

Federal Court Decisions

Rogers Media Inc. v. John Doe 1

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Citation: 2022 FC 775

Ottawa, Ontario, May 27, 2022

PRESENT: Mr. Justice Pentney

BETWEEN:

**ROGERS MEDIA INC.
ROGERS COMMUNICATIONS INC.
BCE INC.
BELL MEDIA INC.
CTV SPECIALTY TELEVISION ENTERPRISES INC.
THE SPORTS NETWORK INC.
LE RESEAU DES SPORTS (RDS) INC.
GROUPE TVA INC.**

Plaintiffs

and

JOHN DOE 1

JOHN DOE 2

**OTHER UNIDENTIFIED PERSONS WHO OPERATE UNAUTHORIZED STREAMING SERVERS
PROVIDING ACCESS TO NHL LIVE GAMES IN CANADA**

Defendants

and

**BELL CANADA
BRAGG COMMUNICATIONS INC. dba EASTLINK
COGECO CONNEXION INC.
DISTRIBUTEL COMMUNICATIONS LIMITED
FIDO SOLUTIONS INC.
ROGERS COMMUNICATIONS CANADA INC.
SASKATCHEWAN TELECOMMUNICATIONS
SHAW COMMUNICATIONS INC.
TEKSAVYY SOLUTIONS INC.
TELUS COMMUNICATIONS INC.
VIDEOTRON LTD.**

Third Party Respondents

and

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY
AND PUBLIC INTEREST CLINIC
BEANFIELD TECHNOLOGIES INC.**

Interveners

ORDER AND REASONS

PUBLIC VERSION

(CONFIDENTIAL VERSION ISSUED ON MAY 27, 2022)

I. Introduction

[1] The Plaintiffs own copyright for live broadcasts of National Hockey League (NHL) games in Canada. They claim that certain unknown Defendants are unlawfully distributing these broadcasts to individuals in Canada, in breach of their copyright.

[2] The Plaintiffs say that despite the steps they have taken thus far, the piracy continues and there are not any further remedies that are likely to be effective to stop it. That is because these Defendants hide their identities, the vast majority of their activities occur in other countries, and they have adopted business practices, which make it unrealistic to stop them using the traditional legal processes intended to deal with copyright

infringement. Because of this, the Plaintiffs say they cannot realistically enforce their copyright by cutting off the source of the unlawfully distributed copyright material.

[3] Instead, the Plaintiffs seek to stop people in Canada from accessing the infringing content. In order to do that, they request a “site blocking” Order against the named Third Party Respondents, who control the vast majority of access to the Internet in Canada. The purpose of the Order they seek is to stop Canadian customers from viewing the copyright-infringing broadcasts of live NHL games.

[4] This case is about whether such a remedy should be granted, and if so, how to balance the interests involved. The relevant interests are those of the Plaintiffs, who own copyright in these broadcasts, the legitimate concerns of the innocent Third Party Respondents, the Internet Service Providers (ISPs) that will have to implement the order, as well as the interests of their customers, whose access to legitimate content might be inadvertently cut off. The remedy here is also of interest to the wider public in Canada, because of its potential scope, reach and impact.

[5] The Order the Plaintiffs seek builds upon a recent precedent, in which this Court approved a different type of site blocking order against a business that provided access to programming content over the internet (*Bell Media Inc v GoldTV.Biz*, 2019 FC 1432 [*GoldTV FC*]). This Order was upheld on appeal by the Federal Court of Appeal (*TekSavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100 [*GoldTV FCA*]), and on March 24, 2022, leave to appeal to the Supreme Court of Canada was denied (SCC File No. 39876)). The *GoldTV FC* order can be described as a “static” site blocking order because it listed a specific number of sites to be blocked, and provided that new sites could only be added by order of the Court.

[6] In this case, the Plaintiffs have requested a “dynamic” site blocking Order, which involves trying to follow and block the unlawful streaming as it moves. The Plaintiffs say that the type of order issued in *GoldTV FC* would not work here because the pirates have adopted new measures to avoid detection and defeat site blocking, including moving their infringing content from site to site on a regular basis. Court approval would be impossible prior to each new blocking step because these efforts need to happen in real time in order to be effective.

[7] The Plaintiffs say this is of particular relevance here, because most fans watch hockey games live, rather than recording them to watch later. This combination of factors means that blocking of unlawful streaming of live

NHL broadcasts must happen while the broadcast is underway. Based on the evidence they have gathered, and experience in other countries where similar site-blocking orders have been issued, the Plaintiffs say that a dynamic site blocking Order is needed to keep up with the evolution in how online copyright piracy operates. For example, in this case the sites to be blocked could shift during the course of a single hockey broadcast. This type of dynamic blocking order has never been granted in Canada or in the United States. However, similar orders have been granted in the United Kingdom and Ireland, as well as in some European countries.

[8] Some of the Third Party Respondents are prepared to consent to the Order. Others object on multiple grounds, opposing the grant of the injunction or objecting to the terms of the Order, or both. Although the objecting Third Party Respondents do not adopt identical positions, they advance broadly similar arguments. They say the process the Plaintiffs followed has been inappropriate and unfair. They contend that the Plaintiffs have failed to prove their case. They argue that the Order sought would impose undue risks, practical difficulties and costs on them, noting that they are not accused of any wrongdoing in this matter. Finally, they submit that if any Order is to be imposed, the Plaintiffs must be required to indemnify them completely for the costs associated with compliance, including (for those that would be required to do so) any cost of upgrading their network infrastructure.

[9] I am granting a mandatory interlocutory injunction to the Plaintiffs, although not on the terms they had proposed. I am satisfied that they have established a very strong *prima facie* case that the unknown Defendants are engaging in ongoing breach of their copyright in the broadcasts of live NHL games. I am also satisfied that the Plaintiffs will suffer irreparable harm if this is allowed to continue. Finally, I find that appropriate conditions can be imposed to minimize the risk of over-blocking of legitimate content and to reduce the burdens imposed on the innocent Third Party Respondents.

[10] The concerns expressed by the Third Party Respondents and Interveners about the scope, reach and implications of the dynamic site blocking order sought here are valid and merit serious attention. In the particular circumstances of this case, however, these concerns do not tip the balance in favour of denying the Plaintiffs' the relief they seek. First, by the time this decision is issued, the NHL playoffs will be underway, and so the number of games being played – and broadcast – is significantly reduced, and will continue to decline until only two teams are playing in the Stanley Cup final. Second, the Third Party Respondents will only have to block to the limits of their current technical capacity to do so, and they will be indemnified (to a capped amount)

by the Plaintiffs for the costs they incur in complying with the Order. Third, the Plaintiffs will retain and pay for an independent expert to verify that the IP addresses identified for blocking fit within the strict criteria defined in the Order, and to monitor the Third Party Respondent's implementation to identify any practical difficulties they encounter. This expert will provide a confidential report to the Court and the parties, and later a public report will be released and posted on the Parties' websites.

[11] The dynamic blocking Order granted in this case is unprecedented in Canada. I am satisfied that, in the circumstances of this case, it is just and equitable to grant this relief, subject to the very specific terms and restrictions set out in the Order.

[12] This case raises novel and complex legal issues. Adding to the complexity is the fact that the parties do not neatly line up on both sides of the question. It will be useful, therefore, to set out the background to the case before entering into the analysis.

II. Background

[13] To put this case into its proper context it is necessary to review several matters: (a) the parties and their roles in this case; (b) the NHL broadcasting rights that are the subject of the copyright claim; (c) the internet and online piracy; (d) how site blocking works; and (e) the *GoldTV* decisions that set the foundation for this motion.

A. The parties

(1) The Plaintiffs

[14] The Plaintiffs are Canadian entities that own and operate a number of television stations and online subscription services in Canada. While they broadcast a wide variety of television programs, the focus of this case is on live NHL games.

[15] Rogers Media Inc. (Rogers), a fully owned subsidiary of Rogers Communications Inc. (Rogers Communications), owns and operates a number of television stations, which are distributed in Canada through broadcasting distribution undertakings (BDUs) such as Rogers' affiliate Rogers Communications Canada Inc. (Rogers Cable), to which Canadian customers subscribe for a fee.

[16] BCE Inc. is Canada's largest communications company. Bell Media Inc. (Bell Media) is a wholly owned subsidiary of BCE. Bell Media is a Canadian company that engages in broadcasting, among other activities.

CTV Specialty Television Enterprises (CTV Television) is a subsidiary of Bell Media, while the specialty television stations The Sports Network (TSN) and Le Réseau des Sports (RDS) Inc. (RDS) are subsidiaries of CTV Television.

[17] Bell Media owns and/or operates TSN, RDS and other television stations that it distributes through BDUs, such as its parent Bell Canada and its affiliate BellExpressVu (which together do business as Bell TV) and others. Some of its stations are also broadcast over the air for free.

[18] Groupe TVA Inc. (Groupe TVA) is a broadcaster that owns and/or operates numerous television stations that it distributes through several BDUs, including Groupe TVA's affiliate Videotron Ltd. (Videotron). Some of its stations are also broadcast over the air for free.

(2) The Third Party Respondents

[19] The Third Party Respondents are ISPs that have two things in common. First, they provide the vast majority of internet access to Canadian households and businesses. Second, none of them are accused of any wrongdoing in this case. They are simply conduits through which unlawful breach of copyright is occurring.

[20] In other respects, however, the Third Party Respondents are not a homogenous group, and it is important to draw distinctions both in respect of their relationship with the Plaintiffs and their positions in regard to this litigation. It will be convenient to distinguish between three groups of Third Party Respondents.

(a) *"Tied" ISPs*

[21] A number of the Third Party Respondents are affiliates or wholly-owned subsidiaries of the Plaintiffs. Another way of describing this is that these ISPs are, or have made arrangements to seek to become, integrated vertically with the Plaintiff rights holders. This includes Rogers Cable and Fido Solutions Inc., both affiliates of Rogers; Bell Canada, an affiliate of the other Bell Plaintiffs; and Videotron Ltd., an affiliate of Groupe TVA Inc. and a wholly-owned subsidiary of Quebecor Media Inc..

[22] Each of these "tied" ISPs is also linked with BDUs that distribute the content of their respective affiliate Plaintiff corporations. In general terms, this reflects the phenomenon of "convergence" in the Canadian telecommunications industry (Canada Radio-Television Communications Commission (CRTC), Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications, Feb. 2010).

[23] As noted above, these ISPs have indicated their consent to the Order sought by the Plaintiffs. They need a court order in order to undertake the site blocking, because section 36 of the *Telecommunications Act*, SC 1993, c 38 requires ISPs to obtain the approval of the CRTC before taking steps to “control the content or influence the meaning or purpose of telecommunications carried by it for the public.” Absent CRTC approval or a court order, the ISPs would contravene section 36 of the *Telecommunications Act* by engaging in site blocking.

[24] Shaw Communications Inc. (Shaw) is in a different position than the “tied” ISPs, because it has entered into an agreement for Rogers Communications to purchase its shares, but this agreement is subject to the approval of regulators. Shaw did not contest the matter at the hearing, and it maintains that position, and so for the moment, Shaw is best included in the category of “non-contesting ISPs” set out below.

(b) Non-Contesting ISPs

[25] Several of the ISPs did not actively participate in these proceedings, although some of them registered concerns with the terms of the proposed Order that are broadly similar to those expressed by the Contesting ISPs. This includes Shaw, Bragg Communications Inc. (Eastlink), Saskatchewan Telecommunications, and TekSavvy Solutions Inc.

(c) Contesting ISPs

[26] Several of the ISPs contest the Plaintiff’s motion, arguing that:

1. the procedure followed by the Plaintiffs was unfair;
2. the Plaintiffs have not established their case, and
3. the terms of the Order sought do not reflect the appropriate consideration of their interests or those of their customers.

[27] This group of ISPs includes Cogeco Connexion Inc. (Cogeco), Distributel Communications Ltd. (Distributel) and Telus Communications Inc. (Telus). Telus did not take a position on the procedure followed by the Plaintiffs or whether the Plaintiffs had met their case for an injunction. Rather, Telus focused on the difficulty that it would face in implementing the Order and the particular form of order. The position advanced by these ISPs will be discussed in more detail below. In the discussion that follows, references to the arguments

of the Third Party Respondents refer to the positions advanced by Cogeco, Distributel and/or Telus (in regard to the difficulty implementing the Order and its particular form), unless otherwise specified.

(3) The Interveners

[28] The Samuelson-Guusko Canadian Internet Policy & Public Interest Clinic (CIPPIC) and Beanfield Technologies Inc. (Beanfield) were granted leave to intervene in this proceeding by order dated October 13, 2021 (2021 CanLII 107613). Both received leave to file written submissions, although Beanfield was limited to making submissions only in respect of the order. CIPPIC also made oral submissions during the hearing of the motion.

[29] CIPPIC sought to situate the case in its wider context by highlighting the interests and issues associated with site blocking orders within the framework of Canada's approach to regulating the Internet.

[30] Beanfield is an ISP, but it is different from the Third Party Respondents because it delivers its services through an independent, facility-based network. Beanfield's submissions focused on ensuring that any Order granted in this case took into account the fact that not all ISPs operate in the same way, and that the order was limited to the situation of the ISPs directly subject to it.

[31] The arguments of the interveners are discussed in more detail below.

[32] We turn now to the copyright claim that underlies this proceeding. For all of the complexities of the case, the copyright claim is rather straightforward. The gravamen of copyright protection is control over the right to produce or reproduce the work, here the broadcasts of live NHL games. The Plaintiffs assert that the Defendants are infringing their rights by arranging for and facilitating the streaming of unauthorized copies of these works to viewers in Canada. To set this in its proper context, it is worthwhile examining how NHL broadcasting rights are allocated.

B. NHL Broadcasting Rights in Canada

[33] The NHL is a professional ice hockey league that operates in Canada and the United States. It is comprised of 32 teams, including seven teams based in Canada: the Montreal Canadiens, the Ottawa Senators, the Toronto Maple Leafs, the Winnipeg Jets, the Calgary Flames, the Edmonton Oilers, and the Vancouver Canucks.

[34] The NHL season is divided into three phases. These are the pre-season, which usually runs over two weeks, involving six to eight exhibition games; the regular season, which typically runs from early October to early April, consisting of 82 games per team; and the Stanley Cup Playoffs and Final, which usually run from mid-April until mid-June, and can involve between 60 and 105 games in total. Together, these constitute the NHL season.

[35] The broadcasters who hold the rights to particular NHL games film and produce them (by adding elements such as text, images, videos, and commentaries to the footage). Copyright in the live footage and production is then assigned from the broadcaster(s) to the NHL or to the local NHL team playing the game; the NHL and the teams in turn licence these rights back to the broadcasters.

[36] The rights to broadcast NHL games depend on whether games are designated “National Games” or “Regional Games”.

[37] Some NHL games between Canadian teams are designated as National Games, as are the Stanley Cup Playoffs and Final as well as select other events such as NHL All-Star games. All other games are Regional Games.

[38] It is not necessary to describe in great detail the specific rights held by the various Plaintiffs. The Plaintiffs collectively hold the rights to all National and Regional Games in Canada, which they sometimes sublicense to other broadcasters.

[39] Rogers holds the rights to distribute, through television broadcast and online streaming, all live NHL National Games broadcast in the English language in Canada. It also holds the rights to distribute all the Regional Games of some Canadian teams. Rogers Media sub-licenses select National Games it produces for broadcast by the Canadian Broadcasting Corporation as well as the Aboriginal Peoples Television Network.

[40] Rogers broadcasts the games to which it holds rights through a number of television stations, including the Sportsnet branded stations (Sportsnet East, Sportsnet Ontario, Sportsnet West and Sportsnet Pacific), as well as several conventional stations, and NHL Centre Ice (which provides access to out-of-market regional games). Rogers provides access to certain broadcasts through online services, including Sportsnet NOW and NHL Live, which Rogers operates. Rogers also produces several NHL-related programs, generally involving commentary that precedes and follows live NHL games, which it broadcasts in a similar manner.

[41] Bell holds the exclusive rights to distribute all the Regional Games of several Canadian teams. It broadcasts live NHL games through its TSN-branded stations (which include TSN1, TSN2, TSN3, TSN4 and TSN5), as well as through its RDS-branded stations (including RDS and RDS2), and through their corresponding online services (TSN DIRECT and RDS DIRECT). Bell also produces and broadcasts several NHL-related programs, in both English and French.

[42] Groupe TVA holds the exclusive rights to distribute select National Games in the French language.

C. The Internet and Online Piracy

[43] The Internet is a global network that is composed of a collection of “nodes” that are directly or indirectly connected. Devices, including computers, smart phones and tablets, each constitute a separate node. Each node has a unique Internet Protocol (IP) address attached to it, expressed in digital form (e.g. 172.217.164.228).

[44] Nodes that Internet consumers typically use tend to focus on accessing content on the Internet. Other nodes, used by the operators of various Internet services, host and provide access to content. Anyone who has used the Internet to find or to share information has engaged with the process, but users are generally not aware of the complex routing system that connects their device to the source of the information and that manages the traffic between the two. Several components of this system, described below, are key to understanding the remedy sought here.

[45] Users typically do not use the IP address associated with any particular node. Instead, they rely on the Domain Name System (DNS) that bridges the gap between IP addresses and domains (e.g., www.NHL.com) or subdomains (e.g., www.NHL.com/scores). The DNS system is essentially the Internet’s phonebook; it matches each domain name with its corresponding IP address. When a user attempts to connect to a recognized domain, the DNS will automatically point that request to the appropriate node associated with the relevant IP address. The DNS is not hosted on a single repository; instead, ISPs and other entities host DNS servers that store the IP addresses used to route the traffic.

