

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

ROGERS COMMUNICATIONS INC.

APPLICANT
(Respondent)

-and-

**VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA,
LLC, CLEAR SKIES NEVADA, LLC, GLACIER ENTERTAINMENT
S.A.R.L. OF LUXEMBOURG, GLACIER FILMS 1, LLC and FATHERS &
DAUGHTERS OF NEVADA, LLC**

RESPONDENTS
(Appellants)

-and-

**SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST
CLINIC, BELL CANADA INC., CANADIAN NETWORK OPERATORS CONSORTIUM
INC., COGECO INC., QUEBECOR MEDIA INC., SASKATCHEWAN
TELECOMMUNICATIONS HOLDING CORPORATION, SHAW COMMUNICATIONS
INC., TEKSAVVY SOLUTIONS INC., TELUS COMMUNICATIONS INC and
XPLORNET COMMUNICATIONS INC.**

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(VOLTAGE PICTURES LLC et al., RESPONDENTS)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Communications Inc.**

TABLE OF CONTENTS

PART I – OVERVIEW	1
CANADA WAS A HAVEN FOR INTERNET PIRATES PRIOR TO THE CMA – THE CMA PROVIDED NEW MECHANISMS TO ASSIST OWNERS IN ENFORCING THEIR RIGHTS.....	1
1. Parliament’s new tool: Notice and Notice Regime.....	1
2. Central question on this Appeal is statutory interpretation of s. 41.26 -	2
3. Notice Transmission, Confirmation and Identity Storage -	2
4. No cost regime is the quid pro quo for new CMA safe harbours -	2
5. CMA expressly supplanted Norwich cost-recovery provisions –.....	2
6. Any unfairness to ISPs / abuse can be remedied by new regulation and the ‘back door’ left by FCA –.....	3
7. Allowing appeal would nullify Parliament’s new enforcement tool -	3
8. There must be consequences for ubiquitous copyright piracy in Canada -	3
FEDERAL COURT OF APPEAL’S DECISION IS CONSISTENT WITH PARLIAMENT’S STATED OBJECTIVE TO EMPOWER COPYRIGHT OWNERS.....	3
9. FCA’s decision is consistent with Parliament’s intent -	3
ROGERS SEEKS AN END-RUN AROUND THE CMA’S ISP OBLIGATIONS BY CHARGING FOR WORK IT IS NOT LEGALLY REQUIRED TO DO, OR WHICH SHOULD HAVE ALREADY BEEN DONE.....	4
10. Rogers’ unnecessary re-verification is a collateral attack on the CMA –.....	4
11. Only the already-stored (and verified) information is requested -.....	4
THIS CLASS PROCEEDING SEEKS TO TAKE ADVANTAGE OF THE NEW MECHANISMS IN THE CMA, INCLUDING NON-COMMERCIAL STATUTORY DAMAGES, WHICH ARE CAPPED AT \$100-\$5000.....	4
12. Reverse class action provides access to justice -	4
13. How to cost-effectively claim non-commercial statutory damages -	5
14. Abuses of cost-free system subject to Government and Court oversight -.....	5
AN EFFECTIVE MECHANISM TO COMBAT RAMPANT ONLINE INFRINGEMENT IS REQUIRED	6
15. International pressure on Canada to combat rampant piracy pre-CMA -.....	6
PART II – QUESTION IN ISSUE	7
WHAT IS THE SCOPE OF AN ISP’S OBLIGATIONS UNDER S. 41.26 OF THE COPYRIGHT ACT AND WHICH OF THESE OBLIGATIONS MUST BE DONE AT NO COST.....	7
17. What is the scope of notice transmission, confirmation and identity storage -	7
18. It takes “two minutes” to deliver stored identities -.....	7
19. Rogers wishes to unnecessarily re-verify the stored information prior to delivery -..	7
20. Automated identity verification occurs before “notice transmission” -.....	8
21. No need to re-verify identities before “delivery” -	8

SUMMARY OF ROGERS’ POSITIONS AND VOLTAGE’S RESPONSES 8

PART III – STATEMENT OF ARGUMENT..... 11

SECTION 41.26 OF THE COPYRIGHT ACT – WHAT ARE THE “ACTS” FOR WHICH ISPS MAY NOT CHARGE? 11

23. s. 41.26 sets out Notice transmission, confirmation and identity storage obligations – 11

ARGUMENT 1 –DOES CAIP DECISION RATIONALE STILL APPLY - HISTORICALLY ISPS DID NOT BEAR COSTS OF IDENTIFICATION - CAIP PRINCIPLES 11

24. CAIP was decided 14 years ago - 11

25. CAIP rationale of “new internet” distinguished in committee due to new realities of the mature internet - 12

26. International statutes and law compels ISPs to pay some costs of IP enforcement - 12

ARGUMENT 2 – CMA SHIFTED COST BURDEN OF IDENTIFICATION TO ISPS.... 13

27. CMA included new enforcement tool - 13

28. CMA explicitly requires s. 41.26(1) obligations to be at no cost - 13

29. Norwich obligations overlap with Notice and Notice obligations - 13

30. Only notice transmission and confirmation are new to the CMA - 14

31. Delivery step is only step not expressly at no cost - 15

ARGUMENT 3 - THE LEGISLATIVE HISTORY OF THE CMA SHOWED A CLEAR INTENTION TO MAKE THE NOTICE AND NOTICE REGIME COST-FREE AND THUS SHARED NORWICH STEPS COST-FREE 15

33. Feedback had been sought from ISPs pre-proclamation - 16

34. Cost-recovery was an ISP concern that was dismissed - 16

35. Express intent is in enacting legislation - 17

36. The internet must not become a safe house for pirates -..... 17

37. Rogers always knew that court orders were part of Notice and Notice - 17

38. Identity storage implies identity production - 18

ARGUMENT 4 - ISPS ARE THE COMMON CARRIERS OF THE INTERNET – THEY HAVE BOTH THE RIGHTS AND THE DUTIES ASSOCIATED WITH SUCH STATUS – THE QUID PRO QUO FOR THEIR CMA “SAFE HARBOUR” IS THE OBLIGATION TO PERFORM THEIR NOTICE AND NOTICE DUTIES AT NO COST 18

39. ISPs are the common carriers of the internet – 18

40. The CMA introduced a new ISP common carrier safe harbour - 18

41. Limitation of liability to \$10,000 for each breach of Notice and Notice obligations - 19

42. Example of effect of limitation of liability - 19

43. CMA introduced a quid pro quo for the no-cost regime - 19

ARGUMENT 5 - THE CMA DID NOT SPECIFY IN SIGNIFICANT DETAIL WHAT TYPE OF SUBSCRIBER INFORMATION WAS REQUIRED TO BE STORED, AND

HOW QUICKLY IT MUST BE DISCLOSED. THE FEDERAL COURT OF APPEAL REASONABLY INTERPRETED THE STATUTE IN LIGHT OF ITS PURPOSE AND OBJECTS, CONSISTENTLY WITH PRIOR CASE LAW	20
44. Statutory regime has both explicit and implied obligations -	20
47. (a) ISPs must Identify and Notify -	21
48. Identification verification required to transmit notice -	21
49. (b) ISPs must retain only accurate and lawful information -	21
50. Lawful content of record is name and address of subscriber -	22
51. No need to update stored information -	22
52. FCA’s obligations are commercially reasonable -	22
53. Rogers provides no alternative to FCA’s obligations -	22
54. Rogers ignores Norwich precedents on storage format -	23
55. Rogers can record names and addresses easily -	23
56. Other procedural mechanisms were recommended by FCA to permit cost-effective enforcement -	23
57. FCA considered overlap of Norwich and CMA disclosure requirements -	23
ARGUMENT 6 - THE CMA CODIFIED THE CONCEPT OF NOTICE AND NOTICE (COMPARED WITH NOTICE AND TAKE-DOWN) BUT DID NOT CODIFY ROGERS’ INTERNAL PROCESSES	24
58. Rogers, Bell and Telus all had different voluntary “notice” systems -	24
59. Parliament did not implement Rogers’ system –	24
ARGUMENT 7 - ROGERS DOES NOT NEED TO PERFORM ITS 8-STEP PROCESS - ROGERS SHOULD BE ABLE TO AUTOMATE ITS ENTIRE SYSTEM.....	24
60. Rogers’ manual process verifies information after the horse has left the barn –	25
61. Verification should have taken place before notice transmission -	25
62. Information has been verified automatically and does not need to be re-verified manually -	25
63. Storing and retrieving notice and notice information should also be done automatically -	25
ARGUMENT 8 - ROGERS’ \$100/HOUR FEE IS NOT COST RECOVERY AND IS NOT REASONABLE – THE FCA FOUND THAT THE EVIDENCE ON COST RECOVERY WAS NOT EVALUATED BY THE MOTIONS JUDGE AND THAT ON REVIEW THE FEE WAS NOT REASONABLE	26
64. ISPs can get cost recovery but not fees for implementing Norwich orders -	26
65. Rogers provided no factual basis for its \$100/hour fee -	26
66. Rogers charged \$5-\$10/IP address in 2012, likely close to its real cost -	26
67. Motion Judge did not evaluate evidence of Rogers’ fee/cost -	27
68. Failure to provide cogent reasons is reviewable error -	28
69. Rogers’ cost of disclosure is at most \$0.50 per IP address -	28
70. Rogers attempts to recoup costs indirectly that it cannot recover directly -	28
ENFORCING THE NOTICE AND NOTICE REGIME WILL NOT VASTLY INCREASE THE COST OF THE INTERNET TO CANADIAN CONSUMERS	28
71. It is not necessary that consumers pay more for internet -	28

- 72. ISPs profiting from infringing activity – it is equitable to use some of those funds to subsidize copyright enforcement - 29
- 73. ISPs’ Terms of Service could permit cost-recovery only from infringing subscribers - 29

SAFEGUARDS AGAINST ABUSE INCLUDE GOVERNMENT’S ABILITY TO REGULATE AND FCA’S BACK DOOR ALLOWING SOME FEES FOR DISCLOSURE 29

- 74. Regulatory safety valve exists - 29
- 75. FCA’s “back door” permits some cost recovery - 29
- 76. Reasonable cost recovery for “delivery” should be in context of automated systems - 30
- 77. Courts oversee all disclosure motions and already implement safeguards –..... 30
- 78. The Courts or the Government can control the process as new cases arise - 31

PART IV – SUBMISSIONS CONCERNING COSTS 31

PART V - ORDER 31

PART VI – TABLE OF AUTHORITIES 32

FACTUM OF THE RESPONDENTS

The [Copyright Modernization Act] clearly provides insufficient incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement; nor has its “notice and notice” system changed consumer behavior with regards to infringement.

