1989) 99 *Ethics* 503.

[8] We do not, however, have to go so far as Giovanella, who claims that resolving rights conflicts is the 'predominant task' of courts: Giovanella, *Copyright and Information Privacy*, 6.

[9] Frances Myrna Kamm, 'Conflicts of rights: Typology, methodology, and nonconsequentialism' (2001) 7 *Legal Theory* 239.

[10] On 'lexical ordering' see John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), pp. 42–4.

[11] Waldron, 'Rights in conflict', 513–15.

[12] Giovanella, *Copyright and Information Privacy*, 42.

[13] *R (Lumsden)* v. *Legal Services Board* [2016] AC 697, 717.

[14] Reflected in the purpose limitation principle of data privacy law, which prohibits use or disclosure of personal information otherwise than for the purpose for which it was collected unless it is justified: Lee Andrew Bygrave, *Data Privacy Law: An International Perspective* (Oxford: Oxford University Press, 2014), pp. 153–7.

which of the two rights is weightier in the abstract, but whether, *in this context,* identity disclosure is justified (and, if so, to what extent)?

In dealing with conflicts between rights (or between rights and interests), the proportionality principle is the dominant international standard for justifying rights infringements.[15] Proportionality is, nevertheless, highly contested,[16] and subject to different formulations.[17] It is neither possible nor desirable to enter into these controversies here, except for two brief points. First, while proportionality and balancing are sometimes equated,[18] proportionality is but one form of balancing, for which special advantages are claimed.[19] Second, the claimed advantages include that, as a constrained form of legal reasoning, proportionality escapes allegations of subjectivity and arbitrariness;[20] it directs attention to considerations that may be overlooked;[21] and it recognises rights are weightier than interests.[22]

15.3 Conditions for Identity Discovery

This section identifies the conditions that must be satisfied for courts to grant identity discovery against non-parties in the three jurisdictions.

[15] Alec Stone Sweet and Jud Mathews, 'Proportionality, balancing and global constitutionalism' (2008–9) 47 *Columbia Journal of Transnational Law* 72; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Oxford: Oxford University Press, 2012).

[16] See the collection of essays in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014).

[17] Martin Luterán, 'The lost meaning of proportionality' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014), p. 21; Bradley W Miller, 'Proportionality's blind spot: "Neutrality" and political justification' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014), p. 370.

[18] Charles-Maxime Panaccio, 'In defence of two-step balancing and proportionality in rights adjudication' (2011) 24 *Canadian Journal of Law and Jurisprudence* 109.

[19] Luterán, 'The lost meaning of proportionality', 23–5.

[20] Robert Alexy, 'On balancing and subsumption. A structural comparison' (2003) 16(4) *Ratio Juris* 433; Aharon Barak, 'Proportionality and principled balancing' (2010) 4 *Law & Ethics of Human Rights* 1.

[21] Miller, 'Proportionality's blind spot'.

[22] Frederick Schauer, 'Proportionality and the question of weight' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014), pp. 173, 177.

In the UK, the availability of identity discovery from a non-party was for long unclear[23] and only conclusively resolved in *Norwich Pharmacal*.[24] Despite variations in how courts have expressed the conditions for making an order, it is accepted that the following must be satisfied:

1. A wrong must have been arguably carried out.
2. The person against whom the order is sought must be mixed up in the wrongdoing so as to have facilitated it, and is likely able to provide the necessary information.
3. The applicant must be intending to seek redress (by court proceedings or otherwise, such as by disciplinary action or dismissal of an employee) for the alleged wrongs.
4. Disclosure of the information must be necessary to pursue the redress.[25]

While the UK Civil Procedure Rules provide for disclosure against non-parties, the court's power to make a *Norwich* order is expressly preserved.[26]

In both Canada and Australia, pre-trial identity discovery is provided for by court rules (although *Norwich* orders remain available), but the relationship between the rules and *Norwich* orders differs between the two countries.

In Canada, identity discovery is relevantly[27] governed by rule 238 of the Federal Court Rules.[28] In *BMG Canada Inc* v. *Doe*,[29] however, the Federal Court of Appeal held that the principles for making an order under rule 238 were the same as those for making *Norwich* orders.[30] While UK courts have held that the applicant for a *Norwich* order must establish there is an arguable wrong, the threshold is imprecise.[31]

[23] While Bray suggested that an exception allowed a bill of discovery to be filed against a non-party to discover the name of a potential defendant, authority was scant: Edward Bray, *The Principles and Practice of Discovery* (London: Reeves and Turner, 1885), p. 40.

