

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

BETWEEN:

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)**

**RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(VOLTAGE PICTURES LLC et al., RESPONDENTS)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)**

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

Kenneth R. Clark
Paul McCallen
Patrick Copeland
Tel: 416.865.4736
Fax: 416-863-1515
Email: kclark@airdberlis.com
pmccallen@airdberlis.com
pcopeland@airdberlis.com

Counsel for the Respondents

SUPREME ADVOCACY LLP
340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855
Fax: 612-695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for counsel for the
Respondents**

TORYS LLP

79 Wellington Street West
Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2

Andrew Bernstein

James Gotowiec

Tel: 416.865.7678

Fax: 416-865-7380

Email: abernstein@torys.com

jgotowiec@torys.com

Counsel for the Applicant

**FASKENS MARTINEAU DUMOULIN
LLP**

55 Metcalfe Street
Suite 1300
Ottawa, ON K1P 6L5

Yael Wexler

Tel: 613.696.6860

Fax: 613-230-6423

Email: ywexler@fasken.com

Agent for Counsel for the Applicant

TABLE OF CONTENTS

<u>Tab</u>	<u>Page</u>
1. Response to Application for Leave to Appeal	
PART I – OVERVIEW OF POSITION AND FACTS	1
Copyright Piracy Is Alive and Well in Canada Despite Notice and Notice Regime	1
The Notice-and-Notice Regime – ss. 41.25 and 41.26 of the Copyright Act.....	3
PART II – QUESTIONS IN ISSUE	5
PART III – CONCISE STATEMENT OF ARGUMENT	6
Rogers’ Remedy Lies with the Executive, not the Judiciary	6
This is not an Issue that Affects All Canadians – It only affects Infringers and ISPs	7
The s. 41.26(1) Obligations are Properly Set out by the Federal Court of Appeal	9
PART IV – SUBMISSIONS CONCERNING COSTS	11
PART V – ORDER	12
PART VI – TABLE OF AUTHORITIES	13
PART VII – STATUES AND REGULATIONS	14

MEMORANDUM OF ARGUMENT 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 Report on Copyright Protection and Enforcement*
1

PART I – OVERVIEW OF POSITION AND FACTS

COPYRIGHT PIRACY IS ALIVE AND WELL IN CANADA DESPITE NOTICE AND NOTICE REGIME

1. The Respondents (“Voltage”) are motion picture production companies. They have produced many highly successful motion pictures, including the Oscar-winning films *The Hurt Locker* and *Dallas Buyers Club*. Voltage’s movies are frequently unlawfully distributed by anonymous individuals over the internet. In this case, Voltage has identified a class of over 55,000 individuals who have infringed certain of its films by way of an internet protocol called “BitTorrent”.

2. Online piracy, particularly of films and music, is endemic in Canada. 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.”²

3. As set out in its materials, the Applicant (“Rogers”) receives hundreds of thousands of notices per month notifying subscribers that they are infringing copyright in movies, TV shows and other copyrighted works.³ Clearly, the receipt of these notices has not appreciably slowed online piracy.

4. Voltage is attempting to change users’ behaviour by reaching past the internet’s veil of anonymity and bringing home that movie piracy is not risk-free. Actually enforcing copyright is

¹ [Report of the International Intellectual Property Alliance \(“IIPA Report”\), dated February 9, 2017](#), at p. 93.

² [IIPA Report](#), *supra*, at p. 95.

³ Memorandum of Argument of the Applicant, Rogers Communications Inc. (“Rogers’ MOA”), paras. 17 and 26, Leave Applicant (“LA”).

a critical step in changing 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 with impunity.

5. The underlying copyright infringement application is a defendant class action,⁴ whereby a representative respondent acts for a large class of respondents. Voltage alleges that each of the respondent class members (i.e. the alleged infringers) have infringed the copyright in Voltage's films, using the BitTorrent protocol.

6. The current proposed representative respondent selected by Voltage, Mr. Salna, is a Rogers subscriber. Originally, his identity was not known although his IP address was identified as having been used to infringe copyright in all of the films at issue in the underlying application. In order to identify him, Voltage brought the disclosure motion that is the subject of this leave application. Rogers requested a \$100/hour fee to identify Mr. Salna, which resulted in a \$150 fee being charged in this specific instance. Voltage refused pay this fee, as it alleged that the 2012 Notice and Notice Regime prohibited fees for the identification of subscribers. The Federal Court of Appeal agreed with Voltage and overturned the Federal Court's requirement that Voltage pay Rogers' fee.

