

2-2023

From Cartier to Codification: Website-Blocking Injunctions and Third-Party Internet Service Provider Respondents

Dan Mackwood

University of Ottawa, Faculty of Law

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/cjlt>



Part of the [Computer Law Commons](#), [Intellectual Property Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Dan Mackwood, "From Cartier to Codification: Website-Blocking Injunctions and Third-Party Internet Service Provider Respondents" (2023) 20:2 CJLT 225.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Canadian Journal of Law and Technology by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

From Cartier to Codification: Website-Blocking Injunctions and Third-Party Internet Service Provider Respondents

Dan Mackwood*

I. INTRODUCTION

In recent years, the proliferation of commercial-scale copyright infringement through unauthorized online content streaming has created persisting legal hurdles for Canadian rights holders seeking redress. John Doe defendants in online copyright disputes can easily preserve their anonymity and operate their infringing enterprises from unknown locations, undeterred by injunctions issued against them directly. These anonymized administrators of illicit streaming platforms offer users unauthorized access to content for a lower cost than or as a free alternative to the access provided by the legitimate rights holder. This form of copyright infringement has reportedly resulted in up to hundreds of thousands of lost subscribers and hundreds of millions of dollars in lost revenues annually for Canadian rights holders.¹ More fundamentally, online copyright infringement undermines the balance of interests that the *Copyright Act* seeks to achieve between empowering Internet consumers and rewarding content creators.²

In response, the Canadian judiciary has recently embraced website-blocking injunctions as a novel remedy to combat online streaming-based copyright infringement.³ Instead of pursuing an anonymous defendant directly, an injunction granted against a third-party Internet service provider (“ISP”) intermediary disables users on the ISP’s network from access to the unknown defendant’s offending website. In *Teksavvy Solutions Inc. v. Bell Media Inc.* (“*GoldTV FCA*”),⁴ the Federal Court of Appeal allowed the first site-blocking order of this type in Canada. The order required third-party respondent ISPs

* Dan Mackwood (he/his) is a recent Juris Doctor graduate of the University of Ottawa Faculty of Law. The author is grateful to Professor Marina Pavlović for her guidance and insight in support of this article. He would also like to thank the anonymous reviewer.

¹ *Rogers Media Inc. v. John Doe I* (2022), 2022 FC 775, 2022 CarswellNat 1916 (F.C.) (motion for interlocutory injunction) [*Rogers Media*] at para 61.

² *Copyright Act*, RSC (1985), c C-42; *Galerie d’art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307 (S.C.C.).

³ This article uses the terms “website-blocking” and “site-blocking” interchangeably.

⁴ *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, 2021 CarswellNat 1539, 2021 CarswellNat 7319 (F.C.A.), additional reasons 2021 CarswellNat 3930, 2021 CarswellNat 8219 (F.C.A.), leave to appeal refused *Teksavvy Solutions Inc. v. Bell Media Inc., et al.*, 2022 CarswellNat 716, 2022 CarswellNat 717 (S.C.C.) [*GoldTV FCA*]. Note:

enjoined by the injunction to use tools at their disposal to prevent the online copyright infringement facilitated by their retail broadband services, despite the ISPs not being directly liable for the infringement.

ISP site-blocking injunctions offer a potential, if reactionary, tool for Canadian copyright holders to confront commercial-scale copyright infringement. Yet, unlike foreign courts that issue blocking orders under the explicit authority of intellectual property legislation,⁵ courts in Canada have instead granted “just and convenient” injunctions against ISPs under the authority of the courts’ equitable jurisdiction and the broad injunction-granting entitlement under the *Copyright Act*.⁶ No statutory provisions extending from Canadian copyright law expressly permit a site-blocking order to enjoin third-party ISPs to assist in enforcing copyrights online. On this basis, the court in *GoldTV FCA* used the broad injunction-granting entitlement available under copyright legislation and applied persuasive factors adopted from the first site-blocking case in the UK, *Cartier International AG v. British Sky Broadcasting Ltd.*⁷

However, the *Cartier CA* factors do not account for certain key facts that distinguish *GoldTV FCA* from the UK decision. Whereas the injunction in *Cartier CA* enjoined the UK’s big five retail ISPs in a site-blocking order, the first Canadian injunction of this sort, by contrast, extended one blocking order to a range of eleven differently sized and differently resourced ISPs enjoined as third-party respondents. Furthermore, unlike *Cartier CA*, the media programming service provider plaintiffs in *GoldTV FCA* are vertically integrated with several — but not all — of the ISPs enjoined by the Canadian site-blocking order. Despite these important distinctions, the same factors established in the *Cartier CA* caselaw were applied in *GoldTV FCA*. Little consideration in the latter judgment focused on the potentially disproportionate outcomes that may arise from applying the same order terms to a broader range of third-party respondent ISPs. The remedy the court upheld in *GoldTV FCA* therefore poses new questions regarding whether the existing copyright statutory regime is effectively balancing the rights of copyright holders, Internet consumers, and Internet

TekSavvy sought leave to appeal *GoldTV FCA* to the Supreme Court of Canada in August 2021. The leave application was dismissed in March 2022.

⁵ For an overview of the legal framework that applies to site-blocking injunctions in Europe, see Giancarlo Frosio & Oleksandr Bulayenko, “Website blocking injunctions in flux: static, dynamic and live” (2021) 16:10 J Intell Prop L & Prac 1127. For India and Singapore, see Pratik P Dixit, “Dynamic injunctions against Internet intermediaries: An overview of emerging trends in India and Singapore” (2020) 23 J World Intell Prop 65.

⁶ *Federal Courts Act*, RSC (1985), c F-7, ss 4, 44; *Copyright Act*, RSC (1985), c C-42, s 34(1). Note: In other intellectual property disputes, courts have granted similar injunctions against different sorts of third-party intermediaries, such as search engines. See *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, 2017 CarswellBC 1727, 2017 CarswellBC 1728 (S.C.C.) [*Equustek*].

⁷ *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658 (C.A.) [*Cartier CA*].

intermediaries — and whether the regime needs statutory reform to achieve its policy objectives in the evolving digital marketplace.

This article makes two arguments. First, I argue that an equitable court injunction, like the one upheld in *GoldTV FCA*, can induce disproportionate outcomes on smaller, non-facilities-based and non-vertically integrated ISP respondents. This is particularly so if fundamental differences between intermediary actors are not confronted and factored into the court's analysis. Second, I argue that content blocking requirements under the *Copyright Act* should be expanded to explicitly apply to ISP intermediaries. I make the argument in favour of codifying ISP website blocking because an explicit statutory remedy under the *Copyright Act* can require courts to resolve online copyright infringement disputes in a way that ensures courts are attentive to the asymmetrical burden that site-blocking orders can impose on different ISPs enjoined as respondents in the same site-blocking injunction. Canadian caselaw so far has not addressed fundamental differences between ISP respondents. The effect of this omission may be exacerbated and impose disproportionate competitive impacts if and when intermediary site-blocking injunctions gain prevalence as an available judicial remedy in future intellectual property disputes.⁸

The remainder of the article is organized in the following manner: Part 2 provides a brief overview of the techniques underpinning ISP website blocking. These are the techniques that a court injunction may order an ISP intermediary to execute, which in turn prevents customer access from one or more copyright-infringing websites operated by an unknown defendant. Part 3 then expands on the obligations to which ISPs are subject as *Copyright Act* intermediaries and as common carriers under the *Telecommunications Act*⁹ and provides an overview of a recent statutory review and government consultation of relevance. Part 4 explores the jurisprudence central to this novel form of injunctive relief.

Part 5 of the article then takes the position that content removal requirements under the *Copyright Act* should be expanded to explicitly apply to ISP intermediaries. Here, I contemplate the merit of a graduated response to how ISP site-blocking orders may be executed and enforced under the copyright regime. A graduated approach may, for instance, impose adjusted requirements, implementation schedules, and filing timelines applied proportionately to the dissimilar ISPs enjoined in a site-blocking order. Differentiated treatment under a graduated approach could be determinable, I argue, based on factors such as the ISP's organization characteristics, level of vertical integration and telecommunications provider registration status, or certain financial metrics. Under this proposed arrangement, the factors would require courts to contemplate whether larger ISPs ought to be bound by more rigorous

⁸ See *Rogers Media*, *supra* note 1.

⁹ *Telecommunications Act*, SC (1993), c 38.

requirements and tighter timelines than smaller ISPs with fewer resources, less capacity, and no vertical integration with the rights-holder plaintiff.

Graduated approaches under past regulatory decisions at the Canadian Radio-television and Telecommunications Commission (“CRTC” or “the Commission”), such as the Accessibility Reporting Regulations and the Internet Code, are valuable examples, I argue, for how a similar approach to injunctive remedies could be utilized under the *Copyright Act*. At the same time, a graduated copyright remedy that is sensitive to the role of ISP intermediaries, and the variety of differently sized individual Canadian ISPs that fit under this intermediary category, may also provide welcome consistency with broader obligations under the *Telecommunications Act* and the Policy Directions issued to the CRTC by the Federal Government. The article concludes by proposing non-exhaustive criteria that courts could factor, on top of those delineated in *Cartier CA*, when contemplating whether to apply a graduated approach to issuing injunctions against respondent ISPs under a codified site-blocking provision.

II. ISP WEBSITE-BLOCKING TECHNIQUES

Website blocking prevents Internet users that interface with a given online intermediary from accessing online webpage content and other online locations. Several main techniques permit online intermediaries, such as ISPs and search engines, to execute site-blocking or search engine de-indexing outcomes. The result is that Internet users are prevented from accessing online content or search results. Fundamentally, these techniques are differentiated by the physical network point or layer at which content is blocked. Courts may grant injunctions to direct an ISP to employ any single blocking technique, or combination thereof. Under other circumstances, a court may also issue a de-indexing injunction against an Internet search engine to impart a similar impact on the indexed results that are made available to a user’s search query.