[24] *Norwich Pharmacal Co* v. *Customs and Excise Commissioners* [1974] AC 133 (cited as *Norwich Pharmacal*). In *Cartier International AG* v. *British Sky Broadcasting* [2018] 1 WLR 3259, the UK Supreme Court held that *Norwich* orders were part of a more general duty imposed on a non-party that is 'mixed up' in a wrongdoing not to assist in that conduct, which may consist in providing information to a rights holder, but is not confined to that.

[25] *The Rugby Football Union* v. *Viagogo Ltd* [2011] EWCA Civ 1585 (Court of Appeal); *Koo Golden East Mongolia* v. *Bank of Nova Scotia* [2008] 2 WLR 1160.

[26] Civil Procedure Rules 1998 (UK) SI 1998/3132, r. 31.18.

[27] In the context of discovery for copyright infringements.

[28] Federal Court Rules, SOR/98-106, r. 238.

[29] [2005] 4 FCR 81 (cited as *BMG*).

[30] Ibid., [30]-[31].

[31] *United Company Rusal Plc* v. *HSBC Bank Plc* [2011] EWHC 404, [50]-[52].

In *BMG*, however, the court rejected the suggestion that the applicant must demonstrate a prima facie case, concluding it was sufficient to establish the lesser threshold of a bona fide claim.[32] In addition to a bona fide claim, the *BMG* court held that an applicant must show evidence that the information cannot be obtained from another source and does not cause undue costs to the non-party.[33]

In Australia, the relevant provision is rule 7.22 of the Federal Court Rules,[34] which provides that an applicant must satisfy the court of multiple factors, including that there may be a right to obtain relief against a prospective respondent and that the applicant is unable to ascertain the description of the prospective respondent. Unlike *Norwich* orders, the non-party need not be 'mixed up' in the wrongdoing.[35] Moreover, in Australia, while an order will not be granted in aid of 'merely speculative proceedings',[36] the applicant need not establish a prima facie case.[37] The Australian rules therefore set a lower threshold than *Norwich* orders.[38]

15.4 Discretion to Grant Identity Disclosure

Identity disclosure orders are discretionary. As the conditions for making an order may be readily satisfied,[39] orders for discovering identities from ISPs have, in practice, depended upon the exercise of the court's discretion. Courts in the three jurisdictions dealt with in this chapter have reached similar conclusions in assessing identity discovery applications: granting discovery subject to conditions safeguarding against speculative invoicing. But, while conflicts between copyright and privacy have been addressed by the courts, the reasoning on the balance between the rights has differed in the three jurisdictions. This section identifies the differences.

[32] *BMG* [2005] 4 FCR 81, [34]. [33] Ibid., [35].
[34] Federal Court Rules 2011 (Cth) r. 7.22.
[35] See *Ashworth Hospital Authority* v. *MGN Ltd* [2002] 1 WLR 515, [35].
[36] *Levis* v. *McDonald* (1997) 75 FCR 36, 44.
[37] *Hooper* v. *Kirella Pty Ltd* (1999) 167 ALR 358, 366.
[38] Nicolas Suzor, 'Privacy v intellectual property litigation: Preliminary third party discovery on the internet' (2004) 25 *Australian Bar Review* 227, 248.
[39] Alexandra Sims, 'Court assisted means of revealing identity on the internet' in Chris Nicoll, J E J Prins and Miriam J M van Dellen (eds.), *Digital Anonymity and the Law: Tensions and Dimensions* (The Hague: TMC Asser Press, 2003), pp. 271, 274.

15.4.1 The UK

In the UK, prior to the Human Rights Act 1998 (UK), the discretion to grant a *Norwich* order involved courts balancing public interest considerations.[40] Since then, however, exercising the discretion has required courts to determine whether an order is proportionate, applying European jurisprudence.[41] More recently, this has entailed reference to the right to data privacy under Article 8 of the Charter of Fundamental Rights of the European Union (EU Charter).[42]

In the principal authority on *Norwich* orders, *Viagogo*,[43] the Supreme Court drew from prior case law to identify ten factors relevant to exercising the discretion, noting that many are 'self-evidently relevant to the question of whether the issue of a *Norwich* order is proportionate'.[44] The factors most relevant to proportionality included (2) the strong public interest in allowing an applicant to vindicate his or her legal rights, (7) the degree of confidentiality of the information sought, (8) the privacy rights under Article 8 of the European Convention of Human Rights (ECHR) of the individuals whose identity is to be disclosed, and (9) the rights and freedoms under EU data protection law of the individuals whose identity is to be disclosed.[45]