*International Intellectual Property Alliance (IIPA)
2017 Special 301 Report on Copyright Protection and
Enforcement*¹

What has changed since 2004, of course, is an awareness of the need to equip rights holders with additional tools to make it easier for them to enforce their rights against, in the Supreme Court’s words, “those who abuse the internet”.

*Craig McTaggart, Director, Broadband policy,
Regulation and Government Affairs, TELUS
Communications*²

PART I – OVERVIEW

CANADA WAS A HAVEN FOR INTERNET PIRATES PRIOR TO THE CMA – THE CMA PROVIDED NEW MECHANISMS TO ASSIST OWNERS IN ENFORCING THEIR RIGHTS

1. ***Parliament’s new tool: Notice and Notice Regime*** - Parliament’s express purpose in enacting the *Copyright Modernization Act*³ (“CMA”) and in particular the Notice and Notice Regime⁴ was to give copyright owners a new tool to combat ubiquitous online piracy, and fulfil Canada’s international treaty obligations. The Notice and Notice Regime is intended to discourage online copyright infringement by providing copyright owners with a tool to enforce their rights, while also respecting the interests and freedom of users.⁵

¹ International Intellectual Property Alliance (IIPA) 2017 Special 301 Report on Copyright Protection and Enforcement (“IIPA Report”), p. 93, Book of Authorities of the Respondents (“RBOA”), Tab 3.

² Testimony of Craig McTaggart, House of Commons, Legislative Committee on Bill C-32, *Evidence*, 40th Parl., 3rd Sess., No. 19, (22 March 2011), p. 2, Book of Authorities of the Appellant, Rogers Telecommunications Inc. (“ABOA”), Tab 6.

³ S.C. 2012, c. 20., RBOA, Tab 4.

⁴ as hereinafter defined.

⁵ Consultation Letter, Affidavit of Meaghan Barrett affirmed May 13, 2016 (“Barrett Affidavit”), Exhibit B, Appellant’s Record (“AR”), Tab 8B, p. 71.

2. ***Central question on this Appeal is statutory interpretation of s. 41.26*** - Passed in 2012, the *CMA* enacted new sections 41.25 and 41.26 of the *Copyright Act* (collectively, with s. 41.27, the “**Notice and Notice Regime**”). The statutory interpretation of s. 41.26(1) and (2) and what obligations they impose on ISPs is the central question in this Appeal.

3. ***Notice Transmission, Confirmation and Identity Storage*** - At its most basic level, the Notice and Notice Regime, s. 41.26(1), obliges an internet service provider (or “**ISP**”), such as Rogers, to forward a copyright owner’s notice of claimed infringement to its customer and to retain a record sufficient to identify that customer for six months or a year.⁶ These steps – notice transmission, confirmation and identity storage – are currently mandated by s. 41.26(2) to be performed by the ISP at no cost.

4. ***No cost regime is the quid pro quo for new CMA safe harbours*** - Parliament expressly chose to have all notice transmission, confirmation and identity storage costs be borne by ISPs, with a legislated option to allow for cost-recovery, if abuse were to occur. At the same time, the *CMA* provided ISPs with a new copyright safe harbour and limitations of liability for their Notice and Notice Regime obligations.⁷ Parliament also introduced new users rights⁸ in the *CMA* to temper owner’s rights. In the *CMA*, Parliament carefully rebalanced all parties’ rights, and allocated the costs of Notice and Notice regime to the ISPs as a consequence of this rebalancing.

5. ***CMA expressly supplanted Norwich cost-recovery provisions*** – Rogers asserts that the *CMA* did not supplant the common-law *Norwich* cost-recovery principles. According to Rogers, the new regime was formalized into law with the expectation that “nothing will change”. This is the opposite of what happened. ISPs’ submissions requesting cost recovery, made prior to proclamation into force of the Notice and Notice Regime, were specifically referenced in the proclamation order and were denied.

⁶ If a proceeding is commenced, as in this case, the information must be retained for one year.

⁷ See e.g. s. 31.1 and 41.26(3) of the *Copyright Act*.

⁸ See e.g. enhanced fair dealing rights in s. 29 of the *Copyright Act*, and in particular ss. 29 (education, parody and satire), as well as ss. 29.21, 29.22, 29.23 of the *Copyright Act*.

6. ***Any unfairness to ISPs / abuse can be remedied by new regulation and the ‘back door’ left by FCA*** – While there is no evidence or allegations of any abuse by Voltage in this specific matter, it is conceivable that, given the millions of copyright notices sent yearly, very large requests for information might be made that could be unfair to ISPs. If this is the case, the Government, currently in the midst of the 5-year copyright review mandated by the *CMA*,⁹ can enact regulations that permit the charging of fees for the Notice and Notice requirements. The Federal Court of Appeal’s decision also permitted the charging of a “nominal” fee for delivery of information, which in the case of a mass request may be substantial and, given court supervision of the issues, can prevent abuse.

7. ***Allowing appeal would nullify Parliament’s new enforcement tool*** - Allowing Rogers’ appeal would reinstate demolished barriers to enforcement and obviate the Notice and Notice Regime. Parliament’s “new tool” for the enforcement of copyright will be thwarted. Online piracy will continue to thrive. This is not Parliament’s intent.

This enactment amends the Copyright Act to

(a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards

8. ***There must be consequences for ubiquitous copyright piracy in Canada*** - Enforcing copyright is a critical step in changing online behaviour and letting it be known that piracy has consequences. Without a tangible consequence for their unlawful acts, individuals will continue to infringe copyright on a massive scale in Canada. This is the precise evil that Parliament attempted to remedy by enacting the Notice and Notice Regime.

FEDERAL COURT OF APPEAL’S DECISION IS CONSISTENT WITH PARLIAMENT’S STATED OBJECTIVE TO EMPOWER COPYRIGHT OWNERS

9. ***FCA’s decision is consistent with Parliament’s intent*** - The Federal Court of Appeal’s interpretation of the Notice and Notice Regime is consistent with Parliament’s stated objective to empower copyright owners. The decision puts meat on the *CMA*’s bones, and gives guidance as

⁹ Section 92 of the *Copyright Act*, and *Parliament to undertake review of the Copyright Act*, Government of Canada News Release, December 14, 2017.

to how the *CMA* should be interpreted. All of the obligations enunciated by the FCA in respect of the Notice and Notice Regime are either express obligations set out in s. 41.25(1), or are implied obligations that are a necessary consequence of those express terms. The decision did not expand Rogers' obligations (or any other ISP's obligations) under the Notice and Notice Regime but merely clarified what are all ISP's obligations under the Notice and Notice Regime. Rogers' position is based on case law and principles that pre-date the Notice and Notice Regime and is in direct opposition to the express policy intentions of Parliament.

ROGERS SEEKS AN END-RUN AROUND THE CMA'S ISP OBLIGATIONS BY CHARGING FOR WORK IT IS NOT LEGALLY REQUIRED TO DO, OR WHICH SHOULD HAVE ALREADY BEEN DONE

10. ***Rogers' unnecessary re-verification is a collateral attack on the CMA*** – While fact-specific to this matter, Rogers' position on “delivery” of a subscriber's information is applicable to all ISPs. Rogers maintains that to “deliver” already stored information, it must undertake extensive measures to identify and verify its subscriber's information before disclosing it to Voltage. This work is unnecessary. Such verification measures must have already been completed when Rogers first identified its subscriber pursuant to the Notice and Notice Regime, otherwise subscribers would be misidentified routinely. Rogers' fee for this eight-step “re-verification” is an end-run around the Notice and Notice Regime. It seeks payment indirectly for what it cannot get directly.

11. ***Only the already-stored (and verified) information is requested*** - Voltage is only seeking to obtain the stored identity information that Rogers is expressly required to retain in accordance with s. 41.26(1). The true cost of disclosing such subscriber information to a party such as Voltage is nominal - all that is required to disclose it is a quick look-up of already stored information.

