SUPREME COURT OF CANADA

Case in Brief: *Rogers Communications Inc. v. Voltage Pictures, LLC*

2018 SCC 38 | Judgment of September 14, 2018 | On appeal from the Federal Court of Appeal

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Internet service providers (ISPs) can charge copyright holders for some steps taken to identify customers suspected of illegal downloading, the Supreme Court has ruled. But they can't charge for things that they already have to do for free under the* Copyright Act*.

Online copyright infringement (illegal downloading of movies and music) has become common in Canada. Until 2015, no legislation specifically dealt with the problem. But a copyright owner could find out the identity of a downloader by getting a court order for the ISP to reveal it. To compensate ISPs for their time and effort, and to prevent them from being overwhelmed with requests, ISPs could charge a reasonable amount of money for the service. All of this fell under common law rules (rules created over time by courts).

After consulting with both copyright owners and consumers, the federal government updated the *Copyright Act*. The Act's "notice-and-notice regime" came into force in 2015. It was meant to work together with the existing common law rules. Both common law (made by courts) and statutory law (made by Parliament) are equally valid. But Parliament can change the common law by passing a statute (like the Act), if it wants to. Where statutory law (like the Act) doesn't cover something, the common law can fill in the blanks.

One of the goals of the notice-and-notice regime is to discourage infringement. It does this by letting customers know when their accounts have been used to illegally download copyrighted content. Under the regime, a copyright owner first has to tell an ISP that it thinks one of the ISP's customers has shared content illegally. Normally, the copyright owner doesn't know the customer's real identity. It only knows the Internet Protocol (IP) address used to download the files. Only the ISP can connect the IP address to a specific customer. The ISP must figure out who was using the IP address at the time of the infringement. It must then pass on a notice to the customer, usually by an automatic message to the email address linked to the account. It then confirms (provides notice) to the copyright owner that this has been done. Under the Act, the ISP can't charge the copyright owner for doing this.

If a copyright owner wants to know a customer's identity after notice has been given, it still has to get a court order. The Act says the ISP has to keep records so it can link IP addresses to customers later. It also says the ISP can't charge a fee for keeping these records.

A group of film producers got together to fight illegal sharing of their films. They wanted to know the real-life identity of a Rogers customer so that they could sue that person. They had the customer's IP address, and got a court order for Rogers to give them the person's contact and personal information. The producers eventually planned to sue about 55,000 more customers, so this would be the first of many requests. Rogers collected the information, but said the producers had to pay a fee for it. It argued that the notice-and-notice regime didn't say that ISPs had to share customers' real-life identities with copyright owners. That meant the old common law rules still applied when copyright owners asked for this information. The producers disagreed. They said disclosing customer identities was part of the regime created by the *Copyright Act*, and so Rogers couldn't charge anything for the information.

The Federal Court ruled for Rogers, and said ISPs could be compensated for all steps taken to identify a customer to a copyright owner. But the Federal Court of Appeal disagreed. It said the Act said Rogers had to keep the information that would identify customers anyway. It said Rogers couldn't be compensated for steps it took that overlapped with things it already had to do under the Act.

Justice Russell Brown, writing for the majority, said ISPs should be paid a reasonable amount to comply with court orders to reveal customer identities. But they shouldn't be paid to do things they already had to do under the notice-and-notice regime. Justice Brown said the regime required the ISP to give notice to the customer and inform the copyright owner that it did so. He said this included a duty to make sure the information was accurate.

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That meant Rogers could not charge a copyright owner to check the information to make sure it was correct. He noted that Rogers followed an eight-step process to respond to court orders asking for customer identities. Some of the steps had to be done anyway to comply with the Act, and so he said Rogers should not be paid for them. But others, like connecting the IP address to the person's real-life identity and sharing that with the copyright owner, were not covered by the Act. Rogers could therefore charge a fee for them. Seven other judges agreed with Justice Brown.

Justice Suzanne Côté agreed that ISPs should be paid a reasonable amount to disclose customer identities as part of a court order. But she said Rogers should be able to charge for all eight steps in this case. In her view, the steps were not about confirming that the records were accurate. They were about confirming the customer's real-life identity *using* those records. Justice Côté said that even if some steps were to confirm that the records were accurate, Rogers should still be compensated. This was because people's contact information could have changed, or some notices may have been sent to the wrong people. Making a mistake in identifying a customer could mean that the copyright owner might sue the wrong person. For that reason, Justice Côté said that Rogers should be able to charge a reasonable amount for following a careful process. She said Rogers and other ISPs could only charge for steps that were necessary, though.

This case was about the interpretation of part of the *Copyright Act* that dealt with who should have to pay for an ISP to reveal a customer's identity. The appeal was based on a pre-trial motion and the courts have not decided whether copyright infringement actually took place. Both Justice Brown and Justice Côté agreed that the matter should go back to the motion judge to decide how much Rogers should be paid.

For more information (case no. 37679):

- Reasons for judgment
- Case information
- Webcast of hearing

Breakdown of the decision:

- Majority: Brown J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ. in agreement)
- Concurring: Côté J.

Lower court rulings:

- Federal Court of Appeal (appeal judgment)
- Federal Court of Canada (disclosure order)

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