The main UK authority on identity discovery from an ISP, *Golden Eye*,[46] was an application by rights holders in pornographic films, either as exclusive licensees or on behalf of others. Holding that the court's discretion was reducible to proportionality analysis based on a balance between rights of copyright holders and privacy rights of subscribers, Arnold J identified the 'correct approach' as follows:

> (i) neither [right] as such has precedence over the other; (ii) where the values under the two [rights] are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or 'ultimate balancing test' – must be applied to each.[47]

[40] *Norwich Pharmacal Co* v. *Customs and Excise Commissioners* [1974] AC 133, 182 (per Morris LJ); *British Steel Corp* v. *Granada Television Ltd* [1981] AC 1096.
[41] *Ashworth Hospital Authority* v. *MGN Ltd* [2002] 1 WLR 515, [36], [57]; *R (Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579, [94].
[42] [2010] Official Journal of the European Union C 83/389, art. 8.
[43] *Rugby Football Union* v. *Consolidated Information Ltd* [2012] 1 WLR 3333 (cited as *Viagogo*).
[44] Ibid., 3339. [45] Ibid.
[46] *Golden Eye (International) Ltd* v. *Telefonica UK Ltd* [2012] EWHC 723 (Ch); *Golden Eye (International) Ltd* v. *Telefonica UK Ltd* [2012] EWCA Civ 1740 (cited as *Golden Eye*).
[47] *Golden Eye* [2012] EWHC 723 (Ch), [117], applying *Re S* [2005] 1 AC 593.

Arnold J held that, in this case, an order was proportionate in that the claimant's interest in enforcing their copyrights outweighed the prospective defendants' interest in protecting their privacy, *provided* the order incorporated safeguards to prevent speculative invoicing. In relation to the application made for other owners, however, Arnold J held that an order would be disproportionate as it would involve sale of the defendants' privacy to the highest bidder (namely, the applicants). Subsequently, the Court of Appeal overturned Arnold J on this point, concluding that there was no relevant distinction between Golden Eye's claims and those made on behalf of others.[48]

In *Viagogo*, the Supreme Court approved Arnold J's approach to proportionality. In doing so, however, the court rejected an argument that it would 'generally be proportionate' to make an order once it was established there was an arguable wrong and no other realistic way of discovering the identity of the alleged wrongdoer, with Lord Kerr observing that the privacy rights of an individual could:

> in some limited instances, displace the interests of the applicant for the disclosure of the information even where there is no immediately feasible alternative way in which the necessary information can be obtained.[49]

15.4.2 Canada

In Canada, the Federal Court of Appeal in *BMG* held that the exercise of the court's discretion required determining whether the public interest in disclosure outweighed 'legitimate privacy concerns',[50] as protected under the federal data privacy law, PIPEDA.[51] In addressing the conflict between copyright and privacy, however, Sexton JA concluded that:

> Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.[52]

Although the appeals court affirmed the first instance ruling denying discovery, this was on the basis of inadequacies with the evidence. Giovanella, accordingly, seems to over-state the significance of the case when she regards it as supporting her conclusion that, applying

[48] *Golden Eye* [2012] EWCA Civ 1740, [28].
[49] *Viagogo* [2012] 1 WLR 3333, 3347 [28].
[50] *BMG* (2005) FCA 193, [15].
[51] Personal Information Protection and Electronic Documents Act, SC 2000, c. 5.
[52] *BMG* (2005) FCA 193, [41].

'conceptual balancing', Canadian courts give more weight to privacy than to copyright (at least relative to other jurisdictions).[53]

In the main case applying *BMG* to disclosure of subscriber names associated with downloading torrent files, *Voltage Pictures*,[54] the Federal Court granted the order, concluding that the rights of the copyright holder outweighed the privacy rights of internet users,[55] largely on the basis that '(p)rivacy considerations should not be a shield to wrongdoing'.[56] The court went on, however, to point out that the order must ensure that 'privacy rights are invaded in the most minimal way possible'.[57] While the court considered that users of BitTorrent networks had no 'reasonable expectation of privacy',[58] it held that safeguards were required to protect users against speculative invoicing.[59] The safeguards included ensuring that the information released remains confidential and is used only in connection with the proposed action.[60]

15.4.3 Australia

In the principal Australian case dealing with identity discovery from ISPs, *Dallas Buyers Club*,[61] Perram J held that the conditions for discovery were satisfied, before turning to the court's discretion. Accepting the relevance of privacy concerns, the judgment referred to the privacy obligations of ISPs imposed under two relevant data privacy laws.[62] In both cases, however, disclosure is permitted when required or authorised by law, such as by a disclosure order.[63] While Perram J acknowledged a conflict between copyright and privacy – and the need for courts to 'try and accommodate both rights as best they can'[64] – like the UK and Canadian courts, he held this could be achieved by imposing safeguards on disclosure. The safeguards imposed included that email addresses not be disclosed and that disclosed identities be used solely for the purpose of legal proceedings.