THIS CLASS PROCEEDING SEEKS TO TAKE ADVANTAGE OF THE NEW MECHANISMS IN THE CMA, INCLUDING NON-COMMERCIAL STATUTORY DAMAGES, WHICH ARE CAPPED AT \$100-\$5000

12. ***Reverse class action provides access to justice*** - Voltage is a movie production studio.¹⁰ It has commenced this proposed defendant class action¹¹ in an attempt to stop the widespread

¹⁰ The Respondents (“Voltage”) are a group of related film production companies.

illegal distribution of their motion pictures. As a class proceeding, legal costs can be spread over a large number of respondents and as a result lower total awards can be sought against each respondent. Non-commercial statutory damages in the hundreds of dollars may be cost-effectively sought. This “reverse” class action will never be possible, in a practical sense, if Rogers’ appeal is allowed by this Honourable Court.¹²

13. ***How to cost-effectively claim non-commercial statutory damages*** - The CMA did not just add the Notice and Notice Regime. Copyright owners are now restricted to seeking statutory damages of between \$100 and \$5000 for non-commercial infringement for all infringed works. This is in contrast to the \$20,000 per work that could be sought pre-CMA.¹³ Commencing individual actions seeking these low damages would be pyrrhic at best given the costs of litigation. Mass litigation¹⁴ may be more cost-effective, and there is no shortage of potential defendants. Class proceedings, however, can be the most efficient proceeding for all involved.

14. ***Abuses of cost-free system subject to Government and Court oversight*** - Imposing the costs of identification on copyright owners in these circumstances restricts access to justice. Potentially abusive behaviour can be remedied by the Government, which retains the ability to pass regulations permitting ISPs fees, which can be done quite quickly. The Courts also can restrict abusive behaviour as all disclosures must be vetted by a court of competent jurisdiction. There is no evidence of any kind that Voltage is being abusive.

¹¹ Technically, a “class application” under the *Federal Courts Rules* as the underlying proceeding is an application and not an action. Class applications are permitted under the *Federal Courts Rules* and the *Copyright Act*. See Rule 334.14(2) of the *Federal Courts Rules*, SOR/98-106 and Section 34(4) of the *Copyright Act*, R.S.C. 1985, c. C-42. The certification motion in this matter is pending.

¹² Given the class size of approximately 55,000 individuals and a cost of \$150 per identification to date, making the cost of initiating such a proceeding in the order of millions of dollars.

¹³ Section 38.1 of the *Copyright Act*, and in particular s. 38.1(b).

¹⁴ Whether by class action or by mass defendants – see e.g. Court File No. T-2177-16, ME2 Productions, Inc. v. Doe #1 et. al.

AN EFFECTIVE MECHANISM TO COMBAT RAMPANT ONLINE INFRINGEMENT IS REQUIRED

15. *International pressure on Canada to combat rampant piracy pre-CMA* - In 2011 the United States pressed Canada “to strengthen protections against piracy”.¹⁵ As had been the case for several years, Canada had the reputation of being a safe haven for internet pirates. The *CMA* was designed to change that reputation, and enact into Canadian legislation the international treaty obligations Canada had previously ratified but had never implemented into domestic law. In describing the aim of the *CMA*, at that time in the form of Bill C-32, later Bill C-11, the *Globe and Mail* stated that:

The legislation, long sought by the U.S. government, seeks to put more teeth in copyright law for those who make software, movies and other creative works – and have seen their intellectual property increasingly pirated around the globe.¹⁶

16. Little has changed since 2011:

- (a) In its 2017 report, the IIPA, a coalition of copyright owners, stated that “major online piracy operations still find a home in Canada. These include leading BitTorrent sites.”¹⁷
- (b) A February 2018 *The Economist* article with the tagline “Canada coddles counterfeiters” repeats the long standing allegations that Canada is “soft on piracy”.¹⁸
- (c) Rogers estimates that ISPs across Canada receive at least a million notices of claimed copyright infringement per month (12 million per year as of 2017).¹⁹

¹⁵ *Law cracks down on digital piracy in Canada*, *The Globe and Mail*, Steven Chase, Published September 29, 2011; Updated March 26, 2017.

¹⁶ *Ibid.*

¹⁷ IIPA Report, p 95, RBOA, Tab 3.

¹⁸ *Canada coddles counterfeiters; Marked Down in Markham*, *The Economist*, The Americas, February 24, 2018, RBOA, Tab 2.

¹⁹ Factum of the Appellant, Rogers Communications Inc., para 36.

PART II – QUESTION IN ISSUE

WHAT IS THE SCOPE OF AN ISP'S OBLIGATIONS UNDER S. 41.26 OF THE COPYRIGHT ACT AND WHICH OF THESE OBLIGATIONS MUST BE DONE AT NO COST

17. ***What is the scope of notice transmission, confirmation and identity storage*** - The primary question in issue is the statutory interpretation of s. 41.26 of the *Copyright Act*, and what obligations that section imposes on ISPs. This section requires that the steps of notice transmission, confirmation thereof and storage of subscriber information be performed without charge by an ISP, following receipt by an ISP of a properly-formatted notice. The delivery step – namely the delivery of the subscriber's retained information – is not explicitly described by the statute (although disclosure is a necessary and implied step).

18. ***It takes "two minutes" to deliver stored identities*** - Voltage's position is that the only step necessary to comply with a disclosure order is to review the request, retrieve the previously-stored information (*i.e.* the name and address of the subscriber) and transmit it to Voltage. This should involve a review of a standard motion record, the input of a reference number into a computer and the retrieval of the stored information for emailing to counsel. The retrieval of the information should take a very short period of time. Rogers admitted in cross-examination that "once you've compiled the information, no, it doesn't take long to send it", and when pressed, admitted that the process would take "two minutes".²⁰

19. ***Rogers wishes to unnecessarily re-verify the stored information prior to delivery*** - Rogers believes that it is necessary to perform an eight-step manual process prior to delivering the stored information. This process includes an initial check of whether the requested IP address(es) are valid, looking up the address of a subscriber, checking a second time whether the IP address is valid (*i.e.* was it from a "cloned modem"), and three further separate checks to ensure that the correct customer has been identified. Various individuals cross-check the results

²⁰ Transcript of the Cross-Examination of Kristi Jackson held June 17, 2016 ("Jackson Cross"), q. 153, p. 133 q. 176-176, AR, Tab 12, p. 132.

to see if those results are correct. Three separate highly specialized data extraction systems are used.²¹

20. ***Automated identity verification occurs before “notice transmission”*** - It is unclear if Rogers already performs this eight-step process to identify subscribers when copyright infringement notices are first sent to them – their witness had no personal knowledge about how Rogers’ Notice and Notice system works.²² What is known is that the identification of subscribers prior to “notice transmission” is done in an automated fashion without any human intervention, as notices are sent to subscribers automatically once received by Rogers’ automated systems. Successful notification is important, as the subscriber, now notified, may be primarily liable for authorizing any future copyright infringement even if they are not the direct infringer.²³

21. ***No need to re-verify identities before “delivery”*** - Either Rogers is abdicating its responsibility to properly identify its own subscribers when it forwards copyright infringement notices to them, or, it has performed an adequate job identifying them prior to “notice transmission”. Rogers in its evidence stated that “That is not to say that the Notice and Notice platform is misidentifying customers or the information it generates cannot be relied on”. Rogers does not need to “re-verify” the information it has already confirmed and stored. It only does so to recoup costs it otherwise may not.

SUMMARY OF ROGERS’ POSITIONS AND VOLTAGE’S RESPONSES

22. The below table summarizes Rogers’ main arguments, and Voltage’s summary responses thereto.

#	<i>Rogers’ Arguments</i>	<i>Voltage’s Response</i>
1.	Parties seeking disclosure were always historically required to pay ISPs costs. (<i>para 11</i>)	Parliament chose in 2012 for ISPs to bear these costs, with a legislative option to reverse the decision if necessary (e.g. in the

²¹ Affidavit of Kristi Jackson sworn June 10, 2016 (“Jackson Affidavit”), paras 20-21, AR, Tab 11, pp. 119-120.

²² Jackson Cross, qq. 53-56, p. 17, A.R. Tab 12, p. 127.

²³ *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004, SCC 45 (“CAIP”)*, at paras 110, 124 and 127.

#	<i>Rogers' Arguments</i>	<i>Voltage's Response</i>
	<p>Parliament did not want copyright disputes to be visited on the heads of internet intermediaries (in 2004). (<i>paras. 83, 84</i>)</p> <p>Creators should bear costs of enforcement on the internet otherwise all internet consumers will be liable. (<i>para 1</i>)</p>	<p>case of abuse).</p> <p><i>Cartier</i> and other EU cases show that ISPs have been statutorily obligated to bear the costs of intellectual property enforcement.</p> <p>The widespread adoption of broadband internet since 2004 has facilitated ubiquitous online infringement. Additional tools were added to the <i>CMA</i> expressly to make it easier for copyright owners to enforce their rights against those who abuse the internet.</p>
2.	<p><i>Norwich</i> order principles that creators (requestors) bear costs are not overridden by the <i>CMA</i>. (<i>para 2</i>)</p>	<p>Notice and Notice obligations overlap with <i>Norwich</i> obligations.</p> <p>s. 41.25 and 41.26 explicitly change the law by requiring overlapping identification, notice and identity retention be done at no cost with irresistible clearness.</p> <p>Only the disclosure of the retained information is arguably not covered by the Notice and Notice Regime.</p>
3.	<p>Legislative history of <i>CMA</i> showed no intent to change <i>Norwich</i> process. (<i>para 9, 86</i>)</p>	<p>The enacting legislation and Order in Council proclaiming into force the Notice and Notice Regime gave the objectives and specific intent of Parliament and the Government to make the Notice and Notice Regime cost-free.</p> <p>Rogers testified before Parliament in 2011 that the Notice and Notice Regime included a disclosure order process.</p>
4.	<p>ISPs are the internet's common carriers and as such should not be responsible for costs of copyright enforcement against their subscribers. (<i>para 20</i>)</p>	<p><i>CMA</i> provided ISPs with a new safe harbour and limitations of liability for Notice and Notice obligations. (see e.g. s. 41.26(3) and s. 31.1)</p> <p>The <i>quid pro quo</i> for the safe harbour and the limitation of liability is the obligation to identify subscribers at no cost.</p>
5.	<p>Parliament was silent on the type of subscriber information required to be stored, how it should be stored, and how</p>	<p>Without the FCA or this Court's interpretation of the legislation, ISPs and rights holders have no guidance on how to</p>