[46] The transfer of data on the Internet always involves two mirror acts: downloading, which involves the first node obtaining a copy of the data from a second node connected to the internet, and (simultaneously) uploading, which involves the second node transmitting the data to the first node connected to the Internet.

[47] The relevant type of download for this case is “streaming”: successive portions of a temporary copy of a video broadcast are downloaded, played as the download progresses, and subsequently or progressively deleted from the device. The Plaintiffs provided an apt analogy: streaming is akin to someone reading a book by being handed a few pages at a time, with these being discarded as the next pages are handed to the reader. At the end of the process, the reader has finished the book without the actual hard copy of the book taking up space on their bookshelf. One of the reasons streamed content can be viewed so quickly on a user’s device is that the entire broadcast is not downloaded all at once; instead, the first few segments are downloaded, and then the rest follow in sequence.

[48] Unlawful streaming services require several technological components. First, a “source feed” is needed – in this case, the live broadcast is captured and uploaded to be ready for streaming. Second, “streaming infrastructure” is required to distribute the pirated material to viewers. This involves both hardware and software components, including one or more “streaming servers” and a “streaming platform”.

[49] Many legal streaming services provide subscribers access to copyright material that the streaming service has obtained under licence. Netflix is an example. However, many illegal streaming sites or platforms provide access to pirated material.

[50] Two types of illegal streaming platforms are commonly available: (i) open web piracy sites that are typically free and publicly available, which derive their revenues from advertising, and (ii) unauthorized subscription services that typically provide a higher quality copy of the pirated material as well as easier access to subscribers. Subscriptions to unauthorized subscription services are generally much cheaper than the fees for the services provided by the ISPs, because the pirates do not pay any licencing fees or incur any production costs.

[51] As discussed above, streaming involves breaking a video (or audio) file down into small media files, referred to as segments (the “pages” referred to in the Plaintiffs’ analogy). All of these segments can be located on a single Streaming Server or duplicated and distributed across multiple different Streaming Servers within the Streaming Infrastructure. One advantage of distributing pirated material in this way is that segments can be provided to the end user in the most efficient means possible, to avoid overloading one component which could cause delays or interruptions.

[52] The evidence shows that while a streaming platform can be operated by the same pirate as the streaming infrastructure, in most cases they are not. A single streaming infrastructure, however, can be accessed by a number of different streaming platforms.

[53] The end user – whether seeking legitimate access or unlawful streaming content - is typically unaware of how the information is routed between the source and their device. However, a key element in this case is the ISPs' capacity to identify and block users' access to streaming platforms that are unlawfully streaming copyright-infringing content, and thus a brief description of how site-blocking works is in order. This requires, first, a further description of how traffic is routed from the customer through the ISP to the Internet.

[54] ISPs provide access to the Internet over several different types of connections. The section of the infrastructure that connects to the residential customer is referred to as the “last-mile” connection. In Canada, there are generally two types of ISPs: those that own the last-mile infrastructure (referred to as “facilities-based providers” or “common carriers”), and those that lease the last-mile infrastructure (known as “resellers”).

[55] At a high level, the infrastructure ISPs use to connect customers to the Internet involves four elements:

1. *Customer equipment* – often a home router, that connects various devices in the home to the network;
2. *Last-mile/access loop* – the last-mile connection from the customer's residence to the access/transportation network owned or leased by the ISP;
3. *The access/transportation network* – the system of routers that aggregate and route the traffic received from the last-mile/access loops and transport that traffic onwards to the core network;
4. *The core network* – which contains a further set of routers that aggregate and route the traffic to and from multiple access/transportation networks. This network includes the DNS servers and other high-level service infrastructures that are essential to the functioning of the Internet as a system of systems.

[56] An ISP's core network then connects to the Internet, which itself is a system comprised of a series of other networks through which traffic is routed to enable the simultaneous downloading and uploading of information. An ISP's infrastructure will include both aggregating routers and core routers. This is key because these are the

focal points of the site blocking efforts. Although the technical process is somewhat different as between common carrier ISPs and reseller ISPs, the differences are not significant for the purposes of this case, because both types of ISPs can and do engage in blocking of certain traffic.

D. Site Blocking

[57] As stated above, site blocking is a method used to deter or prevent access to streaming platforms that provide access to copyright-infringing and other types of material, and to prevent incoming traffic from causing problems for users or affecting the ISPs network. There are three main types of site-blocking approaches for ISPs:

1. *DNS blocking* – which disconnects the link between a domain (or subdomain) and its corresponding IP address in the DNS service;
2. *IP address blocking* – which blocks traffic to and from a specified IP address; and
3. *URL (Uniform Resource Locator) path blocking* – which prevents traffic to and from very specific locations on a website or other Internet service.

(1) DNS Blocking

[58] The DNS (domain name system) acts as a necessary bridge between a domain name and the corresponding IP address, and it is therefore possible for an ISP that hosts DNS servers to block its subscribers from accessing a particular website. Canadian common carriers and resellers that have DNS servers already possess the capacity to carry out this sort of blocking.

[59] However, it is important to note that while a domain or subdomain typically points to a single IP address at any given time, many domains or subdomains can point to the same IP address because a single server can host multiple websites.

(2) IP Address Blocking

[60] This technique focuses on the problematic IP address rather than the domain name. This method can be implemented at the core outer layer of an ISP's infrastructure. It involves configuring the core router(s) so that they will not route the users' traffic to a particular IP address. Instead, when a subscriber tries to access that address, the router will send the query to "nowhere" rather than routing it to its original destination. This is

referred to as “blackholing” because the request is sent into a “blackhole” rather than the IP address. The process also works in reverse, to prevent malicious content from reaching a particular subscriber’s IP address.

[61] The evidence shows that all of the Third Party ISPs regularly use this method to secure their network from malicious content or activity linked with particular IP addresses. This can involve blocking data transfers and attacks from these IP addresses for periods of up to a few hours. All of the ISPs monitor their networks on a continuous basis to detect problematic traffic and to try to prevent them from affecting the service to other customers. One typical situation is known as a “Distributed Denial of Service” (DDOS) attack. A DDOS attack involves a systematic effort to overwhelm a particular customer’s internet service in order to deny them access. ISPs deal with such incoming attacks on a daily basis, and in some cases, this requires disabling a customer’s access in order to prevent the DDOS attack from taking down an entire node on an ISP’s system.

[62] As will be discussed in more detail below, ISP core routers can only block a certain number of IP addresses at one time, due to capacity limits. |||||

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(3) URL Path Blocking

[63] URL Path blocking allows for more specific traffic blocking than the other two methods; it allows an ISP to deny a specific path within a domain without blocking access to other pages within the same domain. To return to an example used earlier, this would allow an ISP to block customers’ access to www.NHL.com/scores, without cutting off access to www.NHL.com or any other pages within that domain.

[64] ISPs that are part of Project Cleanfeed Canada use URL blocking to prevent subscribers in Canada from accessing non-Canadian websites associated with child pornography. This group of ISPs includes Bell, Rogers, Sasktel, Shaw, Telus and Videotron. The evidence shows that Bell updates the list of URLs that are blocked as part of Project Cleanfeed on a daily basis.

[65] At the time of the hearing, not all Third Party ISPs had the capacity to implement URL path blocking.

E. The GoldTV decisions

(1) GoldTV FC

[66] As noted earlier, the Plaintiffs seek to build upon the order granted in the *GoldTV FC* case, and it will be useful to summarize that decision as well as the Court of Appeal's ruling that upheld the order. Both decisions are discussed in more detail below, in the context of the analysis of the current parties' specific arguments.

[67] In *GoldTV FC*, a case involving the same Plaintiffs and Third Party Respondents as the present matter, the Plaintiffs sought an interlocutory injunction to force the Third Party Respondents to block customers from accessing copyrighted broadcasts of television programs. The Plaintiffs filed a statement of claim against two unnamed defendants doing business as "goldtv.biz" and "goldtv.ca" (GoldTV). In view of the steps taken by these defendants to remain anonymous and avoid legal processes, the Plaintiffs also sought an interim injunction for 14 days, as well as an interlocutory injunction. Both were granted.

[68] Despite the issuance of these orders, some of the GoldTV services remained in operation. The unnamed defendants had not filed any statement of defence or otherwise participated in the underlying action. As a result, the Plaintiffs then sought an interlocutory mandatory injunction aimed at the Third Party Respondent ISPs, requiring them to block Canadian customers from gaining access to the unauthorized broadcasts through the GoldTV services, at a specific list of IP addresses and Web domain names.

[69] Several of the Third Party Respondents consented to the order, but TekSavvy and Distributel objected, and both filed records before the Court. Telus also made submissions at the hearing. TekSavvy argued that the Court should not exercise its jurisdiction to grant the injunction for a number of reasons, including that Parliament had deliberately not adopted a site-blocking regime when it amended the *Copyright Act*, RSC 1985, c C-42 in 2012. It also argued that site-blocking fell within the specialized expertise of the CRTC, which had indicated that such measures should only be available in extraordinary circumstances.

[70] TekSavvy noted that in a 2018 decision, the CRTC had rejected a request from the FairPlay Coalition to require ISPs to block access to websites and services engaged in copyright piracy (Telecom Decision 2018-384). TekSavvy's general position was that the Plaintiffs' request had to be considered in the broader context of the Canadian debate on site blocking then underway both in Parliament and before the CRTC. It urged the Court to leave it to those bodies to address the question.

[71] In addition, TekSavvy argued that the Plaintiffs had not met the test to obtain a mandatory interlocutory injunction. A very brief summary of this aspect of the decision will suffice here. The Court found that it had

jurisdiction to grant the requested injunction, noting that orders against third parties were sometimes available in Canadian law. It also noted that courts in the UK had granted similar orders based on both a specific legislative provision relating to online piracy and their more general jurisdiction to grant interlocutory relief – a grant of jurisdiction that was broadly similar to that of the Federal Court.

[72] The Court concluded that the Plaintiffs had met the usual three-part test for an interlocutory injunction.

[73] On the first element, the Court found that the Plaintiffs had demonstrated a strong *prima facie* case of copyright infringement. Turning to the next two elements, whether the Plaintiffs had established irreparable harm, and where the balance of convenience lies, the Court applied the guidance from the UK jurisprudence in identifying and assessing the relevant considerations.

[74] The Court found that the Plaintiffs had established irreparable harm. First, the copyright infringement had continued even after the interim and interlocutory injunctions were granted, and the evidence did not show that less intrusive means of addressing it were likely to be effective. Second, there was a strong *prima facie* case of ongoing copyright infringement and the Defendants were unknown. The Court found that the financial impact on the Plaintiffs therefore constituted irreparable harm.

[75] Turning to the third element, the Court found that the balance of convenience favoured the Plaintiffs. Applying the factors set out in the UK jurisprudence, described in more detail below, the Court was satisfied that the site-blocking order would be effective without interfering in customers' access to lawful content, and that it would not impose an undue burden on the Third Party Respondents. The Court was also satisfied that adequate safeguards could be put in place to prevent abuse of the order.

[76] The Court therefore granted the order, although it made certain amendments to the version proposed by the Plaintiffs. In essence, the terms of the order directed the Third Party Respondents to take steps to block access to a specific list that included two website domain names, ten subdomains and eleven IP addresses. The order could be amended on motion by any party, and any individual whose access was blocked could apply to vary it. Other technical details included in this order are discussed below in connection with the analysis of the Order presently requested.

[77] Since the initial *GoldTV FC* decision, the order has been amended three times, by orders dated December 20, 2019, July 10, 2020 and November 13, 2020. When the present case was argued, the Plaintiffs had brought a

motion to seek a further amendment, but the matter had not been heard.

(2) *GoldTV FCA*

[78] In a decision issued on May 26, 2021, the Federal Court of Appeal dismissed the appeal and affirmed the order granted by Justice Gleeson. The Court of Appeal acknowledged that the order was unprecedented in Canada, but found that it was validly issued and should be upheld.

[79] The Court of Appeal addressed the three main issues TekSavvy raised on the appeal, namely that: the Federal Court did not have the jurisdiction to award a site-blocking injunction; the decision below failed to grapple with the issue that the order violated freedom of expression; and the Federal Court should not have granted the order on the facts of the case.

[80] On the first point, the Court of Appeal found that sections 4 and 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, granted the Federal Court the jurisdiction to award a site-blocking injunction, and this was reinforced by subsection 34(1) of the *Copyright Act*, which includes injunctive relief among the panoply of remedies for copyright infringement. In support of this conclusion, it cited the following passage from *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [Google] at paragraph 23: “[t]he powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited.”

[81] The Court of Appeal rejected TekSavvy’s arguments that the rights and remedies under the *Copyright Act* are exhaustive and that Parliament’s choice to adopt a “notice and notice” regime instead of the “notice and takedown” approach adopted in the United States indicated that it did not wish to grant copyright owners the more powerful remedy of site-blocking order against ISPs. The Court of Appeal also rejected the claim that such orders were foreclosed by section 36 of the *Telecommunications Act* because that provision guarantees net neutrality and bars ISPs from blocking access to websites without an order from the CRTC. The Court of Appeal found that “the general wording of section 36... does not displace the Federal Court’s equitable powers of injunction, including the power to impose a site-blocking order” (para 36).

[82] On the second question, the Court of Appeal rejected the argument that the order should be set aside because the Federal Court failed to address the freedom of expression issues raised by the case. Applying the approach adopted in *Google*, the Court of Appeal found that it was “not necessary for the Judge to engage in a detailed *Charter* rights analysis separate and distinct from the balance of convenience analysis that is already to

be considered” (para 53). The Court of Appeal found that the decision under appeal adequately considered the freedom of expression considerations.

[83] Turning to the question of whether it was just and equitable to grant the injunction in the circumstances of the case, the Court of Appeal found that that there was no reversible error and thus upheld the decision. Once again, the details of this analysis are discussed in the next sections, and so it is not necessary to review them here.

III. Issues

[84] The issues in this case can be distilled to three questions:

1. Should the interlocutory injunction be refused because the process was unfair to the Third Party Respondents?
2. Have the Plaintiffs met the test to obtain a mandatory interlocutory injunction for a dynamic site-blocking order?
3. If so, on what terms should the Order be issued?

[85] A number of other issues are nested within the second and third questions, and these will be discussed below.

IV. Analysis

A. The procedure was fair to the Third Party Respondents

[86] The Third Party Respondents argued that the Plaintiffs pursued a deliberate strategy to place them at a disadvantage in responding to the motion, and urged the Court not to reward such behaviour. They say that there were several alternatives available to the Plaintiffs, including obtaining a consent order that would have applied only to the “tied” ISPs, or seeking the agreement of all of the ISPs to undertake a test of the proposed blocking system in order to assess its feasibility and effectiveness. The Third Party Respondents urged the Court to refuse to grant the relief in the absence of a good faith pre-litigation effort to pursue a commercially reasonable business process before involving innocent third party ISPs in costly, ostensibly urgent litigation.

[87] The discussion of this point begins with a brief review of the procedural history of the case, followed by a summary of the arguments and then an analysis of the merits of this claim.

(1) Procedural History

[88] The Plaintiffs filed a Notice of Motion seeking an interlocutory injunction that would be binding on the Third Party Respondents on July 7, 2021. Their Motion Record was voluminous, including public and confidential material, and several affidavits.

[89] On August 17, 2021, the Court held a Case Management Conference to discuss a schedule and timing with the parties. The Plaintiff noted that their materials had been duly served on the parties, and that because the NHL season was scheduled to commence on October 2, 2021, they said the hearing should be convened without delay.

[90] Several of the Third Party Respondents objected, arguing that the Plaintiffs had chosen a strategy of serving a huge motion record during the of summer holidays, and then seeking an urgent hearing, because that would prejudice the Third Party Respondents who sought to oppose the request. The parties were directed to discuss the issue and to return to the Court with specific scheduling proposals. That was done by late August, and following consideration of the parties' respective proposals, the Court issued a scheduling order on September 14, 2021, setting out a timeline for the motions for leave to intervene, for filing evidence and submissions by the parties, and setting the matter down for hearing. The scheduling order was subsequently amended and two other Case Management Conferences were convened to address several other matters in advance of the hearing.

[91] The matter was heard over three days commencing on November 23, 2021. At the end of the hearing, submissions were received from the Plaintiffs and several of the Third Party Respondents regarding the specific terms of a possible Order. The parties were asked to discuss the various proposed changes to determine whether they could reach agreement on some points (as had been done in *GoldTV FC*); failing that, the Third Party ISPs were asked to return with a consolidated version of their proposed Order, showing where they agreed and diverged. That was done and a continuation of the hearing was held on January 7, 2022, to hear from the parties regarding their proposed changes to the Order.

(2) The Parties' Arguments

[92] The unfairness arguments involve three related claims, connected to the strategy adopted by the Plaintiffs, the fact that the relief they seek will, in reality, be a final remedy, and the alternatives that were available to the Plaintiffs.

[93] First, the Third Party Respondents repeat their arguments made at the August 17, 2021 Case Management Conference: they assert that the procedure followed by the Plaintiffs was a deliberate strategy designed to place the responding parties in an untenable position. They argue that the Plaintiffs had taken many months to assemble a significant documentary record, as evidenced by the fact that Rogers retained a company which began to monitor for copyright infringement as of January 30, 2021. The Plaintiffs' record was then served and filed in early summer, with a request for an urgent hearing. The Third Party Respondents note that this mirrors the approach the Plaintiffs followed in the *GoldTV FC* case, and they urge the Court not to sanction it.

[94] Next, the Third Party Respondents point out that the remedy the Plaintiffs are seeking is, in effect, a final Order because it is highly unlikely they will ever pursue the unnamed defendants. This is another similarity with the *GoldTV FC* case, where at the time of the hearing in this matter, the Plaintiffs were seeking to extend and make permanent the interlocutory injunction, while at the same time staying the underlying proceedings against the defendants in that matter. The Third Party Respondents argue that this reality makes the interlocutory injunction process unsuitable, because it denies them the usual discovery rights and other procedural safeguards that are part of the regular trial process.

