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Two topics:

- **Canadian approaches to “secondary/contributory liability”**
- **Reverse class actions**

[Cox Communications, Inc. et al. v. Sony Music Entertainment et al.](#), 146 S.Ct. 959

Per Justice [THOMAS](#) (delivered the opinion of the Court)

This Court has also recognized two categories of secondary copyright liability, which means liability for the copyright infringement of another. Those two categories are “contributory” liability and “vicarious” liability. [Metro-Goldwyn-Mayer Studios Inc. v.](#)

Grokster, Ltd., 545 U.S. 913, 930, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005). This case concerns contributory liability.

Canada

Authorization (direct liability)

Accessorial liability – procuring or inducing infringement, acting in concert (subject to caveats below)

Enablement (s27(2.3))

Secondary liability in the *Copyright Act* refers to dealings with infringing copies of works under s27(2).

Vicarious liability

U.S. - Vicarious liability is judge-made. A defendant is liable for someone else's direct infringement if it (1) had the right and ability to supervise the infringing activity and (2) had a direct financial interest in it. Knowledge is not required.

Canada – Vicarious liability generally limited to cases of “authorization”, other accessorial principles, or to specific cases.

- *SOCAN v. Canadian Assn. of Internet Providers* (2002), 19 C.P.R. (4th) 289 (Fed. C.A.). “The concept of “authorizing” implies that the person who is alleged to have authorized has the right to give any requisite permission. It is thus different from the notion of what is, in effect, vicarious liability used, for example, in the law of copyright infringement in the United States.”
- An employer can be liable for an employee's infringement committed in the course of employment, and a principal for an agent's infringement. *Cdn. Performing Right Society Ltd. v. Cdn. National Exhibition Assn.*, [1934] O.R. 610 (Ont. S.C.).
- Directors and officers can be personally liable where there is a deliberate, willful and knowing pursuit of a course of conduct that is likely to constitute infringement or reflect an indifference to the risk of it. *Mentmor Mfg. Co. v. National Merchandise Mfg. Co.* (1978), 89 D.L.R. (3d) 195 (Fed. C.A.)
- Accessorial principle of acting in concert or joint infringement liability.

U.S. courts do not expressly recognize liability for authorization outside of contributory infringement; "to authorize" codifies secondary liability.

- **The statute and its history.** § 106 gives the owner the exclusive rights "to do and to authorize." The House Report says the phrase was meant "to avoid any questions as to the liability of contributory infringers" ([H.R. Rep. No. 94-1476](#), at 60).
- **Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).** "The Copyright Act does not expressly render anyone liable for infringement committed by another." However, "the absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." Footnote 17 relies on the "to authorize" legislative history. <https://supreme.justia.com/cases/federal/us/464/417/>

The provider of a service is contributorily liable for the user's infringement only if it intended that the provided service be used for infringement. The intent required for contributory liability can be shown only if the party induced the infringement or the provided service is tailored to that infringement. [Grokster, 545 U.S., at 930, 125 S.Ct. 2764](#); [Sony, 464 U.S., at 440–441, 104 S.Ct. 774](#).

A provider induces infringement if it actively encourages infringement through specific acts. [Grokster, 545 U.S., at 942, 125 S.Ct. 2764](#) (Ginsburg, J., concurring). For example, in [Grokster](#), we held that a jury could find two file-sharing software companies liable for inducement. [Id., at 941, 125 S.Ct. 2764](#) (majority opinion). The companies promoted and marketed their software as a tool to infringe copyrights. [Id., at 926, 125 S.Ct. 2764](#). The "principal object" of their business models "was use of their software to download copyrighted works." [Ibid.](#) Other decisions have held providers liable for similar conduct. See [Kalem Co. v. Harper Brothers, 222 U.S. 55, 62–63, 32 S.Ct. 20, 56 L.Ed. 92 \(1911\)](#) (finding liability where "[t]he defendant not only expected but invoked by advertisement the use of its films" for infringement of an author's copyright); [Henry v. A. B. Dick Co., 224 U.S. 1, 49, 32 S.Ct. 364, 56 L.Ed. 645 \(1912\)](#) (finding liability because the sale was made "with the purpose and intent" that the object be used for patent infringement), overruled on other grounds, [Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 518, 37 S.Ct. 416, 61 L.Ed. 871 \(1917\)](#).

A service is tailored to infringement if it is "not capable of 'substantial' or 'commercially significant' noninfringing uses." [Grokster, 545 U.S., at 942, 125 S.Ct. 2764](#) (Ginsburg, J., concurring) (quoting [Sony, 464 U.S., at 442, 104 S.Ct. 774](#)). In [Sony](#), copyright owners sued the maker and the retailers of the Betamax video tape recorder. [Id., at 422, 104 S.Ct. 774](#). The tape recorder could be used to record copyrighted television programs for later personal viewing, which would not constitute infringement. [Id., at 449, 104 S.Ct. 774](#). On the other hand, it could also be used to reproduce and sell copyrighted television programming, which would constitute infringement. [Ibid.](#) The

lower court found the Betamax maker liable because the tape recorder was “not suitable for any substantial non-infringing use” and infringement “was either the most conspicuous use or the major use of the Betamax product.” [*Id.*, at 428, 104 S.Ct. 774](#) (internal quotation marks omitted). This Court reversed, concluding that “[t]he Betamax is ... capable of substantial non-infringing uses” – like personal use – so “sale of such equipment to the general public does not constitute contributory infringement.” [*Id.*, at 456, 104 S.Ct. 774](#).

