Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC.

Appellant

- and -

BELL MEDIA INC., GROUPE TVA INC., ROGERS MEDIA INC., JOHN DOE 1 DBA GOLDTV.BIZ, JOHN DOE 2 DBA GOLDTV.CA, BELL CANADA, BRAGG COMMUNICATIONS INC. dba EASTLINK, COGECO CONNEXION INC., DISTRIBUTEL COMMUNICATIONS LIMITED, FIDO SOLUTIONS INC., ROGERS COMMUNICATIONS CANADA INC., SASKATCHEWAN TELECOMMUNICATIONS HOLDING CORPORATION, SHAW COMMUNICATIONS INC., TELUS COMMUNICATIONS INC., and VIDEOTRON LTD.

Respondents

- and -

CANADIAN INTERNET REGISTRATION AUTHORITY, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, FIAPF HEADQUARTERS ASBL (FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS DE FILMS--FIAPF), CANADIAN MUSIC PUBLISHERS ASSOCIATION, INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS, MUSIC CANADA, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, INTERNATIONAL PUBLISHERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL AND MEDICAL PUBLISHERS, AMERICAN ASSOCIATION OF PUBLISHERS, THE PUBLISHERS ASSOCIATION LIMITED, CANADIAN PUBLISHERS' COUNCIL, ASSOCIATION OF CANADIAN PUBLISHERS, THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, DAZN LIMITED and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENERS

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TABLE OF CONTENTS

I. INTRODUCTION

1. The Internet is frequently the home of all manner of illegal activity, including the mass dissemination of infringing copyrighted material. Offenders operate under cloaks of anonymity, operating download and streaming sites and servers typically from outside Canada, flouting court orders, and undermining the rule of law. Voluntary takedown requests are ignored or deteriorate into a futile game of whack-a-mole. Claimants have few if any direct means of enforcing court orders against such offenders. Blocking orders to be implemented by Internet service providers ("ISPs") are one of the only means available to disrupt these and other illegal business models.[1]

2. At least 42 countries have adopted and implemented blocking orders directed at ISPs.[2] Blocking orders have been granted to protect musical works and sound recordings,[3] movies and television productions,[4] books, scientific and medical

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[1] Jo Oliver and Elena Blobel, "Website Blocking Injunctions — A Decade of Development", in Jacques de Werra (Ed et asl, Droit d'auteur 4.0, Schulthess Verlag (2018) [*Oliver Website Blocking Injunctions*], Australia Explanatory Memorandum to the *Copyright Amendment (Online Infringement) Bill 2015*; Barry Sookman, *Sookman: Computer, Internet and Electronic Commerce Law* (Thomson Reuters, 2020) at §§3.7(x)(ii)(F)(i), 11.8(c)(i) [Sookman].

[2] Or are legally obligated to adopt and implement such orders. The Interveners refer herein to numerous international authorities including (official and unofficial) translations thereof. See also Sookman, *supra* fn 1 at § 3.7(x)(ii)(F)(i); Nigel Cory, *How Website Blocking Curbing Digital Piracy Without "Breaking the Internet"* (Information Technology & Innovation Foundation, August 2016); Nigel Cory, *The Normalization of Website Blocking Around the World in the Fight Against Piracy Online* (Information Technology & Innovation Foundation, June 2018); *Oliver Website Blocking Injunctions, supra* fn 1.

[3] *Dramatico Entertainment Limited v British Sky Broadcasting Ltd*, [2012] EWHC 1152 (Ch) (May 2, 2012); *Australasian Performing Right Association Ltd v Telstra Corporation* [2019] FCA 751, Federal Court of Australia (Apr. 3, 2019); *LSG - Wahrnehmung von Leistungsschutzrechten GmbH v T-Mobile Austria GmbH*, Case No. 4 Ob 121/17y, Austria, Supreme Court (Oct. 24, 2017) [*LSG*]; *RettighedsAlliancen v Telenor A/S,* Denmark, Court of Frederiksberg (Jul. 4, 2018) [*RettighedsAlliancen*]; *IFPI et al v Anvia Oyj*, Finland, Market Court (Apr. 29, 2016) [*IFPI Finland*]; *SCPP v. Orange et al*, No. RG 19/07936, France, H.C. of Paris (Oct. 17, 2019) [*SCPP 2019*]; *SCPP v Orange S.A. et al*., Case No. RG: 16/05527, France, H.C. of Paris (Jul. 7, 2016); *STEF - Samband tónskálda og eigenda flutningsréttar v Fjarskiptum hf*., Case No. K-8/2013, Iceland, District Court of Reykjavik (Oct. 14, 2014) [*PRS Iceland*]; *Ziggo BV et al. v Stichting Brein*, Case No. 200.243.005/01, Netherlands, Amsterdam Court of Appeal, (June 2, 2020) [*Ziggo Appeal*].