[95] Related to this, the Third Party Respondents submit that the novel remedy sought by the Plaintiffs could have been obtained, on consent, from the "tied ISPs" who represent approximately 70% of the residential retail Internet connection market in Canada. If the Plaintiffs had followed this approach, they could have tested the technical systems they now seek to impose on the Third Party Respondents, to assess their ease of use and accuracy. This would have also enabled the Plaintiffs to gather evidence about the effectiveness of a dynamic site blocking order. The Third Party Respondents contend that this would have been a fairer procedure that would have diminished the impact on them because it would have allowed for a period of testing and refinement of the dynamic blocking procedures.

[96] Building on the last submission, the Third Party Respondents also say that the Plaintiffs should have proposed that the parties work together to identify feasible ways of implementing the novel order sought by the Plaintiffs, including by jointly developing technical solutions and engaging in a period of testing and validation.

This approach would have enabled many of the Third Party Respondents' concerns to be addressed, and would have allowed the parties to present a robust evidentiary record to the Court.

[97] The Third Party Respondents ask the Court to deny the Plaintiffs the relief they seek, to discourage their strategy of filing voluminous materials and then pressing for an urgent hearing. They also assert there were effective alternative approaches available that would have enabled the Plaintiffs to obtain most of what they seek without imposing such undue burdens on the innocent Third Party Respondents.

[98] In a related but separate submission, Distributel argued that the Plaintiffs had known about the problem of copyright piracy for years but it waited until now to bring this motion. Distributel argued that this delay should be sufficient to disentitle the Plaintiffs to the extraordinary interlocutory relief they seek.

[99] The Plaintiffs deny that they have followed an unfair procedure. They argue that the question must be understood in light of the rapidly evolving context, in particular the changes in the way online piracy of copyright content operates in the real world. The fact that the context has changed so rapidly has meant that the Plaintiffs' approach to protecting their copyright must evolve to keep pace. In this case, that has meant going from earlier efforts to enforce their rights (see, for example: *Bell Canada v 1326030*, 2016 FC 612, aff'd 2017 FCA 278; *Bell Canada v Vincent Wesley dba MtlFreeTV.com*, 2016 FC 1379, and see also 2018 FC 66, 2018 FC 861; *Bell Canada v Red Rhino Entertainment Inc.*, 2019 FC 1460; *Bell Canada v Lackman*, 2018 FCA 42), to seeking and obtaining a static site blocking order in 2019, and now seeking a dynamic site blocking order in 2021.

[100] In response to the Third Party Respondent's arguments, the Plaintiffs acknowledge that the preparation of their motion record took some time, but they say that is appropriate in light of the technical nature of the evidence, and the novelty of the remedy they seek. Their record was served in early July, and the Third Party Respondents had months to prepare their cases. The Plaintiffs note that several of the Third Party Respondents cross-examined the Plaintiff's witnesses, and that they also filed extensive evidence about their businesses and the difficulties associated with implementing the type of order being sought.

[101] The Plaintiffs also argue that the alternative procedures proposed by the Third Party Respondents are not realistic, because an action seeking default judgment against the John Doe defendants would have no practical impact on anonymous offshore internet pirates who have taken such elaborate steps to hide their identities and

evade legal processes. The Plaintiffs submit that they have followed the accepted procedure for seeking an interlocutory injunction, which is a legal remedy that is undoubtedly available to them in Canadian law.

(3) Discussion

[102] While I agree with the Third Party ISPs that the Plaintiffs could have followed a different approach, in the end I am not persuaded that the process – as it actually unfolded – was unfair to any of the Third Party Respondents or that it impaired their ability to mount a full answer to the motion.

[103] The procedural history outlined above is a full answer to the Third Party ISPs' arguments. Whether the Plaintiffs could or should have followed a different, more collaborative, approach is not a question for the Court. Rather, the only issue is whether the Plaintiffs should be denied a mandatory interlocutory injunction because the process was unfair in the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56).

[104] In this case, the Plaintiffs filed a substantial record in early July 2021. The matter was not heard until late November 2021, and in the intervening period, the Third Party ISPs had the opportunity to gather and present their own evidence, and all parties had the opportunity to conduct cross-examination on the affidavits that were filed. All parties subsequently had the chance to present their submissions to the Court, and to present further detailed arguments regarding their respective positions on the terms of the Order that might be issued. By any measure, this meets that standards of procedural fairness.

[105] It is true that the interlocutory injunction procedure does not entail the full panoply of procedural rights that an action followed by a trial allows. On the other hand, that procedure also does not involve the delay and cost associated with a full trial of a matter. In addition, none of the Third Party Respondents explained how the Plaintiffs could realistically have pursued the unnamed Defendants. As noted by Justice Locke in *GoldTV FCA* at paragraph 42:

Where, in an action against an anonymous defendant, a court can be convinced that said defendant has and will maintain its anonymity and ignore an injunction against it, it would seem pointless and unfair to require that the plaintiff jump through certain hoops and wait a certain time to confirm what it already knows, and the court already accepts, before seeking an injunction against a third party.

[106] In my view, on the evidence before the Court, these comments apply to the situation facing the Plaintiffs. The additional procedural avenues, and costs and delay associated with bringing an action to trial were not

needed to ensure the process was fair to the Third Party Respondents. The actual proceeding in this case, as it unfolded, allowed them almost six months to obtain and present evidence and arguments and to test the Plaintiffs' evidence.

[107] Given that this case is about unlawful streaming of live NHL games, it made sense to time the matter so that the matter could be heard and decided during the current NHL season.

[108] As a final note, I observe that several of the Third Party Respondents commented on the terms of the proposed draft Order, and included in these submissions was a request that they be given a minimum of three months notice of any motion to extend any order granted. This is an indication of the time these parties thought would be needed to mount an adequate reply to such a request, and it is further confirmation that they were not unfairly prejudiced by the procedure followed in this case.

[109] For all of these reasons, I cannot accept the argument of the Third Party Respondents that the injunction should be refused because the process was unfair to them. We turn next to the merits of the Plaintiff's case.

B. The Plaintiffs have met the test for an interlocutory injunction

[110] The legal test that applies to this case was confirmed in *GoldTV FCA*:

[60] The legal test applicable in a case like this was discussed in *Google* at paragraph 25:

RJR — MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 [*RJR — MacDonald*], sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

[61] It is relevant here to reproduce the following comments from the Supreme Court in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, at para. 13 [*CBC*], after it described the test in *RJR — MacDonald*:

This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald*, the Court identified two exceptions which may call for “an extensive review of the merits” at the first stage of the analysis.) In this case, the parties have at every level of court agreed that, where a mandatory interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR* —

MacDonald test is into whether the applicants have shown a strong prima facie case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.* In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a “serious issue to be tried” needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply. By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

[111] The fundamental question is whether it is “just and equitable in all of the circumstances” that an injunction should issue. This is necessarily context-specific (*Google* at para 25).

[112] In *GoldTV FC*, the Court accepted that it was appropriate to seek guidance from relevant United Kingdom jurisprudence on site-blocking orders, in particular the factors set out in *Cartier International AG v British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658 [*Cartier*]. This was endorsed by the Federal Court of Appeal in *GoldTV FCA* (at paras 76-77), and so I will consider these principles in the analysis that follows.

[113] The following summary of the *Cartier* factors borrows from *GoldTV FC* at paragraph 52 and *GoldTV FCA* at para 74. The factors to be considered are:

- A. *Necessity* –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;
- B. *Effectiveness* –whether the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service;
- C. *Dissuasiveness* –whether others not currently accessing the infringing service will be dissuaded from doing so;
- D. *Complexity and Cost* –the complexity and cost of implementing the relief sought;
- E. *Barriers to legitimate use or trade* –whether the relief will create barriers to legitimate use by unduly affecting the ability of users of ISP services to access information lawfully;
- F. *Fairness* –whether the relief strikes a fair balance between fundamental rights of the parties, the third parties and the general public;
- G. *Substitution* –the extent to which blocked websites may be replaced or substituted and whether a blocked

website may be substituted for another infringing website; and

H. *Safeguards* –whether the relief sought includes measures that safeguard against abuse.

[114] In the circumstances of this case and in light of the wider public policy issues raised by the Order sought, I find that the application of certain of these factors must be adapted to take into account the Canadian context regarding the regulation of the Internet.

[115] Because of the *GoldTV* decisions, the parties largely agree that this is the legal framework that applies. They disagree, however, about whether the test has been met. In addition, the Third Party ISPs and CIPPIC urge caution in any reliance on jurisprudence developed elsewhere in light of the different legislative and policy contexts and because in several of these other cases the ISPs either consented to, or did not oppose, the granting of the order.

[116] An introductory comment regarding the discussion that follows is necessary. Some of the evidence presented by the parties involves highly confidential matters, relating both to the means by which the Plaintiffs identified the piracy and determined that blocking could be done, and also to the business operations and plans of the Third Party ISPs. Although I have carefully reviewed all of the evidence in the record, the discussion that follows will not delve into many of the specific details on either point, because it is not necessary to do so. This will protect commercially sensitive information and to avoid providing a roadmap for individuals who are currently or who may wish to become involved in unauthorized streaming activity.

[117] I now return to the elements of the test for interlocutory relief.

(1) Serious Issue

[118] The Plaintiffs bear the onus of demonstrating that they have a “strong prima facie case”. This involves a more extensive review of the merits of the case than is usual in an interlocutory injunction proceeding. In the words of the Supreme Court of Canada in *CBC*: “the application judge must be satisfied there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice” (para 17).

[119] There is substantial evidence regarding the claim by Rogers Media that the unnamed Defendants are breaching its copyright in live NHL broadcasts. The Third Party ISPs dispute this, however, and submit that

even if Rogers is found to meet the test for serious issue, the other Plaintiffs have not filed any evidence to support their claims of copyright infringement. They argue that there is no basis to extrapolate from the data demonstrating infringements of Rogers' rights to conclude that any of the other Plaintiffs are experiencing similar infringements, and thus there is no basis to find that the other Plaintiffs have established a serious issue.

[120] The Plaintiffs' evidence shows that they hold copyright in the broadcasts of live NHL games, as described in the summary set out earlier. The details of the rights that each of the Plaintiffs hold in the live NHL broadcasts is set out in the affidavits and exhibits of their corporate representatives, and this issue is not in dispute, so it is not necessary to describe the distribution of copyright in the various broadcasts in greater detail. Having reviewed the evidence, I find there is no question that the various Plaintiffs hold the copyright in respect of virtually all broadcast distribution of live NHL games in Canada, including TV broadcasting and online streaming services. With this established, we turn to the evidence of copyright infringement.

[121] Rogers Cable, on behalf of Rogers Communications, retained a company called Friend MTS Limited (FMTS) to monitor the Internet and identify sites and services providing unauthorized access to live streams of certain NHL live broadcasts. FMTS has provided evidence about similar monitoring in previous site-blocking cases in the United Kingdom, Ireland and Argentina. FMTS offers various technological solutions to television broadcasters and copyright holders to protect and enforce their rights against pirates. Its services include monitoring and reporting on unauthorized streams, as well as sending takedown notices and providing site blocking solutions.

[122] In this case, Rogers Communications asked FMTS to monitor unauthorized streams of live broadcasts on four television stations owned by Rogers, namely Sportsnet One, Sportsnet Ontario, Sportsnet West and Sportsnet Pacific, starting on or around January 30, 2021.

[123] FMTS used various proprietary tools to identify, capture and analyze Streaming Servers providing unauthorized access to the monitored live NHL broadcasts in Canada in real time. Between January 30, 2021 and May 30, 2021, FMTS identified a total of 53,433 instances (referred to as "incidents") where streaming servers provided unauthorized access to the live NHL games broadcast on the stations they monitored. Almost |||| of these instances originated from streaming servers known to be associated with copyright piracy.

[124] These incidents originated from 3,957 distinct unauthorized streaming servers, with a mean of 822 distinct IP addresses per week. The monitoring showed that the IP addresses of the unauthorized streaming servers change on average every three and a half weeks, with approximately half of the IP addresses appearing for only a single week. Approximately 95% of the Streaming Servers were physically located outside of Canada.

[125] This is persuasive evidence that the unidentified Defendants are engaged in infringement of Rogers' copyright in its broadcast of these live NHL games.

[126] Bell and TVA filed additional evidence, including the affidavit of Steven Rogers, a former police officer who now provides Internet investigation and digital forensic analysis services. Mr. Rogers' affidavit details his efforts to obtain access to pirated broadcasts of live NHL games, and to compare these with live broadcasts on one of the Plaintiff's specialty sports channels. Although this evidence does not cover as long a time-frame nor as many incidents of unlawful streaming as that of FMTS in regard to Rogers, it does demonstrate that unlawful streaming services are providing access to Bell and TVA (as well as Rogers) content. Mr. Rogers confirms that he was able to gain access to streaming services that provided access to unauthorized versions of the live broadcasts. He explains how easy it was for him to do this, and describes the quality of the pirated content, noting that there was either a very short or no delay in the pirated stream (as compared with the legitimate feed) and that some of the content was available in the same high definition format as the authorized broadcast.

[127] In addition, affidavits were filed by senior employees of Rogers, Bell and Videotron that confirmed that their respective customers were accessing content on one or more of the unauthorized streaming platforms corresponding to the IP addresses identified by FMTS during its monitoring of unauthorized streaming of live NHL games. To be clear, the monitoring done by the Plaintiffs did not identify specific customers, but rather confirmed that at the relevant periods identified by FMTS, thousands of their regular internet customers were accessing unauthorized streams of live NHL games. Although the evidence is not entirely clear on this point, presumably these customers resorted to the unauthorized streaming services because their subscription did not give them access to the game(s) they wanted to watch.

[128] To give a sense of the scale of the problem, Rogers' evidence shows that between March 16 and April 24, 2021, an average of over 20,000 Rogers Cable Internet subscribers accessed known illegal IPTV services on a daily basis. Between May 10 and May 23, 2021, over 43,000 Rogers Internet subscribers accessed the unauthorized IPTV services on a daily basis. Bell Canada's witness reported that during one evening when a

playoff game between Montreal and Toronto was broadcast (a highly popular event) at least 25,000 Bell Canada Internet subscribers accessed the unauthorized streaming services identified in the FMTS reports. Similarly, Videotron reports that its monitoring showed that during the broadcast of NHL live games between May 14, 2021 and June 1, 2021, a large number of its subscribers relied on the unauthorized streaming servers identified by FMTS, generating a high volume of traffic on their system.

[129] Taken together, this evidence demonstrates each of the respective Plaintiffs are experiencing unlawful streaming of their broadcasts of live NHL games. There is no question that this amounts to breach of their copyright.

[130] As noted above, the Plaintiffs hold the exclusive right to communicate to the public all live NHL games through TV broadcast and online streaming. Pursuant to section 3 of the *Copyright Act*, the Plaintiffs have the sole right to broadcast this content, or to authorize its communication to the public. Under section 27(1) of the *Copyright Act*, any person who communicates this content to the public without the owners' consent is infringing the Plaintiff's copyright.

[131] The evidence shows that the unnamed Defendants are responsible for the unauthorized communication to the public in Canada of the Plaintiffs' broadcasts of live NHL games. I agree with the Plaintiffs that the Defendants' actions do not fall within the statutory exception limiting the liability of those who only provide the "means" of telecommunication, set out in subsection 2.4(1) of the *Copyright Act*. The evidence shows that the Defendants are not merely the conduit of the transmission of the copyright material; rather, they have pirated it and arranged for members of the public in Canada to gain access to it through the infrastructure that the Defendants have set up. This involves deliberate and elaborate efforts – involving substantial investments – to capture and stream the Plaintiffs' copyright material.

[132] In summary on this point, and going back to the governing test, I am satisfied, based on a careful and detailed review of the evidence, that the Plaintiffs have demonstrated a very strong likelihood that they would be successful at trial in establishing that the Defendants have breached their copyright. Indeed, the evidence demonstrates that the Defendants are breaching the Plaintiffs' copyright in an ongoing and flagrant fashion.

[133] It bears repeating that the Third Party ISPs are mere conduits and are not in any way involved in the activities that amount to copyright infringement. Their only involvement is that the unlawful streaming flows to

viewers in Canada through the services they provide.

(2) Irreparable Harm

[134] The term “irreparable harm” refers to the nature of the harm rather than its scope or reach; it is generally described as a harm that cannot adequately be compensated in damages or cured (*RJR – MacDonald* at p 341). It has often been stated that this harm cannot be based on mere speculation; it must be established through evidence at a convincing level of particularity (see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16; *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paras 28-29). In addition, the evidence must demonstrate a high likelihood that the harm will occur, not that it is merely possible. This will obviously depend on the circumstances of each case (see the discussion in *Letnes v Canada (Attorney General)*, 2020 FC 636 at paras 49-58).

[135] However, equitable relief must retain its necessary flexibility and it must be admitted that some forms of harm do not readily admit of proof, especially in interlocutory proceedings where speed is of the essence and the ability to prepare a complete evidentiary record is necessarily somewhat limited. What is required, at the end of the day, is a “sound evidentiary foundation” for the assessment of the harm; mere assertions or speculation by an applicant will never be sufficient (see *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at para 60; *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at paras 87-88).

[136] In *GoldTV FC*, Justice Gleeson analyzed the necessity factor from *Cartier* under this branch, and this was not found to be an error by the Federal Court of Appeal. I will therefore follow this approach, although I acknowledge there is a degree of overlap between the consideration of this element and the broader balance of convenience factors.