7. A case nominally worth \$150 is not normally appealed to the Supreme Court of Canada. However, in this case, extrapolating Rogers' fee for each infringer in the proposed class of approximately 55,000 individuals, it would cost Voltage over 8 million dollars to merely identify all of the respondents at the outset of this class action. This is an unreasonable and likely insurmountable barrier to Voltage being able to proceed with its proposed class action. As this

⁴ 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.

Court has previously determined, barriers should be lowered for class proceedings, not interposed.⁵

8. By enacting sections 41.25 and 41.26 of the *Copyright Act* (the “Notice-and-Notice Regime”), and in particular by prohibiting ISP fees for the identification of infringers, Parliament has now levelled the playing field so that rights owners can more cost-effectively enforce their rights. The Federal Court of Appeal’s interpretation of the Notice-and-Notice Regime is consistent with Parliament’s stated objective in amending the *Copyright Act* – namely to curb online piracy. The “implied obligations” to which Rogers makes reference are either expressly contemplated by the new legislation, or they are a necessary consequence of those express terms. The Federal Court of Appeal did not expand Rogers’ obligations under the Notice-and-Notice Regime but merely clarified what those obligations entailed. Rogers is seeking leave to re-establish the prior *status quo* and judicially thwart the express Governmental policy to not permit fees for identification of alleged copyright infringers.

9. Voltage hopes that by pursuing its class action, the costs of litigation (for both itself and for the class of respondents) will be reduced. For instance, only one hearing will be necessary to prove the fundamentals of copyright infringement for the entire class of respondents as the method of infringement (namely BitTorrent) is the same for each of the respondents. Statutory damages likely will be sought for infringement and will be identical for each respondent. Legal costs for these low-value copyright proceedings can be spread out over many respondents rather than being repeatedly incurred.

THE NOTICE-AND-NOTICE REGIME – SS. 41.25 AND 41.26 OF THE COPYRIGHT ACT

10. In 2012, Parliament enacted amendments to the *Copyright Act* that introduced a new mechanism for addressing online copyright infringements, known as the “Notice-and-Notice” regime, to differentiate it from the USA’s “Notice and Take-down” regime. According to official Government correspondence with stakeholders in the industry, 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*

⁵ [AIC Limited v. Fischer, 2013 SCC 69](#) at paras. 27-34.

users.”⁶ The procedure set out by the new provisions (ss. 41.25 and 41.26) of the *Copyright Act* is as follows:

- (a) when an internet service provider (an “ISP”, such as Rogers) receives a notice from a copyright owner that one of its subscribers might be unlawfully distributing infringing material, it forwards that notice electronically to that subscriber and informs the copyright holder once this has been done;⁷ and
- (b) ISPs are then required to retain records in respect of the infringer for the express purpose of allowing the identity of the alleged infringer to be determined.⁸

The records identifying the subscriber may then be released to the copyright owner with a Court Order.⁹

11. The Notice-and-Notice Regime also provided for regulations that could set a maximum fee for the performance of the ISP’s obligations thereunder. If no such regulations were enacted, fees for obtaining and retaining subscribers’ information were forbidden.¹⁰ The Notice-and-Notice Regime was proclaimed into force on June 12, 2014, by Order of the Governor General in Council (“**Notice Order**”), with an effective date of December 12, 2014. The Notice Order specified that there would be no regulations. In so deciding, the Government indicated that it had explicitly considered:

- (a) ISPs submissions that that it may be challenging for an ISP to comply with the Notice-and-Notice obligations without cost recovery (i.e. fees for implementing the Notice-and-Notice regime, including the retention obligations); and
- (b) other submissions regarding charging fees for passing on notices.¹¹

⁶ Letter from the Honourable James Moore and the Honourable Shelly Glover, LA, Tab 5, p. 99.

⁷ If the ISP is unable to forward the notice, it must inform the copyright holder as to the reasons why. See *Copyright Act*, s. 41.26(1)(a).

⁸ *Copyright Act*, s. 41.26(1)(b).

⁹ Letter from the Honourable James Moore and the Honourable Shelly Glover, LA, Tab 5, p. 100.

¹⁰ *Copyright Act*, s. 41.26(2).

¹¹ Copyright Modernization Act, P.C. 2014-675, June 12, 2014, SI/2014-58, Canada Gazette, Part II, Vol. 148, No. 14, pp. 2121-2123, July 2, 2014, in particular p. 2122.