[4] See, *e.g.*, *Roadshow Films Pty Ltd. & Ors. v Telstra Corporation Ltd. & Ors,* NSD 239 of 2016, Federal Court of Australia (Dec. 16, 2016) [*Roadshow* (2016)]; *Roadshow Films Pty Ltd. & Ors. v Telstra Corporation Ltd.*, [2020] FCA 507 (Federal Court of Australia) [*Roadshow* (2020)]; *UPC Telekabel Wien GmbH v Constantin Film*, Case No. C-314/12, Court of Justice of the EU (Mar. 27, 2014) [*UPC Telekabel*]; *LSG, supra* fn 3; *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd,* [2013] EWHC 3479 (Ch); *Judgment No. 909 FS-P+B+R+I*, France, Cour de Cassation République Française (July 6, 2017) [*Allostreaming*]; *UTV Software Communications Ltd v 1337X.TO*, *CS (COMM) 724/2019*, India, Delhi H.C. (April 10, 2019) [*UTV Software*]; *Warner Bros Entertainment Inc v Skymovies.live & Ors, CS (COMM) 409/2019*, India, Delhi H.C. (August 5, 2019);

publications,[5] and broadcasts and cinematographic and artistic productions of sporting events such as soccer (English football) matches.[6]

3. In recognition of the challenges of combatting pirate operators, courts have issued orders requiring ISPs to block access to websites (such as The Pirate Bay, FirstRow, and other forms of illegal services including streaming sites, stream-ripping sites and cyberlockers).[7] More recently they require ISPs to block computer servers that are used to stream or offer infringing content for downloading or to deliver unauthorized live streams. The orders frequently include "dynamic" or site-specific blocking orders which permit blocked online locations to be updated without requiring additional court orders to address circumvention actions by pirate operators. These latter orders have been used in some jurisdictions because, among other things, users are increasingly turning to unauthorized IPTV set-top boxes, apps and services to access infringing streams, rather than just freely accessible "linking" websites running on computers.[8]

II. THIS COURT HAS JURISDICTION TO GRANT BLOCKING ORDERS

4. The *Federal Courts Act* expressly confirms this Court's equitable jurisdiction and specifically its power to grant an injunction "in all cases in which it appears to the

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Twentieth Century Fox Film Corporation et al v Eircom et al, 2018 No. 6 COM, Ireland, H.C. of Dublin, Commercial (Jan. 15, 2018); *Civil Case No e3K-3-236-969/2019*, Lithuania, Supreme Court (July 4, 2019); *Disney Enterprises, Inc v M1 Ltd*, [2018] SGHC 206, H.C. of Singapore (Sept. 19, 2018); *Columbia Pictures Industries v Telefonica Espana et al*, Case No. 15/2018, Spain, Commercial Court No. 6 of Barcelona (Jan. 29, 2018) [*Columbia*]; *Telia Sverige AB v AB Svensk Filmindustri*, Case No. PMT 13399-19, Sweden, Patent and Market Court of Appeal (June 26, 2020) [*Telia*].

[5] *Elsevier B.V. v Banhhof AB*, Sweden, Stockholm Patent and Markets Court (Dec. 6, 2019) [*Banhhof*]; *Elsevier Inc et al v S.C.R.L. Societie Intercommunale Pour La Fiffusion De La Television,* Belgium, Brussels Company Court (Nov. 13, 2019)**;** *Telecom Control Commission Order*, Germany (Oct. 25, 2019; Nov. 13, 2019); *Bloomsbury Publishing PLC et al v BTT*, United Kingdom H.C. (May 19, 2015).

[6] *Football Association Premier League Ltd (FAPL) v British Sky Broadcasting Ltd,* [2013] EWHC 2058 (Ch); *FAPL. v British Telecommunications plc,* [2017] EWHC 480 (Ch.) [*FAPL v BT I*]; *FAPL v British Telecommunications plc,* [2017] EWHC 1877 (Ch); *FAPL v British Telecommunications Plc & Ors,* [2018] EWHC 1828 (Ch) (July 18, 2018); *FAPL. v. Get AS,* Case No. 18-039103TVI-OTIR/02, Norway, Oslo District Court [*Get AS*]; *FAPL. v. M1 Ltd,* Case No. HC/OS 211/2020, H.C. of Singapore; *Signbet PTE Ltd v M1 Limited,* Case No. HC/OS 1152/2018, H.C. of Singapore (Nov. 7, 2018); *La Liga Nacional de Futbol Professional v Telenor A/S,* Denmark, Court of Frederiksberg (April 15, 2019) [*La Liga v Telenor*]; *FAPL v M1 Limited & Ors*, Case No. HC-OS 331-2019, H.C. of Singapore (April 9, 2019); *Telefonica Audiovisual Digital, S.L.U.V. Vodafone Espana S.A.U.*, Commercial Court Madrid (Feb. 11, 2020) [*Telefonica Audiovisual*].

[7] See notes 2-6 above.