[137] I will review the parties’ submissions on financial harms and necessity, and then discuss whether the Plaintiffs have met the test for irreparable harm.

(a) Financial Harm

[138] The crux of the Plaintiffs’ argument on this ground is that they are losing subscribers and potential advertising revenue because of the rampant and egregious ongoing breach of their copyright due to the

unauthorized streaming of their copyright content in live NHL games. There are several inter-related facets to their argument.

[139] First, NHL hockey is very popular among Canadian viewers. NHL games are the most watched live sporting events in Canada, and some games can attract a very large audience. For example, it is estimated that 11 million people watched game seven of the playoff series between Montreal and Toronto in the first round of the 2021 playoffs. Each of the Plaintiffs have invested significant amounts to obtain the rights to broadcast these games and continue to make ongoing investments to maintain the infrastructure needed to meet their customers' needs. Their evidence shows that subscribers to their specialty sports channels are particularly interested in gaining access to live broadcasts of sporting events, in particular NHL games.

[140] Second, because almost all NHL games are watched in "real time" (as opposed to other programming which is often recorded and accessed at different times), the Plaintiffs have had to invest in the infrastructure needed to meet spikes in demand for Internet services during live broadcasts. In addition, because subscribers cannot fast-forward through a live broadcast, advertisers know exactly how many viewers will be seeing their ads during live NHL games, making these advertising spots particularly profitable for the Plaintiffs. It also drives revenue for their sport-related programming broadcast just before and after NHL games.

[141] Third, the Plaintiffs claim that ongoing unauthorized streaming of their content is causing an ongoing loss of customers and will permanently alter consumers' behaviour if left unchecked. The Plaintiffs acknowledge that it is impossible for them to quantify with precision the number of subscribers they have lost (or never gained) as a result of the ongoing piracy of their content, but they argue that the evidence shows that piracy is a substantial problem in Canada that has an undeniably negative effect on them.

[142] In addition, the Plaintiffs point to the obvious fact that the harm arises in a context where a large number of unidentifiable defendants have taken active steps to remain anonymous, and who could be located anywhere in the world. Their chances of ever recovering any damages from these parties is slim, at best (*GoldTV FC* at para 66; *GoldTV FCA*, para 71).

[143] The Plaintiffs point to a number of other decisions where unauthorized communication of copyright content by means of the Internet was found to constitute irreparable harm, including: *Gold TV FC* and *GoldTV*

FCA; Bell Canada v 1326030 Ontario Inc, 2016 FC 612; *Welsey (Mtlfreetv.com) v Bell Canada*, 2017 FCA 55 at paras 3-5; and *Bell Canada v Lackman*, 2017 FC 634 at para 47.

[144] For all of these reasons, the Plaintiffs argue that they have established that they will suffer financial losses that amount to irreparable harm.

[145] The Third Party ISPs contend that the Plaintiffs' evidence falls short because they have not demonstrated that any piracy that is occurring is actually causing the Plaintiffs to lose customers or other revenue. They point out that the law sets a high bar for establishing irreparable harm, and argue that in this case the Plaintiffs have failed to meet it.

[146] The Third Party Respondents do not dispute that NHL live games are widely watched in Canada, or that the Plaintiffs have invested a substantial amount of money to acquire the rights and develop the infrastructure to broadcast them. They also do not dispute that piracy is undesirable. Several of the Third Party Respondents attest to their collaboration on other efforts to stop the distribution of unlawful content on the Internet, including through their participation in Project CleanFeed. However, the Third Party Respondents point out that these general propositions fall well short of establishing irreparable harm to the standard required by the binding jurisprudence.

[147] In regard to the claim that the piracy of live NHL games is causing a loss of revenue, the Third Party Respondents submit that none of the Plaintiffs have provided any evidence that their advertising revenue, subscription payments or other income streams have declined because of piracy. They point out that there is no evidence that the advertising that runs on the Plaintiff's stations is not also displayed on the illegal live streams. Therefore there is no evidence that the advertisers' audience for their advertisements is reduced because of the piracy, and thus no basis to conclude that the Plaintiffs are losing any revenues because of the unlawful streaming.

[148] In addition, the Third Party Respondents contend that the Plaintiffs have failed to link any decline in their subscriber base to the piracy of live NHL broadcasts. The evidence filed by the Plaintiffs is either generic – relating to piracy generally, or piracy across North America – or based on opinions expressed by witnesses that were not properly qualified as experts. The Third Party Respondents point out that none of the Plaintiffs conducted any surveys or took other steps to gather more specific evidence linking the piracy to their losses. In

the absence of such evidence, they submit that the Plaintiffs have failed to meet an essential element of the test for a mandatory interlocutory injunction.

(b) *Necessity*

[149] This *Cartier* factor focuses on whether a mandatory interlocutory injunction is necessary to protect the Plaintiff's rights. As summarized in *GoldTV FCA* (at para 52): "The relief need not be indispensable but the court may consider whether alternative and less onerous measures are available."

[150] The Plaintiffs argue that the order is necessary because it is "the only effective and practical remedy available to them to stop widespread infringement on the Internet of their exclusive right in Canada in the NHL Live Games they acquired at the cost of billions of dollars" (Plaintiffs' Factum at para 174). They rely on the evidence establishing the nature and scope of the piracy and the fact that the vast majority of the pirates take steps to hide their identities and conduct their affairs outside of Canada. They further submit that given the speed with which the pirates change the IP addresses associated with the unlawful streaming, it would be impractical to take steps to stop them by pursuing actions for copyright infringement.

[151] The Plaintiffs note that in *GoldTV FCA* at para 42, the necessity of undertaking such a burdensome process was expressly rejected:

Where, in an action against an anonymous defendant, a court can be convinced that said defendant has and will maintain its anonymity and ignore an injunction against it, it would seem pointless and unfair to require that the plaintiff jump through certain hoops and wait a certain time to confirm what it already knows, and the court already accepts, before seeking an injunction against a third party.

[152] In addition, the Plaintiffs point to the efforts that they and others have taken to curb piracy of live NHL broadcasts.

[153] The evidence shows since 2019, the NHL has worked with a company to send approximately 46,400 takedown notices regarding copyright infringements. For the 2020-2021 NHL season, over 26,300 takedown notices had been sent, and only approximately 11% of these led to a timely removal of the infringing content.

[154] Rogers also asked FMTS to send takedown notices, and during the month of May 2021, it sent 221 notices to hosting providers, including those hosting John Doe No. 2's unauthorized streaming servers and some of John Doe No. 1's servers. As of the date of the hearing, FMTS had received no response to these notices.

[155] The evidence shows the Plaintiffs also work with a third party to monitor classified advertising services and social media platforms to identify individuals or entities advertising unauthorized subscription services, and thousands of takedown requests have been issued in regard to such advertisements and posts. They also monitor websites that sell unauthorized services through major payment processing service such as PayPal, Visa and MasterCard. Finally, Rogers has identified and reported unauthorized streams of live NHL games available on social media sites such as YouTube, Facebook and Twitter, as well as links to such streams posted on aggregating sites such as Reddit. Hundreds of unauthorized streams have been reported to these websites, with limited impact.

[156] The Plaintiffs submit that while it is difficult to quantify the effectiveness of these measures, the evidence before the Court shows that despite all of the enforcement efforts, unauthorized streaming servers providing access to high quality streams of live NHL games remains widespread and easily available to Canadian viewers. In addition, the Plaintiffs argue that the alternative measures proposed by the Third Party Respondents are speculative and unproven.

[157] For all of these reasons, the Plaintiffs say the Order is necessary.

[158] The Third Party Respondents advance two arguments on this point. First, they dispute the Plaintiffs' claim that the order is necessary because their earlier enforcement efforts were not successful to prevent piracy of their copyright material. They point to the data submitted by the Plaintiffs' witness, Mr. Demetriades, which shows an overall decrease in the number of distinct IP addresses linked to unauthorized streaming services during the course of the monitoring conducted by FMTS. The Third Party Respondents claim that this evidence shows that the Plaintiffs' efforts were having an effect, and thus the unprecedented order they now seek is not warranted.

[159] Related to this, the Third Party ISPs say that the Plaintiffs did not conduct any assessment or investigation as to the security of their broadcast platforms to determine how the pirates acquired their streams. Yet the Plaintiffs' own evidence shows that at least some of the footage being pirated is obtained from the Plaintiffs' legitimate subscription services. This suggests that the Plaintiffs could and should have taken steps to prevent piracy through Digital Rights Management (DRM), including through one particular technique ("steganography") that could have assisted the Plaintiffs in identifying the originating source(s) of the unauthorized material. Absent any such evidence, the Third Party ISPs contend that the Plaintiffs have failed to show that the Order is necessary.

[160] Overall, the Third Party ISPs submit that the Plaintiffs have not effectively demonstrated that they have done everything they can to prevent piracy of NHL games, whether through stronger enforcement efforts using other legal remedies, or by implementing DRM measures to prevent unauthorized access or at a minimum to identify its source.

[161] CIPPIC did not make specific submissions on this point, but there is one particular argument that is worth noting here. CIPPIC submits that in light of the statutory context, the nature of the Plaintiffs' evidence and the interests at stake, there needs to be a strong evidentiary foundation in respect of the rights of each Plaintiff.

(c) *Discussion*

[162] The Plaintiffs have established irreparable harm. The Plaintiffs' evidence shows ongoing and substantial unlawful streaming of live NHL broadcasts over which they hold copyright. While there is some indication that their various previous enforcement efforts may have reduced this activity to some extent, there is no basis to conclude that an increased effort to enforce their rights through more traditional means is likely to have any substantial impact on the scale and scope of unlawful streaming. If anything, the more general evidence presented tends to show that piracy is an increasing problem.

[163] This Court has heard many of the cases involving the Plaintiffs' earlier efforts to enforce their copyright. This includes interlocutory injunctions against various parties, and in some instances it has escalated to motions seeking to hold parties in contempt of court for their deliberate and repeated flouting of the orders of the Court (see: *Warner Bros Entertainment Inc. v White (Beast IPTV)*, 2021 FC 53, aff'd *White (Beast IPTV) v Warner Bros*, 2022 FCA 34 and *Warner Bros Entertainment Inc. v White (Beast IPTV)*, 2021 FC 989). Further, the evidence about compliance with notices sent under the *Copyright Act* indicates that while some companies comply, others ignore the notices. In this case, the evidence shows that some of the targeted sites advertise to their customers that they will either ignore such notices, or that they do not expect any steps to be taken after they convey them to the subscriber.

[164] In the circumstances here, the damage resulting from the unauthorized streaming is primarily financial, and ordinarily such damages cannot amount to irreparable harm because they are recoverable after trial. However, in this case, as in *GoldTV FC*, the harm to the Plaintiffs arises "in a context where there is a strong *prima facie* case of an ongoing infringement of the Plaintiffs' copyright where the defendants are unknown"

(para 66). The Court of Appeal found that this was an “entirely appropriate” basis on which to find irreparable harm (para 71).

[165] The evidence does not show with precision the number of subscribers that the Plaintiffs have lost, or new customers they have not been able to attract, as a direct result of the unlawful streaming. However, it is reasonable to infer from the evidence that this is among the reasons that people are either choosing to stop their subscriptions or not signing up in the first place. The evidence shows that copyright piracy results in harms to the Canadian broadcasting system, and similar harms have been recognized in other jurisdictions.

[166] I agree with the Plaintiffs that the alternative measures proposed by the Third Party Respondents are, on the record before me, speculative and unproven. While the issue of DRM, including steganography, should be explored by all parties with regard to any future applications of a similar nature or any application to extend the Order here, the evidence before me does not support a conclusion that such measures are a viable alternative. In particular, the evidence is insufficient to show that implementing steganography is a realistic option for the Plaintiffs, nor does it demonstrate that this technique is an effective mechanism that would, in practice, allow the Plaintiffs to identify the source of the unlawful streams. Finally, even if such identification is possible, it is not clear how this would be effective in stopping the piracy.

[167] Ultimately, on the record before me, it is not possible to conclude that any of the alternatives proposed by the Third Party Respondents would be effective as a means of preventing the piracy.

[168] For these reasons, I am satisfied that the Plaintiffs have established irreparable harm, and that the Order is necessary to stop or at least reduce the unlawful streaming of live NHL games over which they hold copyright.

(3) Balance of Convenience

[169] The third stage of the test “requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits” (*CBC* at para 12). The expression often used is “balance of inconvenience” (*RJR-MacDonald* at 342). At this stage of the analysis, wider public interest considerations arise – and as will become clearer below, in my view these are an important consideration in this case.

[170] As in *GoldTV FC*, it is convenient to organize this part of the discussion with reference to the *Cartier* factors (leaving aside necessity, which has been discussed above). That is how the case was argued by the

parties, and the factors provide a useful means of addressing the evidence and arguments. In doing so, however, I add two caveats. First, I adopt the following words of caution from *GoldTV FC*:

[54] The remaining factors will be of assistance in assessing balance of convenience and determining what is just and equitable in considering the legitimate but conflicting interests as between the Plaintiffs, the Third Party Respondents, and the broader public. I do not view the listed factors as exhaustive, nor do I view any one factor as being determinative of the balance of convenience prong of the test. Each of the factors will be considered but they will be addressed holistically in my assessment of the balance of convenience.

[171] Second, each of the factors will be considered in the order that is appropriate given the parties' arguments and the circumstances of this case, rather than simply following the order that the court in *Cartier* found to be useful for its purposes. Much of the argument in this case revolved around the related questions of complexity and cost, and so this factor will be discussed first.

[172] As will become clear below, a significant amount of the evidence and argument in this case focused on the elements to be discussed here, a key difference between this case and *GoldTV FC*, where it was acknowledged that the Third Party Respondents had the capacity to implement the order and doing so would not impose a significant burden on them (see *GoldTV FC* at paras 86-87).

[173] In order to situate the discussion that follows and to better understand the concerns of the Third Party Respondents, it will be useful to begin with a description of the Plaintiffs' proposed approach to dynamic site blocking.

(a) *Dynamic Site Blocking*

[174] The Plaintiffs propose to retain FMTS to monitor unlawful distribution of the copyright broadcasts of live NHL games, focusing on the IP addresses of the streaming servers through which the unnamed Defendants are distributing this content.

[175] Using proprietary methods described in the affidavits of Mr. Demetriades and Mr. Friend, FMTS would monitor a time window starting prior to a live NHL game broadcast and continuing through to the end of the game: this is described as the "NHL Live Game Window". FMTS would identify live streams showing unauthorized versions of the copyrighted footage licensed by the Plaintiffs, referred to as "NHL Game Footage", through its proprietary technology, which seeks to match a portion of the unauthorized stream to the corresponding portion of an authorized broadcast. Once this match occurs, FMTS would identify the relevant IP

addresses associated with the unauthorized distribution, again using the expertise it has gained in performing similar monitoring under site blocking orders granted in the United Kingdom and elsewhere.

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[176] In order to prevent “over-blocking” (i.e. preventing access to legitimate content), FMTS proposes a number of measures, including:

1. limiting the time when dynamic IP blocking is active;
2. verifying that other content available on the relevant pirate streaming infrastructure also consists of unauthorized content;
3. verifying that there is no evidence of any substantial legitimate activity (separate from video streaming) taking place on the servers to be blocked;
4. |||||
 |||||
5. reporting to the hosting provider whenever one or more of their servers are blocked so that the hosting provider is aware of it and can advise their clients.

[177] The Plaintiffs say these measures would make “under-blocking” (i.e., blocking some, but not all, infringing content) more likely to occur than over-blocking, which would protect the interests of the Third Party Respondents and of the public in ensuring that access to legitimate content is not blocked.

[178] Once these conditions were satisfied, FMTS would identify a number of IP addresses to be blocked to prevent the unauthorized streaming of each live NHL game. This list would be stored on a secure server that can be accessed by the ISPs. The list would be updated on a regular basis, and the ISPs in turn would be expected to update the IP addresses to be blocked at least once every hour during the NHL Live Game Window. This updating could be done either manually or by programming their systems to automate the process. Either way, this would involve obtaining the list from the secure server and pushing it to the core routers on a regular basis during the NHL Live Game Window.

[179] The routing tables on the ISPs' core routers would be programmed to blackhole requests from any subscribers for access to the listed IP addresses. This is ultimately how the blocking would occur; the router would be programmed so that it would not send the request to its intended destination, but instead would send it to nowhere, thus denying the customer access to the unauthorized stream.

[180] At the end of the NHL Live Game Window, each ISP would be obligated to reconfigure its core routers to end the blocking of the listed IP addresses.

[181] The process would then be repeated when the next NHL Live Game Window began, and so on. That, in essence, is what dynamic site blocking as proposed by the Plaintiffs would involve.

[182] With this background, we turn to the analysis of balance of convenience.

(b) *The Cartier factors*

(i) Complexity and Cost

[183] This factor considers the complexity and cost of implementing the proposed dynamic blocking order. A significant portion of the evidence and argument in this case focused on this point, including both whether the Third Party Respondents could actually implement the type of dynamic site blocking sought by the Plaintiffs, the cost and difficulty they would encounter in doing so, and the risks they would incur. Related to this is the question of who pays, which is discussed below under the heading "Costs of Implementation".

[184] Under this element, the focus is on the burden imposed on the Third Party Respondents if they are required to implement a dynamic site blocking order. The reason is obvious, and the point was expressed in this way in *Cartier* at para 120 (citing *Scarlet Extended SA Societe Belge des Auters, Compositeurs et Editeurs Scrl (SABM)*, [2011] ECR I—11959 at para 48, which in turn references Directive 2004/48/EC of the European Parliament and Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) [EU Directive]):

[S]uch an injunction would result in a serious infringement of the freedom of the ISP to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of [the EU Directive], which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.

