Much Ado About Five Hundred Dollars: Why the SCC Should Overturn Rogers v Voltage

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Abstract
The FCA’s decision in Rogers Communications Inc v Voltage Pictures, LLC, et al has dramatic policy implications, despite being only a decision regarding $500 in costs. Voltage Pictures sought the identities of alleged copyright infringers from Rogers by moving for a Norwich Order and was able to convince the FCA to compel Rogers to supply this information for free, by exploiting the “notice and notice” regime. The FCA’s decision in Voltage was legally suspect and should be overturned when the case is heard by the SCC. This paper will argue that SCC must overturn this decision. The case threatens to re-imagine Canada’s “notice and notice” regime, while putting Canadian internet users’ privacy in serious jeopardy. The FCA misinterpreted Canada’s “notice and notice” regime in reference to its interactions with Norwich Orders. This subjects ISPs to considerable liability and may open the floodgates for “copyright trolling.”

Keywords
copyright infringement, copyright, Norwich Order, intellectual property, internet service provider, ISP, notice and notice
Why the SCC Should Overturn Rogers v Voltage

INTRODUCTION

Seemingly low-stakes decisions can sometimes have significant impacts on entire industries. Such is the case with the Federal Court of Appeal’s (FCA’s) decision in Voltage Pictures, LLC, et al v John Doe. As a part of a broader copyright infringement action, the decision contemplates only one question: who shall bear the cost of identifying a single internet subscriber? The FCA held that Rogers Communications Inc (Rogers) was not entitled to costs, a meagre $500. The low financial stakes of this decision bely the underlying stakes for internet service providers (ISPs), internet users, and copyright owners. This decision has the potential to disrupt the way Canada handles online copyright infringement, increase ISP liability, dramatically increase the frequency of infringement actions, and compromise internet users’ privacy.

Despite the procedural nature of this decision, the Supreme Court of Canada (SCC) views these potential disruptions as being of significant national importance and has granted Rogers leave to appeal. This paper will argue that the SCC should decide in favour of Rogers because ISPs are entitled to fees from copyright owners for identifying alleged infringing subscribers. To hold otherwise would be disastrous for Canada’s internet providers and users, and would undermine Canada’s unique solution to internet-based copyright infringement.

This paper will first present a background of the legal aspects discussed in Voltage. This background, which serves to supplement the subsequent analysis, will begin with a discussion of the “copyright trolling” phenomenon and its effects on internet providers and users. It will then explain Canada’s “notice and notice” regime and Norwich Orders. Lastly, the background will summarize both the FCA and the Federal Court (FC) decisions in Voltage. The paper will then shift into its analysis,

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1 2017 FCA 97 [Voltage].
2 Rogers Communications Inc v Voltage Pictures, 2017 FCA 97, leave to appeal to SCC granted [Leave to Appeal].
3 Voltage, supra note 1.
4 2016 FC 881 [Trial].
which will examine the legal issues within the FCA’s decision, the FCA’s interpretation of the “notice and notice” regime, its application of a *Norwich* Order, and the negative policy implications of the decision, including its effects on the cost of internet access and on internet user privacy.

I. BACKGROUND

The decision in *Voltage* will have many legal impacts affecting Canadian internet users and ISPs. To understand the impact of *Voltage*, this section provides a brief background on “copyright trolling,” Canada’s “notice and notice” regime, and *Norwich* Orders.

“Copyright Trolling”: An exploitative business model in the guise of copyright enforcement

“Copyright trolling” is a loaded term. It describes a legal strategy whereby a copyright owner identifies and offers to settle with alleged copyright infringers out of court for a relatively small fee in comparison to the legal costs associated with defending the action. Enough alleged infringers will settle with the copyright owners outside of court for the copyright owners to realize a significant profit without going to court. An action is considered “copyright trolling” when it is brought for the purpose of creating a revenue stream separate from the distribution of copyrighted works instead of being brought to deter or compensate for losses due to copyright infringement. Copyright trolling takes on a particularly spurious—not to mention profitable—character when applied to certain types of copyrighted works. However, this strategy

