

## Federal Court Balances Copyright Enforcement and Internet Privacy

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In *Voltage Pictures LLC v. John Doe and Jane Doe*, 2014 FC 161, the Federal Court ruled that while the plaintiff Voltage could have access to ISP subscriber information for the purposes of pursuing copyright infringement claims against BitTorrent users, subsequent efforts to pursue litigation will be subject to active judicial oversight.

In November 2012, Voltage, a film production company behind such movies as *The Hurt Locker*, commenced an action in the Federal Court alleging copyright infringement of a number of its cinematographic works against BitTorrent users that have allegedly copied and distributed these works without authorization.

Voltage sought the names and addresses of some 2,000 subscribers of the independent ISP TekSavvy through a motion for a Norwich Order - a litigation tool subjecting non-parties, in this case TekSavvy, to discovery or to being compelled to provide information. Voltage alleged that it sought the names and addresses so that it could pursue litigation against the subscribers for unauthorized copying and distribution of its works.

TekSavvy took no position on the motion. CIPPIC, an intervener, argued that Voltage was a “copyright troll” and engaged in “speculative invoicing” to intimidate subscribers into easy settlements by way of demand letters and threats of litigation. Prothonotary Aalto observed, however, that the motion was about whether the test for granting a Norwich order had been met, not for determining whether Voltage was a troll.

The main consideration at issue was the balance of the right of Voltage to enforce its copyright as against the privacy rights of the TekSavvy subscribers. Prothonotary Aalto attempted to balance these competing policy considerations, finding that

“...there are important competing policy considerations as to whether the Norwich Order should be granted in this kind of situation. Such an order is a discretionary and extraordinary order. For the reasons discussed below, given that Voltage has demonstrated a bona fide case of copyright infringement, a Norwich Order will be granted. This Order will be granted with qualifications intended to protect the privacy rights of individuals, and ensure that the judicial process is not being used to support a business model intended to coerce innocent individuals to make payments to avoid being sued.”

After deciding to grant the Norwich Order, Prothonotary Aalto went on to discuss privacy concerns and the potential for abuse:

“...The enforcement of Voltage’s rights as a copyright holder outweighs the privacy interests of the affected internet users. However, that is not the end of the matter. As part of making any Norwich Order, the Court must ensure that privacy rights are invaded in the most minimal way possible...”

After reviewing decisions from U.K. and U.S. courts, Prothonotary Aalto observed that:

“The decisions reviewed suggest that courts in both the U.S. and U.K. are particularly concerned with sanctioning a business model that coerces innocent people into settlements.

Both jurisdictions appear open to imposing safeguards and overseeing the disclosure process to ensure that plaintiffs do not misrepresent the effects of the Norwich Order.

These courts have also generally accepted that users identified by the disclosure may not be the actual infringers but may have information that leads to the alleged infringer....

With respect to privacy concerns, the cases in both jurisdictions suggest that such issues are of secondary importance as the law generally does not shield wrongdoing for reasons of privacy. Thus, the question of the extent of actual wrongdoing, once it has been established, is important. ...

Thus, although CIPPIC asserts that U.S. and U.K. cases recognize a need to assess the strength of a cause of action as a prerequisite, it is not clear from a review of these cases what this actually means in practice. Based on the evidence on this

motion there is a bona fide case of copyright infringement. The real question is the form of remedy.”

In conclusion, Prothonotary Aalto imposed a number of safeguards on Voltage’s enforcement of its rights by way of the Norwich Order, including:

- ordering Voltage to pay the legal costs and disbursements of TekSavvy prior to TekSavvy releasing any of the subscriber information;
- limiting the information provided to only the names and residential addresses but not telephone numbers and email addresses, and ensuring that the information released remains confidential;
- requiring Voltage to submit demand letters to the Court for approval before sending it to the subscribers, to ensure that there is no inappropriate language in the letters;
- requiring Voltage to include language in the letters stating in bold that no determination as to infringement or liability has been made by the Court; and
- requiring Voltage to attach a copy of the court order to any correspondence sent to the subscribers.

This decision sends a strong message to both Internet users and copyright owners: Internet users can no longer expect to rely on their right of privacy as a shield for copyright infringement, and copyright owners who engage in mass litigation against Internet users may be subject to active judicial oversight to ensure that they are not “copyright trolling”.