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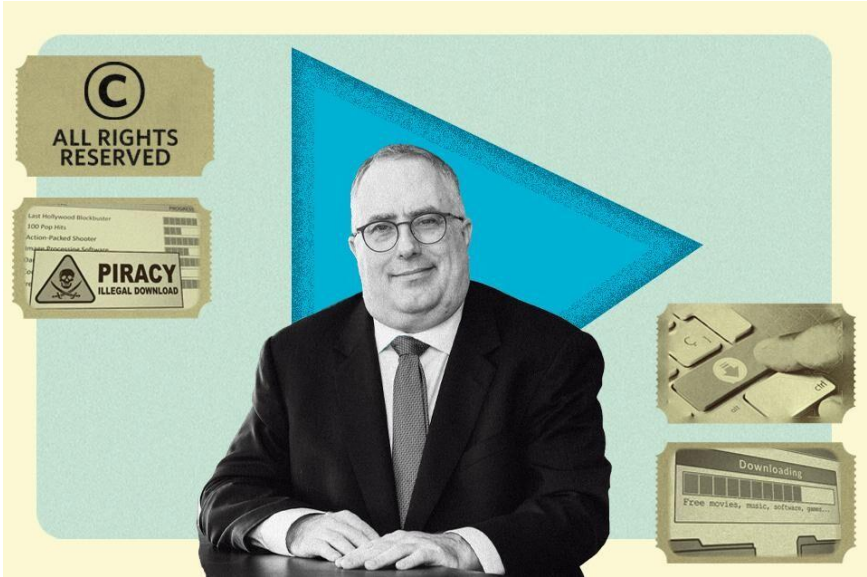
BUSINESS

# Ken Clark has sued thousands of Canadians for streaming pirated movies. Is he a troll — or a hero?

Clark and his law firm send out more than 100,000 warnings every year, and have sued thousands of Canadians, winning out-of-court settlements of up to \$5,000 in most cases. Some say he's harassing regular people for profit — but to others, he's Canada's copyright cop

By Christine Dobby Business Reporter

Feb 11, 2023



Ramon Ferreira Toronto Star Photo Illustration

It's an email no one wants to get, but thousands of Canadians get one every month: "Important notice regarding your internet activity," the subject line says. It looks like spam, but you click through just in case.

At the top of the message is a note from your internet service provider explaining that the law requires it to forward you the email below — and that's when you get nervous.

The message, from an American movie studio, says your computer's IP address was used to illegally distribute one of their movies. The email instructs you to remove the file and stop downloading or uploading copyright-protected content without permission.

You click away from the email and return to your day. About a week later, you get another message that says your IP address is still linked to that studio's movie.

It's a bit unnerving, but you forget about the emails for a few months — after all, your neighbour got a similar notice, and nothing ever came of it — but then you get a package of documents delivered by registered mail. That's when you learn, after wading through the legalese, that you're being sued for copyright infringement in the Federal Court of Canada.

Millions of Canadians have received copyright infringement notices through their internet service providers (ISPs) over the past decade. Most people get one email and stop downloading pirated movies and TV shows (or lecture their teenager on why they shouldn't) and that's the end of the matter.

But if you got two of those notices — and they came from a lawyer named Ken Clark — you should probably pay attention.

When it comes to copyright infringement cases against individuals, Clark, a partner and intellectual property lawyer with the Bay Street law firm Aird & Berlis, is the most active lawyer in Canada.

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The firm sends out well over 100,000 warning notices every year and has sued thousands of Canadians, winning out-of-court settlements of up to \$5,000 in most cases.



To anyone who produces shows and movies that are routinely stolen, Ken Clark is a hero. To his detractors, though, Clark is a copyright troll.

Andrew Francis Wallace

To anyone who produces shows and movies that are routinely stolen, Clark is a hero. He's one of the few unofficial copyright cops in Canada willing to protect the work they created and for which they deserve to be paid.

To his detractors, though, Clark is a copyright troll, going after otherwise upstanding Canadians for the almost victimless crime of streaming movies and shows on easily accessible websites that have been offering up free content for decades.

Which raises a thorny question: Is Clark's relentless pursuit of copyright infringers necessary to enforce his clients' legal rights — or is he harassing and intimidating regular people for profit?

That very question is at the heart of a \$400-million legal battle taking place in Federal Court in Toronto right now.

'A new take on copyright enforcement'

A mug with Clark's smiling face on it (his profile picture from the Aird & Berlis website) sits on a bookshelf in his 28th-floor office overlooking the Toronto harbour.