[185] Although in *Cartier* this factor was grounded in article 3(1) of the EU Directive – which has no application in Canada – the underlying rationale for the factor has been found to be relevant in this country (see *GoldTV FC* at paras 48-50).

[186] The Third Party Respondents argue that they are being asked to take on additional onerous obligations that will benefit their competitors and that may adversely affect the quality and reliability of their service to their own customers. As Cogeco put it. “[t]his would be akin to being forced to become business partners with the Plaintiffs” (Cogeco Factum at para 57). Similarly, Telus said that while it sympathized with the goal of eliminating piracy, it disagreed with the proposition that the Plaintiffs “are entitled to a court order that imposes obligations, burdens and costs on [Telus] as a competitor, for the sole purpose of enhancing the ability of their media divisions to make more money when licensing their content for authorized distribution” (Affidavit of Nazim Benhadid at para 24).

[187] The Third Party Respondents object to the blanket statements by the Plaintiffs’ representatives that every ISP can implement the order, noting that none of these individuals have any knowledge or experience with their particular network infrastructure. I agree with this concern, and the general point was not seriously contested by the Plaintiffs.

[188] The Third Party Respondents’ evidence shows their situations regarding their network infrastructure, internal organization, and plans for upgrading their networks are each unique. They therefore submit that it is not appropriate to impose a blanket order that would impose identical obligations on each of them, noting that they would not be in a position to comply with any order without diverting significant time, energy and resources (both human and financial) to the task.

[189] Despite the unique situations of each Third Party ISP, their concerns are similar, and relate both to the nature and scope of the blocking sought and to the impact it would have on their networks and ultimately on their customers. There are several reasons for these concerns.

[190] First, it is not possible to identify the number of IP addresses that will need to be blocked in advance, because the Order is unprecedented, so there is no relevant Canadian experience, and the scope of the measures taken under dynamic blocking orders elsewhere remain confidential. Noting that during the regular season there are between five and 10 NHL games broadcast each night, the anticipated burden of having to block

unauthorized streaming of each game, to update the IP addresses to be blocked during each game, and then to unblock these sites at each game's conclusion appears daunting.

[191] Next, the Third Party Respondents have no capacity to verify that the sites to be blocked are carrying only unauthorized content and not also legitimate content, and so there is a risk of inadvertently blocking benign content ("over-blocking").

[192] Finally, the nature, scope and speed of actions that is needed to give effect to dynamic blocking imposes undue and unwarranted risks on the Third Party Respondents, who it bears repeating are not accused of any wrongdoing.

[193] For the reasons explained below, I do not find it necessary to discuss much of the confidential business information that was filed by the Third Party Respondents. That said, I wish to underline that this type of evidence may be a significant consideration in any future cases involving requests for a dynamic site-blocking order, and so the fact that it is not dealt with in detail here should not be taken as an indication that it is not relevant. Instead, it is simply a consequence of the current circumstances and the limitations on the Order that will issue, as explained below.

[194] The evidence and arguments of the Third Party Respondents dealt with several aspects of cost and complexity, starting with whether they can - from a practical perspective - actually implement the Order. Several of their witnesses said they simply did not have the current capacity to give effect to the Order sought. There are several reasons for this. Some relate to the current design limits and management practices they have adopted in the management of their current networks. Others relate to the reality that dynamic site blocking of a high number of IP addresses on a continuous basis calls for an automated system, which none of the Third Party Respondents currently use. In addition, an overarching concern remains the impact on the stability, reliability and speed of their networks, and the potential for negative impacts on their subscribers as well as their corporate reputation.

[195] It bears repeating that each of the Third Party Respondents is in a slightly different situation. I will therefore briefly discuss the evidence type provided.

[196] Distributel operates three distinct legal entities: Distributel, Navigata (formed in 2018 following an acquisition) and Primus (formed following completion of an acquisition in 2021).

the Plaintiffs clarified that they only sought an Order that would require Distributel to block its own subscribers, not those of the other recently-acquired companies.

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[199] Cogeco underlined the scrupulous planning and gradual nature of the changes it makes to its network, because of its commitment to excellent and reliable service. Cogeco says that implementing the order would require a similarly cautious, staged approach.

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[202] While Cogeco’s witness provided a lengthy and detailed affidavit, I find his credibility was diminished by cross-examination. The witness provided evasive or incomplete answers to many questions and refused to accept obvious points, before finally conceding several matters that are key to the issues in this case. Because of this, I will give this witnesses’ evidence less weight in the overall assessment of the cost and complexity question.

[203] |||||

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[204] Telus pointed to the fact that while it engaged in some site blocking in order to comply with the *GoldTV FC* order, or because of its participation in Project Cleanfeed, |||||

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[205] At bottom, I must first determine whether the Third Party Respondents can, in fact, implement the Order. If so, the question arises whether the Order sought would impose an inordinate burden on them.

[206] Having reviewed the evidence at length, I am satisfied that the Third Party Respondents each have the capacity to engage in the type of dynamic site blocking that is sought. While I accept that this will impose new obligations on each ISP, and certain additional risks, I am satisfied that the ISPs have the technical capability to engage in dynamic IP address site blocking.

[207] As noted above, the Plaintiffs seek an order that would require ISPs to block access to unauthorized streaming servers and related infrastructure, identified by their respective IP addresses. This involves several basic steps: FMTS would assemble and update the list, for each NHL Live Game Window. The ISPs would then be required to access that list, and to configure their core routers so that any requests for access to those IP addresses are routed to a blackhole instead of their intended destinations. The list would only be “active” during the NHL Live Game Window, and it would be updated during each game. The ISPs would be required to engage in blocking of different IP addresses during each window, and to then unblock these sites after each game. They would have to repeat this process each time that an NHL game is broadcast, which can be several times a day, and may include simultaneous broadcasts of different games. This could be done manually, or by automating their systems to automatically download the list of IP addresses to be blocked and then pushing that information to their core routers.

[208] I will return to the risks associated with the initial assembly of the list of IP addresses, and the controls and safeguards that should be put in place to mitigate these in subsequent sections. At this stage, the focus is on the cost and complexity imposed on the ISPs by such an Order.

[209] I am satisfied on the evidence that the networks of each of the ISPs have “core” or “border” routers that represent the vital point in the chain by which their customers can access content on the Internet. Each of the

witnesses agree that the function of a router is to route traffic – either incoming or outgoing. Therefore, a router can be programmed either to forward incoming or outgoing requests to their intended destination, or to send them into a blackhole, to nowhere; all of the witnesses agree on that point. Indeed, the ISPs currently employ this technique for their own purposes, mainly to protect the integrity and stability of their networks.

[210] For example, the Third Party Respondents protect individual subscribers from DDOS attacks by engaging in Remote Triggered Black Hole Filtering, and monitor their systems on a continuous basis to detect and respond to such attacks. The evidence shows that ISPs sometimes need to take such steps several times per day. Several of the Third Party Respondents do this through a combination of automated and manual interventions, and their monitoring is continuous.

[211] However, the evidence is also clear that each of the Third Party Respondents has limits on its capacity to block, relating either to the configuration of their network, the limits of the routers they currently use, or both. They impose additional limits and restrictions to reduce the risk of error, and to maintain a certain reserve capacity to be able to respond to other problems that may arise, including DDOS attacks. I fully accept the evidence of the Third Party Respondents that their network infrastructure cannot block an unknown and (at this stage) unknowable number of IP addresses. The limits are real.

[212] I do not accept, however, that this translates into an inability on the part of any of the Third Party Respondents to engage in dynamic site blocking, within the current parameters of their network infrastructure. They all can – and currently do – engage in IP address site blocking, and so as a practical matter none of them will face an impossible situation as a result of the Order. They will face certain risks, however, and it is important to acknowledge and seek to mitigate these.

[213] The concerns expressed by the Third Party Respondents related to the risks they would face in implementing the Order largely relate to the quantity and speed of blocking steps they would need to undertake. These concerns are valid and must be taken into account. A key consideration is that the Order would require the ISPs to alter the configuration of the core routers on a regular basis, and under certain time constraints. The reality is that while the core routers are key to the blocking that is required, they are equally vital to the operation of the ISPs' networks. These routers serve as the key junction point between their customers and the wider internet, and so anything that affects their capacity or any error that affects their functioning will have a significant impact on their customers. It is relevant that the ISPs operate in a highly competitive market, where

customers demand quality, speed and reliability of service and can move to other providers if they become dissatisfied.

[214] To mitigate these risks, the Third Party Respondents have implemented a number of internal business practices and processes, and it would be entirely appropriate for them to follow at least some of these in taking steps to implement the Order here.

[215] Mr. Friend, one of the Plaintiffs' witnesses, says that from the router's perspective it does not matter which way the traffic is flowing; the router can either not send the incoming packets to their intended destination, or it can block outgoing requests. While that may be true from the router's perspective, I accept the evidence of the Third Party Respondents that there is a significant difference between interrupting the service to one customer to protect them and the wider system from a DDOS attack, as compared with denying outgoing requests from many subscribers. As ||||| explained, the risk of continually updating the router tables is that an error inputting the address might affect not just a single subscriber or a few IP addresses. If the wrong IP address happens to be associated with a network gateway server, the effect would be to take an entire portion of their network down, potentially affecting thousands of customers.

[216] The Order to be granted must take into account these risks and challenges, as well as the practical capacity limits that each of the Third Party Respondents face.

[217] I am satisfied, however, that in light of the situation at the time of the issuance of this decision, implementing the Order will not impose undue cost or complexity on any of the Third Party Respondents. Several factors lead me to this conclusion.

[218] First, I can take judicial notice of the fact that at the time these reasons are issued, the NHL playoffs are currently underway and thus the number of games being broadcast each day is significantly reduced. Of the 32 teams that play in the league, only 16 made the playoffs. The NHL playoffs are an elimination tournament of four rounds. Each round consists of a best-of seven series, and after each round, the number of teams playing is cut in half. As a practical matter, that will sequentially reduce the burden on each of the ISPs, and the blocking will end within a short, defined time frame.

[219] Second, the Order to be issued will require each ISP to engage in blocking only to the extent of its current capacity. There are several important elements here. First, all of the parties agree that demand for Internet

services is constantly growing; there is evidence that some of the ISPs plan for a 10% annual increase. In light of this, each of the ISPs is regularly making significant planned investments to increase or enhance its current network capacity, simply to be able to continue to serve their customers. The Order in this case will require each ISP to engage in blocking to its then-current capacity. So, for example, if between the time of the hearing and the release of the decision, one of the ISPs has purchased and installed one or more new core routers, and thus increased its capacity to engage in blocking, it will be expected to block as many sites as its newly-enhanced capacity allows.

[220] Third, the Third Party Respondents can implement the Order using either manual or automated methods, depending on their particular circumstances. Although they may find it preferable to be able to rely on an automated system, it is not a condition of compliance that such a system be put in place.

[221] The costs of implementation will be discussed below.

[222] Finally, it is relevant to note that the Plaintiffs only requested an Order to run until the end of the current NHL season. Given that the playoffs are currently underway, that means that the burden on the Third Party Respondents will last for less than two months, following which all parties will have an opportunity to examine the costs and benefits of the blocking that has been undertaken.

[223] For all of these reasons, I am not persuaded that the Order will impose undue cost or complexity on the Third Party Respondents.

(ii) Effectiveness

[224] This factor involves a consideration of whether the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service. There is a degree of overlap between this factor, dissuasiveness and substitution, although their focus is on either existing or potential users of the pirated streams.

[225] The Plaintiffs argue that the Order will be effective based on the evidence about how unlawful streaming occurs, and on the experience with these kinds of orders in other countries. They say that blocking access to streaming servers is essential because they are the source of the communication of the unauthorized broadcast. Because one streaming server may be hosting multiple unauthorized streaming platforms, blocking access to that server will disable all of the streams that rely on that platform.

[226] The Plaintiffs acknowledge that they cannot bring any empirical evidence of the effectiveness of dynamic site blocking orders in Canada since this case is the first of its kind here; however, they submit that the effectiveness of dynamic site blocking orders to thwart the effects of piracy of live sports content has been recognized in other jurisdictions.

[227] The Third Party Respondents submit that the Plaintiffs have failed to make their case on this point. They note that the Plaintiffs could have undertaken steps prior to launching this litigation to test and be able to report on the effectiveness of the requested order. Since the Plaintiffs provide over 70% of the Internet services to residential customers in Canada, they could have sought the necessary approvals to be able to engage in a test of the impact of dynamic site blocking.

[228] In addition, the Third Party Respondents contend that the evidence of the Plaintiffs' witnesses should be discounted because they are employees of FMTS, the company that Rogers hired to conduct the monitoring and that the Plaintiffs propose to rely on to implement the Order. Given their financial interest in the outcome of the matter, these witnesses are not independent or objective, and they should not be recognized as experts. In light of this, the Third Party Respondents submit that the Plaintiffs have failed to demonstrate that the requested Order will be effective.

[229] Starting with this last point, I agree with the Third Party Respondents that Mr. Demetriades and Mr. Friend cannot be accepted as expert witnesses, because of their financial interest in the matter and the absence of an explanation as to why other, more objective, evidence was not available (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 45, 50). That said, however, I find that much of the evidence of both witnesses was of a factual nature, based on their experience with similar blocking orders in other countries, the services they have provided to copyright owners in those instances, and the work they performed for Rogers here. None of this evidence was contradicted or seriously challenged on cross-examination, and I find that it is reliable and persuasive. As will be explained below, I also find that independent and objective expert monitoring and reporting is called for in this case, partly because of the ongoing contractual relationship between FMTS and the Plaintiffs.

[230] Turning to the substance of the issue, based on the evidence in the record, and the experience in other countries, I am prepared to accept that the Order will be effective in making the infringing activities more

difficult and it will have the effect of discouraging users from accessing the infringing services. I note that Justice Gleeson reached the same conclusion in *GoldTV FC*, for largely similar reasons (see paras 75, 81).

[231] The evidence shows that almost ||| of instances of infringement identified by FMTS during its monitoring of the unauthorized streaming of the Rogers broadcasts would be captured by the Order sought. This is an indication that the targets of the Order are a substantial source of the unauthorized streams being accessed to view live NHL games, and thus cutting off these services can be expected to have a significant impact.

[232] This is consistent with the evidence of the Plaintiffs' witnesses, who spoke to their experience elsewhere as well as the efforts to measure the effectiveness of the orders granted by other courts. In particular, Mr. Demetriades stated "Based on our experience, [dynamic site blocking] proved to be much more effective than any previous anti-piracy methods in terms of the ability to have a noticeable impact on the availability of live Premier League matches on pirate streaming services" (Demetriades Affidavit at para 111).

[233] In the United Kingdom, a series of cases have accepted evidence of the effectiveness of this technique, finding that "past experience suggests that blocking access causes a material reduction in the number of UK users who access blocked websites" (*The Football Association Premier League Ltd v British Telecommunications Plc*, [2017] EWHC 480 [*Premier League*] at para 49; see also: *Union des Associations Européennes de Football v Eircom Ltd T  A Eir & Ors*, [2020] IEHC 488 at para 11 and the cases cited therein).

[234] This conclusion is also bolstered by a recent study of the European Union Intellectual Property Office, which found that courts in the UK and in some other countries have concluded that such orders are effective in reducing traffic to unauthorized streaming sites (EUIPO, Study on Dynamic Blocking Injunctions in the European Union (2021) at 59).

[235] Based on all of this, I find that the Plaintiffs have established that the Order they seek will be effective.

(iii) Dissuasiveness/substitution

[236] These factors are largely self-explanatory. Dissuasiveness considers whether others not currently accessing the infringing services will be dissuaded from doing so. Substitution examines the extent to which the blocked websites may be replaced or substituted by new or other infringing sites. Like the other factors, these elements speak to the proportionality of the proposed Order. If it will not steer people away from the unauthorized

services, or the blocked sites can easily be replaced by other illegal streams, then imposing the burden on the innocent ISPs who will have to implement it may not be justified.

[237] The Plaintiffs submit that experience elsewhere shows that the Order will be dissuasive, because denying access to unauthorized content “will help to educate... consumers that accessing infringing streams is not a lawful or reliable way to access [the] content.” (*Premier League* at para 53). They argue that while there are some circumvention measures that users could potentially rely on, such tools have significant costs and it has been recognized that adding costs to the unauthorized streaming may bring the user’s total costs of accessing infringing content closer to the costs of a legal subscription. In *Twentieth Century Fox Film Corp v British Telecommunications Plc*, [2011] EWHC 1981, at paragraph 196, it was found that “[t]he smaller the cost differential, the more likely it is that at least some users will be prepared to pay a little extra to obtain material from a legitimate service.”

[238] The Plaintiffs say that this is particularly apt in the context of the piracy of sporting events such as NHL games, which are best experienced live. Users who repeatedly have their access to the unauthorized stream blocked are more likely to consider subscribing to an authorized service rather than paying for additional means of continuing to access the illegal content. In addition, they claim that this type of order has a dissuasive effect on the operators of the unauthorized streaming servers. That is because their operations will be disrupted on an ongoing basis, as the lists are updated and new IP addresses are identified for blocking.

[239] The Plaintiffs further submit that they can identify and block the vast majority of unauthorized streaming services, and therefore substitution will be limited. Even though they will not succeed in blocking all of the unauthorized streams, the Plaintiffs say that alternatives will not be so readily available as to undermine the Order’s utility. They argue that because the list of IP addresses to be blocked would be updated on a regular basis, the Order will be as comprehensive as it can be and thus there will be a limited ability to substitute other unauthorized streams for the ones that are blocked.

[240] The Third Party Respondents did not address this topic in any detail, other than to note that the dissuasive effect of the order would be enhanced by a requirement that specific notices be sent to individual customers after their access was blocked. They point out that such notices are not required by the terms of the Order proposed by the Plaintiffs; they also note that none of them have the current capacity to implement such a practice, and

doing so would involve new investments in a Deep Packet Inspection (DPI) system, with the associated implementation costs.