These two forms of contributory infringement track patent law. See [*Grokster*, 545 U.S., at 942, 125 S.Ct. 2764](#) (Ginsburg, J., concurring). Under [35 U.S.C. § 271\(b\)](#), “[w]hoever actively induces infringement of a patent shall be liable as an infringer.” Such liability requires that the party express “an affirmative intent that the product be used to infringe.” [*Grokster*, 545 U.S., at 936, 125 S.Ct. 2764](#). Under [§ 271\(c\)](#), a party is liable when it sells a product used for infringement “knowing the same to be especially made or especially adapted for use in an infringement of such patent.”

This Court has repeatedly made clear that mere knowledge that a service will be used to infringe is insufficient to establish the required intent to infringe. In [*Kalem Co.*](#), the Court explained that “mere indifferent supposition or knowledge on the part of the seller” that the buyer will use the product unlawfully is “not enough” to make the seller liable for the buyer’s conduct, [222 U.S., at 62, 32 S.Ct. 20](#). In [*Sony*](#), the Court explained that “[t]here is no precedent in the law of copyright” for liability based only “on the fact that [the defendant] has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material.” [464 U.S., at 439, 104 S.Ct. 774](#). And, in [*Grokster*](#), the Court confirmed that “a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement.” [545 U.S., at 939, n. 12, 125 S.Ct. 2764](#).

Thus, Cox is not contributorily liable for the infringement of Sony’s copyrights. Cox provided Internet service to its subscribers, but it did not intend for that service to be used to commit copyright infringement. Holding Cox liable merely for failing to terminate Internet service to infringing accounts would expand secondary copyright liability beyond our precedents.

Cox neither induced its users’ infringement nor provided a service tailored to infringement. As for inducement, Cox did not “induce” or “encourage” its subscribers to infringe in any manner. [*Id.*, at 930, 125 S.Ct. 2764](#). Sony provided no “evidence of express promotion, marketing, and intent to promote” infringement. [*Id.*, at 926, 125 S.Ct. 2764](#). And, Cox repeatedly discouraged copyright infringement by sending warnings, suspending services, and terminating accounts. As for providing a service tailored to infringement, Cox’s Internet service was clearly “capable of ‘substantial’ or ‘commercially significant’ non-infringing uses.” [*Id.*, at 942, 125 S.Ct. 2764](#) (Ginsburg, J., concurring). Cox did not tailor its service to make copyright infringement easier. Cox simply provided Internet access, which is used for many purposes other than copyright infringement.

The Fourth Circuit found otherwise based only on its Circuit precedent establishing a new form of contributory liability. The court did not suggest that Cox induced its users to infringe. [93 F.4th at 235, n. 4](#). And, it did not deny that Cox's service was "capable of substantial lawful use and not designed to promote infringement." [Id., at 236](#). Rather, the court held that "supplying a product with knowledge that the recipient will use it to infringe copyrights is ... sufficient for contributory infringement." [Ibid.](#); see also [BMG, 881 F.3d at 311–312](#). The Fourth Circuit's holding thus went beyond the two forms of liability recognized in [Grokster](#) and [Sony](#). It also conflicted with this Court's repeated admonition that contributory liability cannot rest only on a provider's knowledge of infringement and insufficient action to prevent it. See [Kalem Co., 222 U.S., at 62, 32 S.Ct. 20](#); [Sony, 464 U.S., at 439, 104 S.Ct. 774](#); [Grokster, 545 U.S., at 939, n. 12, 125 S.Ct. 2764](#).

Inducement liability - Canada

[Bell Canada v. L3D Distributing Inc. \(INL3D\)](#), 2021 FC 832

[71] In addition to the statutory causes of action available to the Plaintiffs in this matter, I am satisfied that the common law cause of inducement also is available to them in the circumstances and further, that the Respondent Defendants knowingly induced infringement of the Media Plaintiffs' copyright in the Plaintiffs' Programs by offering for sale and selling pre-loaded set-top boxes that facilitate the infringement by the users and the streaming sites.

[72] Inducement occurs when someone does something that leads another person to infringe an intellectual property right. In other words, someone (i) knowingly (ii) induces or procures (such as by offering for sale and selling a product, the use of which by the purchaser would be an infringement), and (iii) another to infringe the intellectual property right: *Hanson International Inc v Whirley Industries Inc*, [2002 FCT 1045](#) [*Hanson*] at para [17](#)....