12. The Government’s decision to forbid the charging of fees for identifying online infringers expressly overturned the common-law requirement to do so set out in *Norwich* motions and under the civil law equivalent.¹² The Government was well aware of the consequences of its decision when shifting these costs onto the ISPs’ shoulders, and it did so deliberately. Voltage submits that this was done in the economic context of massive online infringement, from which the ISPs indirectly profit -- the ISPs provide the means for the infringement (*i.e.* the internet connection and bandwidth) and collect fees for so doing.¹³

13. Rogers appears to be seeking leave because it disagrees with a Governmental policy decision. The issues in this application are not matters of national importance, but instead are merely ones that may (slightly) negatively affect Rogers’ profits. Voltage respectfully requests that Rogers’ request for leave be dismissed with costs.

PART II – QUESTIONS IN ISSUE

14. Voltage agrees that the questions set out in para. 49 of Rogers’ materials sufficiently encapsulate the questions in issue in this proceeding, although it does not agree that these issues are of national or public importance. Voltage submits that a better framing of the issues is as follows:

- (a) what are Canadian ISP’s obligations under ss. 41.25 and 41.26(1) of the *Copyright Act*; and
- (b) does s. 41.26(2) of the *Copyright Act* bar any recovery of fees for the ISP Obligations.

15. The answer to question (b) is immediately clear – yes it does: it expressly says so.¹⁴

16. The answer to question (a) is, perhaps, less immediately clear as it involves questions of statutory interpretation as to what “retaining records that will allow the identity of a subscriber to be determined / conserver [...] un registre permettant d’identifier la personne à qui appartient

¹² [Voltage Pictures LLC v. Jane Doe and John Doe, 2011 FC 1024](#) per Shore J. (“Voltage. See also [Fers et métaux américains, s.e.c. c. Picard, 2013 QCCA 2255](#)).

¹³ See [Voltage Pictures LLC v. John Doe, 2015 FC 1364](#) at para. 54.

¹⁴ *Copyright Act*, s. 41.26(2).

l’emplacement électronique” means. This is not rocket science. Voltage’s position is that the Federal Court of Appeal got it right.

PART III – CONCISE STATEMENT OF ARGUMENT

ROGERS’ REMEDY LIES WITH THE EXECUTIVE, NOT THE JUDICIARY

17. As noted above, and as confirmed by Rogers, the 2012 amendments to the *Copyright Act* implementing the Notice-and-Notice Regime were intended primarily to deter copyright infringement.¹⁵

18. The Notice-and-Notice Regime was specifically intended by Parliament to shift the balance towards the copyright owners and away from online pirates. These legislative enactments therefore expressly override any prior decisions of this Court, or any other Court, including the CAIP case relied on by Rogers.¹⁶

19. As even Rogers admits,¹⁷ s. 41.26(1) of the *Copyright Act* expressly requires Rogers to (a) forward copyright infringement notices to its subscribers and (b) retain the identities of such subscribers so that they may be identified (“**s. 41.26(1) Obligations**”). What Rogers ignores is the express legislative prohibition on charging fees for same, set out in s. 41.26(2).¹⁸

20. The Government could have allowed Rogers to charge a fee for its s. 41.26(1) Obligations but specifically chose not to.¹⁹ Rogers therefore seeks leave to appeal to this Court

¹⁵ Roger’s MOA, para. 23, LA, Tab 4, p. 79.

¹⁶ See, for instance, [*Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* \(“CAIP”\), 2004 SCC 45.](#)

¹⁷ See Rogers’ MOA, para. 40, LA, Tab 4, p. 84: “In addition to the express obligations in s. 41.26(1) (forwarding a notice to a subscriber and retaining records allowing the subscriber’s identity to be determined)”.

¹⁸ *Copyright Act*, s. 41.26(2).

¹⁹ *Copyright Act*, s. 41.26(1)(a) and (b). See also [*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.](#)

to override the Government's express prohibition on charging fees. Rogers' avenue for recourse should not be to the judiciary, but rather to the Government.

THIS IS NOT AN ISSUE THAT AFFECTS ALL CANADIANS – IT ONLY AFFECTS INFRINGERS AND ISPS

21. In order to have an effective mechanism to deter infringement – the stated goal of Parliament in enacting the Notice-and-Notice Regime – Rogers (and perhaps some of its subscribers) will have to bear some of the financial burden instead of it falling exclusively on copyright owners and content creators, as it historically did. Obviously Rogers is unhappy with bearing the costs of the Notice & Notice Regime, but this was the compromise the Government chose to make. If the costs of identification are significant, Rogers' remedy lies with the Government, who retains the power to enact new regulations in regards to fees.

