

Canadian Federal Court issues dynamic website-blocking injunction to combat unauthorized hockey webcasts

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On May 27, 2022, the Canadian Federal Court issued a novel dynamic website-blocking injunction to assist copyright owners in their fight against online piracy. In *Rogers Media Inc. v. John Doe 1*, 2022 FC 775 (*Rogers Media*), the plaintiff media companies sought an interlocutory injunction requiring the third-party respondents, established Canadian Internet service providers (ISPs), to block Internet protocol (IP) addresses that host copyright-infringing pirate streams of live National Hockey League (NHL) broadcasts. Extending its own precedent authorizing a site-blocking injunction directed to enumerated websites, the Federal Court issued the injunction directing the ISPs to block access to certain IP addresses identified in real time during NHL hockey matches.

While the blocking order was limited to the 2021–2022 NHL season, it could have far-reaching implications. The plaintiffs may seek further injunctions in respect of future NHL seasons and other copyright owners seem likely to seek similar injunctions. While the injunction was tailored to the facts at issue, the Court's reasons provide a legal framework and guideposts that will assist other copyright owners in seeking dynamic website-blocking injunctions in the future.

Background and injunction

The plaintiffs, including Rogers Media Inc., Bell Media Inc. and Groupe TVA Inc., own the exclusive right to broadcast live NHL games in Canada. Like other copyright owners, they have faced significant challenges in protecting their content against pirates who anonymously broadcast NHL games from shifting IP addresses. To stop these unknown defendants from unlawfully streaming live NHL games, the plaintiffs sought an interlocutory injunction ordering the respondent ISPs to prevent their users from accessing IP addresses hosting the unauthorized game broadcasts.

The Canadian Federal Court has issued a website-blocking order before, in *Bell Media Inc. v. GoldTV.Biz*, 2019 FC 1432 (*GoldTV*) (affirmed on appeal). In *GoldTV*, however, the injunction enumerated the websites to be blocked and provided that targeted IP addresses could only be added by Court order, a potentially slow and cumbersome process. In contrast, dynamic blocking involves continuously blocking IP addresses that host streams of unauthorized copyrighted content because the unknown, infringing defendants shift their broadcast between different IP addresses in an effort to evade static blocking.

Certain third-party ISP respondents opposed certain terms in the plaintiffs' proposed order, citing concerns about their own networks and customers, and with the financial implications of implementing and monitoring such a regime at the behest of third parties or even competitors. These respondent ISPs sought to vary the terms of the proposed order to protect against blocking non-infringing content, prevent overburdening network infrastructure and ensure compensation for the cost of infrastructure changes necessary to implement dynamic blocking.

Weighing the evidence in the plaintiffs' favour, the Federal Court ultimately issued an injunction on terms significantly different than those sought by the plaintiffs. While acknowledging the importance of protecting the public, as well as the interests of third-party ISPs, the Court emphasized the blatant infringement of the plaintiffs' exclusive copyrights and the limited nature of the order in light of the few games remaining in the 2021–2022 NHL season.

Following the legal framework articulated in *GoldTV*, the Federal Court applied the well-established three-part test governing interlocutory injunctions in Canada. The Court accepted that the plaintiffs had shown a strong *prima facie* case that the targeted conduct caused irreparable harm and that the balance of convenience favoured the issuance of the proposed injunction. The Honourable Justice Pentney also had regard for the so-called *Cartier* factors (initially developed in *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658, *aff'd* [2018] UKSC 28), which the Court also applied in *GoldTV*.

Terms of the Order

The Federal Court's website-blocking injunction includes the following terms:

- The plaintiffs must collectively appoint an agent to notify the ISPs of IP addresses to be blocked and when to unblock them.
- ISPs must block or attempt to block access to IP addresses streaming infringing content as identified by the plaintiffs' agent.
- ISPs may comply with the order by using manual IP address blocking, automated IP address blocking or an alternative technical process of which they have given the plaintiff media companies reasonable notice.
- ISPs must disable access to the IP addresses "as soon as practical," defined in the order as "within thirty (30) minutes of the start of an NHL Live Game Window and at least every hour thereafter" until the end of the game. IP addresses must then be unblocked once the live game window is closed.
- The order outlines mechanisms for both the plaintiffs and the ISPs to provide notice and contact information to affected customers.
- ISPs must comply with the order immediately if possible, or within seven days. Any ISP that cannot comply within 15 days must advise the plaintiffs.
- In certain enumerated circumstances, ISPs may temporarily suspend dynamic blocking "no longer than ... reasonably necessary," upon timely notice to the plaintiffs.

- The plaintiffs must retain an independent expert or experts to oversee the identification of IP addresses for blocking, compile complaints from the public related to blocked content, assess the effectiveness of blocking, and issue related reports to the Court and to the public.
- The plaintiffs shall indemnify the third-party ISPs for the marginal cost of implementing the order up to a maximum of \$50,000 per ISP.
- The order is temporary, and will only be in effect until the end of the 2021–2022 NHL season.

Key takeaways

The *Rogers Media* order is the first of its kind in North America. Key takeaways from the case include the following:

- The Court sought to balance the financial and copyright interests of the plaintiffs with the public's interest in open access to content and the third-party ISPs' network infrastructure and competitive interests.
- The order requires ISPs to comply with dynamic blocking only to the extent of their IP blocking capacity at the time of each game.
- ISPs have no obligation to verify whether the IP addresses provided by the agent are in fact hosting infringing content.
- The order explicitly affirms an ISP's right to raise concerns about the order and its renewal, and to oppose related or similar orders that may be sought in the future.

Osler was pleased to represent one of the ISP respondents on the injunction. The views expressed in this Osler Update are those of the authors, and do not reflect the view of any Osler client.