(a) IP Address and Protocol-Based Blocking

The Internet Protocol (“IP”) address system operates through an arrangement of networked routers, administered by ISPs. An IP address is the computer-readable reference used for directing data packets across router nodes. The routers are responsible for detecting the IP address from the headers of data packets and directing the packets across the Internet.¹⁰ IP-based blocking allows ISPs to place barriers in the network to block all traffic to a set of IP addresses or can reroute all traffic away from a set of IP addresses to a non-existent destination. Similarly, protocol-based blocking relies on other low-level network identifiers, including TCP/IP port numbers that can identify a particular application on a server or a type of application protocol.¹¹ In IP and Protocol-

¹⁰ David Lindsay, “Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness” (2017) 40:4 UNSW LJ 1509 at 1509-1510.

¹¹ Internet Society, “Internet Society Perspectives on Internet Content Blocking: An

based blocking, the blocking device has a list of IP addresses to block. Any attempt to connect to a server with an IP address on the block list will be interrupted.¹²

(b) DNS Blocking

The Domain Name System (“DNS”) is a database that matches a domain name to an IP address. DNS blocking uses a resolver to perform DNS lookup requests and to check names against a block list. When a user tries to use a blocked name, the server returns intentionally modified information, such as the IP address of a server displaying a landing page notice that the content has been blocked, or that the name does not exist.¹³ The result is that the user is blocked from easy access to certain content using certain domain names.

(c) URL Blocking

A Uniform Resource Locator (“URL”) is a reference to a web resource associated with a specific web page, file transfer, email, or other online application. URL blocking works with web-based applications to intercept the flow of HyperText Transfer Protocol (“HTTP”) traffic to verify the URL, which is associated with the HTTP request, against a local database or online service.¹⁴ The URL filter will allow or block the connection to the web server requested based on the response and a positive match with a blocklist. The filter can block the traffic outright, or it can redirect the user to another webpage showing a policy statement or notifying that the traffic was blocked.¹⁵ Only some ISPs are able to execute URL path blocking.

(i) Search engine de-indexing

Search engine blocking, or de-indexing, is a technique that requires the assistance of the search engine platform owner. Search queries from a user to a particular search engine will receive a different set of search results from Internet users using different search engine platforms, or different domains of the same search engine.¹⁶ The results are different because certain results that are subject to the blocking request are de-indexed from the full list of results. Search engine de-indexing only affects users who choose a particular search engine.

Overview” (24 March 2017), online (pdf): *Internet Society — Growing the Internet* <www.internetsociety.org/wp-content/uploads/2017/03/ContentBlockingOverview.pdf> at 12.

¹² *Ibid.* at 13.

¹³ Lindsay, *supra* note 10 at 1510.

¹⁴ *Ibid.* at 1509.

¹⁵ Internet Society, *supra* note 11 at 15.

¹⁶ *Ibid.* at 18.

(ii) *Circumvention practices*

One of the main criticisms of site blocking is that it can be relatively easy for Internet users and website administrators to circumvent.¹⁷ A virtual private network (“VPN”) service can allow a user to initiate their broadband connection through the VPN to avoid blocking efforts undertaken by the user’s ISP by routing traffic through another country. To avoid DNS blocking, users can also configure their networked device to access a different DNS server than that which is intended for use by their ISP. Furthermore, an administrator of a blocked website can take measures to circumvent blocking by registering a new domain name or establishing a new server configuration to host the blocked site or sites at a different IP address. For search engine de-indexing, the underlying website that is de-indexed from search results on a particular search engine platform is still directly accessible by URL input, bookmark, or by using a different search engine.¹⁸

III. ISP INTERMEDIARIES UNDER COPYRIGHT & TELECOMMUNICATIONS STATUTE

(a) *Intermediary Actors*

The *Copyright Act* provides a detailed regime that strives to balance the rights of copyright holders, Internet users, and Internet intermediaries.¹⁹ In keeping with this aim, the *Act* articulates specific roles for different intermediary actors. An intermediary is an entity that regularly provides space or means for works or other subject matter to be enjoyed by the public,²⁰ facilitated in a “neutral” manner.²¹ The intermediary regime introduced in the 2012 *Copyright Modernization Act* provides three categories of such actors: Digital Memory

¹⁷ *Ibid.* See: Canadian Radio-television and Telecommunications Commission, *Asian Television Network International Limited, on behalf of the FairPlay Coalition — Application to disable online access to piracy websites*, Telecom Decision CRTC 2018-384 (Ottawa: 2 October 2018) at para 20; *GoldTV FCA*, *supra* note 4 at para 82. See also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Eng. Ch. Div.) at 36 [*Cartier HC*].

¹⁸ See *Equustek*, *supra* note 6 at para 79.

¹⁹ *Copyright Act*, *supra* note 2; *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36, 2018 CarswellBC 1840, 2018 CarswellBC 1841 (S.C.C.) [*Voltage*].

²⁰ *Copyright Act*, *supra* note 2, s 29.21(2).

²¹ *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, 2021 CarswellNat 1539, 2021 CarswellNat 7319 (F.C.A.), additional reasons 2021 CarswellNat 3930, 2021 CarswellNat 8219 (F.C.A.), leave to appeal refused *Teksavvy Solutions Inc. v. Bell Media Inc.*, *et al.*, 2022 CarswellNat 716, 2022 CarswellNat 717 (S.C.C.) (Memorandum of Fact and Law of Interveners, Canadian Internet Registry Authority (CIRA) and Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)) [*GoldTV FCA CIRA-CIPPIC Intervention*], citing *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, 2004 CarswellNat 1919,

Providers (content hosts), Information Location Tools (search engines), and Network Service Providers (ISPs).²² ISPs are the only intermediary category of these three that consists of common carriers, which are subject to common law and *Telecommunications Act* requirements and liability immunities designed to limit interference with content.²³

“Common carriers” are commercial enterprises that transport passengers or goods from one place to another for a fee. Unlike a private carrier that might be available only to specific clients on a contractual basis, a common carrier offers its services to the general public.²⁴ In other words, a common carrier does not discriminate, within certain legal limitations, based on the client or the characteristics of the goods transported. Applying this concept to the business of broadband network data transmission, section 36 of the *Telecommunications Act* requires that a registered telecommunications common carrier not “control or influence” the network content it carries, except in cases where the CRTC approves otherwise.²⁵ This provision provides one of the statutory bases, along with section 27(2) of the *Act*, for the CRTC’s Internet traffic management practices regulatory regime.²⁶ Together, these sections offer the legislative footing for the principle of net neutrality to which Canadian ISPs are bound.

Although all broadband retail service ISPs registered with the CRTC are treated and held accountable as common carriers under the *Telecommunications Act*, there are several inherent differences among the individual ISPs that offer broadband service in Canadian wireline markets. One difference is that several of Canada’s largest incumbent ISPs are vertically integrated with divisions, subsidiaries, or other affiliated entities that are media programming service providers. A “media programming service provider” (or “broadcasting undertaking”) produces, owns, and distributes original media programming content.²⁷ Vertical integration in the communications industry context occurs when an ISP telecommunications service business entity is owned by the same proprietor as a media programming broadcasting business entity. By contrast,

2004 CarswellNat 1920 (S.C.C.); *Bell Canada v. Lackman*, 2018 FCA 42, 2018 CarswellNat 377, 2018 CarswellNat 378 (F.C.A.).

²² *Copyright Modernization Act*, SC (2012), c 20.

²³ *GoldTV FCA CIRA-CIPPIC Intervention*, *supra* note 21 at para 12.

²⁴ Will Kenton, “What is a Common Carrier?” (13 June 2019), online: *Investopedia-Business Essentials* <www.investopedia.com/terms/c/common-carrier.asp>; Sunny Handa et al, *Halsbury’s Laws of Canada — Communications*, 1st ed (Markham: LexisNexis Canada, 2019); *Telecommunications Act*, *supra* note 9, s 2.

²⁵ *Telecommunications Act*, *supra* note 9, s 36.

²⁶ Canadian Radio-television and Telecommunications Commission, *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657 (Ottawa: 21 October 2009).

²⁷ *Broadcasting Act*, SC (1991), c 11, s 2. Note: while other entities, including many ISPs, operate as “broadcasting distribution undertakings” (“BDUs”), they license the broadcasting content they distribute from the programming undertaking.

many other Canadian ISPs that offer wireline service provision as telecommunications carriers are not vertically integrated with media programming service providers.

Another fundamental difference among ISPs in Canadian wireline markets is between “facilities-based providers” (sometimes referred to as “Canadian carriers” or “incumbent” ISPs) and “non-facilities-based providers” (sometimes referred to as “wholesale-based service providers,” “independents,” or “competitors”).²⁸ Facilities-based providers own their own service transmission networks and provision broadband service directly to their retail customers. On the other hand, non-facilities-based providers do not own service networks in all of the areas in which their customers are based. In those areas where they do not own network facilities, non-facilities-based providers provision their services to their retail customers by leasing access to and capacity from network infrastructure and equipment owned by the facilities-based incumbents. Canada’s telecommunications regulator, the CRTC, administers a wholesale access regulatory regime that mandates that non-facilities-based providers have regulated access to portions of incumbent providers’ wireline networks. The significance of this wholesale access regime is that it mitigates barriers to market entry for considerably smaller, non-facilities-based providers, which allows them to improve service innovation and the variety of choice of service provider for Internet consumers.²⁹

(b) Content Removal Obligations and Remedies

The *Copyright Act* accounts for the distinction between common carrier Network Service Provider (ISP) intermediaries and the other intermediary categories through differently applied content removal obligations, liability limitations, and enforcement actions. Specifically, section 31.1(5) of the *Copyright Act* outlines that a Digital Memory Provider (content host) offering digital memory must remove a work or other copyrighted subject matter if the host is aware that the party who has stored the material in its digital memory has done so in a way that infringes copyright.³⁰ Failure to comply with this provision results in removal of the liability limitation granted to the content host under the *Act*.³¹ Similarly, section 41.27(3) requires Information Location Tools (search

²⁸ *Telecommunications Act*, *supra* note 9, s 2; Canadian Radio-television and Telecommunications Commission, “Responsibilities and Regulatory Obligations” (01 June 2020), online: *Canadian Radio-television and Telecommunications Commission* <crtc.gc.ca/eng/comm/telecom/resp.htm>.