22. Further, Rogers, and other Canadian ISPs, have many options in dealing with the costs of identification. For example, Rogers can absorb these costs as part of doing business in Canada. After all, it was not burdened with the USA-style take-down obligations, which are much more costly.²⁰

23. Alternatively, it could pass on the costs of identification to the subscribers who have been identified by a Court as being likely to be infringers (or to permit infringement on their internet accounts). Recall that disclosure of identities is only done if there is a *bona fide* reason to do so under *Norwich* motion principles.²¹

24. Only as a third option does Rogers have to pass on costs of identification to all of its subscribers, including the innocent ones. Rogers costs may be overstated. Its own evidence is

²⁰ Under the USA DMCA system, an ISP is forced to take down (*i.e.* remove from the internet) content that is the subject of a copyright infringement notice, and return it to the internet if a counter-notice is received. Rogers and other ISPs merely have to forward notices electronically and store information – a much less onerous and labour-intensive obligation than could have been the case.

²¹ Rogers' MOA, paras. 26-27, LA, Tab 4, p. 80. See also Judgment and Reasons for Judgment of the Federal Court of Appeal dated May 9, 2017 ("FCA Decision") at paras. 17-19 for an overview of the traditional *Norwich* principles.

that there were only 274 identities requested in 2016.²² At \$150 per identity, that works out to \$41,110. Divided by Rogers' 2,145,000 subscribers, the costs per subscriber works out to less than 2 cents each. Even if identities were requested at 100x the rate they currently are, that would work out to less than \$2.00 per subscriber per year, assuming that Rogers does not implement a much more cost efficient system than its current manual process.²³

25. For that matter, Rogers forbids BitTorrenting motion pictures in its Terms of Service and retains the ability to claim indemnity as against such users. Its terms of service could easily include a compensatory clause that subscribers would be liable to repay its reasonable costs in the event identification was ordered by a Court of competent jurisdiction.

Without limitation, you may not use (or allow anyone else to use) our Services to:

i. use, possess, post, upload, transmit, disseminate or otherwise make available content that is unlawful or violates the copyright or other intellectual property rights of others (as described in more detail below);

viii. upload, post, publish, deface, modify, transmit, reproduce, distribute in any way or otherwise make available information, software or other material protected by copyright or other proprietary or contractual right (such as a non-disclosure agreement) or related derivative works, without obtaining permission of the copyright owner or right holder;

...

[I]f the Services are used in a way that we, in our sole discretion, believe violates this AUP, any of the Rogers Parties may take any responsive actions they deem appropriate. Such actions may include, without limitation, temporary or permanent removal of content, cancellation of news group posts, filtering of Internet transmissions, and/or the immediate suspension or termination of all or any portion of the Services or your account. The Rogers Parties will have no liability for any such responsive actions. The above described actions are not exclusive remedies and the Rogers Parties may take any other legal or technical action deemed appropriate.²⁴

26. Rogers dealings with its own subscribers is not a question of national importance.

²² Rogers' MOA, para. 28, LA, Tab 4, pp. 80-81

²³ See also Affidavit of Kristi Jackson sworn June 10, 2016 ("Jackson Affidavit"), para. 20, LA, Tab 8, p. 110 for the unnecessary 8 step manual review process undertaken by Rogers

²⁴ [Rogers Terms of Services](#), at pp 20 and 24.

THE S. 41.26(1) OBLIGATIONS ARE PROPERLY SET OUT BY THE FEDERAL COURT OF APPEAL

27. One of Rogers’ main contentions in this application is that the Federal Court of Appeal expanded ISPs’ obligations under the Notice-and-Notice Regime.²⁵ Rogers’ argument in this regard centers on the following passage in the Federal Court of Appeal’s decision that sets out seven obligations for ISPs in the Notice-and-Notice Regime:

Overall, putting the two sets of subsection 41.26(1) obligations together, the internet service provider must maintain records in a manner and form that allows it to identify suspected infringers, to locate the relevant records, to identify the suspected infringers, to verify the identification work it has done (if necessary), to send the notices to the suspected infringers and the copyright owner, to 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, finally, to keep the records ready for prompt disclosure.²⁶

28. The Federal Court of Appeal’s summary of the s. 41.26 Obligations, as set out above, does not expand Rogers’ statutory obligations. The first four requirements merely confirm that records must be maintained and be accurate – clearly not an expansion of the express statutory language to keep a record that would allow an infringer to be identified.²⁷

29. The fifth requirement²⁸ only states that the notice be sent to the subscriber at issue. Presumably Rogers does not take issue with this aspect of the Federal Court of Appeal’s decision.

30. The sixth and seventh requirements,²⁹ namely to keep intelligible records ready for prompt disclosure, merely clarifies that the records (“un registre”) that expressly must be kept,

²⁵ See, for instance, Rogers’ MOA, para. 41, LA, Tab 4, p. 85.

²⁶ FCA Decision at para. 40, LA, Tab 3, p. 59.