#	<i>Rogers' Arguments</i>	<i>Voltage's Response</i>
	<p>quickly it must be disclosed. Rogers is therefore free to choose its own methods for so doing. (<i>para 8</i>)</p> <p>The FCA's non-reimbursable obligations were not limited to transmission, confirmation and storage but included also "implied obligations". These implied obligations including many steps ISPs are required to take before disclosing a customer's identity. (<i>paras 59, 64</i>)</p>	<p>answer these questions. Consistency for the industry is paramount.</p> <p>The FCA's guidance was reasonable and fulfilled the purpose of the <i>CMA</i>.</p> <p>None of the seven "implied obligations" are anything other than steps necessary to accurately determine the identity information of the subscriber prior to storage.</p>
6.	<p>The <i>CMA</i> codified Rogers' prior practice for "notice and notice" (<i>paras 3, 30</i>)</p>	<p><i>CMA</i> codified the "notice and notice" concept but did not codify (and in fact overrode) certain ISPs prior practices – including in respect of costs</p>
7.	<p>"regular" notice and notice is automated whereas compliance with <i>Norwich</i> orders requires manual intervention in order to properly identify subscribers accused of infringement (<i>paras 5, 41</i>)</p>	<p>Verification of the identity of the infringer should have been done prior to sending a notice of infringement to the subscriber.</p> <p>Looking up the stored subscriber information can and should be automated. No further processing is requested or necessary.</p>
8.	<p>Rogers costs for disclosure are \$100/hour and are reasonable. (<i>para 93</i>)</p>	<p>The FCA found that the motion judge was palpably and overridingly wrong when he failed to assess the evidence on the reasonability of Rogers' fee by stating that "it is what it is". On cross-examination the \$100/hour fee was shown to be without any foundation in fact.</p>

PART III – STATEMENT OF ARGUMENT

SECTION 41.26 OF THE COPYRIGHT ACT – WHAT ARE THE “ACTS” FOR WHICH ISPS MAY NOT CHARGE?

23. *s. 41.26 sets out Notice transmission, confirmation and identity storage obligations* – Section 41.26(2) currently forbids charging any fee for the acts set out in s. 41.26(1).²⁴ These acts are set out as “forwarding as soon as feasible” (or “dès que possible” – as soon as possible) the notice of claimed infringement (*notice transmission*), informing the claimant of its forwarding²⁵ (*confirmation*) and the retaining of records (or the retention of “un registre”) that will allow the identity of the subscriber to be determined (*identity storage*) for six months or a year.

ARGUMENT 1 – DOES CAIP DECISION RATIONALE STILL APPLY - HISTORICALLY ISPS DID NOT BEAR COSTS OF IDENTIFICATION - CAIP PRINCIPLES

#	<i>Rogers’ Arguments</i>	<i>Voltage’s Response</i>
1.	<p>Parties seeking disclosure were always historically required to pay ISPs costs. (<i>para 11</i>)</p> <p>Parliament did not want copyright disputes to be visited on the heads of internet intermediaries (in 2004). (<i>paras. 83, 84</i>)</p> <p>Creators should bear costs of enforcement on the internet otherwise all internet consumers will be liable. (<i>para 1</i>)</p>	<p>Parliament chose ISPs to bear this cost, with a legislative option to reverse the decision if necessary.</p> <p><i>Cartier</i> and other EU cases show that ISPs have been statutorily obligated to bear the costs of intellectual property enforcement.</p> <p>The widespread adoption of broadband internet has facilitated ubiquitous online infringement. Additional tools were added to the <i>CMA</i> expressly to make it easier for copyright owners to enforce their rights against those who abuse the internet.</p>

24. ***CAIP was decided 14 years ago*** - In the 2004 *CAIP* decision, this Court discussed certain rights and obligations in the context of the early internet, and held in part that Parliament did not intend to have ISPs embroiled in copyright disputes. While this was certainly true at the time, internet technology has greatly improved in the last 14 years.

²⁴ *Copyright Modernization Act*, P.C. 2014-675, June 12, 2014, SI/2014-58, Canada Gazette, Part II, Vol. 148, No. 14, page 2122, July 2, 2014, RBOA Tab 4.

²⁵ or the reason why the notice was not possible to be forwarded.

25. ***CAIP rationale of “new internet” distinguished in committee due to new realities of the mature internet*** - As Rogers states in paragraphs 83 and 84 of its factum, in 2011 and 2012, when the *CMA* was being debated in Parliamentary committee, the *CAIP* decision was brought to the attention of Parliament. Contrary to Roger’s assertions that all *CAIP*’s principles were continued in the *CMA*, *CAIP* was distinguished at committee. ISPs made submissions in respect of the lack of effective remedies for online copyright infringement. The Notice and Notice Regime was touted as a solution to that problem.

What has changed since 2004, of course, is an awareness of the need to equip rights holders with additional tools to make it easier for them to enforce their rights against, in the Supreme Court’s words, “those who abuse the internet”.

Craig McTaggart, Director, Broadband policy, Regulation and Government Affairs, TELUS Communications.²⁶

26. ***International statutes and law compels ISPs to pay some costs of IP enforcement*** - ISPs are not always compensated for their costs in third party enforcement proceedings. Courts in the United Kingdom have held that an ISP’s cost of doing business includes certain expenses associated with enforcement of intellectual property rights. Mr. Justice Arnold of the High Court of Justice (Chancery Division) made the following conclusions: in *Twentieth Century Fox Film Corporation & Others v British Telecommunications Plc* (cited with approval in *Cartier* at para 134):

Each side contends that the other should pay the costs of implementing the order. In my judgment the costs of implementing the order should be borne by BT. The Studios are enforcing their legal and proprietary rights as copyright owners and exclusive licensees, and more specifically their right to relief under Article 8(3). BT is a commercial enterprise which makes a profit from the provision of the services which the operators and users of Newzbin2 use to infringe the Studios’ copyright. As such, the costs of implementing the order can be regarded as a cost of carrying on that business. It seems to me to be implicit in recital (59) of the

²⁶ Testimony of Craig McTaggart, House of Commons, Legislative Committee on Bill C-32, *Evidence*, 40th Parl., 3rd Sess., No. 19, (22 March 2011), p. 2, ABOA, Tab 6.

Information Society Directive that the European legislature has chosen to impose that cost on the intermediary.²⁷

ARGUMENT 2 – CMA SHIFTED COST BURDEN OF IDENTIFICATION TO ISPS

2.	<i>Norwich</i> order principles that creators (requestors) bear costs are not overridden by the <i>CMA</i> (para 2)	<p>Notice and Notice obligations overlap with <i>Norwich</i> obligations.</p> <p>s. 41.25 and 41.26 explicitly change the law by requiring overlapping identification, notice and identity retention be done at no cost with irresistible clearness.</p> <p>Only the disclosure of the retained information is arguably not covered by the Notice and Notice Regime.</p>
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27. ***CMA included new enforcement tool*** - Given this backdrop, in 2012, Parliament included in the *CMA* a new tool for copyright owners to enforce their rights against online infringers: the Notice and Notice Regime.

28. ***CMA explicitly requires s. 41.26(1) obligations to be at no cost*** - While it did not discuss the prior *Norwich* disclosure process directly, Parliament specified with “irresistible clearness” that the notice transmission, confirmation and identity retention steps of the Notice and Notice Regime must be done without cost recovery. These three steps are identical to the core obligations an ISP must fulfil when implementing a *Norwich* order.

29. ***Norwich obligations overlap with Notice and Notice obligations*** - To identify a suspected infringer in compliance with a *Norwich* order, pre-*CMA*, an ISP had to confirm the identity of their subscriber, record that information, and then deliver it to the complainant. The chart below summarizes the overlap of the *CMA* and *Norwich* procedures, from an ISP’s perspective. The shaded areas are common to both procedures.

²⁷ *Twentieth Century Fox Film Corporation & Others v. British Telecommunications Plc* [2011] EWHC 2714 (Ch), para. 32.

Step	<i>Norwich</i> Order	<i>CMA</i> Notice and Notice Regime
1.	Identity sought from ISP by <i>Norwich</i> order motion without notice to infringer (Disclosure Motion)	Notice of infringement sent to ISP by subscriber (notice to ISP)
2.	Potential infringer identified by correlation of IP address assigned to a particular subscriber at a particular time (<i>Identification of subscriber</i>)	Potential infringer identified by correlation of IP address assigned to a particular subscriber at a particular time (<i>Identification of subscriber</i>)
3.	[unique to <i>CMA</i>]	Copyright infringement notice sent to subscriber and confirmation of sending of notice sent to complainant (<i>Transmission and Confirmation</i>)
4.	Subscriber identification is recorded by ISP (<i>Storage</i>)	Subscriber identification is recorded by ISP (<i>Storage</i>)
5.	[see step 1]	Stored information (Identity) sought from ISP (Disclosure Motion)
6.	Stored subscriber identification delivered to complainant if <i>bona fide</i> case proven (<i>delivery</i>)	Stored subscriber identification delivered to complainant if <i>bona fide</i> case proven (<i>delivery</i>)

30. ***Only notice transmission and confirmation are new to the CMA*** - The only procedural steps that are different between a classic *Norwich* motion and a *CMA* disclosure motion under the Notice and Notice Regime are the new “notice transmission” and “confirmation” steps. These two steps (a) provide notice to the subscriber that they are infringing copyright; and (b) confirm to the complainant that the still-anonymous subscriber has received the complainant’s notice. All of the other steps in the identification process are identical.