²⁹ Canadian Radio-television and Telecommunications Commission, *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632 (30 August 2010); Canadian Radio-television and Telecommunications Commission, *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326 (Ottawa: 22 July 2015).

³⁰ *Copyright Act*, *supra* note 2, s 31.1(5).

³¹ *Ibid.*, s 31.1(4).

engines) that host a copy of copyrighted work originally hosted elsewhere to remove that copy within 30 days of receiving a notice of claimed infringement if the work has previously been removed from its original location.³² If the search engine fails to comply, it loses the remedy limitations extended by the *Act*. Search engines found liable for copyright infringement are subject to first party injunctions but are protected from other remedies.³³

In contrast to the content removal obligations imposed on content hosts and search engines under the intermediary regime, the *Copyright Act* does not extend removal obligations to ISP intermediaries. Instead, pursuant to the *Act*'s enforcement actions, ISPs must forward notices of alleged infringement to customers and preserve customer information within their control for the copyright holder to directly pursue the primary infringer — rather than the third-party ISP — if the holder so intends.³⁴ This system, which embraces a notice-and-notice rather than a notice-and-takedown regime, ensures that provisions under the *Copyright Act* to which ISPs are subject do not conflict with, or potentially displace, requirements under the *Telecommunications Act* that prevent common carrier ISPs from controlling or influencing the content transmitted over their networks. The only exception to this requirement is in cases where the CRTC authorizes such ISP control or influence over content carried on the ISP's network.³⁵ It is under this design intention that copyright and telecommunications statutes interact harmoniously together.

However, section 34(1) of the *Copyright Act* challenges this harmonious statutory coexistence by providing broad discretionary powers that entitle copyright holders to civil remedies for infringement.³⁶ This power exists in addition to the content removal obligations, liability limitations, and enforcement actions prescribed under the intermediary regime. Among other available remedies, section 34(1) permits injunctions. In recent years, Canadian

³² *Ibid.*, s 41.27(3); *GoldTV FCA CIRA-CIPPIC Intervention*, *supra* note 21.

³³ *Copyright Act*, *supra* note 2, s 41.27(1).

³⁴ *Ibid.*, ss 41.25, 41.26; Government of Canada, "Notices to Canadian Internet subscribers" (16 November 2021), online: *Office of Consumer Affairs* <www.ic.gc.ca/eic/site/Oca-bc.nsf/eng/ca02920.html>.

Note: When a copyright holder suspects that a user might be infringing the holder's copyright, the holder can send a notice of alleged infringement to the user's ISP. "Notice-and-notice" requires that the ISP forward, by email, the notice of alleged infringement to the user and then inform the copyright owner once this process has been completed. Under the notice-and-notice regime, ISPs must retain records of the identity of the subscribers who have been forwarded notices for a period of six months or longer, up to one year, in cases where a copyright owner decides to take legal action. If ordered to do so by a court, the ISP would release the relevant subscriber information to the copyright holder as part of a copyright infringement lawsuit. This arrangement is different than "notice-and-takedown," which is generally a regime in which an online intermediary is required to remove access to copyrighted material upon receipt of a notice on behalf of a copyright holder who claims that the material in question is infringing copyrights and is being disseminated illegally.

³⁵ *Telecommunications Act*, note 9, s 36.

³⁶ *Copyright Act*, *supra* note 2, s 34(1).

courts have used this statutory provision to issue this injunction remedy in intellectual property rights infringement cases to enjoin innocent third parties indirectly associated with underlying disputes. For example, courts have granted *Norwich* orders to require ISPs to reveal the identity of subscribers alleged to be infringing copyrights.³⁷ The court in *GoldTV FCA* also relied on the broad powers under section 34(1) of the *Copyright Act*, along with the court's equitable power available under the *Federal Courts Act*,³⁸ to allow the injunction to enjoin Canadian ISPs to block several copyright-infringing websites.³⁹ Section 34(1) therefore extends powers to courts that can potentially undermine, or at least complicate, the provisions of the intermediary regime located within the same copyright statute. Importantly, these powers do not prescribe an explicit ISP site-blocking provision or explicit factors relevant to ISP website blocking for courts to assess and weigh when contemplating whether to grant an injunction.

(c) House of Commons Statutory Review and Government Consultation

The 2019 House of Commons review of the *Copyright Act* recognized several of the conflicting priorities (and powers) under Canada's copyright regime, but it did not go so far as to initiate any legislative amendment process to reconcile these conflicts in the regime. In its review, the House of Commons Standing Committee on Industry, Science, and Technology ("INDU Committee") issued recommendations to address copyright infringement that, on the one hand, embraced the use of court orders and, on the other, cautioned against the conflicting interests of vertically integrated entities.⁴⁰ Regarding the former recommendation, the INDU Committee observed that the fight against piracy should focus more on large-scale, commercial infringers, and less on individual Canadians. There is value, the INDU Committee agreed, in clarifying within the *Act* "that rights holders can seek injunctions to deny services to persons demonstrably and egregiously engaged in online piracy, provided there are appropriate procedural checks in place."⁴¹ The Committee also supported amending the *Telecommunications Act* to remove "any procedural duplication or unnecessary hurdles."⁴² While the review does not elaborate on this point, it would likely involve rescinding or amending the requirement of CRTC authorization for content removal under section 36 of the *Act*.

³⁷ *Equustek*, *supra* note 6 at para 31; *Voltage*, *supra* note 19.

³⁸ *Federal Courts Act*, *supra* note 6, ss 4, 44.

³⁹ *GoldTV FCA*, *supra* note 4 at para 2.

⁴⁰ House of Commons Canada, "Statutory Review of the Copyright Act" (3 June 2019), online (pdf): *Standing Committee on Industry, Science and Technology* < www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf >.

⁴¹ *Ibid.* at 97.

⁴² *Ibid.* at 97.

Regarding the latter recommendation, however, the INDU Committee also recognized that enforcement of copyright is made especially difficult by the vertical integration of ISPs and content providers. The Committee pointed out that Parliament and the courts need to be particularly careful that the preservation of net neutrality and of the rights of all parties are fully considered. It is not hard to imagine a situation, the Committee emphasized, where one vertically integrated ISP-rights holder seeks an injunction that would apply to another ISP-rights holder “who would gladly provide it with little contest given that they share similar interests in the outcome of the case.” Under a scenario such as this one, where the alleged infringer is most likely *ex parte*, “the risk for overreach is obvious.”⁴³ To this end, the INDU Committee formally recommended in its review that the federal government should consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and, at the same time, that paramount importance should be given to net neutrality in dealing with impacts on the form and function of the Internet in the application of copyright law. Since the 2019 statutory review, these recommendations have yet to be actioned.

In 2021, the Government of Canada commenced the “Consultation on a Modernized Copyright Framework for Online Intermediaries,” to be conducted under the Department of Innovation, Science and Economic Development (“ISED”).⁴⁴ The goal of the Consultation is to help the government ensure that Canada’s copyright framework for online intermediaries reflects the evolving digital world through three main policy objectives: to protect and encourage the use of copyright-protected content online; to safeguard individual rights and freedoms in an open Internet, and; to facilitate a flourishing digital market.⁴⁵ One of the proposed potential options for reform set forward in the Consultation is to clarify the conditions or obligations of safe harbour protections. Such clarification “could better protect and encourage the use of copyright-protected content online by compelling greater vigilance of intermediaries against potential infringement facilitated by their services.”⁴⁶

Another proposed reform option the Consultation discusses is to clarify or strengthen the tools available to rights holders in their online enforcement efforts. Here, the Consultation suggests that the government could establish a statutory basis and procedure for injunctions against intermediaries “to prevent or stop online copyright infringement facilitated by their services even where they are not themselves liable for it, such as where they may be protected by the safe harbours.”⁴⁷ Injunctions under a statutory scheme could be available through a court process to ensure a high standard of procedural fairness. Any such

⁴³ *Ibid.* at 97.

⁴⁴ Government of Canada, “Consultation on a Modern Copyright Framework for Online Intermediaries” (14 April 2021), online (pdf): *Industry Canada* <[www.ic.gc.ca/eic/site/693.nsf/vwapj/00191_en.pdf/\\$file/00191_en.pdf](http://www.ic.gc.ca/eic/site/693.nsf/vwapj/00191_en.pdf/$file/00191_en.pdf)> .

⁴⁵ *Ibid.* at 5-6.

⁴⁶ *Ibid.* at 11.

provisions, the Consultation further contemplates, could also clarify that a rights holder would only be able to forego obtaining judgment directly against an alleged infringer first where the rights holder has made a good faith but unsuccessful effort to identify the alleged infringer and stop the alleged infringement.

IV. ISP INTERMEDIARIES AND CASELAW

Caselaw in which ISPs have been enjoined as third-party intermediaries in underlying intellectual property disputes is still relatively new in any jurisdiction. In Canada, only two major cases have been heard, both of which rely heavily on a UK precedent established by the *Cartier* cases.⁴⁸ Following the 2014 landmark first instance ruling in *Cartier HC*,⁴⁹ *Cartier CA* represents among the earliest ISP site-blocking orders upheld by courts, internationally. These UK cases offered an important reference for Canadian courts in addressing the issue of whether courts can enjoin non-parties in interlocutory orders, and the persuasive legal model for ISP site-blocking injunctions adopted in Canadian caselaw several years later.

