

The Tort of Misuse of Copyright: A Viable Defence

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On August 29, 2025, the Federal Court of Appeal released its decision in [Bell Canada v. Millennium Funding, Inc.](#), a case that raises important questions about the emerging tort of copyright misuse and its adoption as a viable defence. While the Court of Appeal upheld the decision to strike the pleading, the panel recognized the copyright misuse defence as potentially viable and allowed Bell the opportunity to amend its pleading.

Background

A group of film studios (the Millennium Producers) brought an action against Bell relating to copyright in five films. The Millennium Producers alleged that Bell, as the internet service provider (ISP), failed to comply with the requirement to deliver notices to potential defendants under [sections 41.25](#) and [41.26](#) of the [Copyright Act](#).¹ They sought approximately \$400 million in statutory damages.

Bell filed an amended statement of defence and counterclaim, alleging that the Millennium Producers' copyright enforcement program (CEP) improperly used the notice and notice regime, and therefore it was not a legitimate effort to protect copyright. Bell argued that this conduct amounted to the tort of misuse of copyright, which should serve as a viable defence for Bell's actions. Bell also extended its claims to include secondary allegations against both the Millennium Producers and their legal counsel.

The Federal Court ruled in favour of the Millennium Producers and their counsel, concluding that the case management judge did not err in granting the relief to strike the impugned pleadings. The court cited a lack of material facts on the part of Bell and did not allow leave to amend because "there [was] no basis to suggest that further amendment would cure the defects."² However, the judge stated that it was not true that copyright misuse can never be a defence to a section [41.26](#) action.³

On appeal, Bell's main submission was that its pleading was not deficient and had sufficient material facts to plead the copyright misuse defence. In the alternative, it argued that leave to amend should have been granted to address any deficiencies.

The Court of Appeal recognized Bell's copyright misuse defence as a potentially viable argument. Although it agreed with the Federal Court that Bell's pleading on that issue was deficient, it allowed the appeal in part, permitting it to amend the pleading.

Copyright Misuse as a Defence

The developing doctrine of copyright misuse has yet to be adjudicated by a Canadian court. In the United States, it is said to occur “when a copyright holder attempts to extend his copyright beyond the scope of his exclusive rights in a manner that violates antitrust law, or the public policy embodied in copyright law.”⁴

In its pleading, Bell claimed that the CEP employed by the Millennium Producers and their counsel was not used as a legitimate effort to protect copyright. Instead, they argued, it had two main improper purposes, both inconsistent with public policy objectives: (1) to intimidate alleged infringers into settling claims for amounts much larger than the damages suffered; and (2) to claim exorbitant amounts from ISPs that were alleged not to be forwarding notices.

In allowing Bell to amend its pleading, the Court of Appeal stated that Bell had raised a viable defence of copyright misuse, based on the allegations of the Millennium Producers’ use of the notice and notice regime for improper purposes. While the Court of Appeal agreed with the lower courts that the pleading did not provide sufficient details to support the allegations, it held that it was not plain and obvious that the defects could not be cured through amendment.

The Court of Appeal also upheld the lower court’s decision to strike Bell’s secondary allegations, finding no error of law or palpable and overriding error.⁵ However, the Court of Appeal granted Bell leave to amend its pleading to address those allegations as well.

Conclusion

This decision, and any subsequent decision that may follow after Bell amends its pleading, are likely to be pivotal in shaping the future of copyright misuse in Canada. Although the Court of Appeal found Bell’s pleading to be deficient, it has nevertheless confirmed for the first time that the door is open in Canada for the introduction of copyright misuse as a viable defence. Observers will be watching carefully to see how Bell amends its pleadings and, once it does, how the Federal Court addresses and shapes the developing doctrine of copyright misuse.

¹ Copyright Act, [R.S.C. 1985 c. C-42](#) [Act].

² *Millennium Funding, Inc. v. Bell Canada*, [2023 FC 764](#) at para [96](#).

³ *Ibid* at para [45](#).

⁴ *Ibid* at para [31](#). See also *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 at para [98](#).

⁵ The Court of Appeal considered three secondary allegations: allegations against counsel; allegations of abuse of process; and unlawful means conspiracy, as well as the appropriateness of the declaratory relief sought in Bell’s pleading.

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