

## BitTorrent File Sharing and Copyright Infringement: What Evidence is Needed

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BitTorrent is a peer-to-peer file sharing computer communication protocol, and one of the most used protocols for transferring large files, such as movies, over the Internet. It is well suited for transferring large files, due to its capability to first upload and then download bits of large files from a group of large file hosts, instead of from a single host server.

In *Voltage Holdings, LLC v Doe #1*,<sup>1</sup> the Federal Court of Appeal clarified what is required, in evidence, to prove copyright infringement in the context of file sharing. This decision affects the rights of Internet account holders who are named in lawsuits because other people have been using their account to download movies using BitTorrent file sharing software.

Voltage Holdings, LLC is a movie production company and the owner of the copyright to the film *Revolt* (the Work). Voltage detected that Internet users at certain IP addresses were making the Work available using BitTorrent software.

Unauthorized downloading of copyright protected movies using file sharing software is an infringing activity. It has the effect of making the movies available to other members of the public by telecommunication. In this way, file sharing engages the exclusive rights of a copyright owner under s 3(1)(f) and s 2.4(1.1) of the *Copyright Act*.<sup>2</sup>

At issue in the Federal Court of Appeal was whether the trial judge should have granted default judgment for copyright infringement against Internet account holders. There was evidence that the accounts had been used to download a copyright protected movie using file sharing software. But, Voltage, the copyright owner, had no direct evidence that the account holders were the ones that downloaded the movie. On the motion for default judgment, Voltage had argued that an adverse inference should be drawn against the defendant account holders. They had been sent multiple notices of infringement before being sued. The defendants had not defended the case, despite receiving the claim and a reminder. Therefore, Voltage argued, no further evidence was required to obtain default judgment for copyright infringement against them. Voltage asked the trial judge to find that the defendants had either downloaded the movie themselves or that they had authorized the infringing downloads by failing to control the use of their account. Either way, Voltage argued, default judgment should issue. The trial judge refused. The copyright owner appealed.

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<sup>1</sup> 2023 FCA 194

<sup>2</sup> *SOCAN v. ESA*, 2022 SCC 30

The Federal Court of Appeal said that the Internet subscribers cannot be assumed to have downloaded a movie just because there is evidence that their account was used to download a movie. In many cases, it was someone else. Such an assumption would make an Internet subscriber strictly liable for infringing activity on their account. But the person receiving a notice of copyright infringement on their account is entitled to a presumption of innocence. This presumption<sup>3</sup> was the effect of the Supreme Court's ruling in *Rogers Communications Inc v Voltage Pictures, LLC*.<sup>4</sup> To obtain default judgment, the copyright owner is obliged to provide sufficient evidence to support the claim of infringement on a balance of probabilities. The Federal Court of Appeal held that the receipt of multiple notices of infringement and a failure to respond to a claim was not enough:

Posting a work online and inviting others to view it engages the author's authorization right; however, sharing internet access after receiving notices of alleged infringement does nothing to the work in question, and does not therefore engage any copyright interest granted to the author exclusively ...<sup>5</sup>

Similarly, an Internet subscriber is not liable for authorizing infringement merely because they controlled (or failed to control) the Internet account that was used to download a movie. In accordance with the Supreme Court's ruling in *SOCAN v ESA*,<sup>6</sup> authorization of infringement in the context of file sharing of movies is directed to those who make the copyright material available for download. That is the activity that engages a protected copyright interest under s 3(1) of the *Copyright Act*. Allowing others to use an Internet account (which the Court referred to as "third party authorization"), even if the account holder is indifferent to how the account is being used, is not enough to establish liability for "authorizing infringement". The account holder must also be shown to have had control over the person who downloaded the movie, not just control of the account.<sup>7</sup>

In the result, the trial judge's decision not to grant default judgment was upheld. To obtain judgment the copyright owner will have to obtain additional evidence of infringement by the defendant account holders, such as, evidence establishing control over the person who downloaded the movie. This decision is an important development in the law of online infringement and will be of significant interest to Internet account holders who are named in lawsuits alleging copyright infringement based on the use of their account to download movies or other copyright works.

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<sup>3</sup> 2023 FCA 194, paras 61-64

<sup>4</sup> 2018 SCC 38

<sup>5</sup> 2023 FCA 194, paras 74-78, 85

<sup>6</sup> 2022 SCC 30

<sup>7</sup> 2023 FCA 194, paras 82-85