[73] A similar test was described in a proceeding involving patent infringement and infringement by inducement as follows: (i) the act of infringement was completed by a direct infringer; (ii) completion of the act of infringement was influenced by the acts of the inducer, without which influence the infringement otherwise would not have taken place; (iii) the inducer seller knowingly exercised the influence; that is, the seller knew their influence would result in the completion of the act of infringement: *MacLennan v Produits Gilbert Inc.*, [2006 FCA 204](#) at para [22](#).

Also, [Demirören TV Radyo Yayıncılık Yapımcılık A.Ş. v. General Entertainment and Music Inc.](#), 2024 FC 1127 "[59] Notably, while Kanal D has grouped inducement and authorization together in its submissions; they are distinct causes of action. Authorizing infringement is a statutory cause of action ([subsections 3\(1\)](#) and [27\(1\)](#) of the [Copyright Act](#)) whereas inducing copyright infringement was recognized by

this Court in *Bell Canada v L3D Distributing Inc.* (INL3D), [2021 FC 832](#) [Bell Canada] at para 71)."

But see, David Vaver "[Inducing Copyright Infringement in Canada: Is it a Thing?](#)", IP Osgoode, Osgoode Hall Law School, York University, October 19, 2022

How the patent test has been refined since. In *Teva v. Janssen*, 2023 FCA 68, a patent case:

- The second step (influence) is not a strict "but for" test. What must be proved is that "the putative infringer influenced the party that directly infringes to the point that, without such encouragement, infringement would not have occurred."
- On the third step (knowledge), "the knowledge at issue in the third prong of the test is knowledge that the influence is being exercised, rather than knowledge that the resulting activity will be an infringement."

See *Deja-Musique Inc v. Brulotte et al* Quebec Sup. Court Order July 2008 Action No. 500-17-039771-079 a Quebec Court granted an injunction against the operator of the BitTorrent site, QuebecTorrent. Court ordered the defendants to **cease assisting, encouraging, inducing, procuring, allowing**, authorizing, helping, causing and facilitating the reproduction, uploading, downloading, distribution and communication to the public by telecommunication of works and other subject matter including films, television programs, and sound recordings protected by copyright without the copyright holder's authorization on, at, or through the Quebecorrent site or any other site offering ".torrent" files, trackers, search or indexing capabilities, or using any other means or providing any service including, without limitation using the bittorrent or peer-to-peer technology, or other technology. (emphasis added)

Authorization liability - Canada

[Voltage Holdings, LLC v. Doe #1](#), 2023 FCA 194

The law of authorizing infringement - overview

[22] First, subsection 3(1) of the [Act](#) grants a copyright owner the exclusive right to produce (or reproduce), perform, or publish their work. It also grants a copyright owner the sole right to "authorize any such acts." Accordingly, anyone who authorizes any of these expressions of the copyrighted work, absent a licence

to do so, infringes the copyright owner's exclusive authorization right (the Act, at subsections 3(1) and 27(1)).

[23] Second, and relatedly, authorizing infringement requires that the authorizer hold themselves out as capable of granting one of the copyright owner's exclusive rights (Barry Sookman, Steven Mason & Carys Craig, *Copyright: Cases and Commentary on the Canadian and International Law*, 2nd ed. Toronto: Carswell, 2013, at page 1001):

To authorize an act, the alleged infringer must grant or purport to grant, either expressly or by implication, the right to do the act complained of. Further, the grantor must have some degree of actual or apparent right to control the actions of the grantee before he will be taken to have authorized the act. An act is not authorized by somebody who merely enables or possibly assists or even encourages another to do that act, but who does not purport to have any authority which he can grant to justify the doing of the act.

[24] Third, in copyright law, to “authorize” means to “sanction, approve and countenance” (*CCH*, at paragraph 38). Although “countenance” in this definition may initially appear to include some degree of passivity within the scope of “authorization”, the Supreme Court has confirmed that the term “countenance” here “must be understood in its strongest dictionary meaning, namely, ‘[g]ive approval to; sanction, permit; favour, encourage’” (*CCH*, at paragraph 38).

[25] Fourth, there are certain objective factors that, on their own, do not amount to authorizing infringement. An individual who provides the means or equipment to infringe another's copyright has not necessarily authorized the infringement, for example (*ESA*, at paragraph 106; *CCH*, at paragraph 38). Similarly, upon receiving a warning notice, an Internet subscriber is not automatically assumed to have been responsible for the asserted copyright infringement; the mere association with an IP address is not conclusive of guilt (*Rogers*, at paragraph 41).

[26] Fifth, the law of authorizing infringement relies in part on a subjective standard. The knowledge that someone might be using neutral technology for infringing activity is not necessarily sufficient to establish authorization, and courts presume that an individual who authorizes an activity does so only so far as it is in accordance with the law (*SOCAN*, at paragraph 127; *CCH*, at paragraph 38; Sookman, at page 1002). In some cases, however, a “sufficient degree of indifference” may allow a court to infer that the individual has indeed authorized the infringement (*CCH*, at paragraph 38; *SOCAN*, at paragraph 127).