[241] I am persuaded that the Order is likely to have at least some dissuasive effect and that substitution will not undermine its effectiveness. As has been found in similar cases elsewhere (cited above) and as Justice Gleeson concluded in *GoldTV FC* at paragraph 84, blocking access to unauthorized content is likely to have an impact on the individuals affected, and they face costs and a degree of complexity in seeking to evade the effects of a blocking order. This may dissuade them from continuing, and it may persuade others who may be tempted that it is not worth the effort.

[242] Furthermore, I find that substitution will not be so easily done as to defeat the purpose of the Order or to render it disproportional to the effort required by the Third Party Respondents. The evidence shows that almost |||| of the unauthorized streaming of live NHL games would be captured by the Order, and so a significant proportion of the current access would be cut off. It is not clear whether or how these viewers could replace this content simply by switching to the sites that remain unblocked; for example, it is not evident that these sites can handle such a significant increase in traffic, or that they provide access to a stream of similar quality and reliability as the blocked streams. Thus, substitution is not a barrier to the Order.

[243] On the evidence before me, I accept that while the terms of the Order to be granted will result in a degree of under-blocking (so as to avoid affecting benign traffic by innocent individuals), the type of blocking order here will nevertheless significantly limit access to the unauthorized streaming of live NHL games. That is all that is required under this element of the test.

[244] For these reasons, I find that the Plaintiffs have met the Dissuasiveness and Substitution elements of the *Cartier* factors.

(iv) Barriers to legitimate use or trade

[245] This factor involves 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. As with Cost and Complexity, this element also finds its origins in the EU Directive, which provides that remedies “shall be applied in such a manner as to avoid the creation of barriers to legitimate trade” (Article 3(2), cited in *Cartier* at para 123). In

practical terms, this requires that the measures adopted by the ISP be strictly targeted so that they do not affect users who seek to access content in a lawful manner. This factor’s purpose is to prevent over-blocking.

[246] This is a particularly significant factor in this case, because of the dynamic nature of the Order being sought, and the absence of ongoing judicial oversight in its daily operation.

[247] The Plaintiffs submit that this element is satisfied in two ways: the limited duration of the blocking reduces the risk it will affect legitimate content, and there are safeguards in place, which will result in under-blocking, so as to ensure that legitimate activities are not affected.

[248] In contrast with the site blocking order in *GoldTV FC* (which requires blocking on a continuous basis), the Plaintiffs argue that the fact that dynamic blocking will only be required during the NHL Live Game Window means that any potential impact on legitimate content would only be temporary. In addition, the Plaintiffs point to the safeguards that would be put in place to ensure that any IP addresses identified for blocking are not associated with substantial legitimate activities. These safeguards include requiring that the Plaintiffs (or FMTS) only identify an IP address for blocking if:

1. There are no reasonable grounds to believe that the associated server is being used for any substantial legitimate purpose apart from unauthorized video streaming, or facilitating such streaming; and
2. |||||
|||

[249] The Plaintiffs contend that these safeguards, combined with the operation of the FMTS proprietary tools described in the confidential evidence, serve to minimize the risk of over-blocking. The practical effect of this, they say, is that in the event that legitimate content appears to be available on the streaming infrastructure that is also distributing unauthorized broadcasts of live NHL games, that IP address would not be identified for blocking. In the words of the Plaintiffs, “the safeguards are designed to always err on the side of under-blocking to avoid over-blocking” (Plaintiffs’ Factum at para 217).

[250] The Third Party Respondents express grave concerns about the potential impact of the Order on their customers, and the consequential reputational risk that they would incur if they are forced to implement it. It is not necessary to repeat the discussion of the risks of a mistake in the configuration of an ISP’s core routers (see

paras 197-200 above). The Third Party Respondents say this risk is magnified because they will have no capacity to independently verify that the list of IP addresses meets the criteria set out in the Order. Instead, they are being required to put their faith in the contractor hired and paid for by their competitors. They note that FMTS appears to be based largely in the UK, and there is no indication it has any expertise in Canadian copyright law.

[251] The Third Party Respondents contrast this with the controls and limits inherent in the static blocking order granted in *GoldTV FC*, where the list is subject to Court approval based on specific evidence. They add that under Project Cleanfeed, the information about which domains to block comes from objective sources including the police, not a contractor hired by a party to the dispute, a party who is also a commercial competitor.

[252] Finally, the Third Party Respondents object to the requirement that there be no substantial legitimate content on the listed site; they argue that the test should be stricter, and if there is any legitimate content on the site at an IP address, it should not be listed.

[253] CIPPIC also expresses serious concerns that the risk of over-blocking is increased with a dynamic site blocking order. It notes that FMTS will be using proprietary techniques that largely rely on automated assessment tools in order to identify the sources of the unauthorized streaming and to confirm they do not also host substantive legitimate content. In many cases, the IP addresses for the listed streaming services would be identified and listed without any opportunity for human intervention at all. And the customers as well as the sites affected may not be aware of the reason for the interruption, and thus are less likely to raise a complaint. CIPPIC argues that “[n]ew forensic tools and particularly those operated by private companies require independent verification and peer-review” (CIPPIC Factum at para 37). There is no independent evidence as to the accuracy or reliability of FMTS’s tools, and thus CIPPIC argues that the Plaintiffs should be required to provide the Court with a report regarding the impact of implementation.

[254] While I accept that the Third Party Respondents have significant concerns about the risks they will run if the Order issues, it should be noted that all ISPs will bear a similar risk. This includes those that are tied to the Plaintiffs. In light of the evidence about the combined reach of all of the Third Party Respondents, this is not a situation where the Order will create a competitive advantage.

[255] In *GoldTV FC*, Justice Gleeson was satisfied that the “barriers to legitimate use or trade” condition was met for the following reasons:

1. the order was limited to a specific list of domains and subdomains;
2. any additions to the list could only be done by order of the court based on evidence that the sole or predominant purpose of the newly identified domains was also unauthorized distribution; and
3. the order provided that the blocking could be lifted if the “sole or predominant purpose” criteria was no longer satisfied or because of the need to address technical or security concerns.

Cumulatively, these controls and limits minimized the risk of over-blocking, and empowered the Third Party Respondents to address it if it occurred.

[256] While *GoldTV FC* involved a static blocking order limited to a pre-approved blacklist of domains and subdomains, I find that the considerations relied on by Justice Gleeson also apply, to some degree, here. First, only IP addresses associated with |||||
 |||||. Second, any additions ||||| must be approved by the Court, based on evidence |||||
 |||||. Third, the Third Party Respondents will be able to stop blocking if concerns related to their network’s security or over-blocking arise.

[257] Based on all of this, I am satisfied that the terms of the Order that will be granted will include sufficient measures to mitigate the risk of over-blocking.

[258] I agree with CIPPIC that the untested nature of the techniques used by FMTS is a reason for concern. Requiring real-time monitoring and validation of the implementation of the Order by an independent, third party expert, combined with a reporting requirement on the results, will help to allay the concerns and provide a stronger evidentiary foundation for any future case.

(v) Fairness

[259] This factor calls for consideration of whether the relief strikes a fair balance between fundamental rights of the parties, including the third parties, and the general public. It is a key element in the assessment of the overall proportionality of the remedy, and is of particular salience here.

[260] Once again, this element from *Cartier* is rooted in European law, as explained at para 125:

125. That brought the judge to proportionality. He held, correctly in my judgment, that this requires a fair balance to be struck between, on the one hand, the intellectual property rights guaranteed by Article 17(2) of the [*Charter of Fundamental Rights of the European Union*, 2012/C 326/02] and, on the other hand, the ISPs' freedom to conduct business under Article 16 of the Charter and the freedom of information of internet users under Article 11 of the Charter.

[261] In *GoldTV FC*, Justice Gleeson considered the issues of net neutrality, freedom of expression and impact on competition under this rubric, and I shall do the same here.

[262] The Plaintiffs submit that the balancing under this factor tips heavily in their favour. First, the effect of the Order they seek is limited to restricting access in Canada to servers (almost exclusively located outside of Canada) that blatantly infringe their exclusive rights in the live NHL games. Plus, the Order will only require blocking for a limited time period. The Order does not impinge on any of the Third Party Respondents' rights, or otherwise interfere with their services to their customers.

[263] Next, the Plaintiffs argue that freedom of expression does not protect the ability to disseminate or access blatantly infringing content, noting that this Court routinely issues injunctions to enjoin the distribution of infringing content without any negative impact on the values protected by the freedom of expression guarantee in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (UK), 1982, c 11* [the *Charter*].

[264] Third, the Plaintiffs assert that the economic rights of the Third Party Respondents are protected by the terms of the Order sought, because the Plaintiffs will bear the marginal costs of implementation. They argue that the Order sought does not require the Third Party Respondents to acquire new technology because they can already implement manual blocking.

[265] Finally, the Plaintiffs submit that the Order would not affect net neutrality because it does not interfere with the Third Party Respondents' content-neutral character, but merely requests that they block access to

clearly infringing content in compliance with a Court Order. They say that net neutrality does not apply to illegal content, and since that is the only focus of the Order sought here, there is no interference with the principle.

[266] The Third Party Respondents dispute this on several grounds, many of which have been discussed previously. Their objections to being asked to undertake significant operational burdens solely to benefit their competitors have been set out earlier, and need not be repeated. Similarly, the Third Party Respondents expressed legitimate fears about the reputational impact of any misstep in implementing the Order, noting their inability to advise specific customers whose access is being blocked about why this happened, and that as a result, if subscribers are inadvertently denied access to benign content, they will blame their service provider rather than the Plaintiffs.

[267] Finally, the Third Party Respondents all claimed that they would incur extra costs in implementing the Order, including investments in new routers or other hardware, plus additional software and costs associated with the staff time needed to implement the Order. Some of these estimates ran into the million(s) of dollars, while others were more modest, reflecting both the current capacity of their respective networks and the anticipated demands associated with implementing this type of order for live NHL games.

[268] CIPPIC argued that application of the *Cartier* test needed to take into account two central considerations: the nature of the relief sought, and the wider Canadian legal and policy context. On the first point, CIPPIC submitted:

Several contextual factors require a more rigorous application of these factors in the context of the dynamic website blocking injunction sought in this proceeding: the relief sought is mandatory rather than prohibitive in nature, the remedy is against innocent third parties and its implementation requires substantial changes to the services of these third parties; the relief is sought on largely an ex parte basis; and the relief is effectively final in nature. (CIPPIC Factum at para 10).

[269] In addition, CIPPIC submitted that the statutory and constitutional context is a relevant consideration of the Order and its terms. They point to three key elements of the wider policy framework. First, the *Copyright Act* provides for injunctive relief, but sub-section 34(1) provides that this relief remains “subject to [that] Act” and so the balance between users’ rights and copyright holder’s interests set out in the *Copyright Act* is a relevant consideration.

[270] Next, CIPPIC argued that the principles of net neutrality and the importance of ensuring affordable and competitive ISP services in Canada set out in the *Telecommunications Act* are also relevant considerations in assessing whether to grant the Order sought here, and if so, in setting its terms.

[271] Finally, CIPPIC submitted that dynamic website blocking poses a particular risk of over-blocking (for the reasons explained earlier) and thus engages *Charter*-protected freedom of expression to an even greater extent than website blocking more generally.

[272] Of particular relevance to the fairness factor, CIPPIC contends that the remedy the Plaintiffs seek here amounts to imposing a “notice and takedown” regime on the ISPs, noting that this runs counter to Parliament’s deliberate choice when it adopted the *Copyright Modernization Act*, SC 2012, c 20. CIPPIC points to *Rogers Communications v Voltage Pictures LLC*, 2018 SCC 38, where the Supreme Court of Canada refers to Parliament’s choice not to impose a notice and takedown regime in Canada:

[26] For example, Parliament sought to strike a balance between the interests of copyright owners and of Internet subscribers, respectively, by preferring a notice and notice regime over a “notice and take down” regime (see House of Commons Debates, at p. 2109, per Hon. James Moore). The notice and take down regime prescribed in the United States by the *Digital Millennium Copyright Act (1998)*, 17 U.S.C. § 512, requires an online “service provider”, upon receiving notice of a claimed copyright infringement, to respond expeditiously by removing or blocking access to the material that is the subject of the claimed infringement. While obviously a preferable scheme from the standpoint of copyright owners, its “take down” requirement has been criticized as undermining the presumption of innocence and unnecessarily limiting free expression... In contrast, the notice and notice regime allows for notices of claimed infringement to be forwarded (thereby advancing the rights of copyright holders), while accounting for the interests of Internet subscribers by maintaining the presumption of innocence and allowing them to monitor their own behaviour (and, more specifically, to avoid continued copyright infringement) [citations omitted].

[273] In this case, CIPPIC asserts that the Plaintiffs are seeking, by virtue of the Order, to impose notice and takedown on the Third Party Respondents, because they will be obliged to block access to content immediately upon receiving notice of infringement, and this will be done without ongoing judicial oversight. This stands in contrast to the static site blocking ordered by *GoldTV FC*, which only mandated removal of access following a judicial determination that there is a strong factual and legal basis to conclude that a specific, listed target website is infringing copyright.

[274] While CIPPIC does not claim that this should automatically bar the Plaintiffs from the relief they seek, it does assert that the minimal judicial scrutiny involved in the Order here is a relevant consideration in assessing the balance of convenience factors, and if an Order is to be granted, in fixing its terms.

[275] In addition, CIPPIC asserts that net neutrality – a policy consideration specifically embedded in sections 27(2) and 36 of the *Telecommunications Act* - is implicated in at least two specific ways. First, they say that any order that mandates ISPs to “transform their networks by developing a new content identification and removal capability that does not currently exist” amounts to a significant step that triggers the principle of net neutrality. CIPPIC argues that the principle applies equally to lawful and unlawful content, noting that several CRTC decisions on this question place limits on ISP’s ability to slow down or block unlawful content (CIPPIC Factum, paras 56-57, citing Telecom Regulatory Policy CRTC 2009-657, October 21, 2009 at paras 121-122; Telecom Decision CRTC 2016-479, December 9, 2016).

[276] Secondly, they note that while section 36 of the *Telecommunications Act* effectively prohibits ISPs from blocking access to specific content on their networks without prior approval, the effect of the Order here would be that the ISPs would be required to block content that was unilaterally selected by the Plaintiffs or their agent. This stands in contrast to the *GoldTV FC* case. In CIPPIC’s view, the Order here engages net neutrality principles more robustly, and these principles should serve as a countervailing factor in assessing whether the balance of convenience favours granting the relief sought by the Plaintiffs.

[277] Regarding freedom of expression, CIPPIC submits that the minimal judicial supervision that will occur over both the choice of the services to be blocked and the evidentiary basis for their selection undermines freedom of expression and public policy. It notes that the CRTC recently rejected a proposal to create an independent expert body empowered to identify copyright infringing websites for mandatory blocking by Canadian ISPs (Telecom Decision CRTC 2018-384, October 2, 2018). In addition, a Parliamentary Committee reviewing the *Copyright Act* similarly rejected the adoption of an expedited administrative regime along the lines of the model proposed before the CRTC. The Committee recommended instead that Courts remain in control of adjudicating whether a given use constitutes copyright infringement, and, if so, to issue orders to remedy the breach (Statutory Review of the *Copyright Act*, Report of the Standing Committee on Industry, Science and Technology, House of Commons, 42nd Parl, 1st S, at 18, 93-97).

[278] Finally, CIPPIC argues that the impact of any order on affordability and competition is a relevant consideration in assessing the balance of convenience in the Canadian context, given the terms of the *Telecommunications Act*. Among other considerations, CIPPIC observes that the relative burden of implementing the Order will fall more heavily on smaller ISPs as compared with the larger tied ISPs. CIPPIC argues this is relevant because the balance of convenience must be assessed in regard to each distinct Third Party Respondent.

[279] While I agree with many of the arguments advanced by CIPPIC on this point, having examined the totality of the arguments and evidence, and in light of the specific Order that will be granted, I am satisfied that the balance of convenience weighs in favour of the Plaintiffs.

[280] It is important to begin by recalling that I have already found a very strong *prima facie* case that the unknown Defendants are engaged in blatant, ongoing infringement of the Plaintiffs' copyright in the live NHL broadcasts. I have also found that these Defendants have organized their affairs in a manner that makes it virtually impossible for the Plaintiffs to pursue any of the traditional remedies for copyright infringement to put an end to the unlawful streaming. This is not seriously disputed.

[281] I have also already found that the proposed Order would be effective in reducing the unlawful streaming of live NHL games, that the terms can be fixed such that it will not impose an undue burden on the Third Party Respondents, and that the risks of over-blocking can be mitigated.

[282] The combined effect of these determinations weighs in the Plaintiffs' favour.

[283] I pause to note that I agree with the Third Party Respondents that, if they were required to make significant investments in order to implement the Order, and if the Plaintiffs were not required to fully indemnify them for these costs, the balance of convenience factor would be more in favour of the ISPs, although the outcome would still not be certain. As explained below, in light of the current circumstances these concerns are addressed by the terms of the Order.

[284] Turning to the CIPPIC submissions, I agree that many of the considerations they highlight are relevant and important in assessing where the balance of convenience lies, and ultimately in assessing the overall equities of the case.

[285] While the Court's jurisdiction to issue the requested relief does not lie in the provisions of the *Copyright Act*, I am persuaded that the balance of rights and interests set out in that statute is a relevant consideration in the exercise of my discretion whether to grant the relief and in setting its terms. The same applies for the provisions of the *Telecommunications Act*, in particular net neutrality and the importance of competition in the market.