(a) *Cartier International AG v. British Sky Broadcasting Ltd.* (“*Cartier CA*”)

In this 2016 judgment, the England and Wales Court of Appeal (“EWCA”) found that the court had jurisdiction to grant injunctions against ISP intermediaries whose services are used to infringe registered trademarks. The rights holder in this application was Richemont, which owned registered trademarks for luxury brands including Cartier, Montblanc, and IWC. This decision fully upheld two unprecedented injunctions initially granted in 2014 by Arnold J. of the High Court, requiring the five largest ISPs in the UK to block access to certain websites selling counterfeit versions of Richemont’s goods. These five ISPs collectively held market share of around 95% of UK broadband users. At first instance, the ISPs unsuccessfully argued that the court did not have jurisdiction because Article 11 of the European Union (“EU”) Intellectual Property Enforcement Directive (“IPED”) had not been transposed into UK law. Article 11 provides that EU member states shall ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right.⁵⁰

⁴⁷ *Ibid.* at 17.

⁴⁸ *Cartier CA*, *supra* note 7. Note: The Court of Appeal decision was appealed to the Supreme Court of the UK in *Cartier International AG v. British Telecommunications Plc*, [2018] UKSC 28 (U.K. S.C.) [*Cartier SC*]. However, the focus of the Supreme Court appeal was only on the issue of costs and not the jurisdiction and proportionality issues decided in *Cartier CA*. When referring to these cases collectively, I will call them “the *Cartier* cases.”

⁴⁹ *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Eng. Ch. Div.) [*Cartier HC*].

The ISPs appealed the injunction ruling with the arguments that they were wholly innocent parties and not alleged to be wrongdoers; that the court had no jurisdiction to make any such order; that if the court did have jurisdiction, the threshold requirements were not satisfied in the circumstances of the case; that the judge failed to identify the correct principles that should be applied in deciding whether or not to make an order; that the orders made were disproportionate; and that the judge erred in making the orders that he did in relation to costs.⁵¹ The EWCA ruled that the High Court was correct to find that it had jurisdiction to make broad site-blocking injunctions on the basis that jurisdiction was available under Article 11 of the EU IPED and, if necessary, under section 37(1) of the *Senior Courts Act*.⁵² The court found that Article 11 provided a principled basis for developing the judicial practice of issuing injunctions to include site-blocking orders against ISPs.

Focusing the court's generally wider discretion to grant injunctions under section 37(1), the EWCA endorsed four threshold conditions identified by the High Court to be exercised consistently with the terms of the IPED: first, the ISPs must be intermediaries within the meaning outlined in Article 11; second, either the users or the operators of the website must be infringing the claimant's trademarks; third, the users or the operators of the website must use the services of the ISPs; and fourth, the ISPs must have actual knowledge of this.⁵³

The EWCA reasoned that the High Court was right to conclude that each of these conditions had been satisfied.⁵⁴ Notably, the Court's finding in favour of Richemont came despite the absence of any provision in UK trademark law⁵⁵ equivalent to section 97A of the *Copyright, Designs and Patents Act* of 1988. Section 97A provides an explicit provision for granting courts the power to issue an injunction against an ISP for instances where another person is using the ISP's service to infringe copyright.⁵⁶ The EWCA went on to endorse relevant principles or factors to be applied in considering whether to make a site-blocking order.⁵⁷ The remedy must apply the following factors:

- (i) **Necessity:** a consideration of the extent to which the relief is necessary to protect the plaintiff's rights. The relief need not be indispensable, but the court may consider whether alternative and less onerous measures are available;

⁵⁰ *Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights* (EU) [IPED].

⁵¹ *Cartier CA*, *supra* note 7 at para 7.

⁵² *Senior Courts Act 1981* (UK), s 37(1).

⁵³ *Cartier CA*, *supra* note 7 at paras 80-81.

⁵⁴ *Cartier CA*, *supra* note 7 at para 99.

⁵⁵ *Trade Marks Act 1994* (UK).

⁵⁶ *Copyright, Designs and Patents Act 1988* (UK), s 97A.

⁵⁷ *Cartier CA*, *supra* note 7 at paras 100-126, summarized in *GoldTV FCA*, *supra* note 4 at para 74.

- (ii) **Effectiveness**: a consideration of the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service;
- (iii) **Dissuasiveness**: a consideration of whether others not currently accessing the infringing service will be dissuaded from doing so;
- (iv) **Not unnecessarily complicated or costly**: a consideration of the complexity and cost of implementing the relief sought;
- (v) **Avoidance of barriers to legitimate trade**: a consideration of whether the relief will create barriers to legitimate use by unduly affecting the ability of users of ISP services to access information lawfully;
- (vi) **Fair and equitable**: a consideration of whether the relief strikes a fair balance between fundamental rights of the parties, the third parties, and the general public;
- (vii) **Substitution**: a consideration of the extent to which blocked websites may be substituted for another infringing website; and
- (viii) **Safeguards**: a consideration of whether the relief sought includes measures that safeguard against abuse.

The EWCA held that the High Court had appropriately weighed the relevant principles and the additional arguments tendered by the ISPs.⁵⁸ The EWCA concluded that Arnold J. was entitled to conclude that granting the injunctions was proportionate in the circumstances and that the ISPs' appeal should be dismissed.⁵⁹

The impact of *Cartier CA* on Canadian caselaw has been significant. The UK Court of Appeal decision offers an important precedent in the context of whether Canadian courts can issue injunctions to enjoin third party intermediaries in underlying intellectual property disputes. The Supreme Court of Canada looked to *Cartier CA* as one of the key jurisprudential bases to reject Google's argument in *Equustek* that interlocutory injunctions cannot enjoin non-parties to a dispute. *Cartier CA* also established the model that courts would adopt for ISP site-blocking injunctions issued in Canada. This injunctive remedy was first recognized by the dissenting judgment in *Equustek* as a potentially more feasible alternative than a worldwide search engine de-indexing order. Later, *GoldTV FCA* adopted *Cartier CA* as a persuasive example for the Court to issue and uphold ISP site-blocking in Canada. Put differently, without *Cartier CA*, Canadian courts (as well as courts in other jurisdictions) likely would not have a non-binding foreign precedent on which to base judgments to grant ISP site-blocking injunctions domestically.

⁵⁸ *Cartier CA*, *supra* note 7 at paras 131-183.

⁵⁹ *Ibid.* at para 196.

(b) *Google Inc. v. Equustek Solutions Inc.* (“Equustek”)

In 2017, the Supreme Court of Canada (“SCC”) upheld a worldwide interlocutory injunction against Google Inc. to remove all of a company’s websites from Google’s global search engine.⁶⁰ Google was a third party to an underlying dispute between Equustek, a small network device manufacturing company based in British Columbia, and a former distributor of its products, Datalink, over intellectual property infringement. The underlying case arose when Equustek alleged that Datalink re-labelled one of Equustek’s products and passed it off as its own. Datalink also acquired confidential information and trade secrets belonging to Equustek and used them to manufacture a competing product. After filing a statement of defense disputing Equustek’s claim, Datalink abandoned the proceeding and vacated the province. Datalink continued to carry on business from an unknown location, selling the offending product on its websites to customers all over the world, with most sales taking place outside of Canada.⁶¹

In the majority judgment written by Abella J., the SCC upheld the interlocutory injunction issued by the trial court,⁶² finding that de-indexing the defendant’s domain from Google’s global search engine represented, at most, minimal countervailing harm to Google. Furthermore, the injunction was the only way to preserve Equustek itself, pending the resolution of the underlying litigation.⁶³ The SCC was ultimately unconvinced by Google’s three main arguments, finding that non-party intermediaries can be bound by an interlocutory injunction,⁶⁴ that it was not improper to issue an injunction with extra-territorial effect,⁶⁵ and that freedom of expression concerns did not tip the balance of convenience against granting the injunction.⁶⁶

While the *Equustek* case was primarily concerned with an injunction enjoining a search engine to de-index certain websites from search engine results, aspects of the decision are of relevance to site-blocking injunctions issued against ISP intermediaries. These implications are neither wholly positive nor negative for ISP stakeholders. First, *Equustek* legitimized for Canadian courts the propriety of judge-issued interlocutory injunctions against third-party (or non-party) intermediaries indirectly involved in underlying intellectual property disputes. The SCC rejected Google’s argument outright that non-parties cannot be the subject of an interlocutory injunction, pointing to the application of

⁶⁰ *Equustek*, *supra* note 6.

⁶¹ *Ibid.* at para 41.

⁶² *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, 2014 CarswellBC 1694 (B.C. S.C.), affirmed 2015 CarswellBC 1590 (B.C. C.A.), affirmed *Google Inc. v. Equustek Solutions Inc.*, 2017 CarswellBC 1727, 2017 CarswellBC 1728 (S.C.C.).

⁶³ *Ibid.* at para 55.

⁶⁴ *Equustek*, *supra* note 6 at paras 28-35.

⁶⁵ *Ibid.* at paras 36-44.

⁶⁶ *Ibid.* at paras 45-48.