[27] Sixth, in authorization analyses, courts have historically considered the relationship between the alleged authorizer and the person who infringes as a result of the authorization. A “certain relationship or degree of control” existing between

these parties may rebut the presumption that a person who authorizes an activity has only authorized lawful forms of that activity (*CCH*, at paragraph 38). Control over the means by which the infringement occurred may also warrant a finding of implicit authorization; additionally, authorization may be inferred where the supply of such means was “bound to lead to an infringement and was made specifically for that purpose” (Sookman, at page 1002). These factors suggest that the alleged authorizer played an active role in leading the other party to infringe the copyright owner’s exclusive rights under [subsection 3\(1\)](#) of the [Act](#).

Authorization liability – hosting provider liability (Pre-CMA 2012)

[*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*](#), 2004 SCC 45 (CanLII), [2004] 2 SCR 427

123 The operation of the Internet is obviously a good deal more complicated than the operation of a photocopier, but it is true here, as it was in the *CCH* case, that when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material.

124 On this point the Board concluded as follows (at p. 458):

Even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a license or permission to infringe. An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement. Moreover, an ISP is entitled to presume that its facilities will be used in accordance with law.

This conclusion is generally consistent with the decision of this Court in the *CCH* case, although I would point out that copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action...

126 In the present appeal, the Federal Court of Appeal stated that, in the case of host servers, “an implicit authorization to communicate infringing material might be inferred from their failure to remove it after they have been advised of its presence on the server and had a reasonable opportunity to take it down” (para. 160). Reference was made to *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1986 CanLII 6820 \(FCTTD\)](#), [1987] 1 F.C. 173, aff’d [1990 CanLII 119 \(SCC\)](#), [1990]

2 S.C.R. 209, at pp. 211 and 208, citing *C.B.S. Inc. v. Ames Records & Tapes Ltd.*, [1982] 1 Ch. 91, at p. 110, i.e., an Internet Service Provider may attract liability for authorization because “. . . indifference, exhibited by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred. It is a question of fact in each case” See also *Godfrey v. Demon Internet Ltd.*, [1999] 4 All E.R. 342 (Q.B.).

127 The knowledge that someone *might* be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did “(g)ive approval to; sanction, permit; favour, encourage” (*CCH*, at para. 38) the infringing conduct. I agree that notice of infringing content, and a failure to respond by “taking it down” may in some circumstances lead to a finding of “authorization”. However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of “authorization” would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory “notice and take down” procedure as has been done in the European Community and the United States.

128 In sum, I agree with the Court of Appeal that “authorization” could be inferred in a proper case but all would depend on the facts.

Authorization – liability of Internet subscribers including for acts of users after receiving notices they may be uses P2P file sharing technologies.

[Voltage Holdings, LLC v. Doe #1](#), 2023 FCA 194

[80] These arguments fail for two reasons.

[81] The first is rooted in the Supreme Court’s definition of “authorize” (*CCH*, at paragraph 38):

“Authorize” means to “sanction, approve and countenance”. Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to; sanction, permit; favour, encourage”: see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to

infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement. [Citations omitted, emphasis added.]

[82] “Authorization” therefore depends on the alleged authorizer’s control over the person who committed the resulting infringement; it does not depend on the alleged authorizer’s control over the supply of their technology (*CCH*, at paragraphs 38 and 45; Sookman, at page 1002). Allowing the “mere use of equipment that could be used to infringe copyright”, which at best is all we have here, does not fall within the legal definition of “authorizing” (*CCH*, at paragraphs 38 and 42–43). The Federal Court adhered to this principle, and found that the appellant had not proven any activity beyond the respondents’ sharing of their Internet accounts (Reasons, at paragraphs 59, 68 and 70).

The second reason for the failure of the appellant’s claim of authorizing infringement is, as discussed already, the Supreme Court’s decision in *ESA*.

[33] The Supreme Court endorsed the Copyright Board’s determination that “it is the act of posting [the work] that constitutes authorization”, because the person who makes the work available “either controls or purports to control the right to communicate it”, and “invites anyone with Internet access to have the work communicated to them” (*ESA*, at paragraph 106). The authorizer is the individual directly engaging with the copyrighted material. This close relationship between the authorizer and the copyrighted material is emphasized and repeated throughout the Supreme Court’s reasons (*ESA*, at paragraphs 8, 103 and 106–108).

[34] There is no question, based on *ESA*, that the person using the respondents’ Internet accounts to make the Work available for download via BitTorrent is authorizing infringement. This situation is the precise example of authorizing infringement described throughout *ESA* (*ESA*, at paragraphs 8, 103 and 106–108). However, the appellant’s claim of authorizing infringement does not mirror this example. *ESA* says that an authorizer permits reproduction; the appellant says that an authorizer is someone who permits someone to permit reproduction. And, as Rowe J. observes, subsection 3(1) of the Act “exhaustively” sets out the scope of copyright interests (*ESA*, at paragraph 54).