²⁷ “maintain records in a manner and form that allows it to identify suspected infringers, to locate the relevant records, to identify the suspected infringers and to verify the identification work it has done (if necessary)”.

²⁸ “send the notices to the suspected infringers and the copyright owner”.

²⁹ “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

according to the Regime, must be kept in a form usable by copyright owners and not in some private code known only to Rogers. If the retained identity records are in such a form as to be unreadable to all but Rogers, then the records are not being kept in a manner that “will allow the identity of the person to whom the electronic location belongs to be determined.” The obligation to disclose useable records promptly facilitates the commencement of legal proceedings – an act also clearly contemplated and referred to in s. 41.26(1)(b).³⁰ The identity record retention period varies from six months to one year depending on whether litigation has been commenced. There is no purpose in retaining records for a longer period of time if such records are not to be disclosed by the ISP.

English – 41.26(1)(b)	French – 41.26(1)(b)
<p>“retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, <u>if the claimant commences proceedings</u> relating to the claimed infringement and so notifies the person before the end of those six months, <u>for one year after the day on which the person receives the notice of claimed infringement.</u>”</p>	<p>“conserver, pour une période de six mois à compter de la date de réception de l’avis de prétendue violation, un registre permettant d’identifier la personne à qui appartient l’emplacement électronique et, dans le cas où, avant la fin de cette période, <u>une procédure est engagée par le titulaire</u> du droit d’auteur à l’égard de la prétendue violation et qu’elle en a reçu avis, conserver le registre pour <u>une période d’un an suivant la date de la réception de l’avis de prétendue violation.</u>”</p>

31. If taken at face value, Rogers’ position is that it should be fully indemnified for ensuring its records are accurate and for disclosing such records to copyright owners. At most, Rogers should be only compensated for the final step in the process that is not expressly contemplated by the Notice-and-Notice Regime – the actual delivery of the information it has retained. As held by the Federal Court of Appeal, however, this cost is likely nominal, and must be limited to “actual, reasonable and necessary costs associated with the act of disclosure”. It would defeat the

identity of the suspected infringers, and, finally, to keep the records ready for prompt disclosure”.

³⁰ *Copyright Act*, s. 41.26(1)(b).

entire purpose of the Notice-and-Notice Regime if Rogers could recoup all of the “no cost” steps in the other parts of the regime at the disclosure stage.

32. A comparison of the French and English versions of the Act is instructive in interpreting the s. 41.26 Obligations. The English version obligates an ISP to “retain records that will allow the identity of the [subscriber] to be determined”, while the French version obligates the ISP to “conserver [...] un registre permettant d’identifier [l’abonné]”. Voltage submits that the term “un registre” (which in our submissions, in English, more specifically means “ledger” or “register”), when read with the English term “records”, indicates that Parliament intended that the ISP (in this case Rogers) keep a specific record (or specific records) associated with the notice that triggered the retention obligation. Voltage submits that the use of the terms “un registre” and “le registre” in the French version of 41.26(b), reinforces the prior submission that a specific record (or specific records) must be kept to identify the subscriber.

English – 41.26(1)(b)	French – 41.26(1)(b)
“retain <u>records</u> that will allow the identity of the [subscriber] to be determined”	“conserver [...] <u>un registre</u> permettant d’identifier [l’abonné] [...] conserver <u>le registre</u> pour une période d’un an suivant la date de la réception de l’avis [...]”

33. In particular, the repetition of “le registre” to refer to “un registre” in the provision can only mean that Parliament intended that the records being retained in accordance with this section are to be specific to the notice of infringement. The Federal Court of Appeal’s interpretation of the s. 41.26 Obligations is consistent with a plain reading of the relevant provisions.

34. Voltage therefore respectfully submits that there are no questions of national importance regarding the statutory interpretation of ss. 41.25 and 41.26 of the *Copyright Act* that require the intervention of this Court.

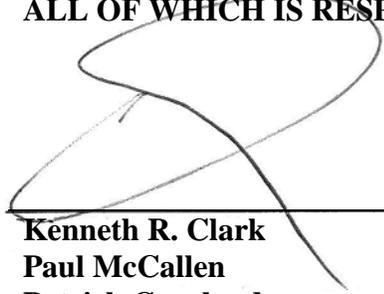
PART IV – SUBMISSIONS CONCERNING COSTS

35. Voltage requests costs.

PART V – ORDER

36. For the reasons set out above, Voltage requests that the leave application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September 2017