31. *Delivery step is only step not expressly at no cost* - The sixth and last step in the identification process is delivery of the stored information. This is the only step that ss. 41.26(1) and (2) do not expressly require to be done without the ability to recover costs. As admitted by Rogers’ affiant in cross-examination, and as found by the Federal Court of Appeal, this step is nominal. It is our submission that Parliament neglected to include the delivery step in the “no costs” regime for that very reason – it is the hitting of the “send” button once the information is retrieved from storage and is included in the “storage” step by necessary implication.

ARGUMENT 3 - THE LEGISLATIVE HISTORY OF THE CMA SHOWED A CLEAR INTENTION TO MAKE THE NOTICE AND NOTICE REGIME COST-FREE AND THUS SHARED NORWICH STEPS COST-FREE

3.	Legislative history of <i>CMA</i> showed no intent to change <i>Norwich</i> process. (<i>para 9, 86</i>)	<p>The enacting legislation and Order in Council proclaiming into force the Notice and Notice Regime gave the objectives and specific intent of Parliament and the Government to make the Notice and Notice Regime cost-free.</p> <p>Rogers testified before Parliament in 2011 that the Notice and Notice Regime included a disclosure order process.</p>
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32. Parliament gave a clear and unequivocal expression of legislative intent in enacting the Notice and Notice Regime:

- (a) Following enactment, but prior to proclamation into force, in an official consultation letter sent to various stakeholders in the industry, including as ISPs, (“**Consultation Letter**”) the Government set out the purpose of the amendments in the following terms:

The Notice and Notice Regime is intended to discourage online copyright infringement by providing copyright owners with a tool to enforce their rights, while also respecting the interests and freedom of users [...]

The identity of the subscriber may be released to the copyright owner with a court order. ISPs or hosts that fail to retain such records or to

forward notices may be liable for statutory damages ranging from \$5,000 to \$10,000 [...] ²⁸

- (b) Most importantly - when proclaiming the Notice and Notice Regime into force, the Order of the Governor General in Council (the “**Notice Order**”) proclaiming the relevant portions of the *CMA* into force on June 12, 2014 (with an effective date of December 12, 2014), echoed the above sentiment in the the accompanying Explanatory Note:

Objective

The objective of this Order in Council is to bring into force the notice and notice regime, an important part of Canada’s modern copyright regime. The regime is intended to discourage online copyright infringement by providing copyright owners with a tool to enforce their rights, while also respecting the interests and freedom of users.

Objectif

L’objectif du Décret du gouverneur en conseil est d’annoncer l’entrée en vigueur du régime d’avis et avis en tant que partie intégrante du régime canadien du droit d’auteur. Ce régime vise à décourager la violation du droit d’auteur en ligne en fournissant aux titulaires de droit d’auteur un outil pour faire valoir leurs droits, tout en respectant les intérêts et libertés des utilisateurs. ²⁹

33. ***Feedback had been sought from ISPs pre-proclamation*** - Notably, the Explanatory Note makes reference to the Consultation Letter, mentioning that feedback had been sought from ISPs on various issues, including regarding if regulations would be needed in addition to what the law requires (e.g. fees for Notice and Notice, format of notices, etc.). Six additional months were then granted (until June, 2015) to provide ISPs the time needed to implement or modify their systems before the provisions are in force. ³⁰

34. ***Cost-recovery was an ISP concern that was dismissed*** - The Explanatory Note lists some of the views expressed during the consultation period, including most notably “Smaller ISPs

²⁸ Consultation Letter - Barrett Affidavit, Exhibit B, AR, Tab 8B, pp. 70-76.

²⁹ *Copyright Modernization Act*, P.C. 2014-675, June 12, 2014, SI/2014-58, Canada Gazette, Part II, Vol. 148, No. 14, pages 2121-2123, July 2, 2014, in particular p. 2122, RBOA Tab 4.

³⁰ *Ibid* at p. 2122.

expressed concern that the cost of complying with the notice and notice obligations without cost-recovery would be challenging for them”.³¹ The Government therefore had heard submissions on cost recovery by ISPs, commented on them in the Explanatory Note, and did not implement them.

35. ***Express intent is in enacting legislation*** - The Government’s (and Parliament’s) express intent is set out in the Explanatory Note to the Notice Order. There is no need to resort to testimony before parliamentary committees, debates in the House of Commons, or other inferential sources when the Government’s intent is so clearly and intentionally set out as in the Notice Order.

36. ***The internet must not become a safe house for pirates*** - The Federal Court of Appeal’s decision articulated the legislative purposes and intent behind the *CMA*. The Court held (correctly, Voltage submits):

[26] The overall aim, then, is to ensure that in the age of the internet, the balance between legitimate access to works and a just reward for creators is maintained. The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others’ dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament’s objectives would crumble. All the laudable aims of the *Copyright Act* - protecting creators’ and makers’ rights, fostering the fair dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment - would be nullified.

[27] Thus, to the extent it can, the legislative regime must be interpreted to allow copyright owners to protect and vindicate their rights as quickly, easily and efficiently as possible while ensuring fair treatment of all.³²

37. ***Rogers always knew that court orders were part of Notice and Notice*** - Despite what Rogers submitted in its factum at para 86, its own witness, Pam Dinsmore, testified at the Bill C-32 legislative committee that court orders were expected to be part of the Notice and Notice Regime:

³¹ *Ibid* at p. 2122.

³² *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, paras. 26 and 27; AR, Tab 3, p. 31.

“[notice and notice] is just the first step in a process by which rights holders can go after those they allege are infringing. The role [ISPs] play through notice and notice is to send the notice off to an alleged infringer on behalf of the rights holder. Then the rights holder can use that when they decide to take that alleged infringer to court.³³ [emphasis added]

38. ***Identity storage implies identity production*** - Subsection 41.26(1) requires that the storage of the subscribers’ identity be retained for a year if a proceeding is commenced, rather than for six months if one is not. To force ISPs to hold information without any mechanism to have it disclosed would be a Kafkaesque, absurd result, one unintended by Parliament.³⁴

ARGUMENT 4 - ISPs ARE THE COMMON CARRIERS OF THE INTERNET – THEY HAVE BOTH THE RIGHTS AND THE DUTIES ASSOCIATED WITH SUCH STATUS – THE QUID PRO QUO FOR THEIR CMA “SAFE HARBOUR” IS THE OBLIGATION TO PERFORM THEIR NOTICE AND NOTICE DUTIES AT NO COST

4.	ISPs are the internet’s common carriers and as such should not be responsible for costs of copyright enforcement against their subscribers (<i>para 20</i>)	CMA provided ISPs with a new safe harbour and limitations of liability for Notice and Notice obligations (see e.g. s. 41.26(3) and s. 31.1) The <i>quid pro quo</i> for the safe harbour and the limitation of liability is the obligation to identify subscribers at no cost.
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39. ***ISPs are the common carriers of the internet*** – At paras 18-20 of its factum, Rogers makes the apt analogy that ISPs are the common carriers of the internet. Their function is to transmit and receive internet information (e.g. packets), much like the post office delivers letters. However, telecommunications common carriers (and other types) are normally highly regulated and have many obligations as a result.³⁵

40. ***The CMA introduced a new ISP common carrier safe harbour*** - The CMA enacted s. 31.1(1) of the *Copyright Act*, which provides that an ISP is not liable for copyright infringement if it provides means for the telecommunication of, or the reproduction of a work, through the

³³ House of Commons, Legislative Committee on Bill C-32, Evidence, 40th Parl., 3rd Sess., No. 19 (22 March 2011), ABOA, Tab 6, p. 10.

³⁴ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para 27 and *Interpretation Act*, R.S.C. 1985, c. I-21, section 12.

³⁵ See e.g. *the Telecommunications Act*, S.C. 1998, c. 38.

Internet. Subsection 31.1(2) provides further protection and permits the ISPs to make copies of works in order to make telecommunication more efficient. This safe harbour insulates ISPs from any liability related to their subscribers for copyright infringements that the ISPs facilitate by their provision of lawful internet services.³⁶ However, similar to other types of common carriers, ISPs have obligations as a result of their role, in this case to not modify the works transmitted³⁷ and to not “interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject matter”.³⁸ In other words the ISPs must not block a complainant’s ability to retrieve “data on the use of the work”, e.g. the identity of the person who was using the work.

41. ***Limitation of liability to \$10,000 for each breach of Notice and Notice obligations -*** Further, to the extent that an ISP fails in its obligations s. 41.26(1) obligations (i.e. notice transmission, confirmation and identity retention), subsection 41.26(3) of the act limits a copyright owner's remedy against such an ISP to statutory damages in the range of \$5,000 to \$10,000 for each such breach. This can be a very significant limitation of liability, in particular in the commercial context.

42. ***Example of effect of limitation of liability -*** For example, if an ISP negligently failed to retain a subscriber’s identity, that subscriber is very unlikely to ever be identified, and therefore never be brought to court. If that subscriber commercially distributed counterfeit works, for example, damages for infringement could easily range into the six or seven figures. Yet the ISP, whose conduct in this example insulated the infringer from liability, would only be liable for \$5000-\$10,000 in damages.