[85] *ESA* establishes clear guidance as to the legal and evidentiary requirements of infringement in the context of online infringement. To establish an infringing activity, there must be evidence that what the activity does to the work engages one of the three interests in subsection 3(1) of the Act (*ESA*, at paragraphs 56–57). 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 (*ESA*, at paragraphs

56–57 and 106; the Act, at subsections 3(1) and 27(1)). Because the latter scenario arises here, the activity asserted by the appellant as “authorization” cannot justify protection under the Act.

Enablement – Canada – (Canadian online contributory infringement?)

27(2.3) It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

Factors

(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

- (a)** whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
- (b)** whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
- (c)** whether the service has significant uses other than to enable acts of copyright infringement;
- (d)** the person’s ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
- (e)** any benefits the person received as a result of enabling the acts of copyright infringement; and
- (f)** the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

Per Justice [SOTOMAYOR](#) (with whom Justice [JACKSON](#) joins, concurring in the judgment)

Instead of artificially limiting secondary liability, the Court should have examined whether some other “rul[e] of fault-based liability derived from the common law” might hold Cox liable for copyright infringement committed on its network. [Grokster, 545 U.S.](#),

[at 934–935, 125 S.Ct. 2764](#). Plaintiffs argue that Cox is liable because it materially contributed to infringement by servicing internet connections that it knew would be used to commit infringement. That argument is rooted in the common-law doctrine of aiding and abetting. That doctrine, however, requires plaintiffs to show that Cox intended to aid infringement, and the facts of this case foreclose that inference.

This Court has addressed common-law civil aiding-and-abetting liability twice in recent years. In both cases, it held that aiding-and-abetting liability requires proof that the defendant aided another with the intent of helping that other person succeed in committing wrongful conduct.

The first of this Court’s recent cases is [Twitter, Inc. v. Taamneh, 598 U.S. 471, 143 S.Ct. 1206, 215 L.Ed.2d 444 \(2023\)](#). There, the plaintiff alleged that social media platforms had aided and abetted a terrorist attack by ISIS because they knowingly hosted content, posted by ISIS and its followers, that was intended to spread ISIS propaganda, recruit members, and raise funds. [Id.](#), at 481, 143 S.Ct. 1206. The platforms also allegedly promoted that content via their algorithms. [Ibid.](#) The plaintiffs asserted that the platforms had not done enough to “detect and remove a substantial number of ISIS-related accounts, posts, and videos.” [Ibid.](#)

This Court held that the platforms could not be held liable as aiders and abettors based on the complaint’s allegations. After surveying lower court cases and common-law sources, the Court identified the “conceptual core that has animated aiding-and-abetting liability for centuries: that the defendant consciously and culpably ‘participate[s]’ in a wrongful act so as to help ‘make it succeed’.” [Id.](#), at 493, 143 S.Ct. 1206 (quoting [Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 \(1949\)](#)). Put another way, “the defendant has to take some ‘affirmative act’ ‘with the intent of facilitating the offense’s commission.’” [598 U.S.](#), at 490, 143 S.Ct. 1206 (quoting [Rosemond v. United States, 572 U.S. 65, 71, 134 S.Ct. 1240, 188 L.Ed.2d 248 \(2014\)](#)). The plaintiffs’ claims did not plausibly meet this standard, however, because they failed to allege that pro-ISIS accounts or content received “any special treatment”. [598 U.S.](#), at 498, 143 S.Ct. 1206. Nor did they allege any other facts sufficient to overcome the “attenuated ... nexus” between the platforms’ actions and the ISIS attack or establish that the platforms intended to aid that attack. [Id.](#), at 506, 143 S.Ct. 1206.

Aiding and abetting - Canada

Dimock: Intellectual Property Disputes: Resolutions and Remedies

§ 1:31 “It has been suggested that there may be a tort of aiding and abetting infringement, apart from inducing and procuring infringement.¹⁶

§ 12:24. It has also been submitted that the tort of aiding and abetting infringement also exists, but this too has never been fully considered by a Canadian court.⁵

Footnotes 16 and 5. Referring to [Dableh v. Ontario Hydro \(1996\)](#), 68 C.P.R. (3d) 129 (F.C.A.) at pp. 131, 141, 148, leave to appeal refused (1997), 74 C.P.R. (3d) vi (S.C.C.); [Halford v. Seed Hawk Inc.](#), 2004 CarswellNat 342, [2004] F.C.J. No. 189 (F.C.), reconsideration / rehearing refused 2004 CarswellNat 882, [2004] F.C.J. No. 557 (F.C.), affirmed 2006 CarswellNat 2397, 2006 CarswellNat 4150 (F.C.A.).