Kenneth R. Clark
Paul McCallen
Patrick Copeland

Counsel for Respondents

PART VI – TABLE OF AUTHORITIES

No.	Name	Paragraph
1	<i>AIC Limited v. Fischer</i>, 2013 SCC 69	7
3	<i>Fers et métaux américains, s.e.c. c. Picard</i>, 2013 QCCA 2255	12
5	<i>Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers</i>, 2004 SCC 45	18
2	<i>Voltage Pictures LLC v. Jane Doe and John Doe</i>, 2011 FC 1024	12
4	<i>Voltage Pictures LLC v. John Doe</i>, 2015 FC 1364	12
Other		
5	Report of the International Intellectual Property Alliance (“IIPA Report”), dated February 9, 2017	2
6	Rogers Terms of Services	25

PART VII – STATUTES AND REGULATIONS

<i>Federal Courts Rules, SOR/98-106</i>	<i>Règles des Cours fédérales, DORS/98-106</i>
<p>Defendant or respondent class proceeding</p> <p>334.14(2) A party to an action or an application against two or more defendants or respondents may, at any time, bring a motion for the certification of the proceeding as a class proceeding and for the appointment of a representative defendant or respondent.</p>	<p>Groupe de défendeurs</p> <p>334.14(2) Une partie à une action ou une demande introduite contre plusieurs défendeurs peut, en tout temps, présenter une requête en vue de faire autoriser l'instance comme recours collectif et de faire nommer un représentant défendeur.</p>
<p>Copyright Act, R.S.C. 1985, c. C-42</p>	<p>Loi sur le droit d'auteur, L.R.C. 1985, c. C-42</p>
<p>Summary proceedings</p> <p>34(4) The following proceedings may be commenced or proceeded with by way of application or action and shall, in the case of an application, be heard and determined without delay and in a summary way:</p> <ul style="list-style-type: none"> (a) proceedings for infringement of copyright or moral rights; (b) proceedings taken under section 44.12, 44.2 or 44.4; and (c) proceedings taken in respect of <ul style="list-style-type: none"> (i) a tariff certified by the Board under Part VII or VIII, or (ii) agreements referred to in section 70.12. 	<p>Requête ou action</p> <p>34(4) Les procédures suivantes peuvent être engagées ou continuées par une requête ou une action:</p> <ul style="list-style-type: none"> a) les procédures pour violation du droit d'auteur ou des droits moraux; b) les procédures visées aux articles 44.12, 44.2 ou 44.4; c) les procédures relatives aux tarifs homologués par la Commission en vertu des parties VII et VIII ou aux ententes visées à l'article 70.12. <p>Le tribunal statue sur les requêtes sans délai et suivant une procédure sommaire.</p>
<p>Obligations related to notice</p> <p>41.26(1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,</p> <ul style="list-style-type: none"> (a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the 	<p>Obligations</p> <p>41.26(1) La personne visée aux alinéas 41.25(1)a) ou b) qui reçoit un avis conforme au paragraphe 41.25(2) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :</p> <ul style="list-style-type: none"> a) transmettre dès que possible par voie électronique une copie de l'avis à la personne à qui appartient l'emplacement électronique identifié par les données de

<p>location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and</p> <p>(b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.</p>	<p>localisation qui sont précisées dans l'avis et informer dès que possible le demandeur de cette transmission ou, le cas échéant, des raisons pour lesquelles elle n'a pas pu l'effectuer;</p> <p>b) conserver, pour une période de six mois à compter de la date de réception de l'avis de prétendue violation, un registre permettant d'identifier la personne à qui appartient l'emplacement électronique et, dans le cas où, avant la fin de cette période, une procédure est engagée par le titulaire du droit d'auteur à l'égard de la prétendue violation et qu'elle en a reçu avis, conserver le registre pour une période d'un an suivant la date de la réception de l'avis de prétendue violation.</p>
<p>Fees related to notices</p> <p>41.26(2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.</p>	<p>Droits</p> <p>41.26(2) Le ministre peut, par règlement, fixer le montant maximal des droits qui peuvent être exigés pour les actes prévus au paragraphe (1). À défaut de règlement à cet effet, le montant de ces droits est nul.</p>

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

Registration
SI/2014-58 July 2, 2014

Enregistrement
TR/2014-58 Le 2 juillet 2014

COPYRIGHT MODERNIZATION ACT

LOI SUR LA MODERNISATION DU DROIT D'AUTEUR

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

Décret fixant à la date qui tombe six mois après la date de publication du présent décret la date d'entrée en vigueur de certaines dispositions de la Loi sur le droit d'auteur

P.C. 2014-675 June 12, 2014

C.P. 2014-675 Le 12 juin 2014

His Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 63 of the *Copyright Modernization Act* ("the Act"), chapter 20 of the Statutes of Canada, 2012, fixes the day that is six months after the day on which this Order is published in the *Canada Gazette*, Part II, as the day on which sections 41.25 and 41.26 and subsection 41.27(3) of the *Copyright Act*, as enacted by section 47 of the Act, come into force.