[8] *FAPL v BT I, supra* fn 6, paras 10-19; *La Liga v Telenor, supra* note 6 at 7-8; *Warner Bros. Entertainment Norge AS et al. v Telenor Norge AS,* Case No. 15-067093TVI-OTIR/05, Norway, Oslo District Court (September 9, 2015) [*Warner v Telenor*], *Telefonica Audiovisual*, *supra* fn 6.

court to be just and convenient to do so."[9] In *Google v. Equustek*, the Supreme Court of Canada specifically confirmed that this authority includes injunctive relief against a non-party intermediary that facilitates illegal activities online, including the infringement of intellectual property rights.[10]

5. TekSavvy seeks to distinguish *Equustek* from the present case by suggesting that the Supreme Court's reasons were limited to "de-indexing" websites from search engine results and cannot be relied on in the site-blocking context.[11] This argument is misguided. While the question of whether it is just and equitable to grant an injunction in a particular matter requires analysis of the relevant facts in each case, *Equustek* illustrates how longstanding equitable principles can be applied to achieve a just result in novel situations. It also presents a careful and considered analysis from our highest court that demonstrates how these principles apply to balance competing interests in a context that is highly analogous, in both its harm and relief, to the case at bar.

6. Writing for the majority in *Equustek*, Justice Abella accepted that "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited."[12] Neither the *Copyright Act* nor the *Telecommunications Act* limits this jurisdiction, which is also consistent with Canada's international treaty obligations.

(A) Blocking Orders Are Consistent with International Treaty Obligations

7. It is appropriate to consider Canada's treaty obligations as a factor in assessing the availability of blocking orders.[13] Domestic legislation is presumed to conform to Canada's treaty obligations. As the Supreme Court of Canada said in *R v. Hape*, "In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations."[14] Where the text of a legislative provision is ambiguous but international law may have influenced its purpose or context, the

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[9] *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*], ss. 4, 44.
[10] *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [*Equustek*].
[11] TekSavvy's Memorandum, para 35.
[12] *Equustek, supra* fn 10, para 23, citing Ian Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333.
[13] *Entertainment Software Association v. SOCAN*, 2020 FCA 100 [*ESA v SOCAN (2020)*], paras 81-92
[14] *R. v Hape*, [2007] 2 SCR 292, para 53 [*Hape*].

relevant international instrument should be examined as part of the overall task of discerning the meaning of the legislation.[15] In addition, where the scope of a statutory provision is capable of more than one meaning, courts should interpret the provision to be consistent with treaty obligations.[16]

8. This Court is being asked, among other things, to determine whether its broad equitable powers include the right to make blocking orders directed at ISPs and whether such powers should be exercised against infringing services. Canada is a party to numerous bilateral and multilateral conventions and treaties that require it to have measures that permit effective action against any act of online infringement of copyright, including expeditious remedies to prevent infringement and remedies that deter further infringement. These treaty commitments support, and may even require, the courts' powers to make blocking orders in appropriate circumstances.

9. Canada's treaty obligations exist in Article 41 of the World Trade Organization TRIPS Agreement ("TRIPS"), Article 14 of the WIPO Copyright Treaty ("WCT"), Article 23 of the WIPO Performances and Phonograms Treaty ("WPPT" and, together with the WCT, the "WIPO Treaties"), Article 20.88 of the recently ratified Canada-United States-Mexico Agreement ("CUSMA"), and Article 18.71 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP").[17] Under TRIPS, CUSMA, and CPTPP, remedies for copyright infringement must not be unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays. CUSMA and CPTPP also expressly require parties to the treaties, consistent with Article 41 of TRIPS, to provide enforcement procedures that permit effective and expeditious action by rights holders against copyright infringement that occurs in the online environment. The parties must also ensure that legal remedies are available for rights holders to address that copyright infringement. In fact, the WIPO Guide to the WCT posits that the

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[15] *ESA v SOCAN (2020)*, *supra* fn 13, para 84.
[16] *Hape, supra* fn 14, para 53; *Rogers Communications v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 [*Rogers v. SOCAN*], paras 41-49, interpreting the communication to the public right and noting it to be consistent with "Developments at the International Level."
[17] WTO, Uruguay Round of Multilateral Trade Negotiations, Art. 41; WIPO Copyright Treaty, Art. 14; WIPO Performances and Phonograms Treaty, Art. 23; Canada-U.S.-Mexico Agreement, Art. 20.88; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 18.71.

availability of injunctive relief directed at an ISP may be necessary to comply with Article 14 of the WCT.[18]

10. In addition, under CUSMA and CPTPP, parties are required to provide legal incentives for ISPs to cooperate with copyright owners, or take other action, to deter the unauthorized storage and transmission of copyrighted materials.[19] These obligations are reinforced by decisions of the Supreme Court of Canada that emphasize the desirability "that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results."[20]

(B) The *Copyright Act* Does Not Abrogate Equitable Jurisdiction

11. The motion judge noted correctly that the *Copyright Act* recognizes the equitable jurisdiction of a court to grant a site-blocking order.[21] Section 34(1) uses broad language, entitling a copyright owner to "**all remedies by way of injunction** … that **are or may be conferred** by law for the infringement of **a right**."[22] Unlike other sections of the *Act*,[23] section 34(1) uses the phrase "a right" broadly to encompass any type of right that is capable of being infringed. On a plain reading, a copyright owner is entitled to the same remedies afforded to the owner of any other form of intellectual property right (or, indeed, any right at all). In *Equustek*,[24] the Supreme Court of Canada affirmed the use of a global website de-indexing order to impede access to websites facilitating the online infringement of trade secret rights and breach of court orders.[25] Similar relief is appropriate to impede online copyright infringement.