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5 Some may take issue with this characterization and instead refer to this strategy as online copyright enforcement. To the extent that this strategy is permitted by law, it could be argued that it is merely a legitimate means for copyright owners to protect their interests in copyrighted material.
9 *Ibid*. For example, the pornography company Malibu Media has engaged in extensive “copyright trolling” in the USA, such that its founders were able to purchase “a sixteen-million-dollar coastal mansion in Malibu” in 2013, possibly as a result of the proceeds from their litigation activities. See Gabe Friedman, “The Biggest Filer of Copyright Lawsuits? This Erotica Web Site” (14 May 2014), *The New
relies on the ability to identify alleged infringers from internet protocol (IP) addresses in order to contact the alleged infringers.

Copyright owners must gain access to the identities of alleged infringers from the ISPs that are associated with the alleged infringers’ IP addresses. Copyright owners first bring infringement actions against unnamed defendants and then move to get the ISP associated with the unnamed defendants’ IP addresses to provide identifying information. Voltage Pictures LLC (Voltage Pictures) is a prolific applicant for these motions in the USA.\(^\text{10}\) Voltage Pictures previously brought forward such a motion in Canada against the ISP Teksavvy.\(^\text{11}\) Such actions effectively end if these motions are granted because enough identified alleged infringers usually decide to settle.

**Norwich Orders: A threat to internet users and service providers**

These motions, brought forward by companies such as Voltage Pictures, aim to achieve a form of disclosure referred to as *Norwich Orders*.\(^\text{12}\) Under a *Norwich Order* an otherwise innocent non-party to an action is compelled to provide information to the moving party because this non-party is alleged to have facilitated the harm caused to the moving party.\(^\text{13}\) These motions are called *Norwich Orders* because they were first developed in the English case of *Norwich Pharmacal Co v Customs & Excise Commissioners* (1973).\(^\text{14}\) The equitable discovery rule, Rule 238 of the *Federal Court Rules*,\(^\text{15}\) in the FCA’s decision in *Glaxo Wellcome plc v. Minister of National Revenue*\(^\text{16}\) incorporated the *Norwich Order* into Canadian federal jurisprudence. *Norwich Orders* were also recently acknowledged by the SCC in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 31 [*Google*]. The five-step test to determine whether a *Norwich Order* should be granted is laid out by the FCA in *BMG Canada Inc v John Doe* as follows: (1) the plaintiff must have a *bona fide* case;\(^\text{18}\) (2) the

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\(^{11}\) Voltage Pictures LLC v John Doe, 2014 FC 161 [*Teksavvy*].

\(^{12}\) *Ibid* at para 2.

\(^{13}\) *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 31 [*Google*].

\(^{14}\) [1974] AC 133 [*Norwich*]. Norwich Pharmaceuticals sought and obtained an order to compel Customs to identify a party who was importing pharmaceuticals that allegedly infringed a Norwich patent.

\(^{15}\) SOR/98-106.

\(^{16}\) [1998] 4 FC 439 (CA).

\(^{17}\) *Google*, supra note 13.

\(^{18}\) 2005 FCA 193 at para 34 [*BMG*]. The “*bona fide*” standard is a less onerous standard to meet on behalf of the applicant than the “*prima facie*” standard. For an applicant to have a *bona fide* case, it need only demonstrate that it intends to pursue an action based on the information it receives from the Norwich
non-party must have information on the proceeding; (3) a *Norwich* order must be the only reasonable means of obtaining the information; (4) fairness requires that the information be revealed to the plaintiff before trial, and; (5) the order must not cause undue inconvenience, cost, or delay to others.\textsuperscript{19}

*Norwich* Orders for copyright infringement actions can impact internet usage on two fronts: the users and the ISPs. *Norwich* Orders affect internet users’ privacy interests because the orders expose an alleged infringer’s identity by tying them to their IP addresses, which are “the identit[i]es of … Internet subscriber[s] which correspond[ ] to particular Internet usage[s].”\textsuperscript{20} These orders therefore engage the electronic privacy rights of users that are contained within the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*).\textsuperscript{21} Generally, *PIPEDA* does not allow for the disclosure of personal information without the consent of the individuals who are the subjects of the information. However, *PIPEDA* does allow for disclosure without consent when an entity holding personal information is compelled by “an order made by a court.”\textsuperscript{22} This enables the courts to force the disclosure of internet users’ online identities in online copyright infringement actions without violating *PIPEDA*.