Sur recommandation du ministre de l'Industrie et en vertu de l'article 63 de la *Loi sur la modernisation du droit d'auteur* (la « Loi »), chapitre 20 des Lois du Canada (2012), Son Excellence le Gouverneur général en conseil fixe à la date qui tombe six mois après la date de publication du présent décret dans la Partie II de la *Gazette du Canada* la date d'entrée en vigueur des articles 41.25 et 41.26 et du paragraphe 41.27(3) de la *Loi sur le droit d'auteur* qui sont édictés par l'article 47 de la Loi.

EXPLANATORY NOTE

NOTE EXPLICATIVE

(This note is not part of the Order.)

(Cette note ne fait pas partie du Décret.)

Proposal

Proposition

This Order fixes the date on which certain provisions of the *Copyright Modernization Act* (the Act) come into force.

Ce décret établit la date d'entrée en vigueur de certaines dispositions de la *Loi sur la modernisation du droit d'auteur*.

Pursuant to section 63 of the Act, the Governor in Council fixes the day that is six months after the day on which the Order is published in the *Canada Gazette*, Part II, as the day on which sections 41.25, 41.26, and subsection 41.27(3) of the *Copyright Act* come into force.

Conformément à l'article 63 de la Loi, le gouverneur en conseil établit que le jour qui tombe six mois après la date à laquelle le Décret est publié dans la Partie II de la *Gazette du Canada*, est le jour où les articles 41.25, 41.26, et le paragraphe 41.27(3) de la *Loi sur le droit d'auteur* entrèrent en vigueur.

Objective

Objectif

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 freedoms of users.

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.

Background

Contexte

The notice and notice regime will legally require Internet intermediaries, such as Internet Service Providers (ISPs), hosts and search engines, to take action upon receiving a notice of alleged infringement from a copyright owner. It formalizes the voluntary system that some copyright owners and ISPs currently participate in.

Les dispositions du régime d'avis et avis exigeront de façon légale que les intermédiaires Internet, tels que les fournisseurs de services Internet (FSI), les hôtes et les moteurs de recherche, agissent après avoir reçu un avis de violation alléguée d'un titulaire de droit d'auteur. Elles officialisent le système volontaire auquel adhèrent présentement certains titulaires de droits d'auteur et les FSI.

The majority of the provisions of the *Copyright Modernization Act* came into force on November 7, 2012. At that time, the coming into force of the provisions related to the notice and notice regime was delayed to allow for the consideration of a regulatory process.

La plupart des dispositions de la *Loi sur la modernisation du droit d'auteur* sont entrées en vigueur le 7 novembre 2012. À ce moment-là, l'entrée en vigueur des dispositions relatives au régime d'avis et avis a été reportée pour permettre l'étude d'un processus réglementaire.

In late 2013, the Ministers of Industry Canada and Canadian Heritage sought views on the implementation of the notice and notice provisions from individuals and entities that were likely to

À la fin de 2013, les ministres d'Industrie Canada et du Patrimoine canadien ont sollicité des commentaires sur la mise en œuvre du régime d'avis et avis auprès de particuliers et d'entités

be directly implicated. The Ministers sought feedback on what, specifically, should be required in the form and content of notices and what, if any, regulations would be needed, in addition to what the law requires.

With this process now complete, the Government is bringing into force these provisions after determining that the regime will function without regulations, as the elements in the legislation are sufficient. The law provides flexibility for stakeholders to work together to develop industry standards to improve the efficiency and effectiveness of their participation in the regime. Marketplace solutions that deter infringement continue to be welcomed and the Government looks forward to seeing further solutions as they develop.

To provide Internet intermediaries the time needed to implement or modify their systems before the provisions are in force, the provisions will come into force six months after the publication of this Order in Council.

Financial implications

There are no financial implications to the Government associated with this Order.

Consultation

In response to their call for views on implementation of the notice and notice regime in late 2013, the Ministers received nearly 60 responses from stakeholders, including

- over 10 traditional ISPs and 2 ISP organizations representing small ISPs;
- over five other Internet intermediaries including hosts, search engines and other organizations that consider themselves intermediaries for the purpose of the notice and notice regime;
- over 35 copyright owners or creator organizations (including representation from the music, film, photography industries, literary publishers, writers, and collectives);
- one from a public interest/consumer organization; and
- two from individual Canadians.

A wide variety of views were shared regarding whether regulations were necessary.