Norwich orders and *Mareva* injunctions against third parties, including in Canadian jurisprudence. Importantly, the SCC also introduced *Cartier CA* in this part of the decision.⁶⁷ The SCC referred to *Cartier CA* simply as a foreign example of a court granting an injunction against third-party intermediaries who are not themselves guilty of wrongdoing. However, the mere fact that the SCC referenced *Cartier CA* in this context, and that *Cartier CA* involves ISPs as the third-party intermediary group in question, did set out an available path for Canadian copyright holders in future infringement disputes to apply for injunctions in which third-party ISPs are enjoined in blocking orders.⁶⁸

Second, in *Equustek*, the SCC showed that courts can and should be sensitive to the level of inconvenience placed on the third-party intermediary regarding the execution of an injunction. The SCC found that the injunction's worldwide effect in this case did not tip the balance of convenience in Google's favour. The order did not require for Google to take steps around the world to implement the search engine de-indexing measures. Instead, the terms of the order only required Google to take steps where its search engine is controlled, which was from a centralized location rather than from globally distributed premises. The SCC reasoned that this was something Google had acknowledged it can do and does with relative ease.⁶⁹

Third, the decision in *Equustek* to grant a worldwide injunction demonstrates that the courts did not necessarily endeavor to exhaust less intrusive remedies before resorting to the bolder global search engine de-indexing order. The SCC's dissenting opinion addresses this concern when it highlights several other available alternatives that likely would have been less intrusive and more effective. For instance, *Equustek* had sought a *Mareva* injunction to freeze Datalink's assets in France, and the Court of Appeal for British Columbia had emphasized that information in the case suggested that French courts would have assumed jurisdiction and considered an application to freeze the assets in that country had *Equustek* further pursued such an application. This option would have focused the proceeding under a single jurisdiction, thus mitigating any potential issues around conflicts of law and comity,⁷⁰ and targeting the defendant's assets would be a more direct approach to confront the harm caused by the intellectual property infringement. In a similar vein, *Equustek* could have initiated contempt proceedings in France or other jurisdictions linked to the defendant. Furthermore, the dissenting opinion affirmed that *Equustek* could have pursued injunctive relief against ISPs, as the trademark holder did in *Cartier CA*.⁷¹

⁶⁷ *Equustek*, *supra* note 6 at para 32.

⁶⁸ *GoldTV FCA*, *supra* note 4 at para 77.

⁶⁹ *Equustek*, *supra* note 6 at para 43.

⁷⁰ *Equustek*, *supra* note 6 at para 80.

⁷¹ *Ibid.* at para 81.

(c) *Teksavvy Solutions Inc. v. Bell Media Inc.* (“GoldTV FCA”)

The *GoldTV FCA* ruling affirms that, for the first time, ISP site-blocking injunctions are available in Canada as a remedy to limit access to sites that provide copyright-infringing content.⁷² The Federal Court of Appeal (“FCA”) decision upheld an unprecedented interlocutory injunction requiring eleven of Canada’s largest wireline ISPs to block access to GoldTV, a streaming service that offered unauthorized online subscription services to programming content. On July 18, 2019, the plaintiffs, Bell Media Inc., Groupe TVA Inc., and Rogers Media Inc., commenced an action for copyright infringement against the unknown operators of the *goldtv.biz* and *goldtv.ca* websites. The Federal Court issued an interim injunction on July 25, 2019, ordering the GoldTV sites to be disabled immediately. As the defendants were unidentifiable, they could not be made to comply with the order. In response, the plaintiffs sought and were granted an interlocutory injunction to replace the 14-day interim injunction, to ensure that the GoldTV sites would continue to be disabled until final determination of the action on the merits.

The plaintiffs also filed a separate motion on July 31, 2019, requesting that eleven ISPs be named as third parties to the motion and be ordered to block access to the GoldTV websites by the ISPs’ residential wireline Internet service customers. The order listed the GoldTV target website domains, subdomains, and IP addresses, and contemplated that the list may be amended by a later order. One of the ISPs, TekSavvy Solutions Inc., opposed the motion. TekSavvy argued that the subject matter of the injunction, site-blocking, should be addressed by the CRTC and not by the Federal Court. TekSavvy further claimed that the plaintiffs had failed to satisfy the test for an interlocutory injunction. On November 15, 2019, the Federal Court issued a landmark mandatory interlocutory injunction in *Bell Media Inc. v. GoldTV.biz*, which required the eleven ISPs to block their customers from accessing the GoldTV websites, the operators of which remained anonymous and never filed a defence nor otherwise participated in the action.⁷³

The order required the ISPs to block or attempt to block access to the target websites within fifteen days of issuance.⁷⁴ The plaintiffs could file to amend the order at any point within the two-year order lifetime. Any enjoined third-party respondent ISP could bring a motion to object to a proposed amendment, but it

⁷² *GoldTV FCA*, *supra* note 4. Also see: Sana Halwani, Online Pirates Can Be Blocked (June 2021), online: Lenczner Slaght Intellectual Property <<https://litigate.com/online-pirates-can-be-blocked/pdf>> [<https://perma.cc/2636-PQCS>].

⁷³ *Bell Media Inc. v. GoldTV.biz*, 2019 FC 1432, 2019 CarswellNat 6733, 2019 CarswellNat 6855 (F.C.), affirmed *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 CarswellNat 1539, 2021 CarswellNat 7319 (F.C.A.), additional reasons *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 CarswellNat 3930, 2021 CarswellNat 8219 (F.C.A.), leave to appeal refused *Teksavvy Solutions Inc. v. Bell Media Inc., et al.*, 2022 CarswellNat 716, 2022 CarswellNat 717 (S.C.C.) [*GoldTV*].

⁷⁴ *GoldTV FCA*, *supra* note 4 at 38 (Attached Order in T-1169-19).

would have to be filed within ten days of the proposed amendment. Among other included terms, the order also specified that the plaintiffs shall indemnify and save harmless the third-party respondent ISPs for the reasonable marginal cost of implementing the domain, subdomain, and IP address blocking techniques. Several other associated reasonable losses or expenses resulting from a complaint, demand, action, claim, or similar proceeding incurred by the respondent ISPs would also be covered by the plaintiffs, subject to any motion disputing the reasonableness of the costs filed within 30 days of receipt of invoice.

TekSavvy appealed the order for a mandatory interlocutory injunction to the FCA. The appeal dealt with three main issues: (i) whether the Federal Court had the power to grant a site-blocking order; (ii) if so, the relevance of freedom of expression; and (iii) whether the order was just and equitable.⁷⁵ On the first issue of whether the Court had the power to grant a site-blocking order, the FCA concluded that such an order fell within section 34(1) of the *Copyright Act*, which affords copyright holders broad access to remedies, including injunctions. The Court also rejected TekSavvy's assertion that the notice-and-notice regime under sections 41.25 to 41.27 of the *Copyright Act* denies copyright owners the benefit of a site-blocking order, on the basis that nothing in such an order conflicts with these provisions. The Court held that Parliament's decision to implement a notification regime did not impose a limit on other remedies to which a copyright holder may be entitled.⁷⁶ To support this holding, the Court referenced other examples of injunctive remedies not specifically mentioned in the *Copyright Act* that could be imposed on third party intermediaries, including *Norwich* orders and *Mareva* injunctions.

Furthermore, the FCA rejected TekSavvy's argument that because section 36 of the *Telecommunications Act* contemplates net neutrality by ISPs, such a provision prevents the Federal Court from ordering an ISP to block a website. The Court agreed with the plaintiffs that a court-ordered injunction did not amount to the ISP having the agency to "control" or "influence" the telecommunications content it carried. Instead, the effect of the order would be that the ISP would itself be controlled or influenced. To this end, the Court concluded that the wording of section 36 was general and did not displace the Federal Court's equitable powers of injunction.⁷⁷ The FCA also found that *Equustek*, though involving a search engine de-indexing order, was good authority for the availability of a site-blocking order in this case.⁷⁸

On the second issue regarding the relevance of freedom of expression, the FCA rejected TekSavvy's position that ISPs were engaged in expressive activity in providing customers access to certain websites. Instead, highlighting

⁷⁵ *GoldTV FCA*, *supra* note 4 at para 16.

⁷⁶ *Ibid.* at para 29.

⁷⁷ *GoldTV FCA*, *supra* note 4 at paras 35-36.

⁷⁸ *Ibid.* at paras 38-43.

TekSavvy's previous argument, the Court held that ISPs are common carriers subject to net neutrality, and that presumably they should not show any preferential treatment of certain websites over others. Moreover, the Court decided that it was unnecessary for it to engage in a detailed Charter rights analysis separate and distinct from the balance of convenience analysis already considered. To this end, the FCA disagreed that the Federal Court's analysis was inadequate.

On the third issue of whether a mandatory order was just and equitable, the FCA reviewed the three-factor test from *RJR-Macdonald Inc. v. Canada (Procureur général)* and concluded that the Federal Court did not commit a reviewable error in issuing the injunction.⁷⁹ Specifically, the Court found that the plaintiffs' case for copyright infringement considerably exceeded the requirements to demonstrate a strong *prima facie* case. Here, the Court contemplated the principles from *Cartier CA* to inform its assessment of the irreparable harm and balance of convenience factors from *RJR-Macdonald*. Among the several concerns TekSavvy raised is that the Federal Court judge failed to establish the effectiveness of the site-blocking order. TekSavvy argued that the judge should have considered the burden of the regular updates needed to counter the defendants' actions and the compounding effect of the many requests for other site-blocking orders that would likely flow if the order in question were allowed to stand.⁸⁰ While the Court acknowledged these as interesting points, they did not amount to a palpable and overriding error in the Federal Court's analysis.⁸¹

The FCA's decision in *GoldTV FCA* represents an important step forward for the role that Canadian courts play in online copyright enforcement. The decision upholds the first ISP site-blocking order in the country. It affirms the common law test and factors to be applied for future ISP site-blocking actions, which are likely to proliferate as the dissemination and use of copyright-protected — and copyright-infringing — content on the Internet continues to expand dramatically. Indeed, in the months after the *GoldTV FCA* judgment was released, the same plaintiffs, along with several additions, commenced an action for another ISP site-blocking injunction against anonymous defendants, with a more ambitious requested order that would allow for a live or dynamic target website list to be enforced, including for websites hosting copyright-infringing live sports event broadcasting coverage.⁸² "Dynamic blocking injunctions" (sometimes called "forward-looking injunctions") are injunction orders that can be issued where the materially same website becomes available immediately after

⁷⁹ *GoldTV FCA*, *supra* note 4 starting at para 60; *RJR-Macdonald Inc. v. Canada (Procureur général)*, 1995 CarswellQue 119, 1995 CarswellQue 119F, (*sub nom.* *RJR-MacDonald Inc. v. Canada (Attorney General)*) [1995] 3 S.C.R. 199 (S.C.C.) [*RJR-Macdonald*].