Although the courts have some flexibility in compelling identity disclosure, the courts are still aware of the risks that these disclosures of personal online identities pose to alleged infringers’ privacy interests. In *Teksavvy*, Prothonotary Kevin Aalto listed several criteria for courts to keep in mind when granting *Norwich* Orders, including “[e]nsuring that the information that is released remains confidential and not be disclosed to the public and be used only in connection with the action.”\textsuperscript{23} Still, it is unclear how the courts will enforce, or even become aware, of any improper uses of personal information disclosed by a *Norwich* Order.

It can also be onerous for ISPs to comply with *Norwich* Orders because the ISPs are innocent non-parties to these copyright infringement actions. *Norwich* Orders compel ISPs to provide information to copyright owners but providing this disclosure comes at a cost for ISPs. This reality was acknowledged in *Teksavvy*, where the Court stated that “[t]he party enforcing the *Norwich* Order should pay the legal costs and

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\textsuperscript{19} *Ibid*. This case was another online copyright infringement action where the plaintiff was successful in obtaining disclosure of the alleged infringers. See also *Teksavvy*, supra note 11 where once the copyright owner had obtained this disclosure, it did not pursue further litigation.

\textsuperscript{20} *R v Spencer*, 2014 SCC 43 at para 32 [*Spencer*].

\textsuperscript{21} SC 2000, c 5, s 2(1) (definition of “personal information”) and s 4(1)(a) [*PIPEDA*].

\textsuperscript{22} *Ibid*, s 7(3)(c).

\textsuperscript{23} *Supra*, *Teksavvy* note 11 at para 134. While these criteria were listed as the considerations that arose from the cases in the US, UK, and Canada on the issue of *Norwich* orders in the context of copyright infringement actions, these criteria were reflected in the Order that Prothonotary Aalto ultimately awarded to Voltage Pictures.
disbursements of the innocent third-party.”\textsuperscript{24} Charging copyright owners with the costs for the \textit{Norwich} Order reflects the fact that ISPs are not liable for any alleged infringement under the \textit{Copyright Act}. This is because ISPs do not “solely by reason of providing those means” of accessing infringing content on the internet “infringe copyright in that work or other subject-matter.”\textsuperscript{25}

\textbf{“Notice and Notice”: Canada’s unique solution to internet copyright infringement}

A recent change in the \textit{Copyright Act} introduced a new online copyright enforcement mechanism that imposes obligations on ISPs in cases of alleged copyright infringement by their users. This is the so-called “notice and notice” regime. The regime allows copyright owners to compel ISPs to give notice to its users with IP addresses that owners have identified as being linked to alleged copyright infringement. Although the \textit{Copyright Modernization Act} was assented to in 2012,\textsuperscript{26} the “notice and notice” regime was not brought into force until January 2, 2015.\textsuperscript{27} This date draws an important distinction in the case law: the “notice and notice” regime was not in place during the \textit{Teksavvy} decision, but it was in place for \textit{Voltage}. In \textit{Teksavvy}, Voltage Pictures’ only recourse against alleged infringers was via a \textit{Norwich} Order, and it sought that order without relying on the “notice and notice” regime. This contrasts with \textit{Voltage}, where Voltage Pictures compelled Rogers to provide notice to alleged infringers alongside its motion for a \textit{Norwich} Order and it relied on the “notice and notice” regime in its motion.

In addition to the notice requirement, the ISPs are also compelled by the “notice and notice” regime to retain records of users identified of infringement for six months. If ISPs fail to fulfill these requests, the copyright owners may hold the ISPs liable for damages between $5,000 and $10,000.\textsuperscript{28} Throughout the process, the copyright owners are not privy to the personal identities associated with the allegedly infringing IP addresses. The FCA’s interpretation of the “notice and notice” regime lies at the heart of the issues with the decision in \textit{Voltage}.