He's just finished describing his client's position in a recent copyright court fight, documents from the case arranged neatly on a desk cleared of all other distractions for this meeting, and now he's talking more happily about some of the memorabilia he's collected over the years.

There are the requisite framed degrees of course, his "wall of credibility," including a mechanical engineering degree from the University of Waterloo that briefly landed him work designing sensors for paper mills before he made a hard turn into a legal career.

But then there's the fun stuff, and Clark, an affable 53-year-old with dark, expressive eyebrows and salt and pepper hair, breaks into a real-life smile as he shows some of it off.

Mixed in with family photos on his bookshelf there's a mini sextant, a celestial navigational tool his brother gave him as a gift when he was called to the bar; mounted above his desk is a small replica of the Rosetta Stone; and behind him, on the last bit of space before the walls of the small office meet the glass windows, hangs a poster for the late '90s movie "Ghost Dog: The Way of the Samurai."

Clark, dressed in a sharp black suit and a tie with small pink flowers, says of "Ghost Dog," "I came up with the metaphor that lawyers are sort of like him, urban samurais, following your code, that kind of thing."

Clark says he stumbled into the copyright enforcement program he leads at Aird & Berlis pretty much "by pure chance."

Have your say

Are you willing to pay for movies, TV shows and music online?

- ☐ Yes, there are so many options now and you can get just about everything.
- ☐ Sometimes, but there are too many options and subscribing to them all adds up!
- ☐ No, why would I pay when I can access content online for free?

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Canada introduced new copyright rules about a decade ago (the so-called "notice and notice" regime that lets copyright holders send those emails to internet users through their ISPs), and he received a cold call from a client who wanted to protect its content rights. It was that call that got him started.

He has an affinity for computers and technology and began researching enforcement approaches content owners were using in Europe, Scandinavia and the U.S.

"I came up with a litigation system that would fit in within the Canadian context ... And once you develop a specialty in it, other people come and hire for you it."

"I don't know that we're the only people doing it, but I think that we're the most well known," he says.

That's certainly true. Online message boards are filled with posts from people confused about what to do after being sued for copyright infringement — many users mention Clark by name in one thread on RedFlagDeals that goes on for 120 pages and spans almost five years.

There are even defence lawyers who advertise, "If you have received a statement of claim from Ken Clark of Aird & Berlis, we can help."

"I guess it's a compliment," he says of that. He also notes that there's a team of people working on this at the firm, not wanting to take all the credit.

Clark says his clients use forensic software to detect IP addresses that are sharing their movies using the BitTorrent protocol.

BitTorrent is a legal way for computer users to share files, but it's often used for illegal file-sharing. Many Canadians have also purchased Android boxes to watch online content on their televisions and certain apps for those boxes use BitTorrent to access "free" movies and TV shows, Clark says.

The firm sends second notices in about one in 10 cases, he estimates. His clients then routinely go to court for orders disclosing the names of the internet users to whom they've sent second notices if the infringing behaviour did not stop.

Clark estimates he's launched about 25 copyright infringement claims in Federal Court and in each of those cases, he sues hundreds — sometimes thousands — of people at a time.

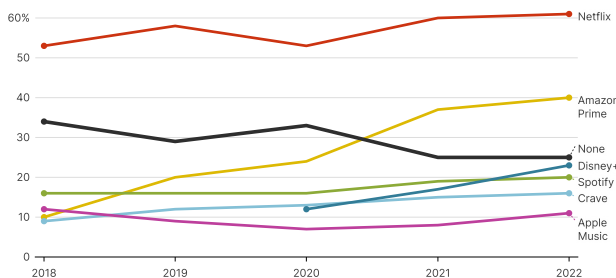
None of those lawsuits have gone to a full trial (though one case seeking a default judgment against defendants who failed to respond is working its way through the system).

Instead, the cases are almost always settled for amounts that are not publicly disclosed, but range from \$100 to \$5,000, the statutory limit for copyright infringement by individuals.

The point of all this, he tells the Star, is to educate people on copyright rules, teach them that the internet is not a free-for-all.

## Streaming services are gaining traction

Survey participants were asked which paid online content providers they subscribe to.



2,000 Canadian internet users 18 and older were surveyed in March 2022 via an online panel methodology. The findings were compared with results from previous years if available.