43. ***CMA introduced a quid pro quo for the no-cost regime -*** The ISPs obtained both significant financial benefits and some financial hardship from the enactment of the *CMA*. The *quid pro quo* for the safe harbours and the limitations of liability is the obligation to identify

³⁶ s. 31.1(1) of the *Copyright Act*.

³⁷ A classic “common carrier” obligation – see the similar obligation in the *Telecommunications Act*, S.C. 1998, c. 38, s. 36.

³⁸ s. 31.1(3)(a) and (c) of the *Copyright Act*.

subscribers at no cost. This is consistent with the purpose of the Notice and Notice Regime and the *CMA*.

ARGUMENT 5 - THE CMA DID NOT SPECIFY IN SIGNIFICANT DETAIL WHAT TYPE OF SUBSCRIBER INFORMATION WAS REQUIRED TO BE STORED, AND HOW QUICKLY IT MUST BE DISCLOSED. THE FEDERAL COURT OF APPEAL REASONABLY INTERPRETED THE STATUTE IN LIGHT OF ITS PURPOSE AND OBJECTS, CONSISTENTLY WITH PRIOR CASE LAW

5.	<p>Parliament was silent on the type of subscriber information required to be stored, how it should be stored, and how quickly it must be disclosed. Rogers is therefore free to choose its own methods for so doing. (<i>para 8</i>)</p> <p>The FCA’s non-reimbursable obligations were not limited to transmission, confirmation and storage but included also “implied obligations”. These implied obligations including many steps ISPs are required to take before disclosing a customer’s identity. (<i>paras 59, 64</i>)</p>	<p>Without the FCA or this Court’s interpretation of the legislation, ISPs and rights holders have no guidance on how to answer these questions. Consistency for the industry is paramount.</p> <p>The FCA’s guidance was reasonable and fulfilled the purpose of the <i>CMA</i>.</p> <p>None of the seven “implied obligations” are anything other than steps necessary to accurately determine the identity information of the subscriber prior to storage.</p>
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44. ***Statutory regime has both explicit and implied obligations*** - The Federal Court of Appeal concluded that the Regime included obligations both express and implied. The implied obligations “must also exist—otherwise, the purposes underlying the legislative regime will be unfulfilled or, worse, frustrated”.³⁹

45. Rogers’ factum at paragraph 64 sets out the Federal Court’s stated obligations:

- (1) maintain records in a manner and form that allows it to identify suspected infringers;
- (2) locate the relevant records;
- (3) identify the suspected infringers;
- (4) verify the identification work it has done;

³⁹ *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, para. 32, AR, Tab 3, p. 32-33.

- (5) send the notices to the suspected infringers and the copyright owner;
- (6) translate the records (if necessary) into a manner and form that allows them both to be disclosed promptly and to be used by copyright owners and later the courts to determine the identity of the suspected infringers; and
- (7) keep the records ready for prompt disclosure.

46. Each one of these obligations relate to one or more of the following fundamental requirements of the Notice and Notice Regime:

- (a) properly identifying the subscriber and sending the notice to that subscriber (obligations 1, 2, 3, 4 and 5); and
- (b) retaining accurate records and ensuring that the records that are being retained are actually usable by the copyright owner and the court (obligations 1, 2, 3, 4, 6 and 7).

47. ***(a) ISPs must Identify and Notify*** - ISPs must correctly identify its subscribers prior to sending them notices, otherwise the entire notification purpose of the legislation is nullified. In order to do so, this requires keeping records to permit the identification in the first place (obligation 1), and looking up these records when a notice is sent in (obligation 2) to identify the subscriber (obligation 3). If necessary, any verification of the identity, through a check of cloned modems or whatnot, must be done to ensure the identity of the subscriber prior to sending the notice (obligation 4). Only if the subscriber is properly identified (and, if necessary, verified) can the obligation to send the notice to the subscriber be completed (obligation 5).

48. ***Identification verification required to transmit notice*** - If these first 5 obligations are not met, notices could be sent to the wrong subscriber and the ISP would have failed in its obligation to forward the notice to the subscriber.

49. ***(b) ISPs must retain only accurate and lawful information*** - The *Copyright Act* expressly states that the “storage” obligation is to “allow the identity of the [subscriber] to be determined”. “Un registre” must be kept “permettant d’identifier la personne”. The precise nature and content of this record is left unsaid – Parliament has left it to be determined by the Courts.

50. ***Lawful content of record is name and address of subscriber*** - The “record” that must be kept is intended to be disclosed, that is why the record must be kept for a year instead of six months when an action is commenced. The “record” is “personal information” of the subscriber, and therefore must be maintained in accordance with both privacy statutes and case law.⁴⁰ Typically, to date, only names and physical addresses of subscribers are permitted to be disclosed in *Norwich* orders to protect the privacy rights of the subscriber.⁴¹ This is also consistent with s. 41.25(2)(a) of the Notice and Notice Regime that requires the name and address of the complainant to be provided to the subscriber.

51. ***No need to update stored information*** - Rogers should therefore be recording the name and address of the subscriber as at the date of the notice, in a manner that anyone can read (obligation 6). It is not necessary to update that information when it is requested – that is not part of the statutory scheme. It is the complainant’s obligation to make prompt requests for disclosure or suffer the consequences of any dilatory actions. Similarly, the obligation to store the subscriber’s information must be done in a way that facilitates prompt disclosure by the ISP - that act is under the control of the ISP (Obligation 7).

52. ***FCA’s obligations are commercially reasonable*** - There is nothing unreasonable or even controversial with what the Federal Court of Appeal decided – these obligations are necessary to fulfil the purpose of the Notice and Notice Regime. These obligations are the meat on the bones of the “notice transmission / confirmation / identity storage” system. They are minimally intrusive into Rogers’ business, and they are commercially reasonable in the context of the objects of the *CMA*.

53. ***Rogers provides no alternative to FCA’s obligations*** - It is telling that Rogers goes into no details as to any alternative system of how the Notice and Notice Regime is supposed to work, or how the Federal Court of Appeal’s obligations are unreasonable or unfair. Rogers

⁴⁰ *Voltage Picture LLC v. John Doe*, 2014 FC 161 at paras. 34, 54 and 57, for example. See also *Voltage Pictures LLC v. John Doe*, 2015 FC 1364.

⁴¹ Order of Case Management Judge Aalto dated February 20, 2018, *ME2 Productions, Inc. v. Doe #1 et al*, Court File No. T-2177-16 [similar orders have issued in Court File Nos. T-1614-16, T-1674-16, T-1692-16, T-264-17, T-265-17, T-463-17, T-480-17, T-908-17, T-909-17, and T-1918-17]

merely states that it wishes to do what it has always done. This is not reasonable given the time the Government gave the ISPs to implement systems to conform with the *CMA*.

54. ***Rogers ignores Norwich precedents on storage format*** - Rogers posits in paragraph 77 of its factum that it can store whatever it wants as long as it (Rogers) can use that information to identify a subscriber. This contravenes both *Norwich* order precedents and the clear words of the *Copyright Act*. *Norwich* orders are equitable bills of discovery that permit documents and information to be produced. Unlike *Mareva* injunctions, which have more onerous requirements, in a *Norwich* motion, third parties are not compelled to take any action other than what would be permitted in a discovery. Subscriber identities are not produced in *Norwich* orders in some sort of computer code – they are produced in French or English. In order to fulfil the purpose of the act, Rogers must store information in a human-readable format.

55. ***Rogers can record names and addresses easily*** - Rogers is a highly sophisticated organization. It already automates the lookup of hundreds of thousands of subscribers' identities to send them electronic notices. It should at the same time automatically record the names and addresses of the individuals it sent the notices to.

56. ***Other procedural mechanisms were recommended by FCA to permit cost-effective enforcement*** - The Federal Court of Appeal further stressed the need to streamline the disclosure process in order to remove barriers to enforcement. This includes the use of standardized motion materials, which could include reasonable compensation for the actual act of delivery of the stored information.⁴²

57. ***FCA considered overlap of Norwich and CMA disclosure requirements*** - Rogers' argument that the Federal Court of Appeal created an entirely new process for obtaining disclosure is wrong. The Court held that "the legislative regime does not displace the *Norwich* order process entirely" and that the "*Norwich* order process remains to govern disclosure".⁴³ As a result, whether disclosure ought to be made in any particular instance, and on

⁴² *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, para. 64, AR, Tab 3, p. 41-42.

⁴³ *Ibid*, at para. 56.

what terms, will still be governed by the Court. Courts can deal with any unfairness arising under this new legislative regime.⁴⁴

ARGUMENT 6 - THE CMA CODIFIED THE CONCEPT OF NOTICE AND NOTICE (COMPARED WITH NOTICE AND TAKE-DOWN) BUT DID NOT CODIFY ROGERS' INTERNAL PROCESSES

6.	The CMA codified Rogers' prior practice for "notice and notice". (<i>paras 3, 30</i>)	CMA codified the "notice and notice" concept but did not codify (and in fact overrode) certain ISPs prior practices – including in respect of costs.
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58. **Rogers, Bell and Telus all had different voluntary "notice" systems** - Rogers makes great hay regarding the "codification" of the pre-existing voluntary "notice and notice" system into the Notice and Notice Regime. However, as is clear from the testimony before the Parliamentary Committee, each of Rogers, Bell and Telus had different notice and notice systems, and different ways of dealing with infringers.⁴⁵

59. **Parliament did not implement Rogers' system** – Parliament made it clear in the Explanatory Note that it chose a notice and notice system rather than a USA-style notice and take-down system. Parliament gave ISPs six months from the date of the Notice Order to implement or modify their systems before the provisions came into force in order to adapt their systems to the new law.⁴⁶

ARGUMENT 7 - ROGERS DOES NOT NEED TO PERFORM ITS 8-STEP PROCESS - ROGERS SHOULD BE ABLE TO AUTOMATE ITS ENTIRE SYSTEM

7.	"regular" notice and notice is automated whereas compliance with <i>Norwich</i> orders requires manual intervention in order to properly identify subscribers accused of infringement. (<i>paras 5, 41</i>)	Verification of the identity of the infringer was done, or should have been done, prior to sending a notice of infringement to the subscriber. Looking up the stored subscriber information
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⁴⁴ *Ibid*, para. 57.