\textsuperscript{24} \textit{Ibid}.
\textsuperscript{25} RSC 1985, c C-42, s 31.1(1) [\textit{Copyright Act}]. See \textit{Society of Composers, Authors \& Music Publishers of Canada v Canadian Assn of Internet Providers}, 2004 SCC 45 for how the SCC endorsed the interpretation that absolved ISPs from liability for copyright infringement (albeit on the virtually analogous provision that existed at the time of this decision and not the current s 31.1(1)) [CAIP].
\textsuperscript{26} SC 2012, c 20 [\textit{Copyright Modernization Act}].
\textsuperscript{27} \textit{Order Fixing the Day that is Six Months after the Day on which this Order is published as the Day on which Certain Provisions of the Copyright Act Come into Force}, SI/2014-58, (2014) C Gaz II.
\textsuperscript{28} \textit{Copyright Act, supra} note 25 s 41.26(3).
The “notice and notice” regime is often referred to as a “made-in-Canada” solution to online copyright infringement.\(^\text{29}\) In contrast to the USA’s more heavy-handed “notice and take down” regime (which empowers copyright owners to compel websites hosting allegedly infringing material to take down the material on notice), Canada’s “notice and notice” regime provides a more balanced approach.\(^\text{30}\) It assumes that internet users will refrain from copyright infringement by cautioning them that ISPs are observing their online behaviour.\(^\text{31}\) This assumption appears to have merit, as peer-to-peer piracy rates of copyrighted material have dropped dramatically following the enactment of this regime.\(^\text{32}\)

Importantly, the “notice and notice” regime, in contrast to a Norwich Order, does not provide any mechanism for the copyright owner to directly interact with the internet user. Until Voltage, the ways in which the “notice and notice” regime would interact with Norwich Orders remained enigmatic. The SCC’s forthcoming hearing of Voltage should certainly help answer the following questions: Does the regime displace Norwich Orders entirely? Are the two unrelated? Or, is the “notice and notice” regime a steppingstone for Norwich Orders?

**Summary of Rogers v Voltage**

At trial, the FC granted Voltage Pictures the Norwich Order, but it ordered Voltage Pictures to pay Rogers the cost of complying with this order. Rogers was entitled to costs for locating the personal information associated with the alleged infringing IP address and transmitting that information to Voltage Pictures. Voltage Pictures appealed to the FCA.

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\(^{31}\) *House of Commons Hansard*, 41st Parl, 1st Sess, No 141 (15 June 2012) at 1030 (Christian Paradis).

\(^{32}\) This is analogous to the phenomenon that office workers are less likely to steal coffee from a communal coffeemaker when pictures of eyes are posted near the coffeemaker because of the feeling that they are being watched. See Melissa Bateson, Daniel Nettle, Gilbert Roberts, “Cues of being watched enhance cooperation in a real-world setting” (2006) 2 Biol Lett 412.

\(^{33}\) This is based off statements by the chief operating officer of an internet security firm that issued notice requests to ISPs on behalf of copyright owners. The COO observed a significant decrease in piracy rates after just 13 weeks of the regime being in place. See “Six Strikes And You’re (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System” (12 May 2015), Cision PR Newswire, online: <www.prnewswire.com/news-releases/six-strikes-and-youre-not-even-close-to-out-internet-security-task-force-calls-for-end-of-copyright-alert-system-300082007.html>.
The FCA held that Rogers must bear the cost of producing the personal information associated with the allegedly infringing IP addresses since it was required to maintain this information, pursuant to paragraph 41.26(1)(b) of the *Copyright Act*. The FCA also concluded that Rogers’ costs for locating infringing users’ personal information was negligible. Rogers was obligated to locate this information under the “notice and notice” regime pursuant to paragraph 41.26(1)(a). Furthermore, Rogers could not charge a fee to Voltage Pictures for performing these obligations under subsection 41.26(2), since the minister had not set a maximum fee that ISPs could charge for fulfilling these obligations. However, the FCA stated that although ISPs are entitled to reasonable costs necessary to effect delivery of their users’ personal information, Rogers was not entitled to any costs associated with the disclosure required in complying with the *Norwich* Order. This was because Rogers “failed to adduce sufficient evidence on this.” The FCA held that Rogers was not entitled to any costs for complying with the *Norwich* Order due to its obligations under the “notice and notice” regime. Rogers appealed this decision to the SCC, which granted Rogers leave to appeal.