⁸⁰ *GoldTV FCA*, *supra* note 4 at para 80.

⁸¹ *Ibid.* at para 82.

⁸² *Rogers Media*, *supra* note 1.

issuing the injunction with a different IP address or URL.⁸³ Dynamic blocking injunctions are different than the “static” ISP site-blocking orders discussed in this article because they are typically drafted in a way that makes it possible for the order to also cover the new IP address or URL without the need for a new judicial procedure to obtain a new injunction. The “live blocking order” is a sub-category of the dynamic blocking injunction. Live blocking orders allow the repeat blocking of a website every time a live broadcast is in process.⁸⁴ These newer varieties of ISP site-blocking have been in use in the EU and other jurisdictions for several years. *GoldTV FCA* has potentially opened the door for dynamic and live blocking orders to be granted in Canada.

The *GoldTV FCA* judgment is also significant for other reasons. The FCA’s decision to approve ISP site-blocking is consistent with, and reinforces the feasibility of, the proposals for statutory reform contemplated in the Government of Canada’s “Consultation on a Modernized Copyright Framework for Online Intermediaries.”⁸⁵ The *GoldTV FCA* outcome improves the likelihood that the Consultation will recommend for an amendment to the *Copyright Act* to provide expressly for injunctions against intermediaries to block online copyright infringement facilitated by their services, despite not being directly liable. An amendment of this nature would update the Canadian copyright regime to be broadly consistent with the US, UK, Europe, and Australia.⁸⁶

V. CODIFYING ISP WEBSITE BLOCKING

The Government of Canada’s “Consultation on a Modernized Copyright Framework for Online Intermediaries” may prompt changes to different aspects of the country’s copyright framework, including to the intermediary regime first introduced in 2012.⁸⁷ One area of possible reform is to establish a statutory basis and procedure for injunctions against third-party intermediaries. Specifically, the Consultation is contemplating the reform option of amending the *Copyright Act* to provide expressly for injunctions against intermediaries, such as ISPs, to block online copyright infringement facilitated by their services, even where they are not themselves liable for the infringement.⁸⁸

Whether issued under the courts’ equitable jurisdiction or prospectively under an explicitly codified provision in the *Copyright Act*, site-blocking injunctions run the risk of imposing disproportionate impacts if fundamental differences between intermediary actors are not acknowledged and factored into

⁸³ Giancarlo Frosio & Oleksandr Bulayenko, “Website blocking injunctions in flux: static, dynamic and live” (2021) 16:10 J Intell Prop L & Prac 1127.

⁸⁴ *Ibid.* at 1128.

⁸⁵ Government of Canada, *supra* note 44 at 17.

⁸⁶ *Ibid.* at footnote 53.

⁸⁷ *Copyright Modernization Act*, *supra* note 22.

⁸⁸ Government of Canada, *supra* note 44 at 17.

the court's analysis. Graduated approaches under past regulatory decisions at the CRTC, such as the Accessibility Reporting Regulations and the Internet Code, illustrate how a similar approach to injunctive remedies could be utilized as a required factor for courts to weigh when applying a codified site-blocking provision under the *Copyright Act*. Moreover, a graduated copyright remedy that is sensitive to the role of ISP intermediaries, and the variety of differently sized individual Canadian ISPs that fit under this intermediary category, may also provide consistency with broader obligations under the *Telecommunications Act* and the Policy Directions issued to the CRTC by the Federal Government.⁸⁹

(a) Differences Among Third-Party ISP Intermediaries Enjoined In IP Disputes

The caselaw discussed above involves three examples of third-party intermediaries enjoined in underlying intellectual property disputes — with each case involving distinguishable intermediary facts. In *Equustek*, the lone third-party intermediary enjoined in the underlying dispute was Google, the world's largest Internet search engine. Here, the SCC only had to account for the level of inconvenience placed on one single non-party intermediary, specifically regarding Google's ability to execute the global de-indexing order. As Google had past experience with this sort of operation, the level of inconvenience was understandably low. The remaining two cases both involve site-blocking injunctions that enjoin multiple third-party ISP intermediaries. There are important distinctions to note between these two cases as well.

The injunction in *Cartier CA* enjoined Sky, BT, EE, TalkTalk, and Virgin, the five main facilities-based retail ISPs in the UK, with a collective market share — relatively evenly distributed between the five ISPs — of 95% of UK broadband users.⁹⁰ By contrast, the injunction in *GoldTV FCA* enjoined both incumbent facilities-based providers⁹¹ and significantly smaller non-facilities-based providers.⁹² In 2019, the year the Federal Court initially granted the *GoldTV* injunction, incumbent facilities-based providers had a collective Canadian revenue share of approximately 92%, with the five largest accounting for 87.3% of total revenues for the year. Furthermore, the three largest Canadian facilities-based providers had between 25,300⁹³ and 52,000

⁸⁹ Privy Council of Canada 2006-1534, Order Issuing a Direction on the CRTC on Implementing the Canadian Telecommunications Policy Objectives; Privy Council of Canada 2019-227, Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation.

⁹⁰ *Cartier CA*, *supra* note 7 at paras 1-2.

⁹¹ The enjoined incumbent facilities-based providers were Bell Canada, Bragg (Eastlink), Cogeco, Fido, Rogers, Shaw, SaskTel, TELUS, and Videotron. Note: Fido is a subsidiary owned by Rogers but operates as a flanker brand.

⁹² The non-facilities-based providers enjoined in the injunction were Distributel and TekSavvy.

employees.⁹⁴ Non-facilities-based providers, on the other hand, had a collective revenue share of only 3.7%,⁹⁵ with reportedly less than 1000 employees at each of the two non-facilities-based ISPs enjoined in the order. To this end, whereas the injunction in *Cartier CA* enjoined five relatively even-sized large ISPs with similar abilities and resources to execute the same blocking order,⁹⁶ the injunction in *GoldTV FCA* enjoined a list of eleven ISPs with a considerably more drastic range of sizes between the large facilities-based and comparatively much smaller non-facilities-based ISPs. This distinction is demonstrated by revenue share and employee counts, among other available metrics. Despite this distinction, the *GoldTV FCA* injunction imposes the same site-blocking requirements on all of the ISPs enjoined in the order.

(b) Cartier Factors Do Not Account For Differences Among Multiple ISPs Enjoined in the Same Order

In *GoldTV FCA*, the appellant and a smaller ISP, TekSavvy, challenged the effectiveness of the Federal Court order and the burden that the order's lack of effectiveness would carry, especially on smaller ISPs. It noted that in the relatively short period since the Federal Court issued the interlocutory injunction, the order had to be updated several times to meet the defendant's circumvention reactions. TekSavvy went on to argue that the Federal Court should have considered the burden of regular updates and the compounding effect of the many requests for other site-blocking orders that were likely to follow if the *GoldTV* order was allowed to stand. The FCA accepted these points as interesting, but it was not convinced that the Federal Court made a palpable and overriding error. The Court reasoned that, while it did appear it would be necessary to amend the order from time to time to respond to the defendant's circumvention efforts, the Court "[had] little information about the burden of doing so, or the likelihood of many other such orders (in other cases)

⁹³ Rogers Communications Inc., "Rogers Communications Inc. 2019 Annual Report" (2019), online (pdf): *Rogers Investor Relations* <1vjoxz2ghhkclty8c1wjich1-wpengine-netdna-ssl.com/wp-content/uploads/2020/03/Rogers-2019-Annual-Report.pdf> at 19.

⁹⁴ Bell Canada Enterprises Inc., "BCE Inc. 2019 Annual Report" (2019), online (pdf): *BCE Investors Annual Reports* <www.bce.ca/investors/AR-2019/2019-bce-annual-report.pdf> at 25.

⁹⁵ Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report: 2020" (2020), online (pdf): *CRTC Plans and Reports* <crtc.gc.ca/pubs/cm2020-en.pdf> at 31-32. Note: The list of incumbent facilities-based providers is virtually exhaustive for the Canadian wireline market. Contrastingly, while Distributel and TekSavvy are two of the largest non-facilities-based providers in Canada, many other smaller wholesale-based providers were not enjoined by the *GoldTV* order. For additional perspective, in 2019, there were approximately 700 registered non-facilities-based ISPs in Canada, comprising nearly 68.2% of the total list of registered ISPs. This is to say that Distributel and TekSavvy collectively represent what is likely a plurality, but certainly not the entirety, of the 3.7% market share.