Common Design - Canada

Common design (joint liability) is a form of accessory liability derived from English tort law. The plaintiff must prove four things:

1. Assistance. The defendant assisted the primary infringer, and the assistance was more than trivial.
2. Common design. The persons act in concert pursuant to a common design that the act be done.
3. Infringement. The act done under that plan is actually an infringement.
4. Knowledge of the essential facts that make the act wrongful. Knowing that the act is legally an infringement is not required.

See, generally, *Fish & Fish v. Sea Shepherd*, [2015] UKSC 10, *Lifestyle Equities v. Ahmed*, [2024] UKSC 17. U.K. and Australian cases accept the liability theory applies in copyright cases.

See, also, David Vaver “Inducing” Copyright Infringement in Canada: Is it a Thing?”

“In fact, it is well settled that tort concepts of accessory liability — the civil law equivalent of aiding and abetting in criminal law — do apply to the Copyright Act, and indeed all IP Acts”.

[*De Tervagne v. Beloeil \(Town\) \(T.D.\)*](#), 1993 CanLII 2960 (F.C.T.D.)

One final point which I would like to note relates to the issue of the joint liability of the defendants. In *CBS Songs Ltd v. Amstrad Consumer Electronics plc*, [1988] 2 All E.R. 484 (H.L.), at page 495, Lord Templeman stated the following with respect to the defendants’ joint liability in an action for copyright infringement:

My Lords, joint infringers are two or more persons who act in concert with one another pursuant to a common design in the infringement.

In the case at bar, it cannot logically be said that the defendants acted in concert with Mr. Bossac to commit the infringement. It is therefore unnecessary to consider this question any further.

[SOCAN - Tariff 22 \(Transmission of Musical Works to Subscribers Via a Telecommunications Service not covered under Tariff Nos. 16 or 17\) \[Phase I: Legal Issues\]](#)

Internet intermediaries cannot always claim the benefit of paragraph 2.4(1)(b)

The liability of an entity participating in any Internet transmission must be assessed as a function of the role the entity plays in that transmission, and not as a function of what it generally does over the Internet. Consequently, Internet intermediaries can rely on paragraph 2.4(1)(b) of the *Act* only with respect to communications in which they limit themselves to acting as intermediaries. **In some cases, as a result of business relationships or other factors, intermediaries will act in concert with others in a different manner.** Such is the case where an ISP posts content, associates itself with others to offer content, creates embedded links or moderates a newsgroup. In these cases, these entities are no longer acting as intermediaries; their liability will be assessed according to the general rules dealing with copyright liability.^[36] ...

In the same vein, entities wishing to rely on decisions dealing with the notion of authorization to argue that they should not be held liable will probably find it difficult to do so, if only because their liability would flow not from their authorizing the communication, but from being an active and direct participant in it. ^[36]

The fact that there may be multiple parties engaged in the transmission does not preclude a finding that each is communicating the work. Thus, where a site owner, through a mirroring arrangement, grants a second party the right to operate a mirror site in its own name, both the original site owner and the person who operates the mirror site jointly communicate works that are posted on the original site when they are transmitted from the mirror site.

Patent cases:

[*Adeia Guides Inc. v. Videotron Ltd.*](#) 2025 FC 1725

B. Infringement by Common Design of Two Parties Acting in Concert

470 I turn first to the common design doctrine, whereby two parties agree on a common action and, in carrying out that action together, infringe on the rights of the plaintiff. Common design has been accepted in Canada in the context of large torts (see for example *I.C.B.C. v Stanley Cup Rioters* 2016 BCSC 1108) and occasionally referenced in the context of patent infringement cases ([*Molo Design*](#)), although no case of patent infringement has in fact turned on that issue.

471 The doctrine originates from the United Kingdom. In [Fish & Fish v Sea Shepherd, \[2015\] UKSC 10](#), the Supreme Court of the United Kingdom stated that for a respondent to be jointly liable with the principal tortfeasor, the two must combine to do acts which constituted a tort. That required proof of two elements, the respondent i) must have acted in a way which furthered the commission of the tort by the principal tortfeasor; and ii) must have done so in pursuance of a common design to commit the tort.

472 In [Bauer Hockey Corp. v Easton Sports Canada Inc. 2010 FC 361](#), the Court notes that infringement "by common design" exists in Canada but had not been applied in the context of a patent infringement action at the time of the decision. If it had been, knowledge of the specific patent that was allegedly infringed could form part of the reasoning but would not be a prerequisite for an infringement finding (para 206).

473 Despite the passing mention of common design in [Bauer Hockey](#), the Courts in Canada have since increasingly acknowledged the possibility of patent infringement on the theory of common design, and have cited [Sea Shepherd](#) as the leading case for the related tort (see for example: [Molo Design](#) at para 157, [Rovi Guides Inc v BCE Inc, 2022 FC 979, at para 59](#); [Adeia Guides Inc v BCE Inc, 2025 FC 560, at para 7](#)).