12. None of the text, context, or purpose of the *Copyright Act* displace the court's equitable jurisdiction to grant a blocking order or Canada's obligations to ensure that its

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[18] Guide to the Copyright and Related Rights Treaties Administered by WIPO, CT-14.10 [WCT Guide].
[19] *CUSMA*, *supra* fn 17 Art. 20.88; *CPTPP, supra* fn 17, Art. 18.82.
[20] *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76, para 13.
[21] Reasons for Decision dated November 15, 2019, Appeal Book, Tab para. 29 [FC Decision].
[22] *Copyright Act,* RSC 1985, c C-42 [*Copyright Act*], s. 34(1) [emphasis added]. See also Sookman, *supra* fn 1**,** §3.7(X)(ii) footnote 2689-143 citing Government of Canada Bill C-32 Questions and Answers ("In Canada, courts have the ability to order the blocking of access to infringing material.")
[23] For example, see *Copyright Act*, s. 34(3) ("infringement of a right **conferred by this Act** …").
[24] *Equustek, supra* fn 10, paras 31-32.
[25] TekSavvy's attempt to distinguish between de-indexing and site-blocking orders is contrary to the understanding of the Supreme Court itself; see *Equustek*, *supra* fn 10, paras 18, 19, 40.

enforcement procedures permit effective and expeditious action by rights holders. The plain text of the statute is broad enough to recognize such relief and there is no express prohibition against granting it.

13. With respect to the context and purpose of the *Copyright Act*, the safe harbour and notice and notice provisions cited by TekSavvy[26] coexist comfortably with the availability of site-blocking remedies. Those provisions merely protect an ISP against *liability* for copyright infringement where it provides only the means for telecommunication or reproduction over the Internet.[27] They have no bearing on the availability of a blocking order, since that relief is not based upon an ISP's liability for infringement but instead upon its unique ability to help prevent ongoing harm resulting from infringement by a third party.[28] Indeed, in *Equustek*, the equitable de-indexing order was "[not] a finding of any sort of liability against Google for facilitating access to the impugned websites."[29] The same is true of a blocking order directed at an ISP.

14. Blocking orders and ISP safe harbours also coexist in the international context. That is particularly relevant because the *Copyright Modernization Act* (the "*CMA*"), which introduced safe harbours in the *Copyright Act*, was enacted expressly to adopt international norms, including the WIPO Treaties.[30] Although this Court has recently cautioned against relying on international norms as a pretext to "ignore the specific terms of the *Act*," it affirmed in examining subsection 2.4(1.1) that Canada's WCT obligations are "one element of the legislative purpose and context" behind the provisions of the *CMA*, "indeed an important element."[31]

15. The international context can therefore be instructive in considering the interaction between safe harbours and blocking orders. As noted, the authoritative WIPO

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[26] TekSavvy's Memorandum, paras 45-50, citing *Copyright Act,* ss. 2.4(1)(b) and 31.1(1) (the safe harbour provisions) and ss. 41.25 and 41.26 (the notice and notice provisions applying to an ISP).
[27] *Copyright Act,* ss. 2.4(1)(b), 31.1(1)–31.1(3). See also *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38, [2018] 2 SCR 643 [*Voltage*], para 27.
[28] FC Decision, para 29.
[29] *Equustek, supra* fn 10, para 49. See also para 53.
[30] Preamble to the *Copyright Modernization Act,* SC 2012 c 20, which introduced an ISP safe harbour and notice and notice, states that Parliament intended to "adopt coordinated approaches [to copyright infringement], based on internationally recognized norms," including those in the WIPO Treaties.
[31] *ESA v SOCAN (2020), supra* fn 13, paras 50.

Guide to the WCT posits that the availability of injunctive relief directed at an ISP may be required to comply with the WCT, notwithstanding any exemption from liability.[32] Consistent with that interpretation, blocking orders are available in many jurisdictions that also afford safe harbour protection to ISPs. The EU has adopted a Directive requiring Member States to enact legislation that under certain conditions protects Internet intermediaries, including an ISP that acts as a "mere conduit," from *liability* for their users' activities, but allows a rights holder to obtain an order requiring an ISP to take measures to terminate or prevent an infringement.[33] Other EU Directives specifically require Member States to ensure the availability of injunctive relief directed at ISPs, who are often "best placed to bring such infringing activities to an end."[34] The Supreme Court of Canada has considered these Directives and the WCT in interpreting provisions of the *Copyright Act*, even prior to the coming into force of the *CMA*.[35] Similarly, CUSMA refers to safe harbours as limitations that have the effect of precluding "*monetary* relief" against ISPs.[36]

16. The Court of Justice of the European Union (CJEU) has confirmed that injunctive relief directed to an intermediary is available to prevent infringement by its users, regardless of any liability of the intermediary.[37] Courts in many countries have also granted blocking orders where safe harbour provisions also exist.[38] Simply put, the international context reveals no conflict between statutory safe harbour provisions and the availability of equitable blocking orders. The availability of a blocking order in Canada is therefore consistent with international norms, which is both a relevant consideration[39] and one of the express goals of the *CMA*.