⁹⁶ *Cartier HC*, *supra* note 49 at paras 38-51.

compounding this burden.”⁹⁷ The Court went on to conclude that if the burden of making amendments to the site-blocking order, or of issuing new site-blocking orders, ever became a concern because of a growing number of such orders, “that concern [could] be addressed at the time.”⁹⁸

At the time of its decision, the FCA had little direct evidence about the burden of regular updates and the compounding effect of the many likely prospective requests for blocking orders. However, had the Court focused more of its analysis on the differentiating characteristics of the third-party respondent ISPs, it would have been apparent that, because the terms of the order apply equally to all of the ISPs, any such burden extending from the order would disproportionately impact smaller, non-vertically integrated service providers. This vertical integration means that the same corporate holding company plaintiff that commences an action seeking a site-blocking injunction for infringement of programming it owns or licenses as a media company simultaneously owns the ISP company enjoined as a third-party respondent by the injunction. Notably, the Court made no acknowledgement that several of the larger ISPs, namely Bell Canada, Rogers, and Videotron, are likely to *never* object to or scrutinize the plaintiffs’ requests to add sites to the order because, through vertical integration, these three larger ISPs and the plaintiffs are one in the same. The Court also did not address the fact that two of the respondent ISPs enjoined by the order are considerably smaller non-facilities-based providers, while the remainder are incumbent facilities-based carriers. These differences between respondent ISPs suggest that the order’s prospective differential burden on the respondents was already a live issue, one that the *Cartier CA* factors were not designed to assess.

Regardless of these fundamental differences between respondent ISPs, the terms of the order were applied equally to all of them. The order outlines a fifteen-day implementation timeline for the blocking requirements equally applicable to all of the ISPs. Similarly, all of the ISPs were subject to the same ongoing ten-business-day timeline to bring a motion to object to any additional proposed domains, subdomains, and IP addresses that the plaintiffs may seek to add to the order.⁹⁹ Adding consequence to this tight objection timeline, the terms of the order stipulate that if an ISP fails to file a motion to object within the ten business days, the Court may grant the amended order without further proceedings.¹⁰⁰ These uniform terms were applied equally to all of the respondent ISPs, despite the presence of objective indicators that demonstrate significant differences in size and capacity, such as the number of employees, the percentage of total avenue revenue share for the telecommunications market, or the ISP’s status as either a facilities- or non-facilities-based provider. Factoring

⁹⁷ *GoldTV FCA*, *supra* note 4 at paras 81-82.

⁹⁸ *Ibid.* at para 82.

⁹⁹ *GoldTV FCA*, *supra* note 4 at Attached Order in T-1169-19 para 2b.

¹⁰⁰ *Ibid.* at Attached Order in T-1169-19 para 2c.

these marketplace, architectural, and legal characteristics into the analysis would clearly highlight differences between the large ISPs, some of which are vertically integrated with the plaintiffs, and the smaller ISPs. The uniformity of these terms suggests that as the burden of site-blocking under this order — and likely under future orders¹⁰¹ — intensifies, smaller ISPs will be the first and most severely negatively implicated.

(i) *A graduated requirement under statute can better account for ISP differences*

The factors that come out of the *Cartier* cases do not directly contemplate an injunction in which a diverse range of ISPs are enjoined as third-party respondents. It is this fundamental distinction between *Cartier CA* and *GoldTV FCA* that highlights a purpose for codifying an explicit ISP site-blocking provision under the *Copyright Act*. An explicit blocking provision of this kind amended into the *Copyright Act* can function as a mechanism that requires courts (or any other issuing body) to factor whether a graduated approach to injunction granting is prudent, particularly in cases where an action is requesting for a multitude of ISPs to be enjoined as third-party respondents. A graduated approach to issuing the injunction can therefore mitigate the possibility that smaller ISPs are treated inequitably, relative to larger ISPs, by an order that holds them to the same requirements and filing timeline standards.

One way in which a graduated approach for assessing different ISP actors was realized is in the CRTC Accessibility Reporting Regulations.¹⁰² Made under the *Accessible Canada Act* (“ACA”),¹⁰³ the Accessibility Reporting Regulations generally establish procedural requirements relating to the reporting obligations of broadcasting undertakings and telecommunications service providers (or ISPs). In general, these Reporting Regulations concern the manner and form of accessibility plans, feedback processes, and progress reports under the *ACA*.

The *ACA* granted the Commission the ability to distinguish between classes of regulated entities in the process of making the Accessibility Reporting Regulations. It also granted the Commission the power to exempt any regulated entity or class of regulated entity from all or any parts of the reporting requirements. ISPs are the entities under the telecommunications portion of the Regulations. To apply these powers and determine appropriate entity classes, the CRTC first decided in its Notice of Consultation for this proceeding that it was appropriate to adopt the high-level distinction used in the *ACA* between regulated private and public sector entities.¹⁰⁴ The CRTC went on to determine that further distinguishing between classes of private regulated entities based on

¹⁰¹ *Rogers Media*, *supra* note 1.

¹⁰² Canadian Radio-television and Telecommunications Commission, *The Canadian Radio-television and Telecommunications Commission Accessibility Reporting Regulations*, Telecom Regulatory Policy CRTC 2021-215 (Ottawa: 7 July 2021).

¹⁰³ *Accessible Canada Act*, SC (2019), c 10.

¹⁰⁴ Canadian Radio-television and Telecommunications Commission, *Call for comments — The Canadian Radio-television and Telecommunications Commission Accessibility*

their size is generally consistent with the Commission's regulatory approach in other areas. Indeed, this approach, the Commission noted, would acknowledge "that different types of entities have correspondingly different abilities to contribute to legislative and policy objectives."¹⁰⁵ The CRTC went on to determine that, while there are numerous ways that the size of an entity might be measured, "the number of employees provides a relatively simple and intuitive basis on which to do so."¹⁰⁶ To this end, the Commission established a graduated organizational structure with three classes of regulated private sector ISP entities, based on number of employees.¹⁰⁷

Under the graduated approach to entity classes, the Commission elected to exempt the smallest ISP class from the reporting requirements to strike "an appropriate balance" between the importance of having the *ACA* apply as broadly as possible while also recognizing the limited capacity of smaller entities and the limited impact that their participation in the reporting requirements would have on accessibility. The Commission also determined that the small-to-medium-sized private ISP entities (the second smallest class) would be subject to the requirements under the *ACA*, but entities in this class would have an additional year to publish their initial accessibility plans on top of the one-year timeline by which the largest private and public ISP entities would be required to publish their initial accessibility plans.¹⁰⁸

Another way in which a graduated approach for differentiating ISP actors has been deployed is in the CRTC Internet Code.¹⁰⁹ The CRTC established the Internet Code in 2019 as a mandatory code of conduct for ISPs offering wireline retail access service for individual customers. The Commission created the Internet Code to make it easier for Canadians to understand their Internet service contracts, to prevent bill shock from overage fees and price increases, and to make it easier for customers to switch ISPs. The Internet Code, furthermore, was designed to ensure that Canadians would benefit from increased clarity in

Reporting Regulations, Telecom Notice of Consultation CRTC 2021-69 (Ottawa: 18 February 2021).

¹⁰⁵ *Ibid.* at 18.

¹⁰⁶ *Ibid.* at 19.

¹⁰⁷ In addition to these three classes of private sector telecommunications entities defined by number of employees, the CRTC also created two other categories defined by other characteristics: one is a public sector class of entities, which may include organizations like government corporations, municipalities, and universities, that act as ISPs; and the other is limited to entities that provide telecommunications service without an explicit charge, on a temporary basis, to users on the entity's premises or by a service that does not allow individuals to engage autonomously in two-way voice telecommunications or to access the Internet autonomously. See Canadian Radio-television and Telecommunications Commission, *supra* note 102 at Appendix 1, para 18(1).

¹⁰⁸ Canadian Radio-television and Telecommunications Commission, *supra* note 104.

¹⁰⁹ Canadian Radio-television and Telecommunications Commission. (2019). Telecom Regulatory Policy CRTC 2019-269: The Internet Code.

their interactions with ISPs; from clearer prices, including for bundles, promotions, and discounts; and from improved transparency around service calls, outages, security deposits, and disconnections.

The CRTC decided the Internet Code would apply only to large facilities-based ISPs that provide retail wireline service,¹¹⁰ but not to smaller ISPs.¹¹¹ The Commission noted that over 87% of Canadians receive their Internet service from nine large facilities-based providers.¹¹² Moreover, large facilities-based ISPs have more complex service offerings than those offered by smaller non-facilities-based ISPs.¹¹³ Given these factors, the CRTC reasoned that imposing the Internet Code on the largest national and regional service providers “strikes an appropriate balance between benefitting the largest possible customer base and minimizing the burden of compliance with the Code.”¹¹⁴ On this basis, the list of large facilities-based ISPs to which the Internet Code applies included the following: Bell Canada, Cogeco, Eastlink, Northwestel, Rogers, SaskTel, Shaw, TELUS, Videotron, and Xplornet.

The Commission arrived at this decision to have the Code apply only to the largest facilities-based providers despite opposing viewpoints that were expressed. Many parties in the proceeding argued that it would be best if all ISPs were subject to the Internet Code. However, the CRTC stressed that certain factors must be assessed before determining whether the Internet Code should apply to all ISPs, or just to the large facilities-based ISPs. Here, the Commission determined that it must consider “not only the impact on customers, but the impact of the regulatory burden on ISPs.”¹¹⁵ Further, the Commission acknowledged that, in some cases, smaller ISPs may not have the resources to fully understand and implement requirements under the Internet Code. The CRTC therefore concluded that the Internet Code would not apply to smaller ISPs. However, because customer protection is an important issue for the CRTC, the Commission emphasized that it expected all ISPs to behave in a manner that is consistent with all the principles set out in the Internet Code.

¹¹⁰ *Ibid.* at paras 112, 114.

¹¹¹ *Ibid.* at para 126.

¹¹² It is worth noting that the largest eight of these facilities-based ISPs are the same largest eight ISPs enjoined in the *GoldTV* order. The remaining three ISPs in the *GoldTV* order are Fido (which is a subsidiary and flanker brand wholly owned by Rogers, one of the largest facilities-based ISPs) and the two smaller non-facilities-based ISPs, Distributel and TekSavvy.

¹¹³ Canadian Radio-television and Telecommunications Commission, *supra* note 109 at para 110.