⁴⁵ See e.g. p. 4 of Tab 6, ABOA – Bell Canada's witness testified that "At Bell we're somewhere in between [Rogers and Telus], or maybe I should say we're at the other side of Telus."

⁴⁶ *Copyright Modernization Act*, P.C. 2014-675, June 12, 2014, SI/2014-58, Canada Gazette, Part II, Vol. 148, No. 14, p. 2122, RBOA, Tab 4.

		can and should be automated. No further processing is requested or necessary.
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60. ***Rogers' manual process verifies information after the horse has left the barn*** – Rogers uses a manual eight step procedure, which includes three new verifications of subscriber information.⁴⁷ Rogers maintains that such measures are necessary and must be done manually to ensure the accuracy of the disclosed information. Neither justification stands up to scrutiny. If Rogers is only verifying the information after sending the notices to its subscribers, it is too late – the horse has already left the barn (les oiseaux se sont envolés).

61. ***Verification should have taken place before notice transmission*** - The identification verification measures seemingly undertaken by Rogers in its eight step process should have been completed prior to transmitting a notice to a subscriber, not after the subscriber's identity is stored. Otherwise the notice could go to an incorrect person. Re-verification is unnecessary.

62. ***Information has been verified automatically and does not need to be re-verified manually*** - The process does not need to be done manually. The automated notice and notice platform used by Rogers has been in use for over a decade, and it automates several hundred thousand notice requests every month. In each of these cases, a subscriber's identity has to be determined automatically – Rogers has to know where to send the notices. It therefore already is looking up its subscriber's identity automatically, and verifying it.

63. ***Storing and retrieving notice and notice information should also be done automatically*** - There is no reason why Rogers cannot store plain-text identity information as part of the “identity storage” step as it already seems to do for the content of the notice and whether it was delivered or not delivered.⁴⁸ There is no evidence showing that the notice-and-notice identity verification is unreliable and, to the contrary, Rogers asserts that the data retrieved by its automated system is reliable.⁴⁹ Ms. Jackson had no knowledge of whether a subscriber's name and contact information was stored automatically, and undertakings on this issue were not clearly

⁴⁷ Jackson Affidavit, para. 20, AR, Tab 11, pp. 119-120.

⁴⁸ Jackson Affidavit, para 16, AR Tab 11, p. 119.

⁴⁹ Jackson Affidavit, para. 23, AR, Tab 11, p. 121.

answered.⁵⁰ Rogers' evidence ought therefore to be subject to a negative inference and this Court should find that the system can be automated without undue effort.

ARGUMENT 8 - ROGERS' \$100/HOUR FEE IS NOT COST RECOVERY AND IS NOT REASONABLE – THE FCA FOUND THAT THE EVIDENCE ON COST RECOVERY WAS NOT EVALUATED BY THE MOTIONS JUDGE AND THAT ON REVIEW THE FEE WAS NOT REASONABLE

8.	Rogers costs for disclosure are \$100/hour and are reasonable. (<i>para 93</i>)	The FCA found that the motion judge was palpably and overridingly wrong when he failed to assess the evidence on the reasonability of Rogers' fee by stating that "it is what it is". On cross-examination the \$100/hour fee was shown to be without any foundation in fact.
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64. ***ISPs can get cost recovery but not fees for implementing Norwich orders*** - Under *Norwich* order principles, an ISP is not entitled to be paid a fee for complying with a *Norwich* Order. It is only entitled to be reimbursed for its incurred costs, which may be assessed (i.e. taxed). This does not include overhead or benefits – only the ISP's direct costs. Disclosure compensation is not meant to fund real estate investments or computer infrastructure.⁵¹

65. ***Rogers provided no factual basis for its \$100/hour fee*** - Even Rogers' calculation of its \$100/hour fee is highly suspect when the facts are examined in detail. Voltage cross-examined Rogers' affiant, Ms. Jackson, on how Rogers had set its fee, and it was quite clearly shown that Rogers had no factual basis in its evidence for the \$100/hour figure other than a bald statement that Rogers' executives had set that fee and that was what their legal department charges.⁵² No documents were provided to substantiate this fee, and no detailed breakdown of actual costs was ever provided to Voltage.

66. ***Rogers charged \$5-\$10/IP address in 2012, likely close to its real cost*** - Ms. Jackson eventually admitted that Rogers had previously charged \$5-\$10 per identification for similar

⁵⁰ Jackson Cross, AR, Tab 12, q. 52, p. 127 (p. 15-17 of the condensed transcript); Answers to Undertakings, AR, Tab 13, p. 141.

⁵¹ *Glaxo Wellcome PLC v. Canada (Minister of National Revenue)*, [1998] FCJ No. 874 ("Glaxo") at para. 68, ABOA, Tab 2.

⁵² Jackson Cross, qq. 220-233, AR, Tab 12, p. 136, p. 51-54.

requests, the industry standard figures for such disclosures at that time.⁵³ The cross-examination of Ms. Jackson further showed that the salary of the Rogers employees who were assembling and providing the information was on average no more than \$33/hour, and that it would take 20 minutes to assemble the information, and only very few minutes to produce it. Rogers' real costs are clearly much lower than \$100/hour.

67. ***Motion Judge did not evaluate evidence of Rogers' fee/cost*** - In his decision, the Motion Judge held that Rogers' fee "is what it is" and ordered that Voltage must pay Rogers' \$100/hour fee.⁵⁴ In his reasons, the Motion Judge did not evaluate the evidence including the contradictory evidence elicited in cross-examination. He did not provide any rationale for accepting Rogers' figures as being its actual out of pocket expenses, as opposed to a fee. His reasons provide only a very brief synopsis of his thoughts, and they are reproduced below in their entirety:

[19] In any event, the Applicants contend that even if Rogers is entitled to a fee for disclosing information about the Subscriber, that fee is at best minimal and should be at most 50 cents per subscriber because most of the information has already been collected and assembled by Rogers in complying with its obligations under subsection 41.26(1) of the Copyright Act. Moreover, the Applicants assert that the fee of \$100 per hour is unreasonable and contrary to certain evidence in the record which suggests that the fee was only \$5 or \$10 per subscriber name a few years ago. For its part, Rogers has offered evidence as to how the \$100 per hour fee was established and why it is reasonable.

[20] The case law suggests that consideration should be given to the costs incurred by Rogers in assembling the information about its Subscriber and complying with a disclosure order (see BMG at para 35 and also Voltage at paras 46 and 138). In Voltage, for example, it was ordered that "all reasonable legal costs, administrative costs and disbursements incurred" by the ISP in abiding by the disclosure order were to be paid by the plaintiff to the ISP prior to release of the customer information.

[21] The Applicants' argument as to the unreasonableness and the amount of Rogers' hourly fee is not persuasive. The fee is what it is, and if the Applicants want information about the Subscriber they must pay the hourly fee. The record suggests that no more than about an hour will be necessary for Rogers to assemble, verify and forward the Subscriber information to the Applicants, so the total cost would be approximately \$113.⁵⁵

⁵³ Jackson Cross, qq. 262-291, AR, Tab 12, p. 138-40, pp. 61-67.

⁵⁴ *Voltage Pictures, LLC v. John Doe*, 2016 FC 881 at para. 21, AR, Tab 1, p. 12.

⁵⁵ *Ibid*, at paras 19-21.

68. ***Failure to provide cogent reasons is reviewable error*** - The proper test for insufficient reasons is whether a reasonable person (taking into account all relevant circumstance) would conclude that the alleged deficiency is evidence of a fundamentally unfair decision making process.⁵⁶ By not evaluating the evidence, analyzing the applicable law, or explaining the basis for the decision that the “fee is what it is”, it is respectfully submitted that the Motion Judge failed to discharge the Court’s duty to provide cogent reasons for a fundamental aspect of its order. As the Federal Court of Appeal held, the Motion Judge did not assess the reasonableness of the fee and should have. This is a palpable and overriding error.⁵⁷

69. ***Rogers’ cost of disclosure is at most \$0.50 per IP address*** - It was on the basis of Rogers’ own evidence that the Federal Court of Appeal decided, correctly in Voltage’s submission, that the Motion Judge committed a palpable and overriding error in reaching his conclusion, and that at best, Rogers could only demonstrate a fee of \$0.50 per IP address.⁵⁸

70. ***Rogers attempts to recoup costs indirectly that it cannot recover directly*** - Rogers didn’t simply deliver the information it was required by law to retain at no fee. That would have been simpler, much less costly, and just as effective as its eight-step manual process. The only plausible answer as to why Rogers would do this is that Rogers is seeking to recover costs through this process that it is not permitted to charge under s. 41.26(2). The alternative is that Rogers is not retaining information that is necessary to identify the subscriber. In either case, Voltage should not be liable.