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[32] WCT Guide, *supra* fn 18, CT-14.10: "…applicability of injunctive relief … should be maintained."
[33] Directive 2000/31/EC (8 June 2000) [*eCommerce Directive*], Recital 45, Art. 12(3).
[34] Directive 2001/29/EC (22 May 2001) [*InfoSoc Directive*], Recital 59, Art. 8(3); Directive 2004/48/EC (29 Apr 2004) [*Enforcement Directive*], Recital 23, Art. 11.
[35] *SOCAN v. Canadian Assn. of Internet Providers*, 2004 SCC 45, paras. 97-98, 118, 125 [*SOCAN v. CAIP*]; *Rogers v. SOCAN*, *supra* fn 16, paras 45 & 49
[36] *CUSMA, supra* fn 17, Art. 20.88 [emphasis added].
[37] *Tobias McFadden v Sony Music,* [2016] CJEU C-484/14 (Sept 15, 2016), para 79. See also: *Tommy Hilfiger Licensing,* [2016] C-494/15 (July 7, 2016), para 22 (re: the sale of physical counterfeit goods).
[38] See, *e.g.*, *Cartier International AG v British Telecommunications plc*, [2018] UKSC 28 [*Cartier SC*], para 21; *RettighedsAlliancen*, *supra* fn 3 at 9 & 12; *PRS Iceland*, *supra* fn 3 at 12-13; *Roadshow, supra* fn 4, para 29.
[39] *Rogers v. SOCAN*, *supra* fn 16, para 41 & 49; *SOCAN v. CAIP*, *supra* fn 35, paras 63 & 97.

17. Similarly, the notice and notice regime in the *Copyright Act* does not abrogate the equitable jurisdiction of a court to issue a blocking order. The regime is directed at ISP *customers* and addresses a different challenge from a blocking order, which is often the only effective remedy against a website or service whose operator hides its identity or is located outside Canada. The notice and notice regime merely requires an ISP to forward a notice of claimed infringement from a copyright owner to an Internet user and to preserve certain information to identify that user for a one-year period.

18. When enacting the notice and notice regime, "**Parliament knew that the regime was only a first step** in deterring online copyright infringement," and that the copyright owner may proceed to sue the alleged infringer.[40] When litigation is pursued against that user, the notice and notice regime does not limit the jurisdiction of the court to grant equitable relief directed at a non-party ISP that is not liable for, but nevertheless passively facilitates, the infringing activity. Although the regime includes liability for an ISP that fails to comply with its obligations, it is unrelated to the availability of equitable relief against the ISP in a proceeding against another Internet user.[41]

(C) Net Neutrality Does Not Preclude Blocking Orders

19. TekSavvy argues that sections 27(2) and 36 of the *Telecommunications Act*[42] provide a statutory limitation on this Court's equitable jurisdiction to grant injunctive relief in the form of a blocking order, arguing that Parliament's intent was "that where the content of the Internet is to be controlled, this control will be exercised by the CRTC."[43] But the CRTC itself disagrees with this argument; its *FairPlay* decision makes clear that it does not have jurisdiction under the *Telecommunications Act* over matters of copyright infringement or to mandate site-blocking.[44]

20. TekSavvy also argues, more broadly, that blocking orders somehow "contraven[e] the net neutrality principle" enshrined in both the *Copyright Act* and the

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[40] *Voltage, supra* fn 27, para 45 [emphasis added]. See also para. 24.
[41] *Copyright Act,* s.41.26(3), which limits liability to an award of damages of not more than $10,000.
[42] *Telecommunications Act*, SC 1993, c 38.
[43] TekSavvy's Memorandum, para 61.
[44] Telecom Decision, CRTC 2018-384 (Oct. 2, 2018) [*FairPlay*], paras 63, 67, 70, 71, Appeal Book, Vol. 3, Tab X.

Telecommunications Act.[45] This submission is belied by the fact that numerous foreign jurisdictions that recognize net neutrality have nevertheless granted blocking orders.[46] In any event, TekSavvy's submissions neglect to explain what it means by "net neutrality," or even how the requested relief runs contrary to TekSavvy's understanding of the notion. A boundless interpretation of net neutrality is overbroad, out of step with international norms, and potentially dangerous.

21. Although the precise scope of net neutrality is not universally agreed upon or well-defined, it is clear that the international consensus is that it does not operate to protect unlawful conduct.[47] In the EU, net neutrality is understood as "rules to safeguard equal and non-discriminatory treatment of traffic in the provision of Internet access services and related end-users' rights,"[48] and its principles are expressly "without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications, or services."[49] A recent decision of the Delhi High Court expressly considered whether blocking a website dedicated to piracy contravenes net neutrality principles and squarely held that blocking orders granted to impose limits on accessing illegal content online do *not* violate net neutrality.[50]

22. Sections 27(2) and 36 of the *Telecommunications Act* provide, respectively, that "no Canadian carrier shall… unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue unreasonable disadvantage" and "except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public." These provisions were adopted in 1993, before "net neutrality" came into existence, but have since been understood to protect the concept of net neutrality, which is not defined in the legislation. More recently, the