¹¹⁴ *Ibid.* at para 112.

¹¹⁵ *Ibid.* at para 122.

(ii) *A graduated requirement can instill consistency with telecommunications obligations*

The CRTC used a graduated approach to determine which ISPs should be applicable under the Internet Code. The outcome of this approach struck a balance between capturing the largest possible customer base and, at the same time, minimizing the burden of compliance. This approach was also consistent with the 2006 Policy Direction,¹¹⁶ which states that when relying on regulation, the Commission should use measures that are efficient and proportionate to their purpose.¹¹⁷ The 2006 Policy Direction further provides that measures should interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives. Moreover, if they are not of an economic nature, the Commission should use measures that are implemented, to the greatest extent possible, in a symmetrical and competitively neutral manner.

During the Internet Code proceeding, large facilities-based ISPs and other smaller non-facilities-based ISPs both attempted to make the case to the Commission that their respective opposing perspectives were consistent with the 2006 Policy Direction.¹¹⁸ The large facilities-based ISPs stressed the importance of symmetrical and competitively neutral regulation. By contrast, the smaller non-facilities-based ISPs stressed the importance of such regulation “to the greatest extent possible,” which they contended required consideration of the burden of imposing the Internet Code on ISPs that are not large and not facilities-based. Weighing these arguments, the Commission determined that limiting the application of the Internet Code would forward two key outcomes. First, the measure taken here would be efficient and proportionate to its purpose by ensuring that the majority of customers benefit from the Code without imposing undue regulatory burden on other ISPs. This, according to the Commission, was consistent with the 2006 Policy Direction. Second, limiting the application of the Internet Code, at least initially, to the large ISPs would further the policy objectives set out in paragraphs 7(a), (b), (f), and (h) of the *Telecommunications Act*.¹¹⁹

¹¹⁶ The CRTC Internet Code was released only several weeks after a 2019 Policy Direction was issued. Given the short timeframe between the release date of each, the Regulatory Policy under which the Internet Code was released notes that it is not subject to 2019 Policy Direction. That said, the Commission also notes in Canadian Radio-television and Telecommunications Commission, *supra* note 109 at para 7, that in reaching its determinations in establishing the Internet Code, the Commission took into consideration the principles set out in the 2019 Policy Direction, which include promoting competition, affordability, consumer interests, and innovation. (See Privy Council of Canada 2019-227, *supra* note 90.)

¹¹⁷ Privy Council of Canada 2006-1534, *supra* note 89.

¹¹⁸ Canadian Radio-television and Telecommunications Commission, *supra* note 109 at para 129.

¹¹⁹ Canadian Radio-television and Telecommunications Commission, *supra* note 109 at para 130; *Telecommunications Act*, *supra* note 9, s 7. These policy objectives are: (a) to facilitate the orderly development throughout Canada of a telecommunications system

(iii) *Criteria recommendations to assess respondent ISPs*

Amending the *Copyright Act* to include an explicit ISP site-blocking provision could require courts to consider the material differences among third-party intermediaries when contemplating a blocking order to which more than one intermediary may be enjoined. In other words, an explicitly codified provision under copyright statute could offer a mechanism that requires courts to account for differences between ISPs in a more optimized manner than the current *Cartier* factor assessment.

A statutory ISP site-blocking provision that requires courts to factor whether a graduated approach is needed when issuing an ISP site-blocking order can allow courts to navigate the role of ISP intermediaries in disputes under copyright law while also addressing some of the fundamental telecommunications distinctions between different ISPs. One type of graduated approach may be to impose different requirements, implementation schedules, and filing timelines applied proportionately to ISP intermediaries enjoined in a site-blocking order. Under a codified ISP site-blocking provision, courts could determine proportional treatment using a graduated approach based on consideration of the following non-exhaustive ISP criteria:

- (i) **ISP organization characteristics:**
 - a. How many employees are employed at the ISP?
 - b. Is the number of employees at this ISP materially different than the number of employees at any other ISPs listed as third-party respondents in this action?
- (ii) **Level of vertical integration and telecommunications provider registration status:**
 - a. Is the ISP vertically integrated with any media programming service entities?
 - b. Are any entities involved as plaintiffs in the underlying dispute vertically integrated with ISPs listed as third-party respondents in this action?
 - c. Is the level of vertical integration at this ISP materially different than at any other ISPs listed as third-party respondents in this action?
 - d. Is the ISP registered with the CRTC as facilities-based provider or a non-facilities-based provider?¹²⁰
 - e. If any other ISPs are listed as third-party respondents in this action, are they of the same facilities-based or non-facilities-based status?

that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and (h) to respond to the economic and social requirements of users of telecommunications services.

¹²⁰ Canadian Radio-television and Telecommunications Commission, *supra* note 28.

(iii) **ISP financial metrics and indicators:** ¹²¹

- a. What is the ISP's annual revenue or percentage of total Canadian telecommunications annual revenue?
- b. What is the ISP's net income (earnings) before tax, depreciation, and amortization ("EBITDA") from the previous year?
- c. Are there material differences between the revenue or EBITDA generated by this ISP and any other ISPs listed as third-party respondents in this action?

It may be appropriate to weigh these criteria as additional factors, or to integrate them with those factors delineated in the *Cartier* cases. Regardless of the particular capacity in which these criteria may be contemplated, the underlying aim is that they may assist decision-makers in identifying some of the fundamental telecommunications characteristics that distinguish different ISPs that may be on the same list of third-party respondents in an action. The Government of Canada's ongoing "Consultation on a Modernized Copyright Framework for Online Intermediaries" offers an active opportunity to design a statutory scheme that strengthen the tools available to rights holders, but also one that is sensitive to the role that ISP intermediaries play, and the burden they take on, in online copyright enforcement efforts.

VI. CONCLUSION

This article has confronted the potentially problematic way in which courts have recently applied the broad injunction-granting entitlement available under copyright legislation in Canada's first ISP site-blocking case. In forming its judgment, the *GoldTV FCA* court used factors drawn from the first site-blocking case in the UK, *Cartier CA*. The injunction in *Cartier CA* enjoined the UK's big five retail ISPs in a site-blocking order. In contrast, however, *GoldTV FCA* involved one blocking order that enjoined a range of eleven differently sized and differently resourced ISPs as third-party respondents. Moreover, unlike *Cartier CA*, the rights holders who sought the injunction in *GoldTV FCA* were media companies that are vertically integrated with several of the ISP intermediaries enjoined by the Canadian site-blocking order. Despite the presence of these important distinctions, the same factors established in the *Cartier CA* case were applied in *GoldTV FCA*. The latter judgment focused little analysis on the potentially disproportionate outcomes that may arise from applying the same order terms to a list of ISPs that includes both large, vertically-integrated, facilities-based providers and small non-facilities-based providers.

¹²¹ Financial metrics are already used to group and categorize Canadian ISPs in other contexts. For example, section 16 of the *Telecommunications Act* establishes restrictions on foreign ownership and control of telecommunications common carriers. This foreign ownership and control regime applies only to telecommunications entities that account for more than 10% of total Canadian telecommunications service revenues, annually.

ISP site-blocking injunctions are clearly a compelling remedy to confront commercial-scale copyright infringement. But without a thorough consideration of all the stakeholders involved, the benefits of an injunctive remedy may be undermined by the asymmetrical costs that site-blocking orders are likely to impose on third-party intermediaries. The implication of not addressing third-party respondent distinctions may amount to undue negative competitive impacts on smaller ISPs, particularly once intermediary site-blocking injunctions gain further prevalence as an available judicial remedy in future disputes. To this end, the article has made the argument in favour of codifying ISP website blocking. A statutory remedy amended into the *Copyright Act* offers a platform to tailor an explicit provision that can require courts to deeply consider the differences between ISP intermediaries when assessing whether to issue a site-blocking injunction against such third-party respondents.

The article has also contemplated a graduated approach to how ISP site-blocking orders may be executed and enforced under the copyright regime. Differentiated treatment under a graduated approach could be determined, the article suggests, based on factors such as the ISP's organization characteristics, level of vertical integration and telecommunications provider registration status, or certain financial metrics. Under this proposed arrangement, the factors would require courts to contemplate whether larger ISPs ought to be bound by more rigorous requirements and tighter timelines than smaller ISPs with fewer resources and less capacity. The outcome of employing a graduated approach may impose requirements, implementation schedules, and filing timelines applied proportionately to the dissimilar ISP intermediaries enjoined in a site-blocking order.

Finally, the article has proposed non-exhaustive criteria that courts could weigh, perhaps on top of those factors used in *Cartier CA*, when deciding whether to apply a graduated approach to issuing injunctions against third-party respondents under a codified ISP site-blocking provision. These general assessment criteria were influenced, at least in part, by the two graduated approaches discussed in the article. Here, I have sought to highlight how a similar approach could be used to apply injunctive remedies under the *Copyright Act*. A graduated copyright remedy that is sensitive to the role of ISP intermediaries, and to the variety of differently sized individual Canadian ISPs that comprise this intermediary category, may also provide consistency with broader obligations under the *Telecommunications Act* and the CRTC Policy Directions. As the Federal Government continues its "Consultation on a Modernized Copyright Framework for Online Intermediaries," time will tell if the Consultation formally recommends a statutory basis and procedure for injunctions against ISPs and other intermediaries. If such a recommendation does materialize, parliamentarians who support a competitive Canadian telecommunications industry will do well to ensure that any codified ISP site-blocking provision written into the *Copyright Act* recognizes the diversity of Canadian ISP intermediaries. If measures are not adopted to ensure equitable

treatment among third-party respondents, this new type of injunctive relief is likely to impose a mounting asymmetrical burden on the smaller ISPs that are vital to the competitiveness of Canada's Internet service market.