Concerned at the potential for speculative invoicing, Perram J stayed the order to permit scrutiny of the applicant's letter of demand. In a subsequent application to lift the stay, however, Perram J held that

[53] Giovanella, *Copyright and Information Privacy*, 310–12.
[54] *Voltage Pictures LLC* v. *Doe* (2014) FC 161 (cited as *Voltage Pictures*). [55] Ibid., [57].
[56] Ibid., [54]. [57] Ibid., [57]. [58] Ibid., [59]. [59] Ibid., [60]. [60] Ibid., [134].
[61] *Dallas Buyers Club LLC* v. *iiNet Limited* (2015) 245 FCR 129 (cited as *Dallas Buyers Club'*.
[62] These are the Telecommunications Act 1997 (Cth) and the Privacy Act 1988 (Cth).
[63] See Telecommunications Act 1997 (Cth) s 280; Privacy Act 1988 (Cth) sch 1, Australian Privacy Principle 6.2(b).
[64] *Dallas Buyers Club* (2015) 245 FCR 129, 149 [86].

supervision of correspondence with subscribers undertaken by the courts in *Golden Eye* and *Voltage Pictures* was based on:

> the fact that in both the United Kingdom and Canada there are human rights instruments which guarantee privacy, the application of which requires the Courts in those countries to engage in a proportionality analysis foreign to Australian law.[65]

While Perram J concluded that Australian courts could not exercise such overarching supervision, he held that a degree of supervision was authorised to ensure the disclosed information was used for obtaining relief and not for any ulterior purpose.[66] The applicant rights holder subsequently announced it would not challenge termination of proceedings.

15.5 Copyright and Privacy: Rights-Based Analysis

Taking rights seriously involves establishing a principled means for determining limits on rights, including limits arising from rights balancing. When evaluating rights conflicts, however, there are dangers in courts being influenced by unexpressed values, leading to arbitrariness. Structured legal analyses are a means for defending against arbitrariness and subjectivity.

In contrast to traditional common law reasoning, rights-based reasoning is top-down, entailing application of high level principles to facts. A difficulty is that, while it is comparatively easy to formulate abstract tests, applying such tests to facts risks introducing subjectivity and arbitrariness. And yet, the application of rights-based analysis (such as proportionality) is, as courts acknowledge, highly context dependent.[67] In application, rights-based analysis can degenerate into the pro forma,[68] with courts paying lip service to rights but with outcomes hinging on unstructured, multi-factor tests. The reasoning of common law courts determining applications for identity discovery therefore illustrates broader problems. In the context of the discretion to award identity discovery orders, the analysis of the relationship between copyright and

[65] *Dallas Buyers Club LLC* v. *iiNet Limited (No 4)* (2015) 327 ALR 702. [66] Ibid., [8].

[67] The distinction between balancing of abstract rights and balancing of rights as applied to specific cases is also known as the distinction between 'definitional balancing' and 'ad hoc balancing': Melville B Nimmer, 'The right to speak from times to time: First Amendment theory applied to libel and misapplied to privacy' (1968) 56 *California Law Review* 935; Giovanella, *Copyright and Information Privacy*, 12–14.

[68] As Aleinikoff puts it, balancing can degenerate into 'mechanical jurisprudence': T Alexander Aleinikoff, 'Constitutional law in the age of balancing' (1987) 96 *Yale Law Journal* 943.

privacy has, even in the UK (where courts are required to apply 'proportionality'), been unduly unstructured and, therefore, unsatisfactory.[69]

Is there a way for the analysis to be improved, so rights conflicts are more clearly acknowledged and resolved? To begin, recall how rights-based analysis differs from other legal 'balancing'. Common law balancing, such as traditionally occurred in the exercise of the discretion to award discovery, entails weighing 'public interest' factors in what has been termed 'a broad brush, and sometimes opaque, analysis aimed at a resolution of the rights and interests involved'.[70] Compared with rights-based approaches, such as proportionality, common law balancing fails to expressly give special weight to rights, is less structured and is more likely arbitrary.