[286] To be clear, the Court is not constrained from exercising its discretion by virtue of these statutes; rather, they help to set the context within which the Court will assess whether to grant the equitable relief sought, and on what terms. This is consistent with the holding in *GoldTV FCA*, and is particularly apt here given the unprecedented nature of the relief requested and the rights and interests affected.

[287] In addition, the impact of any order on freedom of expression is an important factor. However, it is of limited significance to the outcome here, given the restraints in the Order to be granted and the fact that the focus of the activity is on unlawful streaming of broadcasts which have been found to constitute a strong *prima facie* case of copyright infringement. The concerns expressed by CIPPIC about the lack of ongoing judicial oversight are valid, but will be addressed in other ways, as explained below.

[288] Considering the impact of the Order that will be granted on the interests of the Plaintiffs and the Third Party Respondents, as well as its impact on the rights and interests of the viewing public in Canada, I am satisfied that this factor is not a basis to reject the Order sought. The rights and interests of all concerned can, in the very particular circumstances now facing the Court, be balanced and protected in a manner that meets the requirements of copyright enforcement, without unduly interfering with the ISPs operations or interests, or significantly interfering with the freedom of expression interests of the affected viewers.

[289] Some of these considerations have been discussed previously. It is not necessary to repeat that here, so I will only add a few points to address the remaining elements.

[290] On the issue of net neutrality, I am not persuaded by the Plaintiffs' assertion that the principle is not affected by the Order. Any requirement that ISPs consciously interrupt or interfere with a subscriber's access to their services *prima facie* implicates the principle of net neutrality, which generally means, "that all traffic on the Internet should be given equal treatment by ISPs. In other words, there should be no manipulation, preference, or discrimination, either through technical or economic means" (CRTC Telecom Regulatory Policy 2017-104 at para 10). The fact that the content is said to be illegal does not prevent the principle from being

affected, but neither is it entirely irrelevant that the content to be blocked here has been found to constitute a blatant and ongoing infringement of the Plaintiffs' copyright in live NHL broadcasts.

[291] Each situation should be assessed on its own merits, and in this case I am persuaded that net neutrality should not prevent the limited blocking to be required by the Order here. I find that the safeguards put in place by the Order, including the specific requirements imposed on the Plaintiffs regarding the selection of the services to be identified for blocking and the extent to which this will result in under-blocking rather than over-blocking, will sufficiently protect net neutrality.

[292] In addition, I am also not persuaded by the Plaintiffs' argument that the Order does not engage the very strong protection for freedom of expression enshrined in the *Charter*. As with *GoldTV FC*, I find that freedom of expression – particularly the access to information aspect of the freedom – is an important consideration in assessing whether to grant or deny the remedy requested, but in the end it does not weigh in favour of not denying the relief.

[293] First, the Plaintiffs have established a strong *prima facie* case that the content to be blocked constitutes an ongoing infringement of their copyright. This is not simply an assertion of the Plaintiffs; I have already found that the activity of streaming this content is *prima facie* unlawful. As stated in *Google*, at paragraph 49: "[e]ven if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders."

[294] Second, the nature, scope and duration of the blocking is limited and subject to a specific and detailed Order. The Order seeks to limit its impact on the interests of any member of the viewing public who wants to access legitimate content, and extends only to those who seek access to unauthorized content that is subject to the specific terms of the blocking Order. I am satisfied that the risks of over-blocking are minimal.

[295] Third, the Order will require independent expert monitoring and verification of the steps taken under it. Although that is a *post-facto* measure (i.e. it will not prevent any infringement of freedom of expression), it will serve to encourage all parties to pay scrupulous attention to the very specific details set out in the Order, and it will ensure a degree of transparency for the parties, the Court and the wider public.

[296] On balance, I am satisfied that any potential infringement of freedom of expression guarantees under the *Charter* will be limited, proportionate and justified.

(vi) Safeguards

[297] This factor requires that the relief include measures that safeguard against abuse. As noted above, the Plaintiffs assert that a number of features of their requested Order amount to safeguards against any misuse or over-reach, while the Third Party Respondents and CIPPIC contest the point and each propose additions and refinements to the terms to better limit its reach.

[298] Because several of these arguments have been reviewed previously, and because in the section below on the terms of the Order I will set out several requirements that are intended to safeguard against abuse, it is not necessary to discuss this factor in any detail. I find that it is possible to include measures that safeguard against any potential abuse by virtue of the Order to be granted, including measures that go beyond those proposed by the Plaintiffs. These are included in the Order to be granted here.

(c) Summary on balance of convenience

[299] Stepping back from the details of the *Cartier* factors, and recalling the guidance from the Supreme Court of Canada in *Google*, I am required to assess whether, in the circumstances of the matter, it is just and equitable to grant the equitable relief sought by the Plaintiffs.

[300] The question is not free from doubt, and many of the cautions and concerns expressed by the Third Party Respondents and CIPPIC are worthy of serious consideration. However, I am satisfied that in light of the current situation, and with the limits and requirements set out below, it is just and equitable to grant the Plaintiffs the type of injunction they seek.

[301] It is particularly significant and therefore bears repeating that by the time the Order is implemented, the NHL playoffs will have begun. This substantially reduces the overall burden on the Third Party Respondents (as compared with the burden the Order would impose if the regular season was still underway) and means that the Order will only be in place for a very limited duration. It is important that the terms of the Order, as explained below, will require the Plaintiffs to indemnify the Third Party Respondents for the costs they incur in implementing it, up to a fixed amount. It is also relevant that the Order will specify that the Third Party Respondents will only be required to block up to the limits of their current capacity, and that none of them will be required to acquire new capacity in order to comply with it. Finally, the terms of the Order also require the Plaintiffs to retain an independent expert, to monitor the steps taken by FMTS in assembling the list, to observe

the blocking efforts of at least some of the Third Party Respondents, and to provide a report to the parties and the Court, and later to the public, once the NHL playoffs end.

[302] The combined effect of these elements of the Order tip the balance of convenience in favour of the Plaintiffs. I repeat here that if the circumstances were different, for example, if the Order would have come into effect during the regular NHL season, the results may have been different, on the record before me. This does not foreclose the Plaintiffs from seeking other similar orders in the future, but it does put them on notice of the types of issues and concerns that should be addressed in any future request.

[303] On this last point, several Third Party Respondents expressed concerns that any order granted here would open the floodgates, noting the evidence that Rogers Communications had asked FMTS to monitor other sports broadcasts in addition to the NHL. I am not persuaded that this is a live concern here, but I note that the cumulative cost and complexity burden that might be imposed by overlapping dynamic blocking orders covering multiple live sports broadcasts is a relevant consideration.

[304] I therefore find that the balance of convenience weighs in favour of granting an order of the type sought by the Plaintiffs. Before turning to the terms of the Order, I will discuss the costs of implementation.

V. Costs of Implementation

[305] The question of who pays for the implementation of the Order was a major point of divergence between the parties, and a significant portion of the evidence and argument was devoted to this subject. At the core of the position of both sides is a concern about being required, by Court Order, to subsidize their competitors.

[306] The Plaintiffs proposed to indemnify the Third Party Respondents for the reasonable marginal costs of their implementation of a system to automate the process of downloading the IP addresses and pushing those to their core routers. The Third Party Respondents argued that this was totally insufficient and that they should be reimbursed for all of the costs they incur in implementing this unprecedented remedy. Based on the evidence submitted, these costs would amount to significant sums, in some instances reaching over one million dollars. One of the Third Party Respondents indicated that it would have to make substantial capital investments to replace all of its core routers; another indicated that it would have to acquire duplicate hardware to be able to monitor the outgoing traffic of its customers and to push the necessary configuration changes to its core routers.

[307] In light of their positions, both parties devoted significant time and resources to the question of cost of implementation. I will not discuss this evidence in any detail. There are two reasons for this.

[308] First, in light of the position adopted by the Plaintiff at the hearing, and given the situation at the time the Order will issue, it is not necessary to discuss these points.

[309] Second, I recognize that the Plaintiffs may well seek a further order, either aimed at unlawful streaming of live NHL games for the next season, or of other live sports broadcasts, or both. Any discussion of the evidence presented here could only complicate a future assessment of any such motion based on fresh evidence relating to this issue, and so is best avoided here.

[310] At the hearing, the Plaintiffs undertook to indemnify the Third Party Respondents for their costs of implementation up to a maximum of \$50,000 each, and a term to this effect will be included in the Order.

[311] While this amount may not have been sufficient to cover the costs of implementing an open-ended dynamic blocking order for a substantial portion of the NHL regular season, I find on the evidence it is sufficient to enable the Third Party Respondents to undertake manual (or automated) site blocking for the remainder of the NHL playoffs. In light of the Plaintiffs' undertaking, it is not necessary to deal with the other matters raised by the parties during the hearing. Those are best left for another day.

VI. Terms of the Order

[312] As with costs of implementation, it is not necessary to deal with many of the submissions on the specific terms of the proposed Order, because I have simply incorporated many of them into the Order that will issue, and much of the focus was on costs of implementation and the costs of the proceeding, which are discussed above and below respectively. There are four points, however, that merit some discussion to clarify terms and explain the underlying rationale.

[313] First, the Third Party Respondents asserted that merely posting information on a website about the existence of the Court's Order would be insufficient to inform their subscribers whose access was blocked about why they were being denied access. Instead, they argued that the Order should require them to follow industry best practices by informing their customers whose access was blocked. However, the objecting Third Party Respondents do not have the capacity to identify the specific customers, which requires technology called a

Deep Packet Inspection (DPI) System. The Third Party Respondents argued that they should be indemnified by the Plaintiffs for their costs of acquiring and implementing such a system.

[314] I am not persuaded, at this stage, that such a requirement should be imposed. I accept that the Order sets the minimum threshold, and any ISP that has the capacity to identify specific subscribers whose access has been blocked may want to do so. For the time being, however, I do not find that acquiring and implementing a DPI system should be imposed on all of the Third Party Respondents, or that related costs should be imposed on the Plaintiffs. The subscribers who are seeking to access the unlawful streams of live NHL games will have their access blocked, and if they wonder why, notices posted on publicly accessible site(s) will help to inform them. Plus, it can be expected that once the Order becomes public it will attract a certain amount of attention, at least among those who pay attention to these sorts of activities. Finally, the Order will include safeguards to prevent over-blocking, so the concern that customers of the Third Party Respondents might be blocked from accessing legitimate content will be minimized.

[315] I agree with the Third Party Respondents and CIPPIC that the Plaintiffs should be encouraged to take steps to publicize the existence of the Order, and should establish a consolidated single-point of contact to provide information about the Order. I will not specifically order that these further steps be taken, however, since the requirement to post the Order and an explanation of why it was sought, what it does and who to contact in case of questions or complaints, will be included.

[316] The next issue concerns whether it was necessary to set out the terms of any application for a renewal or extension of the Order. Based on their experience with *GoldTV FC*, the Third Part ISPs sought to include a number of safeguards to ensure that they would not be taken by surprise by an urgent application on the part of the Plaintiffs. It is not entirely clear that this will be relevant because the Order will expire at the end of the NHL season. It will be for the Plaintiffs to decide whether they wish to seek to renew it, and if they do so a procedure that is fair to all sides will be followed.

[317] Several of the Third Party Respondents and CIPPIC proposed that the Plaintiffs should be required to retain an independent expert to report on the implementation and effectiveness of the Order. In view of the unprecedented nature of the remedy, concerns both about the selection of services to be blocked and the possible impact on subscribers seeking access to legitimate content, and in view of the financial interest of FMTS in the outcome, it was suggested that an independent third party expert should be retained to perform this function.

[318] I agree with the concerns expressed about the lack of independent oversight or verification. The evidence from FMTS about its experience in other jurisdictions, and in particular its evidence that it has not received any complaints and is not aware of any significant over-blocking, is significant, so far as it goes. However, given the interests involved, FMTS's lack of any experience in Canada with this type of Order, and the absence of evidence in the record of any independent verification of FMTS's work elsewhere, the counsel of prudence would suggest that the Court adopt an attitude of "trust but verify" in this instance. This is similar to the "evaluate, measure and verify" approach suggested by Beanfield.

[319] For that reason, the Order will require the Plaintiffs to retain an independent expert, to be selected with input from the Third Party Respondents, and if necessary, subject to selection among a list of candidates presented for approval of the Court. This expert will have several tasks that will have to be completed in two stages.

[320] First, the expert will review [REDACTED] to ensure [REDACTED]; review the implementation of the blocking by at least some of the Third Party Respondents; and then submit a confidential report to the parties and the Court on these subjects.

[321] Second, the expert will review information presented by any of the parties on the effectiveness of the Order, and will provide the parties and the Court with a confidential report on that topic. Of necessity, the second report will take some time, and so the Order sets different deadlines for each.

[322] Once these reports are submitted, the parties may make submissions as to any portions of either report that involve confidential matters, and propose redactions or suggested replacement text to protect that information. Once the Court considers these, a consolidated public version of the Expert's Report will be made available to the public, by posting on the websites of the parties.

[323] By this measure, a degree of independent verification and oversight will occur, and the parties and the Court will be able to assess the degree to which the Order was properly targeted, the issues (if any) associated with its actual implementation, and its effectiveness. It also increases the transparency about the process to the public.

[324] Finally, CIPPIC expressed a concern about the scope of the confidentiality asserted by the Plaintiffs, arguing that it was broader than was needed and did not reflect the "strong presumption in favour of open

courts” recently affirmed in *Sherman Estate v Donovan*, 2021 SCC 25, at para 2. I agree with these concerns, and while there is no doubt that a certain amount of the material in the record is highly confidential, it is equally certain that some portions of the evidence and submissions can be made public. That is why the Court provided a confidential draft of the Order and Reasons to the parties, and the version that is released takes into account their submissions on this question. In addition, the Confidentiality Order will remain in place until submissions are received regarding the parts of the record that can and should be made public. A further, narrower, Confidentiality Order will then be issued.

VII. Costs

[325] The Plaintiffs have succeeded in obtaining the relief they seek, although on significantly different terms than they had requested. Similarly, although the Third Party Respondents did not succeed in preventing the issuance of the Order, many of their submissions were accepted and others have been overtaken by events (but may arise at a future point in time). So, it is fair to say that success is divided.

[326] Some of the Third Party Respondents sought full recovery of their costs; some did not seek costs. In my view, in view of the unprecedented nature of the order sought, the manner in which the case proceeded, and in light of the divided success, I will not order costs to any party. Each party will bear its own costs in this proceeding. Although each case must be assessed on its merits, and in consideration of the factors set out in Rule 400 of the *Federal Courts Rules*, SOR/98-106, I note in passing that this was also the outcome in *GoldTV FC*.

VIII. Conclusion

[327] Unlawful streaming of live NHL games is, on the evidence before the Court, a significant and ongoing breach of the Plaintiffs’ copyright in these broadcasts. It is, undoubtedly, a blatant infringement of their interests and they are entitled to a remedy to seek to thwart it.

[328] By the same token, the Third Party Respondents that will be affected by the Order granted are entirely innocent of any wrongdoing, drawn into this matter simply because their networks are the conduits through which the unlawful streaming occurs. Although they earn income from their subscribers, at least some of whom are likely engaging in the unlawful activity, there is no evidence that any of the Third Party Respondents have

encouraged or otherwise supported their customers' behaviour. Having become ensnared in all of this, the Third Party Respondents also have legitimate rights and interests they seek to protect, and the Order is tailored to reflect these and to seek to minimize the burden imposed on the innocent parties.

[329] In addition, the wider public interest is implicated, including the balancing of rights and interests reflected in the statutes that otherwise govern the affairs of the parties here – namely the *Copyright Act* and the *Telecommunications Act* – as well as the fundamental guarantee of freedom of expression set out in the *Charter*.

[330] For the reasons set out above, I have concluded that the procedure – as it actually transpired -was not unfair to the Third Party Respondents, and thus the relief is not denied on that ground.

[331] Applying the three-part test that governs mandatory interlocutory injunctions, and in particular following the general guidance set out in *GoldTV FC* and *GoldTV FCA*, I find that the Plaintiffs have established a strong *prima facie* case of copyright infringement by unknown Defendants who almost exclusively operate overseas and take steps to hide their identities. I also find that the Plaintiffs have established irreparable harm because of the ongoing infringement of their copyright through the unlawful streaming of broadcasts of live NHL games, and that the Order of the kind sought by the Plaintiffs is necessary to try to stop it.

[332] Finally, applying the factors set out in the jurisprudence, which collectively seek to ensure that any order imposed is proportional to the harm sought to be prevented, I find that the balance of convenience weighs in favour of the Plaintiffs, in the particular circumstances of the case at the time the Order is being issued.

[333] As explained in the reasons set out above, the Order proposed by the Plaintiffs was modified to take into account the interests of the Third Party Respondents, as well as the wider public policy considerations relevant to the dynamic site blocking order awarded here and identified by CIPPIC. Some important limitations were included, such as the requirement that ISPs only block up to their then-current capacity. Some limits arose simply by virtue of circumstance, most importantly that the number of games broadcast on any given night was significantly reduced because the NHL playoffs had begun by the time the Order is issued. In addition, some elements were added to ensure greater transparency, in light of the important public interests implicated by the Order.

[334] In light of the divided success, no costs are awarded.

[335] In closing, I want to acknowledge the cooperation of the parties and the efforts of Court staff that were needed to make this hearing a success. The hearing involved multiple parties and many counsel and observers were in attendance. It was conducted in a hybrid format, with some parties participating in person and others joining by Zoom videoconference. The hearing was bilingual, so translation was required. And, at times the hearing had to be “closed” to deal with confidential or highly confidential material. There were, as they say, many moving parts. The combined efforts of the parties and the Court staff allowed the hearing to proceed smoothly, and that should be acknowledged here.