II. ANALYSIS

The FCA’s decision in *Voltage* has set a worrying and dubious precedent, and the SCC should overturn it on the basis of both legal and policy-driven reasons. The decision is suspect on legal grounds for two reasons: (1) it misinterpreted the effect of the “notice and notice” regime on *Norwich* Orders, effectively ignoring what makes the regime a successful “made-in-Canada” solution to online copyright infringement, and (2) it failed to properly apply the criteria for granting a *Norwich* Order, undermining the criteria for issuing a *Norwich* Order. Furthermore, there are two strong policy reasons for the SCC to overturn the FCA’s decision: (1) the cost of internet use will increase for consumers, and (2) user privacy will be compromised.

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34 *Copyright Act, supra* note 25.
35 *Voltage, supra* note 1 at paras 42–43; *Copyright Act, supra* note 24. The FCA’s conclusion that Rogers could not charge a fee for performing its obligations under subsection 41.26(1) is beyond reproach, since subsection 41.26(2) states that “[i]f no maximum is fixed by regulation, the person may not charge any amount under that subsection.”
36 *Voltage, supra* note 1 at para 75.
37 Leave to Appeal, *supra* note 2.
The decision in *Rogers v Voltage* is legally incorrect

**The FCA misinterpreted the “notice and notice” regime**

Much of the FCA’s decision in *Voltage* turns on its interpretation of Canada’s “notice and notice” regime and how the regime is involved in granting a *Norwich* Order. The FCA concluded that the “notice and notice” regime does much of the necessary preliminary work for a *Norwich* Order. The FCA justified this conclusion by determining that the purpose of the “notice and notice” regime is “to reduce the complications and answer many of the questions that can arise when a *Norwich* order is sought … to the benefit of all involved—but most of all to copyright owners who need to protect and vindicate their rights.”38 This characterization of the “notice and notice” regime is staggeringly myopic and fails to take into account the elements of the regime that differentiates it from its counterparts in other countries, such as the USA’s “notice and takedown” regime.

The FCA engaged in statutory interpretation of subsection 41.26(1) of the *Copyright Act* to determine what ISPs’ obligations are under the “notice and notice” regime. The preeminent approach to statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”39 Subsection 41.26(1) lays out two obligations for ISPs: (1) to provide notice to the persons associated with allegedly infringing IP addresses,40 and (2) to “retain records that will allow the identity of the person” who is associated with an allegedly infringing IP address “to be determined.”41 The FCA’s conclusion, that the “notice and notice” regime exists to facilitate the disclosure of internet users’ identities pursuant to a *Norwich* Order, is contingent upon the FCA’s interpretation of the record retention obligation. Whom did Parliament envisage as being able to access these records retained by ISPs to identify the alleged infringers? The FCA concluded that “Parliament must have intended that the records be in a manner and form that can be used by the copyright owner to determine its options and … by the court.”42 This deduction is suspect for several reasons.

First, if Parliament intended for the records retained under paragraph 41.26(1)(b) to be used by the courts and copyright owners to identify alleged infringers, then why did it not expressly state that intention? The provisions of the “notice and notice” regime make multiple explicit references to “an owner of the copyright in a work” and

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38 *Voltage*, *supra* note 1 at para 21.
40 *Copyright Act, supra* note 25 s 41.26(1)(a).
41 *Ibid*, s 41.26(1)(b).
42 *Voltage, supra* note 1 at para 38.
“a claimant”; yet, paragraph 41.26(1)(b) does not expressly state that these identifying records of alleged infringers are to be disclosed to copyright owners in the event of an action. This provision does contemplate the commencement of such proceedings. It only requires that the ISP retain the records for one year rather than six months. Parliament explicitly addressed the possibility that a copyright owner might bring an action against a notice recipient, but it decided not to state that these retained records could be disclosed to these owners.