SOURCE: CANADIAN INTERNET REGISTRATION AUTHORITY

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There have been multiple court battles fought over the notice and notice system (with Clark's clients at the centre of most of them, including a proposed "reverse class action" that could allow them to streamline the administrative process while suing thousands of people at a time).

Yet, there are still untested legal issues, according to James Plotkin, a lawyer with Gowling WLG in Ottawa who has represented numerous defendants in lawsuits launched by Clark's firm.

One major question, he says, is whether someone like a landlord or internet subscriber with an open Wi-Fi connection should be responsible for what other people do with that connection.

"Copyright laws exist for a reason of course, but the question is how should they be enforced against whom and using what methods?" Plotkin says. "These BitTorrent cases are certainly a new take on copyright enforcement that we haven't seen before in Canada."

## Users 'intimidated' into settlements, Bell claims

A few days after the meeting in his office, Clark sits in silence in a courtroom on Queen St. W. near University Ave., listening as a lawyer representing Bell Canada tears into the copyright program he's built. The lawyer accuses his law firm of overwhelming internet service providers with notices and then intimidating the ordinary people they later sue.

Clark's client, Millennium Funding, launched a lawsuit against Bell in 2021, alleging the telecom company failed to pass along almost 40,000 initial notices of infringement tied to six movies: "Angel Has Fallen," "Hellboy," "The Outpost," "Hunter Killer," "Rambo: Last Blood," and 2017's "The Hitman's Bodyguard" starring Ryan Reynolds.

The penalty for an internet service provider such as Bell failing to pass along a valid notice is up to \$10,000, which is how the claim got to the eye-popping \$400-million number.

It's the first case to test this issue and it's a strange position for Bell to be in.

Bell itself owns an array of creative content, some produced for its CraveTV streaming service, as well as shows created for its traditional and specialty TV stations and the TSN sports broadcast network. The company has been aggressive in protecting its own copyright and has been involved in several cases seeking court orders to block websites illegally streaming content, such as the NHL playoffs.

But Bell came out swinging in its defence, arguing that it did send along all the valid notices it received from Clark's client, and launching a counterclaim against both Millennium and Aird & Berlis itself, accusing them of abuse of process and "copyright misuse."

In a ruling last year, a case management judge struck out parts of Bell's statement of defence and its counterclaim against Aird & Berlis, but the company appealed that decision and the whole thing landed back before the Federal Court in Toronto in late January.

"The copyright enforcement program is a tool of harassment and intimidation," says Steve Mason, an experienced IP litigator with McCarthy Tétrault, adding that the goal is to get average internet users to settle for "much larger amounts than the damages actually suffered."

Standing at a podium surrounded by other lawyers in dark suits and stacks of bound copies of legal filings, Mason says Aird & Berlis's copyright program inundates internet service providers with vast numbers of "unreliable and automatically generated" notices.

"They say they're just enforcing their rights. We say they're doing so in a manner that violates public policy."

In his own submissions to the judge, Dale Schlosser, who represented Aird & Berlis at the hearing, later calls Bell's claims "bald allegations (that) are scandalous and vexatious."

He also points out that Bell has acknowledged the legitimacy of the "notice and notice" regime and co-operated in other cases. If Bell wanted to challenge the actual system, Schlosser says, it should have objected during previous cases when Aird & Berlis sought orders requiring Bell to turn over its internet subscribers' names so the firm could sue them for copyright infringement.

When Mason rises to reply, things get tense. He makes one emphatic point after another before concluding: "They are shaking down innocent people for unjustified settlements, extorting innocent infringers."

After the hearing wraps just minutes later, the lawyers from both sides stand to shake each others' hands.

But Clark refuses to extend his hand to Mason.

"(Not after) you stand up here and say Aird & Berlis extorts people," he says, explaining his rejection of the typical custom in Canadian court.

A few days later, Clark says Mason sent him a partial apology, explaining that he misspoke and didn't mean to say "extort." (Bell's written pleadings don't contain the word.)

Bell declined to comment beyond the court proceedings and Clark doesn't want to say much more at this point, concerned about commenting directly on matters before the judge, who has not yet ruled on the motion.

But he adds, "I would have expected a little more courtesy."

## 'No one's getting rich off of these lawsuits'

Mason's dig at Aird & Berlis's copyright enforcement program stung because Clark himself designed it. It's the most prominent such program in Canada, and says he goes to great lengths to treat people fairly.

"We take our reputation as a major law firm very seriously," he told the Star in an interview before Mason's comments.