474 In non-patent cases that turned on the notion of common design, the precise content of what the actual common design ought to be is highly fact specific and is tailored to the precise action that occurred.

475 In [Genentech Inc. v Celltrion Healthcare 2019 FC 293](#), the plaintiff alleged that several pharmaceutical companies were working together to bring a specific drug to the Canadian market, thereby infringing on its patent. In that case, Prothonotary Mandy Ayles (as she then was) accepted the argument for common design in relation to patent infringement, as the evidence led — which included clear delineation of roles that the primary and additional defendants were engaged in — supported the pleading (para 43). She found that "acting in concert" in the context of parties working together to commit a tortious act fell within the scope of infringement by common design, as the two were one in the same (para 41).

476 Given the facts of this case, together with this Courts' increasing recognition of the theory of common design and overarching policy concerns, I find Videotron liable for infringement of the 187 and 674 Patents, on the theory of common design. The concept stems from the principle of holding someone accountable for their actions towards another if they are working with a third party to further those actions. Put simply, one cannot escape liability for patent infringement by virtue of subcontracting out a portion of the infringing act, or by being but one party to an overall harm towards another.

477 From 2010 until 2015, Videotron and Adeia (then known as Rovi) had established a licensing agreement, whereby Videotron would license Adeia's patent portfolio, so Videotron could offer services such as its illico TV STB system and the Club illico and VRAI platforms for delivering services to its subscribers. In the fall of 2015, [text omitted] while also discussing the renewal of the license with Adeia. ...

479 Following the end of the [text omitted] on December 17, 2015, Adeia and Videotron agreed to formally extend their contract into 2016, and at the end of the year, Videotron elected not to renew the license agreement. Some months later, on August 29, 2017, Videotron announced a partnership with Comcast to deliver an IPTV service using Comcast's XFINITY X1 platform. This agreement between the two parties is understood [text omitted] fulfilled Videotron's requirements.\

481 Not only were Comcast services designed to answer Videotron's specific needs/requirements, but the evidence also shows that for its Helix TV system, Videotron and Comcast were actively engaged in providing the Helix TV system to Videotron's customers. Throughout the Videotron/Comcast relationship, [text omitted] Videotron was not a docile party — it was engaged in the acts of infringement. Comcast not being included in this litigation does not bar the finding of common design, as both parties do not need to be named defendants to find infringement by common design ([Sea Shepherd](#), at para 55).

Also,

[Molo Design, Ltd v. Chanel Canada Ulc](#) 2024 FC 1260 “158 Courts in the UK have accepted that there may be liability for patent infringement based on common design: [Molnlycke AB et al v Proctor & Gamble Limited et al](#) [1992] 4 All ER 47 (CA) at pp 52-53, 57-58; [Unilever v Gillette](#) [1989] RPC 583 (CA) at pp 603, 607-609; [Bauer Hockey Corp v Easton Sports Canada Inc](#), 2010 FC 361 at para 206; see Simpson, John H, *Liability of Foreign Manufacturers for Inducing Patent Infringement in Canada* (2009), 25:1 CIPR 153 at pp 163-164. To date, no Canadian case has found a defendant liable for patent infringement by common design, although the plea has survived motions to strike: [Packers Plus Energy Services Inc v Essential Energy Services Ltd](#), 2017 FC 1111 at paras 48-49; [Rovi Guides, Inc v Videotron Ltd](#), 2022 FC 981 at paras 14-15, 45-47; [Genentech, Inc v Celltrion Healthcare Co, Ltd](#), 2019 FC 293 at paras 40-41.”

[Rovi Guides, Inc. v. Videotron Ltd.](#) 2022 FC 981 “To conclude on common design, I am unable to find either error, or palpable error, or palpable and overriding error in the statement of, or in the consideration and application by the CMJ of the [La Rose](#) principles on striking this pleading as disclosing no reasonable cause of action. The CMJ found the allegation of common design should not be struck and I agree with that determination. Thus, the appeal alleging infringement by common design discloses no cause of action is dismissed.”

Finally, Sony argues that the DMCA safe harbor would have no effect if Internet service providers are not liable for providing Internet service to known infringers. The DMCA safe harbor protects Internet service providers that terminate repeat infringers “in appropriate circumstances.” [17 U.S.C. § 512\(i\)\(1\)\(A\)](#). Sony argues that Congress must have enacted the DMCA on the presumption that Internet service providers could be held liable in cases such as these.

Sony overreads the DMCA. Sony does not contend that the DMCA expressly imposes liability for Internet service providers who serve known infringers. It does not. The DMCA merely creates new *defenses* from liability for such providers. And, the DMCA made clear that failure to comply with the safe-harbor rules “shall not bear adversely upon ... a defense by the service provider that the service provider's conduct is not infringing.” [§ 512\(l\)](#).

ISP Safe Harbours (Enacted by the CMA in 2012)

Network services

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network **does not, solely by reason of providing those means, infringe copyright** in that work or other subject-matter...

Hosting

(4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, **provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone,** infringe copyright in the work or other subject-matter.