Second, the FCA determined that the obligations under subsection 41.26(1) require ISPs to “keep the records ready for prompt disclosure,” despite there being absolutely no mention of “disclosure” in the “notice and notice” provisions. The FCA went beyond the grammatical and ordinary sense of the words in the “notice and notice” provisions by inferring an additional power and purpose that was not included by Parliament in this statutory scheme. Part of the FCA’s mistake in doing so lies with what it determined Parliament’s intention to be.

The FCA mischaracterized Parliament’s intention in creating the “notice and notice” regime. In focusing on the preamble of the Copyright Modernization Act, the Court stated that the “notice and notice” regime was intended to “update the rights and protections of copyright owners’ and to ‘enhance[e] the protection of copyright works or other subject-matter’ in order to promote ‘culture and innovation, competition and investment in the Canadian economy.’” The FCA overlooked the component of the preamble acknowledging that “some limitations on those rights exist to further enhance users’ access to copyright works or other subject-matter.” Although the Court acknowledged the SCC’s statement that the Copyright Act attempts to achieve “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator,” the Court selectively ignored the “public interest” with regards to the “notice and notice” regime.

When Parliament crafted Canada’s online copyright enforcement regime, other developed states were already operating their own regimes. Specifically, the USA had been operating its “notice and takedown” regime for nearly a decade prior. The “notice and takedown” regime is often viewed as being overly favourable to copyright owners at the expense of internet users. Rather than adopting this readymade regime,

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43 Voltage, supra note 1 at para 40.
44 Voltage, supra note 1 at para 24.
45 Copyright Modernization Act, supra note 26.
46 Galerie d’art du Petit Champlain Inc v Théberge, 2002 SCC 34 at para 30 [Théberge].
Parliament created its own online copyright enforcement regime—the “notice and notice” regime—which is widely regarded as less strict than the “notice and takedown” regime.\(^{48}\) If the SCC decides to uphold the FCA’s interpretation of the “notice and notice” regime in *Voltage*, it would produce a harsher result—the identification of an internet user based on her IP address—than the USA’s “notice and takedown” regime, since demonstrating a *bona fide* case for a copyright infringement action is a trivial obstacle to overcome. This is because it would effectively serve as a preliminary step to identifying alleged infringers, something the “notice and takedown” regime does not even contemplate. The FCA’s interpretation of the “notice and notice” regime therefore does not align with Parliament’s intention to adopt a less severe online copyright enforcement regime.

Third, the FCA improperly dismissed the possibility that the retention of identifying records is mandated for the benefit of ISPs. The FCA dismissed this possibility because it determined that ISPs would have had to produce identifying records of allegedly infringing IP addresses under the notice obligations pursuant to paragraph 41.26(1)(a), and thus, the records obligation is for the benefit of the copyright owners and courts.\(^{49}\) This interpretation, however, ignores that the provision is about the retention of records rather than the creation of records, as evidenced by the presence of the word “retain” in paragraph 41.26(1)(b). In a House of Commons debate about the *Copyright Modernization Act*, MP Chris Alexander stated that the act would require “the safe harbours provided to Internet intermediaries [to be] amended to ensure that the conditions that must be met to receive shelter are aligned with industry best practices.”\(^{50}\)

Conversely, there is no mention in the parliamentary debates of the provisions providing a path for copyright owners to more easily identify alleged infringers. This is persuasive evidence that Parliament’s intention regarding the record keeping requirement under paragraph 41.26(1)(b) was to ensure that ISPs produce and retain records to demonstrate their conformity “with industry best practices.”

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via formal process that their content is not infringing. This is often too onerous for the average user whose content is removed, so they do not often engage in these proceedings. Thus, the “notice and takedown” regime frequently gives copyright owners the ability to unilaterally remove content from websites, so long as they allege copyright infringement.


