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International Institute of Communications - Canadian Chapter

Communications and Copyright Law

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Bell Media Inc. v. GoldTV.Biz, 2019 FC 1432

- “Within fifteen (15) days of the issuance of this Order, the Third Party Respondents shall block or attempt to block access by at least their residential wireline Internet service customers to the websites or online services identified at Schedule 1 to this Order (the “Target Websites”), by blocking or attempting to block access to all of the Target Websites’ domains, subdomains and IP addresses identified therein.”
- “Recent studies have shown that website blocking has operated as an effective tool in addressing digital piracy, despite the familiar misperceptions about its efficacy and alleged potential for abuse. Currently, more than 40 countries have either enacted or are under an obligation to enact some form of no-fault injunctive relief to block access to piracy sites.” Section 512 of title 17, a report of the U.S. register of copyrights, May 2020

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MEMORANDUM OF FACT AND LAW OF TEKSAVVY SOLUTIONS INC.

- 1. Is an interlocutory site-blocking injunction for copyright infringement available at law? **[No.]**
 - **1. The site-blocking remedy is not available in this statutory context**
 - **a. Site-blocking is not an available remedy under the Copyright Act**
 - **b. A site-blocking injunction frustrates s. 36 of the Telecommunications Act**
 - **2. Site-blocking is not appropriate as an interlocutory remedy**
 - **3. In the absence of a legislative framework, courts are ill-equipped to make site-blocking orders and should decline to make such orders**
- 2. If so, did the motion judge err in law in failing to take into account freedom of expression in deciding whether the injunction was just and reasonable in the circumstances? **[Yes.]**
- 3. Did the motion judge otherwise err in law in finding that a site-blocking injunction was just and equitable in the circumstances? **[Yes.]**
 - **1. The motion judge erred in law in his analysis of irreparable harm**
 - **2. The motion judge erred in applying lower thresholds than required for irreparable harm and balance of convenience**
 - **3. The motion judge erred in law in importing factors from a foreign jurisdiction into the injunction test**
- Interveners: CIRA, CIPPIC, BCCLU, Coalitions: Music, Movies and TV programs, Publishers & Sports

Rogers Communications Inc. v. Voltage Pictures, LLC, 2018 SCC 38

- “41.26(2) prohibits an ISP from charging a fee for ... (1) determining, for the purposes of forwarding notice electronically, who was assigned the impugned IP address at the time of the alleged infringement; (2) taking all steps necessary to verify that the ISP has done so accurately; and (3) taking all steps necessary to verify the accuracy of records which would permit the ISP to identify the name and physical address of the person to whom notice was forwarded.”
- “there is a distinction between an ISP’s obligation under the notice and notice regime to ensure the accuracy of its records that allow the identity of the person to whom an IP address belonged to be determined, and an ISP’s obligation under a *Norwich* order to actually identify a person from its records. While the costs of the latter are recoverable, the costs of the former are not.”

Voltage Pictures, LLC v. Salna, 2019 FC 1047

“The evidence shows that, on average, it takes 24 minutes for Rogers to look up the customer name and address information for an IP address with two timestamps (or 12 minutes per time stamp). However, in view of my finding above that it would have taken Rogers a total of 115.25 minutes to identify the customer information associated with the five IP addresses in the *Norwich* Order, Rogers is entitled to compensation of \$67.23, plus HST, for searching and disclosing the customer name and address information associated with the five time stamps in the *Norwich* Order (i.e., $\$35.00 \times 115.25 \text{ minutes} / 60 \text{ minutes} = \67.23). Voltage shall pay Rogers the amount of \$67.23, plus HST, within 30 days of the date of this order.”

Voltage Pictures, LLC v. Salna, 2019 FC 1047

“Voltage’s proposed reverse class proceeding should not be certified...Voltage has failed to fulfill all of the requirements in [Rule 334.16](#).

Voltage has not met the low threshold requirement that the pleadings disclose a reasonable cause of action with respect to Authorizing Infringers who are internet subscribers...

A class proceeding is not a preferable procedure for the just and efficient resolution of any common issues which may exist...The factual context in which an internet subscriber may permit users to access his or her internet connection could vary widely from one class member to another.

There are other available means of resolving Voltage’s claims that are preferable; notably, joinder or consolidation.

Voltage’s litigation plan depends upon the notice-and-notice regime and places an additional burden on ISPs, something which was not contemplated by Parliament. Voltage seeks to appropriate the notice-and-notice regime as a litigation support service.

The proposed class respondents lack the necessary incentive to defend the application with diligence and vigor.”

ME2 Productions, Inc. v. Doe, 2019 FC 214

- “This underlines the importance of accuracy – starting with the copyright owner in bringing forward the best available evidence as to the basis for its belief that unlawful downloading and sharing has occurred, that it is linked to a particular IP address, that this address is within the bank of IP addresses allocated to the ISP, and that the required notice has been provided to the ISP...
- Second, the key evidence in support of the granting of the *Norwich* order is set out in the Arheidt Declaration, but it is simply an exhibit to an affidavit. It is therefore beyond the reach of cross-examination ...the key evidence of alleged copyright infringements must normally be set out in an affidavit, sworn either by a person with direct personal knowledge of how the evidence was gathered, or by someone who can explain why such evidence is not available and why they have reason to believe the truth of the material they are submitting.”