But top-down, rights-based analyses are difficult for courts to apply.[71] Take, for example, the reasoning of the UK courts in *Golden Eye* and *Viagogo*. In *Golden Eye*, Arnold J set out an abstract framework (the 'correct approach') for determining whether an interference with privacy rights is proportionate.[72] While, in *Viagogo*, the Supreme Court approved this framework, it also held that the 'essential purpose' of a *Norwich* order is 'to do justice', which involves 'the exercise of discretion by a careful and fair weighting of *all* relevant factors'.[73] The court then identified ten factors, only some of which are relevant to rights-based proportionality.[74]

What does this tell us about common law courts applying rights-based analyses? First, consider the paradox of how rights-based analysis aims to avoid reducing rights to utilitarian balancing, yet rights conflicts involve trade-offs. The absence of an accepted form of weighing arguably qualitatively equivalent rights, such as copyright and privacy, appears to result in courts gravitating to unstructured, multi-factorism. What seems to be needed is the development of second-order rules – what Schauer refers to as 'rules of weight'[75] and Luizzi as 'specific guides'[76] – so as to better

[69] As Giovanella points out in relation to identity discovery jurisprudence in the US, Canada and Italy, judges 'have found themselves struggling to understand which right should prevail': Giovanella, *Copyright and Information Privacy*, 36.

[70] Benjamin J Goold, Liora Lazarus and Gabriel Swiney, 'Public protection, proportionality, and the search for balance' (Research Paper No. 10/07), UK Ministry of Justice, 2007, i.

[71] For a controversial attempt at integrating rights-based analysis with common law reasoning see Trevor R S Allan, *Constitutional Justice, A Liberal Theory of Law* (Oxford: Oxford University Press, 2001).

[72] *Golden Eye* [2012] EWHC 723 (Ch), [117].

[73] *Viagogo* [2012] 1 WLR 3333, 3338 (emphasis added).

[74] Ibid., 3339.

[75] Schauer, 'Proportionality and the question of weight', 178.

[76] Vincent Luizzi, 'Balancing of interests in courts' (1980) *Jurimetrics* 373, 394.

bridge the gap between high-level principles and factual context. While it seems that the factors identified by the Supreme Court in *Viagogo* were intended to serve this purpose, they are too general and diffuse and insufficiently tailored to resolving rights conflicts.

Second, and more controversial, establishing 'rules of weight' or 'specific guides' should, as potentially hinted by Arnold J in *Golden Eye,* involve some substantive analysis of the values and interests underpinning the respective rights.[77] For example, as pointed out by the court in *Voltage Pictures,* the right to privacy is not intended to shield wrongdoers. On the other hand, in that case, the court apparently held that, apart from the risk of 'speculative invoicing', users of P2P networks have no 'reasonable expectation of privacy', as they necessarily reveal an IP address.[78] This would seem, in some way, to reduce privacy to a right not to be subject to 'speculative invoicing', when the two (privacy and speculative invoicing) are distinct.

In short, in the exercise of the court's discretion, privacy has been paid lip service, with the value and importance of online anonymity not being referred to[79] and systemic threats of surveillance ignored. A potential benefit of rights-based reasoning, however, is the ability for courts to take account of system-wide effects, such as surveillance practices, extending beyond the individual case.[80] Moreover, the reluctance of common law courts to engage in substantive analysis of the relationship between rights may potentially explain how, in the relevant cases, the relationship between copyright and privacy has been subsumed by concerns about speculative invoicing. This is not to say that avoiding the potential for speculative invoicing is unimportant. The underlying issue, however, is the extent to which reasoning in the exercise of judicial discretion is properly structured. If rights are to be prioritised, then analysis of interference with privacy should not be conflated with the potential economic harms of speculative invoicing.

It may be helpful, at this point, to illustrate weaknesses in the reasoning of the courts by providing a sketch of what a rights-based approach to

[77] This conclusion may be similar, but is certainly not identical, to Giovanella's 'conceptual balancing': Giovanella, *Copyright and Information Privacy*. For example, I do not agree that 'concepts' of rights are necessarily jurisdiction specific.

[78] *Voltage Pictures* (2014) FC 161, [59]-[60].

[79] See, for example, Julie E Cohen, 'A right to read anonymously: A closer look at "copyright management" in cyberspace' (1996) 28 *Connecticut Law Review* 981.

