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June 18, 2021

Online Pirates Can Be Blocked

Copyright holders in Canada have scored a major victory in the fight against online piracy. The Federal Court of Appeal (“FCA”) in *Teksavvy Solutions Inc v Bell Media Inc* recently affirmed that site blocking injunctions may be ordered against Internet Service Providers (or ISPs), even as third parties to a copyright infringement action.

LOWER COURT’S DECISION

On July 18, 2019, the plaintiffs, Bell Media Inc., Groupe TVA Inc. and Rogers Media Inc. commenced an action for copyright infringement against the operators of goldtv.biz and goldtv.ca, websites offering unauthorized online subscription services to programming content.

On July 25, 2019, the Federal Court issued an interim injunction, ordering that the GoldTV websites be immediately disabled. The defendants could not be made to comply with the Order as they could not be identified.

Thus, on July 31, 2019, the plaintiffs filed a separate motion requesting that the ISPs be named as third parties to the motion and be ordered to block access to the GoldTV websites by at least their residential wireline Internet service customers. Teksavvy Solutions Inc., one of the ISPs, opposed the motion on the basis that the subject matter of the order, should be addressed by the CRTC rather than the Federal Court and that the plaintiffs had failed to satisfy the test for an interlocutory injunction in the context of copyright infringement:

- the evidence discloses a strong *prima facie* case of copyright infringement by the defendants;
- the plaintiffs would suffer irreparable harm if the order does not issue; and
- the balance of convenience favours granting the injunction.

On November 15, 2019, the Federal Court issued an unprecedented mandatory interlocutory injunction in *Bell Media v Gold TV Biz* requiring a number of Canadian ISPs (third parties and not defendants in the action), including Teksavvy, to block their customers from accessing GoldTV websites operated by the anonymous defendants.

To date, the defendants have yet to file a defence or participate in the action in any way.

APPEAL DECISION

Teksavvy appealed the Order for a mandatory interlocutory injunction to the FCA. The appeal dealt with the following issues:

- Whether the Federal Court had the power to grant a site-blocking order;
- If so, the relevance of freedom of expression; and
- Whether the Order was just and equitable.

First, on the issue of whether the court had the power to grant a site-blocking order, the FCA rejected Teksavvy's assertion that sections 41.25 to 41.27 (the "notice and notice" provisions) of the *Copyright Act* denies copyright owners the benefit of a site-blocking order, on the basis that nothing in these provisions conflicted with the order sought by the plaintiffs. The Court held that the fact that Parliament had implemented a notification regime did not impose a limit on other remedies to which a copyright owner may be entitled.

The FCA also referenced other examples of injunctive remedies not specifically mentioned in the *Copyright Act* that could be imposed on third parties, such as *Norwich* orders and *Mareva* injunctions. The FCA concluded that a site-blocking order fell within section 34(1) of the *Copyright Act,* which affords copyright owners broad entitlement to remedies, such as injunctions, damages, accounts, and delivery up. The only question was whether the site-blocking order should be granted in this case.

The FCA went on to reject Teksavvy's argument that because section 36 of the *Telecommunications Act* contemplated net neutrality by ISPs, it prevented the Federal Court from ordering an ISP to block a website. Section 36 of the *Telecommunications Act* provides that unless the Commission approves otherwise, a Canadian carrier cannot control the content or influence the meaning or purpose of telecommunications carried by it for the public. The court agreed with the plaintiffs that complying with a court-ordered injunction did not amount to "controlling" or "influencing". Rather, in such circumstances, it would be the ISP that would be controlled or influenced by the Order. Thus, the Court concluded that this wording was general and did not displace the Federal Court's equitable powers of injunction, including the power to grant a site-blocking order.

The FCA also went on to find that *Google Inc v Equustek Solutions Inc*, involving a de-indexing order, was good authority for the availability of a site-blocking order in such circumstances. Nevertheless, it held that each case must be considered on its facts to determine whether and what type of injunction may be appropriate in the circumstances.

Second, on the relevance of freedom of expression, the FCA rejected Teksavvy's assertion that ISPs were engaged in expressive activity in providing customers with access to certain websites. Instead, the Court held that ISPs were common carriers obliged to maintain net neutrality and should not presumably show any preference for one website over another based on its content. Furthermore, the Court deemed it unnecessary to decide whether the Charter was engaged and whether freedom of expression was infringed because it was found not necessary for the Court to engage in a detailed Charter rights analysis separate and distinct from the balance of convenience analysis already considered. Although the Court acknowledged that Teksavvy may have desired a more fulsome analysis of freedom of expression, the FCA disagreed that the lower court's analysis was inadequate.

Lastly, on the issue of whether the order for a mandatory injunction was just and equitable, the FCA reviewed the three-factor test from *RJR-Macdonald v Attorney General (Canada)* and concluded that the lower court had not committed a reviewable error. In particular, the Court found that the plaintiffs' case for copyright infringement significantly exceeded the requirements to demonstrate a strong *prima facie* case or strong likelihood of success. The Court also considered the factors from a series of UK decisions (collectively, the *Cartier* decisions) to inform the assessment of irreparable harm and balance of convenience. Teksavvy argued that the judge failed to establish one of these factors, namely the effectiveness of the site-blocking order, given that the order had to be updated several times to counter the defendants' actions. Although the Court acknowledged that this was an interesting point, it did not amount to a palpable and overriding error in the lower court's analysis.

IMPLICATIONS

The FCA's decision in *Teksavvy v Bell Media* represents another step forward in combating online piracy. It is also consistent with the Canadian Government's approach to the Consultation on a Modern Copyright Framework for Online Intermediaries. Section 4.4.1 of the Copyright Framework contemplates the possibility that the *Copyright Act* could be amended to provide expressly for injunctions against

intermediaries who facilitate services that may lead to online copyright infringement, despite not being directly liable. Such injunctions could include site-blocking as in this decision or the de-indexing as in *Google v Equustek.* This scheme will put Canada in line with other international jurisdictions, including Europe, US, UK, and Australia, in the fight against online piracy.