ME2 Productions, Inc. v. Doe, 2019 FC 214

- “The information regarding the alleged breach emerged in the context of a motion for a *Norwich* order, brought in support of an action for copyright infringement. The CMJ found that the statutory damages claim could be addressed as part of the same proceeding. This is a matter fully within the discretion of the CMJ and, in view of the standard of review and the “elbow room” that ought to be accorded to a CMJ in managing such procedural questions, I do not find any reversible error in the particular circumstances of this case...
- The amendments do not prescribe any particular procedure for such claims. The CMJ in this case adopted a sensible and practical approach, drawing on the analogous situation of a contempt of court proceeding.”

TVB Productions v Doe, Bell Canada, Sasktel, Xplornet (Non-Party Respondents), Order Aalto CMJ, March 3, 2020

- “THESE THREE MOTIONS, brought by the Plaintiff, for an Order as against the Non-Party Respondents for disclosure of identities of various parties (as previously ordered by this Court) and in respect of a claim for statutory damages in accordance with s. 41.26(3) of the Copyright Act, R.S.C. 1985 c. C-42 seeking directions to proceed to a sanctions hearing before a judge of the Federal Court...
- Upon hearing the arguments and submissions of the Parties, the Court may determine whether or not any of the claims for statutory damages as against the Non-Party Respondents should proceed to a hearing to be considered on its merits and, if so, in what manner”

Bell Canada v. Canada (Attorney General), 2019 SCC 66

Abella and Karakatsanis JJ. in dissent: “Finally, Bell and the NFL argue that the CRTC’s interpretation of s. 9(1)(h) conflicts with the operation and purpose of the Copyright Act. It is well established that the... CRTC may not choose to pursue its objectives in ways that are incompatible with the purposes of the Copyright Act or which operationally conflict with its specific provisions: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, at para. 45. But given the NFL’s repeated submission that “[U.S.] advertising is not even part of the Super Bowl game or covered by the NFL’s copyright, much less integral to the Super Bowl”, it can hardly come as a surprise that the CRTC adopted the same position: A.R., vol. II, at p. 115 (emphasis added). We agree with Near J.A. that there is no operational conflict with the Copyright Act.”

Keatley Surveying Ltd. v. Teranet Inc., 2019

SCC 43

- “Section 12 states that the Crown will have copyright when a work is prepared or published by or under its direction or control. Critical to the assessment of whether Crown copyright subsists, is the notion and extent of government direction or control in relation to a work... While it is true that s.12 has two parts — the prepared prong and the published prong — these two “prongs” are different only to the extent that preparation and publication are different processes. The goal of the s.12 inquiry in its entirety is to determine whether the degree of direction and control of the Crown over the preparation or publication of the work is sufficient to vest copyright in the Crown. While the manner of assessing whether the requisite degree of direction or control is present will necessarily vary depending on whether Crown copyright is asserted on the basis of preparation or publication, the overarching question remains: has the Crown exercised sufficient direction or control, consistent with the purposes of Crown copyright, that it can be said that Crown copyright subsists?”

York University v. The Canadian Copyright Licensing Agency (Access Copyright), 2020 FCA 77

- S73 (formerly s.68(2)) “Without prejudice to any other remedies available to it, the collective society concerned may collect the royalties specified in an approved tariff or fixed by the Board under subsection 71(2) for the applicable period and, in default of their payment, recover them in a court of competent jurisdiction.”
- “I conclude that a final tariff would not be enforceable against York because tariffs do not bind non-licensees... Acts of infringement do not turn infringers into licensees so as to make them liable for the payment of royalties.”
- Application to other regimes:
 - Equitable remuneration for sound recordings (makers and performer are “entitled to be paid” under s.19)
 - Private copying (“...eligible makers are entitled to receive remuneration” under s.81)
 - Retransmission ss.31(2)(d), 73, 75(3)

Statement Amending the Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries, Canada Gazette, March 24, 2020

- “Recent and expected developments relating to this area of law would require these limitations to be repealed. The U.S. *Music Modernization Act*, enacted in late 2018, changed relevant aspects of U.S. law and requires certain immediate changes to the 2014 Ministerial Statement. The CUSMA will subject Canada to new national treatment obligations with respect to the right to equitable remuneration for U.S. rights holders such that further changes will be required to the 2014 Ministerial Statement once the agreement enters into force.”
- Ministerial Statement repealed exception for equitable remuneration for U.S. sound recordings for: (1) terrestrial radio, (2) background music, and (3) pre-1972 sound recordings.

Pending

- Making available right (MAR) reference appeal (FCA)
 - Appeal from Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013), Decision, Aug 25, 2017.
- Anti-spam (CASL) Charter and constitutional challenge
 - Appeal from Compliance and Enforcement Decision CRTC 2017-367, Decision, Oct. 2017

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**Guide to the
Copyright Board
of Canada**

2020

**Incorporating the User's Guide
to Canadian Copyright Tariffs**

*by Peter S. Grant, Grant Buchanan,
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