\(^{49}\) *Voltage*, supra note 1 at para 37. The FCA’s reasoning additionally considers that ISPs may have produced records under s. 41.26(1)(a) in a manner that would be unusable for the courts or copyright owners to identify alleged infringers. This reasoning is particularly vulnerable, since paragraph 41.26(1)(b) requires retention of records, which if they were a form usable only to ISPs, would not be useful to copyright owners or courts in identifying alleged infringers.

\(^{50}\) Mr. Alexander was speaking as member of the then incumbent Conservative Party, which eventually passed the *Copyright Modernization Act. House of Commons Hansard*, 41st Parl, 1st Sess, No 123 (14 May 2012) at 1555 (Chris Alexander).
If Rogers is not compensated, then a Norwich Order cannot be issued

Notwithstanding whether the FCA misinterpreted the provisions comprising the “notice and notice” regime, the Court inappropriately issued a **Norwich** Order because Voltage Pictures failed to meet the criteria for issuance. The FCA’s previous decision in **BMG** sets out five criteria for deciding whether to issue a **Norwich** Order.\(^{51}\) The fifth criterion is that “any order made will not cause undue delay, inconvenience or expense to the third—party or others.”\(^{52}\) Denying Rogers costs in **Voltage** caused Rogers both undue inconvenience and expense. Therefore, the FCA should not have issued the **Norwich** Order in **Voltage**.

The FCA incorrectly characterized the role that compensation plays in the context of a **Norwich** Order. The Court stated that it “may attach a condition to the order, allowing for compensation to be paid to the internet service provider provided this is consistent with the legislation” and that “[i]t is for the internet service provider to adduce the evidence necessary to prove its actual, reasonable and necessary costs that can and should be compensated.”\(^{53}\) This fails to acknowledge the fundamental and mandatory role that minimizing the undue difficulties of non-parties plays in the issuance of a **Norwich** Order. This is particularly evident in the FCA’s use of “may,” indicating that it believes cost compensation for a **Norwich** Orders is not absolute.

It could be argued that the costs involved in the disclosure of alleged infringers’ identifying information by an ISP are not “undue” costs because the “notice and notice” regime effectively requires the ISPs to bear them. Even if the FCA was correct in its interpretation of the “notice and notice” regime, copyright owners must still appropriately compensate ISPs for the costs of providing the identities to the owners, no matter how small those costs may be. If any of the costs of providing identifying information to copyright owners goes uncompensated, then the target of the **Norwich** Order will have incurred undue inconvenience and expense.

The decision in **Rogers v Voltage** is problematic for internet policy

**The cost of internet services will increase**

In the event the FCA’s statutory interpretation is seen as a valid interpretation of the “notice and notice” regime, the SCC should, nevertheless, overturn the FCA’s decision because it raises several serious policy concerns. The FCA’s decision in

\(^{51}\) **BMG**, supra note 18.

\(^{52}\) **Teksavvy**, supra note 9 at para 45. This case reiterated and summarized the criteria developed in **BMG** in a succinct manner.

\(^{53}\) **Voltage**, supra note 1 at para 75.
Voltage will likely increase the costs of internet subscriptions in Canada.\(^{54}\) Currently, Canadian internet users pay a premium for internet services when compared to users in other developed countries.\(^{55}\) Since internet access is becoming an increasingly essential component of modern life, any conclusion that could lead to increased costs, and thus decreased access for the poor, should be avoided.\(^{56}\)

The expectation that ISPs will be required to bear the costs of Norwich Orders will increase the volume of Norwich Orders sought, increasing costs for ISPs and incentivizing them to transfer these costs to their users by charging higher rates.\(^{57}\) This will create a power imbalance in favour of copyright owners that does not respect the balance between owners’ rights and the public interest espoused by the SCC in Théberge.\(^{58}\) The decision in Voltage relieves copyright owners of these costs, removing the financial barriers of engaging in “copyright trolling.” According to the director of the Canadian Internet Policy and Public Interest Clinic, David Fewer, “[t]his is the Federal Court of Appeal throwing the floodgates wide open” to trolling activity.\(^{59}\) Increased copyright trolling will lead to increased costs for ISPs, which will in turn give rise to increased costs for internet users.