[80] McFadden points out that 'sophisticated', as opposed to 'elementary', balancing takes into account societal interests beyond the facts of the particular dispute: Patrick M McFadden, 'The balancing test' (1988) *Boston College Law Review* 585, 586.

the exercise of the discretion to award identity discovery might look like. The privacy rights of internet users, consisting of a right not to have personal data disclosed for a purpose other than the purpose of collection, will be breached unless disclosure is justified. Disclosure may be justified where it is necessary to protect other rights, such as the right of copyright owners to vindicate their rights. But disclosure should be restricted to what is strictly necessary to vindicate the relevant rights. Therefore, it must be limited to where there is a genuine intention to vindicate rights, by bringing an infringement action or good faith settlement negotiations, but not for other purposes, such as speculative invoicing. The problem with speculative invoicing is therefore not that it is an infringement of privacy, but that identity disclosure for that purpose would be a disproportionate infringement of the right to privacy (whereas disclosure for the purpose of legitimate litigation is generally not). Similarly, the litigation agreement in *Golden Eye*, which provided for the applicant to bring actions on behalf of other owners, was problematic not because it involved trading privacy rights (as suggested by Arnold J), but because it risked privacy being infringed for an illegitimate purpose (that is, a purpose apart from vindicating rights).

So far, in this section, we have not distinguished rights-based analyses in general from proportionality analysis. Proportionality, as a constrained form of rights-based reasoning, promises much, including safeguarding against subjective and arbitrary reasoning. Like any form of high-level reasoning, however, it is not a panacea. That is why this chapter suggests that the critical proportionality sub-test – proportionality stricto sensu (that a limitation on a right must not impose excessive burdens on other rights or interests)[81] – needs to be supplemented by 'rules of weight' or 'specific guides'.

In the cases dealt with in this chapter, which reach similar conclusions but by different routes, it is hard to criticise the outcomes, with the safeguards imposed by the courts reflecting concerns at the pre-trial stage to protect rights and interests of users, especially potentially innocent users. It is, however, also hard not to be critical of the reasoning of the courts in balancing rights and interests, which seems insufficiently structured. What might this mean for a jurisdiction such as Australia where, for example, Perram J in *Dallas Buyers Club* concluded that, absent a rights-based framework, courts may be prevented from applying proportionality analysis? While the argument

[81] Barak, *Proportionality*, 3.

cannot be made in full here, this should properly be regarded as part of broader questions of whether common law courts should incorporate rights into their reasoning and, if so, how.[82] For this chapter, it is sufficient to observe that in exercising judicial discretion common law courts, even Australian courts, commonly loosely refer to 'rights', including the right to privacy, but without attempting to pursue the implications of using this terminology. The flexibility of traditional common law balancing, however, is such that there may be no insurmountable obstacle to courts in exercising broad discretions adopting a more highly structured approach to identifying and resolving rights conflicts.

15.6 Conclusion

The ease with which content may be downloaded and disseminated, and the proliferation of metadata (such as IP addresses) that may be linked to users, mean that conflicts between copyright and privacy are more intense online than offline.[83] This chapter has suggested that if we are to take rights seriously, conflicts between copyright and privacy should be resolved through rights-based reasoning. Adopting a structured, rights-based framework for analysing conflicts between copyright and privacy promises more precise, and less subjective and arbitrary, decision making than multi-factor analyses. But the demands and discipline of rights-based analyses can be formidable.

Given that courts applying rights-based proportionality and multi-factor balancing may reach the same conclusions, is there any point in burdening common law courts with the demands of top-down, rights-based reasoning? The answer depends upon, first, the extent to which it is considered important to integrate rights into discretionary judicial decision making and, second, whether there is a concern to improve the precision and quality of such decision making. This chapter has suggested some ways in which judicial analysis of conflicts between copyright and privacy might be improved, principally by developing rules of weight or specific guides. Overarching these suggestions, however, is the prospect that a focus on the substantive relationship between potentially conflicting rights in judicial reasoning may assist in greater

[82] See, for example, Michael D Kirby, 'The role of the judge in advancing human rights by reference to international human rights norms' (1988) 62 *Australian Law Journal* 514.

[83] Orit Fischman Afori, 'Proportionality – A new mega standard in European copyright law' (2014) 46 *International Review of Intellectual Property and Competition Law* 889.

understanding of those rights, and of the evolving nature of rights online. In this sense, as acknowledged in Giovanella's book,[84] pre-trial identity discovery raises broader issues about the nature of judicial reasoning than those involved in resolving conflicts between copyright and privacy in this specific context.

[84] Giovanella, *Copyright and Information Privacy*.