ENFORCING THE NOTICE AND NOTICE REGIME WILL NOT VASTLY INCREASE THE COST OF THE INTERNET TO CANADIAN CONSUMERS

71. ***It is not necessary that consumers pay more for internet*** - Rogers misguidedly argues that if it must bear the costs of the Notice and Notice Regime, then all of its subscribers, and therefore by analogy all Canadian internet users, will end up paying more for their internet. Rogers suggests that these are the necessary consequences of the Federal Court of Appeal’s decision. This fails to address the balance between consumers and content creators.

⁵⁶ *Cojocaru v. B.C. Women’s Hospital and Health Centre*, 2013 SCC 30 at para. 13

⁵⁷ *Housen v. Nikolaisen*, 2002 SCC 33.

⁵⁸ *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, at para. 76, AR, Tab 3, p. 45.

72. ***ISPs profiting from infringing activity – it is equitable to use some of those funds to subsidize copyright enforcement*** - ISPs like Rogers provide the means for copyright infringement (*i.e.* the internet connection and bandwidth) and they collect fees from subscribers for so doing.⁵⁹ While this is part of their function as common carriers, and we are not ascribing any blame to ISPs as a result, there is no doubt that a certain percentage of Rogers’ subscribers use Rogers’ services for unlawful reasons, and pay Rogers for the ability to do so. It is equitable that those funds be used to subsidize copyright enforcement efforts.

73. ***ISPs’ Terms of Service could permit cost-recovery only from infringing subscribers*** - Rogers’ standard Terms of Service prohibits copyright infringement.⁶⁰ Subscribers who infringe copyright are therefore in breach of the Terms of Service. Disclosure orders are only permitted when a *bona fide* case of infringement is made out against the infringers. ISPs could therefore legitimately pass on their costs of delivery to those subscribers who breach the Terms of Service. This would ensure that only those users who are directly implicated as infringing or who are facilitating infringement pay the associated costs. This is entirely in Rogers’ control, subject to any regulation by the appropriate governmental authority. There is no reason Rogers’ entire customer base is required to pay for any costs of enforcement, or for that matter all Canadian consumers. It further remains an open question as to the real scope of such costs, and the impact they would have on ISPs.

SAFEGUARDS AGAINST ABUSE INCLUDE GOVERNMENT’S ABILITY TO REGULATE AND FCA’S BACK DOOR ALLOWING SOME FEES FOR DISCLOSURE

74. ***Regulatory safety valve exists*** - In any event, Parliament has installed a safety valve if abuses of the system take place. The Government may pass regulations allowing ISPs to charge fees for implementing the Notice and Notice Regime. Further, the *Copyright Act* currently is in the midst of the 5-year review mandated by s. 92, implemented by the *CMA*, and any necessary changes may well be legislated by Parliament.

75. ***FCA’s “back door” permits some cost recovery*** - The Federal Court of Appeal’s decision permits ISPs to charge fees for the actual, reasonable and necessary costs associated

⁵⁹ See *Voltage Pictures LLC v. John Doe*, 2015 FC 1364 at para. 54.

⁶⁰ Rogers’ Terms of Service and Other Important Information” at para. (i), p. 20.

with the act of disclosure of the information, as well as legal fees where equitable to do so.⁶¹ While the decision referred to this fee as “likely nominal”, that was in the context of this case where only one identity was sought. If requests are made for large numbers of identities – as is likely to take place, for example, if the underlying class application is certified - the actual, reasonable and necessary costs to deliver the identities of thousands of infringers is not likely to be nominal.

76. ***Reasonable cost recovery for “delivery” should be in context of automated systems -*** The “actual, reasonable and necessary” costs in cases where large numbers of identities are sought should be done in the context of reasonable automation of the process, and not some onerous and unnecessary manual process. The request made by the copyright owner should be made in reasonable electronic format (e.g. an excel spreadsheet), and the identity look-ups can easily be automated by a computer system and provided to the copyright owner in a similar electronic format. This is not rocket science. ISPs can have, or should have, implemented systems to do this automatically given the additional time explicitly provided in the Notice Order to do so.

77. ***Courts oversee all disclosure motions and already implement safeguards*** – All identity disclosure is obtained by motion and is supervised by the Courts. The Courts have a gatekeeper function in deciding whether to issue disclosure orders, independent of whether the parties consent to the motion. Reasonable safeguards can be, and are, implemented on a case-by-case basis depending on the specific facts of a particular disclosure request to protect ISPs and subscribers from abuse. The Federal Court has already mandated safeguards to protect privacy in this case and in other similar cases of online infringement enforcement,⁶² which include:

- (a) a court-mandated cover letter must be sent to the subscriber with any pleading implicating the subscriber, stating, *inter alia*, that no Court has yet made a determination of fact or law that the subscriber is liable for copyright infringement or damages;

⁶¹ *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, at paras. 77, 78, AR, Tab 3, pp. 45 and 46.

⁶² *Voltage Pictures, LLC v. John Doe*, 2016 FC 881, AR, Tab 1, pp. 14 - 16; *Voltage Picture LLC v. John Doe*, 2014 FC 161 at para. 134 and Order of Case Management Judge Aalto dated February 20, 2018, in Court File No., T-2177-176, RBOA, Tab 1, for example.

- (b) any personal information received shall remain confidential and shall not be disclosed to the public (including by way of press release) until a subscriber's identity becomes part of the public record; and
- (c) any correspondence with subscribers must include the disclosure order itself, and on request, the reasons for the disclosure order.

78. *The Courts or the Government can control the process as new cases arise* - The Court of first instance will deal with abusive cases as they arrive, and have the equitable jurisdiction to craft appropriate fact-specific remedies. If the Courts fail to intervene, the Government can quickly intervene and pass appropriate regulations. It is not necessary to craft remedies for abuse at this stage, given the lack of factual context.

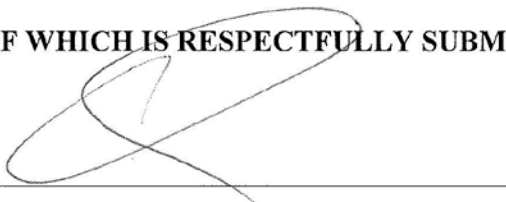
PART IV – SUBMISSIONS CONCERNING COSTS

79. Voltage requests its costs on the ordinary scale.

PART V - ORDER

80. The Federal Court of Appeal's decision is reasonable, and correct. For the reasons set out above, Voltage requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of March 2018



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PART VI – TABLE OF AUTHORITIES

No.	Name	Paragraph
CASES		
1.	<i>Cartier International AG and others v. British Sky Broadcasting Ltd. and others</i> [2016] EWCA Civ 658	22, 24, 26
2.	<i>Cojocar v. B.C. Women’s Hospital and Health Centre</i> , 2013 SCC 30	68
3.	<i>Glaxo Wellcome PLC v. Minister of National Revenue</i> , [1998] 4 F.C. 439 (C.A.) , leave to appeal to S.C.C. retd [1998] S.C.C.A. No. 422	64
4.	<i>Housen v. Nikolaisen</i> , 2002 SCC 33	68
5.	<i>ME2 Productions, Inc. v. Doe #1 et al.</i> , Court File No. T-2177-16, Order of Case Management Judge Aalto dated February 20, 2018	50
6.	<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27	38
7.	<i>Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers</i> , 2004 SCC 45	20
8.	<i>Twentieth Century Fox Film Corporation & Others v. British Telecommunications Plc</i> [2011] EWHC 2714 (Ch)	26
9.	<i>Voltage Pictures LLC v. John Doe</i> , 2014 FC 161	50, 77
10.	<i>Voltage Pictures LLC v. John Doe</i> , 2015 FC 1364	50, 72
11.	<i>Voltage Pictures, LLC v. John Doe</i> , 2016 FC 881	67, 77
12.	<i>Voltage Pictures, LLC v. John Doe</i> , 2017 FCA 97	36, 44, 56, 69, 75
SECONDARY SOURCES		
13.	<i>Canada coddles counterfeiters; Marked Down in Markham</i> , The Economist, The Americas, February 24, 2018, RBOA, Tab 2.	16(b)
14.	House of Commons, Legislative Committee on Bill C-32, Evidence, 40th Parl., 3rd Sess., No. 19 (22 March 2011)	1, 25, 37,
15.	International Intellectual Property Alliance (IIPA) 2017 Special 301 Report on Copyright Protection and Enforcement	1, 16(a)

16.	<i>Law cracks down on digital piracy in Canada</i> , The Globe and Mail, Steven Chase, Published September 29, 2011; Updated March 26, 2017	15
17.	<i>Parliament to undertake review of the Copyright Act</i> , Government of Canada News Release, <i>December 14, 2017</i>	6
18.	<u>Rogers' Terms of Service and Other Important Information</u>	73
LEGISLATION		
19.	<i>Copyright Act</i> , R.S.C. 1985, c. C-42, ss. 29 , 31.1 , 34(4) , 38.1 , 41.25 , 41.26 , 92	2, 3, 4, 6, 9, 11, 12, 13, 17, 22, 23, 28, 31, 40, 41, 50, 70, 74
20.	<u><i>Copyright Modernization Act</i>, S.C. 2012, c. 20</u>	1
21.	<i>Copyright Modernization Act</i> , P.C. 2014-675, June 12, 2014, SI/2014-58, Canada Gazette, Part II, Vol. 148, No. 14, pages 2121-2123, July 2, 2014	23, 32, 59
22.	<i>Federal Courts Rules</i> , SOR/98-106, Rule 334.14(2)	12
23.	<i>Interpretation Act</i> , R.S.C. 1985, c. I-21, s. 12	38
24.	<i>Telecommunications Act</i> , S.C. 1998, c. 38, s. 36	39, 40