**Internet users’ privacy will be compromised**

In addition to increased costs for internet users and ISPs, the FCA’s decision in Voltage will violate internet users’ right to privacy. In online copyright infringement actions, Norwich Orders seek the personal information held by ISPs that are associated with the allegedly infringing IP addresses. In theory, this gives copyright owners access to the personal information of the alleged infringer, but that is not always the case. The personal information associated with an IP address is that of a single subscriber, rather than all the individual users of that subscription. If a household contains multiple individuals accessing the internet through one subscription, then it is possible that the alleged infringer is not the subscriber whose personal information is disclosed.\(^{60}\)

\(^{54}\) *Infra*, note 56.


\(^{56}\) To the extent that some are even calling for internet access to be enshrined as a human right. See *The promotion, protection and enjoyment of human rights on the Internet*, 27 June 2016, UN General Assembly, A/HRC/32/L.20.

\(^{57}\) Emily Jackson, "Copyright ruling called 'bad news for consumers, bad news for Canada'" (26 May 2017), *Financial Post*, online: <www.business.financialpost.com/technology/copyright-ruling-called-bad-news-for-consumers-bad-news-for-canada>. One unnamed telecom executive was quoted by the Financial Post as saying that “they were ‘shocked’ by the ruling, adding it will be expensive for all providers.”

\(^{58}\) *Théberge*, supra note 46 at paras 30-33.

\(^{59}\) *Ibid.*

\(^{60}\) *Spencer*, supra note 19. Although in a criminal law context, the facts in *Spencer* were roughly analogous to this hypothetical. In that case, the accused was viewing and sharing child pornography while...
Additionally, infringing individuals could be using a subscriber’s internet connection without consent, in which case the individual identified by the Norwich Order would not be the alleged the infringer. Ultimately, this does away with a user’s right to privacy.

Even in instances where the alleged infringer and the subscriber are one and the same, the Voltage decision still places the privacy of internet users at too great a risk. Copyright owners identify alleged infringers by finding IP addresses that are engaged in alleged copyright infringement on the internet. The same tools for detecting allegedly infringing activities on the internet can be extended to practically all activities on the internet. Consequently, when copyright owners receive the personal information associated with an IP address, they can then discern other online activities associated with a particular subscriber. In theory, when copyright owners come into possession of this kind of information through a Norwich Order, they are required to restrict their use of this information to the immediate proceedings. However, without clear statutory procedural rules defining the scope of Norwich Orders, there remains a large risk for abuse of this private information. This will especially be the case if the FCA’s decision prompts an increase in the number of copyright owners seeking disclosure of the identities of alleged infringers.

CONCLUSION

The FCA’s decision in Voltage carries with it repercussions which go far beyond the $500 immediately at stake. Voltage touches on various issues that are important for everyone who uses the internet. These issues include “copyright trolling,” Canada’s “notice and notice” regime, Norwich Orders, and internet users’ privacy. The SCC made a prescient decision in granting Rogers leave to appeal. It is imperative for both Canadian internet users and providers that the SCC overturn the FCA’s decision.

The FCA’s decision was both legally suspect and highly problematic for Canadian internet policy. The FCA misinterpreted the “notice and notice” regime, the way it interacts with Norwich Orders, and incorrectly awarded a Norwich Order. This was living with sister, who was the internet subscriber in that household. The police identified the accused’s sister with the information they got from the ISP regarding the IP address they were interested in. However, subsequent investigation correctly identified the accused.

61 For instance, an infringing individual may be able to gain access to a person’s internet network by obtaining the password through some untoward means.
62 Michael Geist, “Canipre Admits It’s Behind Voltage-TekSavvy File Sharing Lawsuits With Speculative Invoicing Scheme” (12 March 2013), Michael Geist (blog), online: <www.michaelgeist.ca/2013/03/canipre-speculative-invoicing/>.
63 TekSavvy, supra note 11 at para 134.
decision has broad policy implications, including increasing internet costs and decreasing privacy for internet users.

The SCC must overturn the FCA’s decision in *Voltage* to restore order to Canada’s online copyright enforcement regime.