ORDER

THE COURT ORDERS that:

1. The Plaintiff’s motion for an interlocutory injunction is granted, on the terms set out below.
2. There is no order as to costs.

TERMS OF THE ORDER

3. In this Order, “**NHL Live Game**” refers to the live footage of a National Hockey League (“**NHL**”) game and/or the live television program produced by adding text, images, videos, commentaries and/or animations to said footage, and which is produced and/or broadcast by the Plaintiffs in Canada under license from the NHL or its Canadian franchise teams.
4. Subject to the terms of this Order, the Third Party Respondents shall, during each of the NHL Live Game Windows (as this term is defined in Confidential Schedule 2 of this Order) specified in Schedule 1 of this Order, block or attempt to block access, by at least their residential wireline Internet service customers, to each of the IP addresses for the Target Servers (as this term is defined in Confidential Schedule 2 of this Order and as may be hereafter varied) which the Plaintiffs or their appointed agent have notified to the Third Party Respondents in accordance with this Order.

4.1 Timing of Implementation

- a) The Third Party Respondents shall begin to block access to the specified IP addresses under this Order immediately, if they are in a position to do so;
- b) Any Third Party that cannot begin immediately shall take steps to comply without delay, and in any case shall begin to block access under this Order no later than seven (7) days after it is issued;
- c) Any Third Party Respondent that is unable to fully comply with the terms of this Order within fifteen (15) days shall advise the Plaintiff, pursuant to the terms of paragraph 8.

5. The Plaintiffs shall collectively appoint a single agent to fulfill the duties outlined in this Order (the“Agent”).

5.1 The Agent may notify to the Third Party Respondents an IP address to be blocked as a Target Server pursuant to paragraph of this Order if:

(a) The Agent has detected that the IP address is being used:

- (i) during an NHL Live Game Window to communicate an NHL Live Game to the public by telecommunication without authorization; or
- (ii) during the Pre-Monitoring Period (as defined in Confidential Schedule 2 of this Order) to communicate to the public by telecommunication without authorization one of the Plaintiffs’ stations on which an NHL Live Game is scheduled to be broadcast during the NHL Live Game Window; or
- (iii) in a manner that meets one or more of the detection conditions specified in paragraph (c) and (d) of Confidential Schedule 2 of this Order; and

(b) the Agent has concluded that at the time of the detection the IP address satisfies the safeguard requirements of paragraph 2(e) and (f) of Confidential Schedule 2 of this Order.

Upon the conclusion of each NHL Live Game Window, the Agent shall give notice to the Third Party Respondents in accordance with this Order to unblock all Target Servers that have previously been notified for blocking during the NHL Live Game Window. The Third Party Respondents shall use reasonable efforts to un-block as soon as reasonably practical after the end of the NHL Live Game Window.

7. The Third Party Respondents have no obligation to verify whether the IP addresses to be blocked as Target Servers notified by the Agent pursuant to this Order have been correctly identified, and are wholly reliant on the Plaintiffs or their appointed agent accurately identifying and communicating to the Third Party Respondents such IP addresses in compliance with this Order.
8. A Third Party Respondent will be deemed to have complied with paragraph of this Order if it uses either manual or automated IP address blocking, or an alternative or equivalent technical means (provided that the Third Party Respondent provides reasonable notice to the Plaintiffs of said alternative or equivalent means). If a Third Party Respondent is unable to implement either manual or automated IP address blocking, or IP address rerouting, or alternative or equivalent technical means, that Third Party Respondent shall, within fifteen (15) business days of this Order, notify the Plaintiffs, of the step(s) it has taken and why it will be unable to comply with the Order.
9. When blocking access to an IP address pursuant to paragraph of this Order, the Third Party Respondents shall use reasonable efforts, subject to the limits of their networks and resources, to disable access to the IP address as soon as practicable following the notification by the Plaintiffs or their appointed Agent pursuant to this Order. A Third Party Respondent will be deemed to have complied with paragraph of this Order if it uses the technical means set out in paragraph of this Order within thirty (30) minutes of the start of an NHL Live Game Window and at least every hour thereafter until the end of the NHL Live Game Window, or according to such other schedule as may be agreed between the relevant Third Party Respondent and the Plaintiffs in writing.
10. A Third Party Respondent shall not be in breach of this Order if it temporarily suspends its compliance with paragraph, in whole or in part, when such suspension is reasonably necessary:

- (a) to correct or investigate potential over-blocking that is caused or suspected to be caused by the steps taken pursuant to paragraph;
 - (b) to maintain the integrity or quality of its Internet services or the functioning of its network and/or system(s);
 - (c) to upgrade, troubleshoot or maintain its Internet services or blocking system(s), including as a result of technical or capacity limitations of its blocking system(s); or
 - (d) to prevent or respond to an actual or potential security threat to its network or systems,
- provided that:
- (e) the Third Party Respondent gives notice to the Plaintiffs as soon as reasonably practical in advance of, during or following such suspension and provides the reason for such suspension and an estimate of its duration, or if the suspension does not last longer than 48 hours, uses commercially reasonable efforts to maintain a record of the suspension and provides that record to the Plaintiffs upon request; and
 - (f) the suspension lasts no longer than is reasonably necessary.

For greater certainty, a Third Party Respondent shall not be in breach of this Order where it suspends in part compliance with paragraph 2 because the capacity of its blocking system is exceeded by the number of IP addresses for the Target Servers notified in accordance with this Order, provided it continues to block or attempt to block access to the number of IP addresses that does not exceed the capacity of its blocking system. A Third Party Respondent may hold a reasonable portion of its capacity in reserve if it deems it necessary to do so in order to be able to respond to threats to its subscribers and to maintain the integrity of its network and services. Any such measure must be justified with reference to the network capacity used for similar purposes within the 12 months preceding this Order.

The Plaintiffs shall treat any information received pursuant to this paragraph confidentially and shall use it solely for the purposes of monitoring compliance with this Order.

Notifications of IP addresses of Target Servers to the Third Party Respondents

11. Any notifications given by the Agent under paragraph of this Order must:

- (a) be notified to the Third Party Respondents by means of publishing a consolidated list of all the IP addresses of the Target Servers to be blocked during an NHL Live Game Window accompanied by the start and anticipated end time for each Window and each IP address on a secure electronic platform to which each of the Third Party Respondents has been given access by arrangement with the Agent, in the manner specified in paragraphs (b) – (d);
- (b) be in a fully specified data format, that is provided to the Third Party Respondents in advance.
- (c) be published to the said platform on an ongoing basis during each NHL Live Game Window, and (save as set out in paragraph below) not during other periods; and
- (d) be published in such a manner that they are put actively to the attention of all Third Party Respondents as contemporaneously as is reasonably practicable.

12. Any notifications given by the Agent under paragraph of this Order must be notified to the Third Party Respondents by the same means as those specified in paragraph of this Order and given within fifteen (15) minutes of the expiry of the relevant NHL Live Game Window, and shall be effected by publishing an empty list of IP addresses.

Notification to Target Servers

13. Where the Agent notifies an IP address for blocking in accordance with paragraph of this Order, the Agent must within a reasonable period of the first occasion when that IP address is notified (being no later than the end of the day on the day of the NHL Live Game Window in question) send to the hosting provider associated with the IP address an electronic notice which contains at least the following information:

- (a) that access to the IP address has been blocked in Canada by court order;
- (b) the identity of the Plaintiffs who obtained this Order;
- (c) a link to an internet location from which the public version of this Order may be accessed; and

(d) a statement that affected server operators have the right to apply to the Court to discharge or vary the Order pursuant to paragraph below.

Notification to Third Party Respondents Customers

14. The Plaintiffs shall post this Order, as well as an explanation of the purpose of the Order, and contact information for any inquires or complaints, on each of their websites, in a prominent manner.

15. Where access to a Target Server is blocked by a Third Party Respondent pursuant to this Order, that Third Party Respondent shall make reasonable efforts to make the following information immediately available to its residential Internet service customers who attempt to access the Target Servers and whose access is blocked:

(a) that access has been blocked by this Order;

(b) the identity of the Plaintiffs and the Federal Court File for this matter and contact information of the Plaintiffs, to be provided by the Plaintiffs to the Third Party Respondents for use by such customers;

(c) a statement to the effect that the operators of the Target Servers (i.e. the John Doe Defendants), any third party who claim to be affected by this Order, and any Internet service customer affected by the Order, may apply to the Court to discharge or vary the Order pursuant to paragraph below; and

(d) contact information that the Plaintiffs' agent shall provide to the Third Party Respondents, and may update from time to time on 30 days' notice, that enables the affected customer to readily contact the Plaintiff or its agent to direct any complaints, including false positives.

The reasonable expenses incurred by the Third Party Respondents in making the efforts required by this section 12 shall be paid by the Plaintiffs.

15.1 Any personal information collected to achieve the objectives of this Order, or collected through any Deep Packet Inspection (DPI) or other system adopted to achieve the objectives of this Order, will be used

solely for the purposes of providing notice to customers, will not be disclosed, and will only be retained as long as is strictly necessary to ensure the integrity of the customer notification obligation.

Changes to Confidential Schedule 2

16. No changes to the contents of PART 1, paragraphs (a) to (g), or to PART II, paragraphs (a) to (e) of Confidential Schedule 2 may be made unless approved by Order of this Court. No additions to Part II, paragraph (f) of Confidential Schedule 2 may be made unless approved by Order of this Court. For greater certainty, deletions from PART II, paragraph (f) may be made without approval of the Court, and must be made without delay as soon as the Plaintiffs or Agent become aware that the criteria for inclusion are no longer met.
17. The Plaintiffs must report any deletions to the Court, on a confidential basis, within 30 days of the end of the NHL Playoffs.
18. All parties have permission to apply by way of motion to vary the contents of Confidential Schedule 2, such motion to be supported by evidence and on notice to all the other parties.

Permission to apply

19. The operators of the Target Servers (i.e. the John Doe Defendants), any other third party who claims to be affected by this Order, and any Internet service customer of the Third Party Respondents affected by the Order, may bring a motion to seek a variation of this Order insofar as this Order affects their ability to access or distribute non-infringing content by serving and filing a motion record within thirty (30) days of the first occurrence of the event that allegedly affects them and that results from this Order.
20. This Order shall in no way limit the ability of a Third Party Respondent to seek to stay, vary, or set aside this Order or oppose on any basis any other related or similar Order sought by the Plaintiffs or any other party. In particular and without limitation, this Order shall in no way limit the ability of a Third Party Respondent to raise issues in connection with the implementation or renewal of this Order on grounds relating to the technical implementation of this Order, impacts on a Third Party Respondent's services to its subscribers, or the effectiveness of the Order in preventing the unauthorized streaming during an NHL Live Game Window.

Sunset clause

21. This Order shall terminate at the end of the last NHL Live Game Windows of the 2021-2022 NHL season (i.e., the final of the Stanley Cup), unless the Court orders otherwise.

Confidentiality

22. The Confidential Affidavits filed by any of the parties, any cross-examination on these Confidential Affidavits, and any written representations by any of the parties that refer to this information shall remain confidential and be sealed in the Court record, subject to those portions addressed in paragraph 23 below, because this is necessary to prevent a serious risk to the efficacy of the present Order and similar orders rendered by courts in other jurisdictions; and no reasonable alternative measures will prevent that risk; and the benefits of protecting this efficacy outweigh the negative effects of confidentiality.

23. The Court is satisfied that, while certain portions of the documents listed below can be made public, it is necessary for other portions to remain confidential. For greater certainty, the following portions of the documents listed below will be treated as confidential and be sealed in the Court record to prevent a serious risk to the efficacy of the present Order and similar orders rendered by courts in other jurisdictions; and that no reasonable alternative measures will prevent that risk; and that the benefits of protecting this efficacy outweigh the negative effects of confidentiality:

- (a) Certain paragraphs of the Affidavit of Mr. George Demetriades sworn June 28, 2021;
- (b) Certain paragraphs of Exhibit JF-5 to the Affidavit of Mr. Jonathan Friend sworn October 15, 2021;
- (c) Certain portions of the cross-examinations of Mr. Demetriades (held October 25, 2021) and Mr. Friend (held November 4, 2021);
- (d) Certain paragraphs of the confidential version of the Plaintiffs' written representations in support of the present Order;
- (e) Schedule 2 to this Order (as well as Schedule 2 to the draft order submitted by the Plaintiffs);

- (f) Any portion of the written representations submitted by the Third Party Respondents and/or Intervenor that references the information contained in documents (a) to (f); and
- (g) Item (i) of the reports to be submitted to the Court pursuant to paragraph 17 of this Order.
- (Collectively, “Confidential Information”).

The parties are to provide proposed redactions, identifying the specific portions of the documents listed in paragraphs (a) to (d), and paragraphs (f) and (g) to be treated as “Confidential Information”, within 30 days of the issuance of this Order. The redactions approved by the Court will be incorporated into a revised Confidentiality Order. Until then, the existing Confidentiality Order continues to apply.

24. The Confidential Information shall be treated as confidential by the Registry of the Court and shall not be available to anyone other than the Plaintiffs, the Third Party Respondents, the Intervenor and appropriate Court personnel.
25. Any defendant or third party bringing a motion pursuant to paragraph of this Order who wishes to have access to the Confidential Information for the purposes of these proceedings shall serve and file a motion record seeking leave from the Court to have access to the Confidential Information.
26. Any party who is authorized to have access to the Confidential Information pursuant to paragraphs or of this Order may only make use of the Confidential Information for the purposes of these proceedings and shall not disclose the Confidential Material to anyone (except their legal counsel or experts who have been informed of the present Order), without leave from the Court.

Reporting to the Court

27. The Plaintiffs shall retain an independent expert, selected with input from the Third Party Respondents. If the parties cannot agree, they may propose up to three possible experts, by letter to the Court, and the Court will advise the Plaintiffs which of the list they must retain.
28. This expert shall have several principal tasks:

- a. To review the application of the criteria by the Plaintiff's Agent for the identification of IP addresses for blocking, including the application of all of the criteria set out in Confidential Schedule 2;
- b. To convey to the Court a list (which list shall be prepared by the Agent) of all IP addresses that were notified for blocking, the dates and times on which they were required to be blocked, and the criteria which were applied that resulted in them being notified for blocking;
- c. To review and report on the implementation of the blocking by as many of the Third Party Respondents as is feasible (and no less than four);
- d. To report on compliance with the terms of the Order, by both the Plaintiffs and the Agent, as well as the Third Party Respondents;
- e. To compile information on any complaint(s) received by any of the Plaintiffs or Third Party Respondents relating to the implementation of this Order (which information shall be compiled by the respective parties);
- f. To assess and report on the expert's assessment of the effectiveness of the Order, including the criteria for measuring success, why these were selected, and the results of the assessment.

The Expert shall be provided the necessary access to facilities, processes or information that is needed to fulfil these responsibilities.

29. The Expert will be subject to an ongoing obligation of confidentiality, and shall not disclose any information obtained pursuant to this mandate, except as permitted by the terms of this Order.

30. The Expert will prepare three reports:

- a. An Initial Confidential Report – on the implementation of the Order, as set out in paragraphs (a) to (e) above, which shall be prepared and provided to the parties and the Court, on a confidential basis, within thirty (30) days of the end of the NHL Playoffs;

- b. A Further Confidential Report – on the expert’s assessment of the effectiveness of the Order, as set out in paragraph (f) above, within sixty (60) days of the end of the NHL Playoffs; and
- c. A “Public” Report – which shall be prepared following consultations with all parties as to proposed redactions or alternate wording needed to protect confidential information. If the parties cannot agree on proposed redactions, the Expert can seek the assistance of the Court to resolve the issue. This Report shall be issued as soon as is feasible following the completion of the Reports under paragraphs (a) and (b) above. This Report shall be posted on each Party’s website within thirty (30) days of its completion.

Costs of Implementation

31. The Plaintiffs shall indemnify and save harmless the Third Party Respondents for:

- a. the reasonable marginal cost of implementing this Order, up to a maximum amount of \$50,000.00; and
- b. any reasonably incurred loss, liability, obligation, claim, damages, costs (including defence costs), or expenses resulting from a third party complaint, demand, action, claim, application or similar proceeding whether administrative, judicial, or quasi-judicial in nature, in respect of the Third Party Respondents as a result of their compliance with the Order.

32. With respect to the costs referenced in paragraph (a) above:

- a. the Third Party Respondents shall provide the Plaintiffs with an invoice setting out the claimed costs elements and the total cost claimed, within 30 days of the end of the NHL Playoffs;
- b. the Plaintiffs shall, within thirty ;(30) days of receipt of the invoice, either (i) pay the invoice; or (ii) serve and file a motion disputing the reasonableness of the costs claimed in the invoice, failing which the costs shall be deemed to be reasonable.

Costs

33. There shall be no costs on the motion.

“William F. Pentney”

Judge

SCHEDULE 1: NHL LIVE GAME WINDOWS

- The NHL Live Game Window of all national and regional NHL games broadcast in Canada by any of the Plaintiffs via television broadcast and/or online streaming during the regular 2021-2022 NHL season (starting on or around October 1st, 2021) as per the schedule found on the NHL website (<https://www.nhl.com/schedule>), as updated from time to time.
- The NHL Live Game Window of all national NHL games broadcast in Canada by any of the Plaintiffs via television broadcast and/or online streaming during the 2021-2022 Stanley Cup playoffs and final series as per the schedule found on the NHL website (<https://www.nhl.com/schedule>), as updated from time to time.

CONFIDENTIAL SCHEDULE 2: [REDACTED]

(a) [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

(g) [REDACTED]

1. [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(a) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

(g) ||||| |||||

(h) ||||| |||||

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(j) ||||| |||||

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(dd) ||||| |||||

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(gg) |||| ||||

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