- Some copyright owners, including the major industry associations, argued that regulations are not necessary because, in their view, the specifications in the law are sufficient.
- Other copyright owners, including collectives and some creator groups, requested that the Government regulate to require, among other things, that notices contain information to discourage online infringement.
- ISPs, hosts, and other intermediaries requested that the Government regulate to require that notices be in some kind of standardized format and include some additional information, which they argued would allow their notice systems to operate more effectively.
- Smaller ISPs expressed concern that the cost of complying with the notice and notice obligations without cost-recovery would be challenging for them.

susceptibles d'être affectés directement. Plus précisément, les ministres ont cherché à obtenir des commentaires sur la forme et le contenu des avis et, le cas échéant, sur les règlements nécessaires en plus des exigences législatives.

Ce processus étant terminé, le gouvernement met maintenant en vigueur ces dispositions après avoir établi que le régime fonctionnera sans règlement, car les dispositions de la loi sont suffisantes. La législation offre aux intervenants la possibilité de collaborer afin d'élaborer des normes pour l'industrie en vue d'accroître l'efficacité et l'efficience de leur participation au régime. Les solutions provenant du marché pour dissuader la violation continuent d'être les bienvenues, et le gouvernement espère prendre connaissance d'autres solutions à mesure qu'elles seront élaborées.

Afin d'accorder aux intermédiaires Internet le temps nécessaire pour mettre en œuvre ou modifier leurs systèmes avant l'entrée en vigueur des dispositions, l'entrée en vigueur des dispositions aura lieu six mois après la publication du Décret.

Incidences financières

Ce décret n'a aucune incidence financière pour le gouvernement.

Consultation

En réponse à leur demande de commentaires sur la mise en œuvre du régime d'avis et avis à la fin de 2013, les ministres ont reçu près de 60 réponses de la part des intervenants touchés, dont :

- plus de 10 FSI traditionnels et 2 organisations représentant de petits FSI;
- plus de cinq autres intermédiaires Internet, dont des hôtes, des moteurs de recherche et d'autres organisations qui se considèrent comme des intermédiaires aux fins du régime d'avis et avis;
- plus de 35 titulaires de droit d'auteur ou d'organismes de créateurs (représentant notamment l'industrie de la musique, du film et de la photographie, les maisons d'édition littéraire, les écrivains et les sociétés de gestion collective);
- une organisation qui représente l'intérêt du public/de défense des droits des consommateurs;
- deux particuliers canadiens.

On a recueilli un large éventail de points de vue quant à la nécessité d'élaborer des règlements ou non.

- Certains titulaires de droit d'auteur, y compris les grandes associations de l'industrie, ont fait valoir qu'il n'est pas nécessaire d'adopter des règlements, car les dispositions de la loi sont suffisantes.
- D'autres titulaires de droit d'auteur, dont des sociétés de gestion collective et des groupes de créateurs, ont demandé que le gouvernement adopte un règlement pour exiger, notamment, que l'avis contienne des renseignements afin de décourager la violation du droit d'auteur en ligne.
- Les FSI, les hôtes et les autres intermédiaires ont demandé au gouvernement d'adopter un règlement qui exigerait que l'avis soit présenté selon un format normalisé et contienne des renseignements supplémentaires, qui d'après eux, rendrait le système d'avis plus efficace.
- Les petits FSI ont partagé leur préoccupation qu'il serait financièrement difficile pour eux de se conformer aux obligations du régime d'avis et avis sans procédure de recouvrement des coûts.

Some entities and individuals also shared views on issues outside the scope of the call for views, such as fees for passing on notices and alternatives to the notice and notice regime.

Departmental contacts

Anne-Marie Monteith
Director
Copyright and Trade-mark Policy
Industry Canada
235 Queen Street
Ottawa, Ontario
K1A 0H5
Telephone: 613-952-2527
Fax: 613-941-8151

Lara Taylor
Director
Policy and Legislation
Canadian Heritage
25 Eddy Street
Gatineau, Quebec
K1A 0M5
Telephone: 819-934-8963
Fax: 819-953-6720

D'autres entités et particuliers ont formulé des commentaires dépassant la portée de la demande de commentaires, notamment sur l'imposition de frais pour transmettre les avis et les solutions de rechange au régime d'avis et avis.

Personnes-ressources du ministère

Anne-Marie Monteith
Directrice
Politique du droit d'auteur et des marques de commerce
Industrie Canada
235, rue Queen
Ottawa (Ontario)
K1A 0H5
Téléphone : 613-952-2527
Télécopieur : 613-941-8151

Lara Taylor
Directrice
Politiques et législation
Patrimoine canadien
25, rue Eddy
Gatineau (Québec)
K1A 0M5
Téléphone : 819-934-8963
Télécopieur : 819-953-6720