Condition for application

(5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.

Exception

(6) Subsections (1), (2) and (4) do not apply in relation to an act that constitutes an infringement of copyright under [subsection 27\(2.3\)](#).

[Voltage Pictures, LLC v. Salna](#), 2025 FCA 131

[80] The first contextual point is that, in enacting the notice-and-notice regime in the *Copyright Modernization Act*, Parliament at the same time insulated [ISPs](#) from liability for authorization in [section 31.1](#) of the *Copyright Act*. The intervener, the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC), correctly notes that this signals Parliament's intent to limit the involvement of ISPs in copyright infringement litigation...

[83] I agree with CIPPIC that the insulation of [ISPs](#) from liability for authorization in [section 31.1](#) of the *Copyright Act* supports the conclusion that a "notice of claimed infringement", within the meaning of [subsection 41.25\(2\)](#) of the *Copyright Act*, is to be interpreted narrowly.

Reverse class actions

[Voltage Pictures, LLC v. Salna](#), 2025 FCA 131

In Canada, a "[reverse class action](#)" (also called a defendant class action) is a class proceeding brought against a class of defendants rather than on behalf of a class of

plaintiffs. A plaintiff sues one or more representative defendants, and the result binds all similarly situated members of the defendant class.

Certification test: It is the same as for an ordinary class action. Under Federal Courts Rules r. 334.16 the court must find that

- the pleadings disclose a reasonable cause of action;
- there is an identifiable class of two or more persons;
- the claims of the class members raise common questions of law of fact, whether or not those issues predominate;
- a class proceeding is the preferable method of resolving the common issues; and
- there is a suitable representative of the class.

What was claimed:

Voltage sued Robert Salna, an internet account subscriber, and sought to certify a class of BitTorrent users alleged to have downloaded the same films, with Mr. Salna as the representative respondent.

It pleaded direct infringement, secondary infringement, and authorizing infringement.

The authorization claim was that subscribers authorized infringement "by failing to take reasonable steps to ensure that the first and second unlawful acts did not take place in respect of an internet account controlled by an Internet Account Subscriber."

"I ... conclude that the Federal Court's finding on preferable procedure should be set aside because there is no basis in fact for the conclusion that a class proceeding is the preferable procedure to determine the common questions proposed by the appellants."

The following issues arise in this appeal and cross-appeal:

Did the Federal Court err in finding that a "notice of claimed infringement", in [subsection 41.25\(2\)](#) of the [Copyright Act](#), is to be interpreted narrowly and that the proposed use of the notice-and-notice regime in the *Copyright Act* was contrary to [subsection 41.25\(3\)](#) of the *Copyright Act*?...

Did the Federal Court err in concluding a class action is the preferable procedure?

Does a notice of claimed infringement include certification orders?

[78] Thus, I conclude that the text of subsection 41.25(2) and of the related provision in [paragraph 41.26\(1\)\(b\)](#) of the *Copyright Act* support the conclusion that a "notice of

claimed infringement” is to be interpreted narrowly and does not include a notice of a class proceeding like that proposed by the appellants.

[87] Several comments, made in the House of Commons and before the Legislative Committee when the *Copyright Modernization Act* was being debated, provide contextual support for a narrow interpretation of “notice of claimed infringement” in [subsection 41.25\(2\)](#) of the [Copyright Act](#) and for the conclusion that such a notice cannot be aimed at a primarily litigation purpose, which would include a notice of a class proceeding like that proposed by the appellants...

Why the Voltage reverse class action was not certified

- **The class was defined by account subscribers.** It consisted of internet subscribers whose IP addresses were detected offering Voltage's films over BitTorrent.
- **Being a subscriber does not prove infringement.** It does not establish that the subscriber infringed, or authorized infringement of, copyright (consistent with [Voltage Holdings, LLC v. Doe #1](#), 2023 FCA 194)
- **Individual issues would overwhelm the common ones.** Who actually uploaded films and whether each subscriber "authorized" that use, would have to be proved person by person (Mr. Salna, for example, provided internet access to tenants). So a class proceeding was not the preferable procedure.

Does the decision foreclose reverse class actions for copyright claims?

- **They are procedurally available.** The Federal Courts Rules permit classes of defendants and respondents, and the Court of Appeal confirmed in 2021 that the novelty of a reverse class action is not a reason to deny certification (2021 FCA 176).
- **The decisions adapted the certification rules for reverse class actions instead of rejecting them.** Three "necessary" modifications:
 - references to "plaintiff or applicant" become "defendant or respondent";
 - the representative defendant bears the burden of filing evidence of funding arrangements; and
 - inadequate funding for class counsel is not an absolute bar to certification, since otherwise defendants could defeat certification by deliberately failing to arrange funding.
- **A better-designed class could succeed.** For example, a class whose members are defined by provable infringing conduct, with liability turning on

common questions such as whether a particular common act infringes, could satisfy the preferable-procedure test.