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[45] TekSavvy's Memorandum, para 55; see also para 50.
[46] See *e.g.*, *UPC Telekabel, supra* fn 4; *UTV Software, supra* fn 4; *Ziggo Appeal, supra* fn 3; *Allostreaming, supra* fn 4. See also *The Energy Agency's audit of compliance with the EU regulation on access to the open internet* (Denmark), J No. 2020-8182, 29 June 2020, p. 6, confirming that blocking orders comply with net neutrality rules.
[47] Sookman, *supra* fn 1, s.11.8(c)(v).
[48] EU Regulation 2015/2120, November 25, 2015, Recital 1.
[49] *Ibid*, Article 3.
[50] *UTV Software, supra* fn 4, paras 55, 56, 80.

CRTC has defined net neutrality as "the concept that all traffic on the Internet should be given equal treatment by Internet providers with little to no manipulation, interference, prioritization, discrimination or preference given."[51]

23. Although Canadian law does not *expressly* provide that net neutrality applies exclusively to lawful content, there is no basis to suggest that Canada has diverged in that respect from analogous jurisdictions.[52] Moreover, giving unlawful conduct a pass under some amorphous and unbounded principle of net neutrality would result in absurd consequences. ISPs would effectively be *required* to facilitate unlawful conduct, and it would result in the incongruity that illegal acts that can be enjoined *offline* cannot be enjoined *online*. Although TekSavvy argues that ISPs should exert no control over content on their networks, nothing can or should preclude a court from requiring an ISP to block its users' access to infringing websites. It would be entirely unreasonable and even dangerous to adopt a concept of net neutrality that would supersede our courts' equitable jurisdiction to enjoin unlawful conduct and thereby undermine the rule of law.

III. FREEDOM OF EXPRESSION IS NOT VIOLATED

24. Canadian courts have long recognized the importance of copyright protections, and the complementary—not adversarial—role they play in relation to safeguarding free expression. As stated by this Court:

> Intellectual property laws originated in order to protect the promulgation of ideas. Copyright law provides incentives for innovators – artists, musicians, inventors, writers, performers and marketers – to create. It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.[53]

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[51] CRTC, "Strengthening net neutrality in Canada", Jan. 26, 2018.
[52] Indeed, the Minister of Innovation, Science, and Industry recently stated that "all *legal content* must be treated equally by internet service providers": see Sookman, *supra* fn 1, ch. 11.8(c), note 421.87 [emphasis in Sookman].
[53] *BMG Canada Inc. v Doe*, 2005 FCA 193, paras 27, 40. Also, *Voltage Pictures, LLC v. Joe Doe #1*, 2017 FCA 97, rev'd in part; *Voltage*, *supra* fn 27, para 26, "The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others' dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament's objectives would crumble."

25. Copyright has been recognized as being a human right internationally.[54] In Canada, the Supreme Court has recognized that copyright is a fundamental right under the *Quebec Charter of Rights and Freedoms*.[55]

26. This case is about blocking sites that are devoted to making available infringing content. It does not implicate freedom of expression interests. This was the conclusion of the Supreme Court in *Equustek*, where it held that impeding access to sites selling products predicated on intellectual property theft do not implicate freedom of expression stating such as an order "is not an order to remove speech that … engages freedom of expression values".[56] Consistent with the decision in *Equustek*, courts have held that that the *Copyright Act* does not violate freedom of expression rights under the *Charter*.[57] Technological neutrality requires that infringers not be given special dispensation to infringe copyright because it occurs online and not in the physical world.[58]

27. Even if free expression interests were engaged, which they are not, they would be outweighed in this case by the harm to expression from massive global piracy of creative industries. As the Supreme Court noted at paragraph 49 of *Equustek*: "Even if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result … ."

28. Courts around the world with strong freedom of speech rights have found that blocking orders do not violate those rights.[59] For example, freedom of expression rights

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[54] Sookman, *supra* fn 1 at 730.34-35.
[55] *Cinar Corporation v Robinson*, 2013 SCC 73, para 114.
[56] *Equustek, supra* fn 10, para 48.
[57] See, *e.g.*, *Cie Générale des Établissements Michelin v CAW-Canada* (1996), [1997] 2 FC 306 (TD), para 85; *Canada v James Lorimer & Co* (1983), [1984] 1 FC 1065 (CA), para 29.
[58] *CBC v SODRAC 2003 Inc.,* 2015 SCC 57, paras 156-157. Also: *UTV Software, supra* fn 4, para 53 ("Should an infringer of the copyright on the Internet be treated differently from an infringer in the physical world? If the view of the aforesaid Internet exceptionalists school of thought is accepted, then all infringers would shift to the e-world and claim immunity! A world without law is a lawless world.")
[59] Christophe Geiger et al "Blocking Orders: Assessing Tensions with Human Rights", in *The Oxford Handbook of Intermediary Liability*, Center for International Intellectual Property Studies Research Paper No. 2019-03; Sookman*, supra* fn 1, 730.32-730.44, summarizing *Capif Camara Argentina De Productores De Fonogramas et al. v The Pirate Bay*, Case No. 67921/2013, Argentina, Court of First Instance Buenos Aires [2013] at 24, Case No. 3399 Rep. 2011/8314, Belgium, Court of Appeal Antwerp (Sept 26 2011) at 14, Case No. 040/2016, France, Paris Court of Appeal (Mar 15, 2016); *Warner v Telenor, supra* fn 8; 2012 District Court order quoted in *Stichting Brein v Ziggo BV*, Case/Docket No. District Court C/09/535341/KG ZA 17-891, The Hague Court, Commercial Law Division (Sept 22, 2017); *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch) [*Cartier HC*].

