

Federal Court issues landmark website-blocking injunction with significant implications for ISPs

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In the first order of its kind in Canada, the Federal Court has issued an injunction directing named internet service providers (ISPs) to prevent users from accessing certain websites operated by anonymous defendants that are alleged to infringe Canadian copyrights over a wide range of audiovisual works and broadcasts. This landmark decision offers a new remedy for copyright holders and media producers to prevent access from Canada to infringing content over the internet, and it provides a framework for ISPs to implement such a remedy while also benefiting from important safeguards. Although the Federal Court's order was shaped by the evidence submitted by the parties, its terms are likely to set the precedent for an increasing number of similar cases going forward.

The injunction arose in *Bell Media Inc. et al v. John Doe 1 dba GoldTV.biz et al.*, 2019 FC 1432 (*Bell Media*) [PDF], in which three Canadian media companies alleged that a number of defendants operated an unauthorized subscription and streaming service that allowed users to access television programs online, in violation of the *Copyright Act*. After multiple failed attempts to unmask the unknown website operators, the media companies brought a motion for an interlocutory injunction against a number of third-party ISPs to require them to take steps to restrict, if not eliminate entirely, access to the infringing websites. A number of third-party ISPs did not oppose the proposed order after negotiating terms relating to process, costs and indemnification. However, three ISPs opposed the motion. In particular, Teksavvy Solutions Inc. objected on several principled grounds, including that the Federal Court either had no jurisdiction or should refrain from issuing such blocking injunctions. Distributel Communications Limited and Cogeco Connexion Inc. did not oppose the motion *per se*, but took issue with the form of the order requested, which they argued was too onerous and intrusive on the business of the ISPs as neutral third parties.

After a two-day hearing in September 2019, the Federal Court directed all parties to attempt to bridge their differences about the form of a potential order. When these negotiations failed to resolve all disagreements, the Federal Court ruled on the interlocutory injunction motion.

The Federal Court held that it had jurisdiction to issue the blocking injunction requested, and it rejected Teksavvy's argument that the Court should refrain from exercising this jurisdiction either because the *Copyright Act* is silent as to blocking remedies or because the matter fell more squarely within the mandate of the Canadian Radio-television and Telecommunications Commission.

The Federal Court considered what legal principles should guide its application of the well-known *RJR-MacDonald* test in circumstances where a website-blocking injunction is aimed at innocent third-party ISPs. In presenting their case, the plaintiffs had relied on case law from the United Kingdom, in particular on the English Court of Appeal's decision in the *Cartier*

case, as affirmed by the U.K. Supreme Court (*Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658, aff'd [2018] UKSC 28). The Canadian Court accepted guidance from U.K. jurisprudence in spite of differences in the law of the two countries and Justice Gleeson expressly considered the *Cartier* factors in analyzing the balance of convenience prong of the injunction test.

In the result, the Federal Court's order in *Bell Media* includes the following key provisions:

- Within 15 days of the issuance of the order, the ISPs are required to block or attempt to block access by their residential customers to websites specified in a schedule of the order.
- The plaintiff media companies may seek to add domains or IP addresses to the schedule of websites – such a process will involve judicial supervision and an opportunity for the ISPs to object. Conversely, if the plaintiffs become aware that a domain or IP address listed in the schedule no longer has for its sole or predominant purpose to enable access to a targeted website, then the plaintiffs must remove such website from the schedule.
- The plaintiff media companies are required to indemnify the ISPs for (i) the reasonable marginal cost of implementing and updating the website blocking required by the order and (ii) any reasonably incurred liability, including defence costs, resulting from third-party claims as a result of the ISPs' compliance with the order.
- The ISPs may temporarily suspend website blocking under the order when necessary to correct over-blocking or to respond to technical or security concerns.
- The order terminates two years from its date of issue.

Bell Media brings Canada in line with other jurisdictions, notably the United Kingdom and Australia, where courts have issued website-blocking orders binding ISPs. Key takeaways from this landmark decision include the following:

- *Bell Media* provides clarity as to the availability of website-blocking orders in Canada and the legal framework for analyzing them.
- Although the *Bell Media* order is but one interlocutory injunction, its terms are likely to set the precedent for an increasing number of similar cases going forward.
- The order was tailored to the evidence before the Federal Court, but the Court could have accepted different terms if it had received different or better evidence, for example, as to less intrusive methods to target offending websites or alternative technical means.
- The Federal Court modified the form of order negotiated by the media companies with the majority of third-party ISPs, most importantly to increase judicial oversight over the process for adding websites to the schedule of blocked sites, thereby signaling the Court's appreciation of the onerous and potentially far-reaching nature of website-blocking orders.
- *Bell Media* involved anonymous websites redistributing entire audiovisual works and broadcasts, all without authorization or additional creative content. On the evidence, *Bell Media* did not raise material concerns about chilling unrelated expression or about depriving users access to lawful content. The injunction terms, or even the outcome of the motion, could have been different in such circumstances.

Bell Media will resonate in the Canadian telecommunications industry for months and years to come, and website-blocking orders are likely to be sought, and granted, with increasing

frequency going forward.

Osler acted for one of the Third-Party Respondents in this case. For clarity, the views expressed in this Osler Update reflect the personal views of the authors, and do not reflect the view of any Osler client.