

Federal Court of Appeal Upholds Canada's First Copyright Site-Blocking Order

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On May 26, 2021, the Federal Court of Appeal released its decision in *Teksavvy Solutions Inc. v. Bell Media Inc., et al.*,¹ upholding the first site-blocking order issued by the Federal Court in a copyright infringement case. The decision comes as a long-awaited appellate confirmation that site-blocking orders are available in copyright cases in Canada.

Teksavvy involved a motion by the plaintiffs, Bell Media Inc., Groupe TVA Inc. and Rogers Media Inc., requesting that a number of Canadian Internet service providers (ISPs) be ordered to block access to certain websites. The websites in question, *goldtv.biz* and *goldtv.ca*, were operated by unidentified defendants. They offered unauthorized subscription services that provided access to programming content over the Internet. The Federal Court granted the order, which required the named ISPs, none of whom were defendants or accused of any wrongdoing, to block their subscribers' access to the websites.

The appeal, brought by *Teksavvy Solutions Inc.*, considered three main issues: (1) Whether the Federal Court had the power to grant a site-blocking order, pursuant to its equitable jurisdiction, or under the *Copyright Act*,² or both; (2) If so, the relevance of freedom of expression; and (3) Whether the Order was just and equitable.

On the first issue, the Court confirmed that the Federal Court has the equitable jurisdiction to issue site-blocking orders under sections 4 and 44 of the *Federal Courts Act*.³ The Court's jurisdiction to do so is reinforced by subsection 34(1) of the *Copyright Act*, which provides that a copyright owner is "entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right."

The Court found that the lack of an express mention of a site-blocking remedy in the *Copyright Act* does not limit a court's broad equitable power to grant those and other effective remedies. Indeed, the Court pointed to various remedies recognized by the Supreme Court of Canada that are not specifically mentioned in the *Copyright Act*, including punitive damages, declaratory judgments, and *Norwich* orders. It also confirmed that site-blocking orders do not conflict with the *Copyright Act*, including the notice-and-notice regime and other measures targeted specifically at online intermediaries, or the *Telecommunications Act*,⁴ including the principle of net neutrality and the regulatory authority of the Canadian Radio-television and Telecommunications Commission (CRTC).

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Importantly, the Court also held that plaintiffs are not necessarily required to avail themselves of the notice-and-notice process, or exhaust all other potential measures, before seeking a site-blocking order, provided that the court is convinced that a defendant has and will maintain its anonymity and ignore an injunction against it.

On the second issue, the Court stated that it was not necessary to determine whether site-blocking orders engage or infringe freedom of expression as defined in the *Canadian Charter of Rights and Freedoms*.⁵ Rather, when asked to grant a particular equitable remedy, courts may consider freedom of expression as part of the “balance of convenience” analysis, consistent with the approach taken by the Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc.*⁶

In its conclusion on this point, the Court affirmed the adequacy of the motion judge's analysis, which had confirmed that freedom of expression does not require the facilitation of unlawful conduct. Notably, it also held that that ISPs do not engage in expressive activity when they provide their customers with access to certain websites, and that, as a result, their everyday activities do not engage freedom of expression.

On the final issue, the Court held that the motions judge did not err in determining that it was just and equitable to grant the requested order or by considering factors relied upon in foreign law in arriving at that conclusion. In particular, the motions judge was justified in considering the factors in the ground-breaking UK *Cartier* case⁷ in determining that a site-blocking order was just and equitable, even though those factors were grounded in a European Union Directive. The Court explained that “*it was entirely appropriate for the Judge to look abroad for inspiration when faced with a motion for an order that was unprecedented in Canada.*”

This landmark decision, confirming the availability of site-blocking orders in copyright cases in Canada, is a major victory for rights holders. The decision represents a vital contribution to the remedial toolbox available to copyright owners in the enforcement of their rights against sites and services that make infringing content available in Canada.

Casey Chisick and Eric Mayzel of Cassels represented a coalition of music industry organizations—Music Publishers Canada, Music Canada, the International Confederation of Music Publishers (ICMP), and the International Federation of the Phonographic Industry (IFPI)—as interveners before the Federal Court of Appeal. This decision is the latest in a series of recent interventions by the Cassels copyright litigation team in precedent-setting appeals, including before the Supreme Court of Canada.

¹ 2021 FCA 100.

² *Copyright Act*, R.S.C. 1985, c. C-42.

³ *Federal Courts Act*, R.S.C. 1985, c. F-7.

⁴ *Telecommunications Act*, S.C. 1993, c. 38.

⁵ *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

⁶ 2017 SCC 34.

⁷ *Cartier International AG v. British Telecommunications plc*, [2018] UKSC 28, aff'g *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658.

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