are enshrined under Article 10(1) of the *European Convention on Human Rights* and Article 11 of the *EU Charter of Fundamental Rights*, but blocking orders of predominantly infringing sites do not violate these fundamental rights. The leading case on blocking in the EU is *UPC Telekabel Wien*,[60] which confirmed that blocking of such sites is consistent with fundamental freedom of speech rights. To protect freedom of speech, the EU courts require measures adopted by the ISP to be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement without affecting users who are using the provider's services to lawfully access information. Targeted blocking can be effective without overblocking of lawful content.[61]

29. Courts in the EU recognize that site operators whose primary aim is to violate the rights of others have no expressive right that requires protection, that Internet users have no expressive interest in accessing pirated digital goods, that ISPs' freedom of expression rights are not violated by having to block or disable access to pirate sites, and that such orders thereby meet the proportionality criteria to limit freedom of expression rights.[62] The CJEU jurisprudence requires, *inter alia*, that a rights holder seeking an injunction establish that that the "order respected the fundamental rights of the parties affected, including internet users." This requirement has regularly been found not to be breached by an order directing that ISPs block copyright infringing websites.[63]

30. The approach of foreign courts to balancing rights of copyright holders and Internet users in blocking cases is consonant with *Charter* cases, which do not provide freedom to disseminate materials that are infringing or otherwise unlawful.[64]

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[60] *UPC Telekabel, supra* fn 4.
[61] See authorities at note 57; Sookman, *supra* fn 1, s.3.7(x)(ii).
[62] Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford 2016), Ch. 14; *Cartier HC, supra* fn 59; *Cartier SC*, *supra* fn 37; *Twentieth Century Fox v Sky UK*, [2015] EWHC 1082, H.C. of Justice; *UPC Telekabel*, *supra* fn 4. Also: *Banhhof*, *supra* fn 5 at 18-19; *Telia*, *supra* fn 4 at 14-17; *Get AS*, *supra* fn 6 at 20; *Ziggo Appeal*, *supra* fn 3 at 12-14; *PRS Iceland*, *supra* fn 3 at 15; *VZW Belgian Anti-Piracy Federation v NV Telenet*, Case No. 2011/8314, Belgium, Court of Appeal (1st Div) at 11, 14; *Assn. de Gestion de Derechos Intelectuales*, Case No. E/2012/ 00358, Spain, Comm. De Prop. Intelectual (Oct. 28, 2014).
[63] *Sony Music Entertainment (Ireland) Ltd. et al. v Upc Communications Ireland Ltd.,* [2016] IECA 231, Ireland Court of Appeal (July 28, 2016), para 65; *LSG, supra* fn 3 at §3.1.
[64] *Equustek, supra* fn 10, para 48; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, paras 64-67; *Stichting Brein v Ziggo BV*, Case 14/02399 LZ/EE, Sup Ct Netherlands (Nov 13 2015) at 5.

IV. FACTORS CONSIDERED IN GRANTING BLOCKING ORDERS

31. The court properly took guidance from international jurisprudence in identifying factors relevant to granting a blocking order, including necessity, effectiveness, dissuasiveness, complexity and cost, barriers to legitimate trade, substitutability, safeguards, and fairness.[65]

32. While derived from the *Cartier* decision,[66] these factors, or factors similar to them, have been applied in varying degrees by courts in many jurisdictions. For example, in relation to the necessity factor, courts have applied the principle, adopted by the motion judge, that a blocking order need not be indispensable and that the court may consider whether alternative or less onerous measures are available.[67] As for effectiveness, dissuasiveness, and substitutability, the CJEU and courts in many jurisdictions have all held that an order can be sufficiently effective and justified if it makes infringing activities more difficult and dissuades those who are not currently infringing from beginning to do so, even if the blocked website might be replaced by another infringing website.[68] Courts have also confirmed that blocking orders that contain appropriate safeguards do not create barriers to trade[69] with respect to the

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[65] As the parties settled on the terms of the order, the question of who bears the costs of implementing a blocking order, which has been dealt with in a variety of ways internationally, is not before this Court. The Interveners therefore do not address the issues of indemnity and costs in this appeal.

[66] *Cartier International AG v British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658.

[67] *LSG, supra* fn 3 at 6.1-6.4, (pursuant to statute and general legal principles); *Telia, supra* fn 4 at 14 ("The existence of other measures to be taken … does not affect this assessment"); *IFPI Finland*, *supra* fn 3, para 32; *Roadshow* (2020), *supra* fn 4, paras 45-46 (granting blocking orders against online locations that "facilitat[e] the infringement of copyright by making it easier for users to ascertain the existence or whereabouts of other online locations," and finding that blocking is "a proportionate response to the conduct of the target online locations," pursuant to statutory principles.)