"In our view, it's a transparent litigation tactic to try to kick Aird & Berlis off the record," Clark says of Bell's arguments in its counterclaim and in its appeal.

He believes clients like Millennium have a legitimate reason to launch these lawsuits, noting that if mid-size studios don't actively enforce against copyright infringement, it's either harder to get distribution deals or they make less money from the deals.

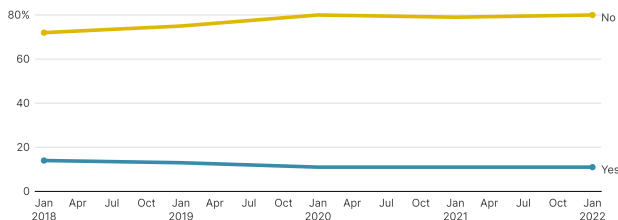
(Clark has acted for other studios, including Voltage Pictures, but only Millennium allowed him to comment for this article.)

Recent data suggests Canadians are less likely to access pirated content than they were in the past, particularly now there are more legal options, such as Netflix, Spotify and Amazon Prime, but many people still illegally stream pirated movies and TV shows online and don't seem to think it's a serious crime.

A 2022 survey of 2,000 adults conducted by the Canadian Internet Registration Authority found 80 per cent of respondents said they do not access pirated TV shows or movies — up from 72 per cent who said the same in 2018 — but 11 per cent of people said they still do.

## Yes, I'm accessing pirated film/TV content online

Survey participants were asked: In the last 12 months, have you intentionally accessed or streamed pirated film or TV content online (content that is copyright-protected and that you did not pay for)? Only 11% admitted they had. (Others said they either did not know or preferred not to answer.)



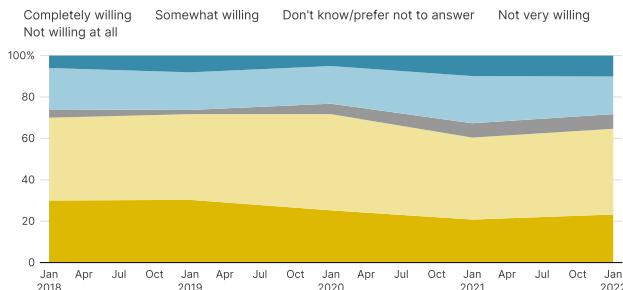
## Why? Cost, convenience and lack of availability

From "it's too expensive" to "everybody does it," those who admitted to accessing pirated content online were asked to select all their main reasons for doing so.

It isn't available in my region	38%
It is easier/more convenient	34%
I don't want to pay for it	30%
It's too expensive	24%
It's not available without a cable subscription	20%
I can't afford it	17%
It gets delayed in Canada	16%
It's normal/everybody does it	16%
I find it hard to purchase	12%
I tried to purchase it and it didn't work	12%
The creators already make enough money	10%

## OK, but would I pay?

Among those who accessed pirated content, about two-thirds said they are willing to pay for content — even if they can find the same content for free.



2,000 Canadian internet users 18 and older were surveyed in March 2022 via an online panel methodology. The findings were compared with results from previous years if available.

SOURCE: CANADIAN INTERNET REGISTRATION AUTHORITY

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"There's considerable online infringement out there," Clark says. "I send tens of thousands of warning notices every month and it's still there and it's still been going on for a long time."

He points to a recent report from the International Intellectual Property Alliance (a coalition of U.S. trade associations representing the music, film, TV and publishing industries), which notes that box office revenue in Canada and the U.S. could increase by about 15 per cent if pre-release movie piracy could be stopped.

When it comes to the process itself, Clark says it's all supervised by the Federal Court and not meant to harass people or force them into settling.

In fact, he says he asks for confidentiality orders to protect the names of the people his clients sue and includes information on pro-bono legal resources in the cover letters to every defendant.

He also requires his clients to agree to accept settlements in proportion to what they believe the defendants can afford to pay and says he's dropped cases when he's learned someone is on social assistance. "The deal there is we're not taking anyone's rent money away," he says. "No one's getting rich off of these lawsuits."

Clark encourages people to get legal representation specifically so they don't feel intimidated, he says, adding that no one has ever filed a complaint with the Law Society of Ontario over his conduct.

"Our goal here ... is to try to get people to have the equivalent of a speeding ticket now and then, and to learn," he says.

"A lot of people need to learn. And sometimes the only way to learn is by getting caught and paying the price."



Christine Dobby is a business reporter for the Star.

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