[68] *UPC Telekabel, supra* fn 4, paras 62-64; *PRS Iceland*, *supra* fn 3 at 15, ("Though … customers may be able to get around the defendant's blocking of the websites, for example with the use of proxy servers, it has not been shown that an injunction is purposeless."); *Ziggo Appeal*, *supra* fn 3 at 3.8.7, : ("…[subscribers] will be seriously discouraged from continuing to seek access to that website with protected works… This circumstance… is an important factor in the assessment that the advanced blockade is sufficiently effective."); *Telia, supra* fn 4 at 15; *IFPI Finland*, *supra* fn 3, para 45.

[69] *PRS Iceland*, *supra* fn 3 at 15: "… though an injunction may curtail the defendant's freedom of trade, this curtailment would not be great compared to the plaintiff's vested interest in stopping copyright violations. Not all of the defendant's business activities will be stopped ..."; *LSG, supra* fn 3 at §3.1-3.8; *Roadshow* (2020)*, supra* fn 4, para 84 (permitting an ISP to suspend blocking to address technical or security concerns provides safeguards).

accessing of lawful content by an ISP's customers. The factors relating to fairness and fundamental rights have also received extensive consideration internationally.[70]

V. INTERNATIONAL FACTORS ARE PROPERLY CONSIDERED IN DETERMINING THE "BALANCE OF CONVENIENCE"

33. The exercise of a court's equitable jurisdiction to grant interlocutory injunctive relief is case-specific and flexible by nature; it requires a court to assess factors it considers relevant to the fundamental question of "whether the granting of an injunction is just and equitable in all of the circumstances of the case."[71] It is no error for a Canadian court to structure its analysis of this overarching question with reference to the substantial experience of foreign jurisdictions that have previously addressed the specific issue before the court—particularly when the issue is novel to Canadian law and relates to unlawful activity on the Internet, whose "natural habitat is global."[72] On the contrary, given the rising tide of jurisdictions offering site-blocking, it is not only appropriate but prudent for a Canadian court to be informed by those legal developments in other jurisdictions, and to exercise its equitable jurisdiction and balance the equities of the situation before it with these developments in mind.

34. Accordingly, considering factors articulated by Commonwealth and other foreign courts that have examined the issues and granted blocking orders does not, as TekSavvy suggests, amount to "importing" foreign law and "fail[ing] to carry out a proper analysis."[73] The "balance of convenience" stage of the framework for granting an interlocutory injunction articulated in *RJR-MacDonald*[74] was specifically designed to be flexible and to weigh the equities of individual cases. Since the introduction of this framework into Canadian law, courts have declined to constrain the factors to be taken into consideration in deciding where the balance of convenience lies, and indeed have expressly contemplated that this stage involves the consideration of "special factors" that may arise in the particular circumstances of the individual case.[75]

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[70] See the discussion at paras. 24-28 above.
[71] *Equustek, supra* fn 10, para 25.
[72] *Ibid*, para 41.
[73] See TekSavvy's Memorandum, para 113.
[74] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, [1994] SCJ No. 17 [*RJR*].
[75] *RJR, supra* fn 74, paras 63-64.

35. The factors detailed above and relied upon in the court below provide useful and relevant guidance for Canadian courts' analysis of the balance of convenience when a site-blocking order is sought. They need not be exhaustive or determinative in a court's analysis of the equities in a particular case; as *RJR-MacDonald* provides and the court below confirmed, "consideration of the balance of convenience engages numerous factors that will vary from case to case."[76] Indeed, the motion judge did not view the factors as exhaustive[77] and therefore did not "fetter his discretion" as TekSavvy mistakenly asserts.[78] Instead, he properly viewed them as providing a helpful structure for the evaluation of the specific interests that must be examined in determining whether to grant the injunctive relief—in other words, they direct the court's attention to the "special factors" that ought to be considered in the site-blocking context.

36. Where *Charter* rights and values are engaged in a request for interlocutory relief, the balance of convenience stage involves balancing not only the interests of the parties but also the public interest, including "both the concerns of society generally and the particular interests of identifiable groups."[79] The factors discussed above helpfully direct the court's attention to the interests of Internet users, including in assessing "fairness" (which may include freedom of expression interests) and whether the order creates "barriers to legitimate trade."[80] These factors can also assist the court in achieving a balance by providing guidance as to the *form* of order to be granted to achieve a fair balance between the rights and interests at play, including the legitimate need for effective relief for the infringement of legal rights.

VI. STATEMENT OF THE ORDER SOUGHT

37. FIAPF, the Music Industry Coalition, and the Publishers and Sports League Coalition request leave to make oral submissions of not more than 30 minutes each, for a total of 90 minutes.

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[76] FC Decision, para 70; see also *ibid,* para 63.
[77] FC Decision, para 54.
[78] TekSavvy's Memorandum, para 110.
[79] *RJR, supra* fn 74*,* para 66.
[80] See discussion at paras 29-30 above.

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