

## INTERLOCUTORY INJUNCTIONS IN THE FEDERAL COURT

By John McKeown

A Judge of the Federal Court has recently granted an interlocutory injunction against a number of sports bars for showing unlicensed sporting events from illegal satellite systems. The grant of such an injunction is certainly not as common as it once was.

### The Facts

#### a) The Claim

The plaintiff asked the Federal Court for an interlocutory injunction relating to an action it had brought against a number of sports bars in Ontario, Quebec and British Columbia. The plaintiff claimed that the defendants infringed copyright and the provisions of the *Radiocommunications Act* by publicly showing, exhibiting or performing sports events, without authorization, that were licensed to or by the plaintiff.

#### b) The Focus

The particular focus, although not the only events in issue, were Ultimate Fighting Championship (UFC) matches or events distributed by broadcasting undertakings by both satellite and cable pay-per-view subscribers. The plaintiff asserted that it was the premium provider of mixed martial arts events in North America and that such events were one of the fastest growing sports in North America.

The defendant sports bars were commercial establishments in Canada which could only exhibit events distributed by pay-per-view if they obtained appropriate licenses. No such licenses had been obtained in this case. In the affidavit in support of the interlocutory injunction, the plaintiff's witness said that the defendants were using an illegal or illegally modified satellite system to gain access to UFC events without authorization.

#### c) The Demand

Letters were sent to the defendants by the plaintiff advising them that their conduct was unlawful unless authorized. No response was received and the plaintiff believed that the defendants would continue to show UFC events as well as other proprietary events to which they were able to gain access using illegal or unauthorized receiving equipment.

#### d) Irreparable Harm

The plaintiff's evidence concerning the balance of convenience and irreparable harm emphasized the following factors:

(a) The need for an interlocutory injunction given the number of UFC events, the vast number of commercial establishments and the ease of access through the use of unauthorized receiving equipment;

(b) The fact that the plaintiff needed to preserve the integrity of its licensing system by avoiding the piracy of UFC events and the duty it owed to its customers, who expressed concerns about the illegal exhibition by their competitors. In some cases customers had told the plaintiff that they would not purchase future UFC events unless the plaintiff stopped the unauthorized exhibitions;

(c) Unauthorized and illegal access to UFC events infringed the plaintiff's trade marks used in association with the UFC trade name.

(d) The continued ability of the defendants to intercept and decode the live transmission of UFC events contrary of the *Radiocommunications Act*.

The hearing of the motion took place on December 9, 2010 which was overshadowed by the fact that a blockbuster UFC event was to take place on December 11, 2010.

In addition, although the defendants retained counsel and disputed the motion, they did not cross-examine on the plaintiff's affidavits or file evidence relating to the allegation that they had unlawfully exhibited UFC events in the past and intended to do so in the future.

#### **e) The Test for Granting an Interlocutory Injunction**

A three-stage test is applied in considering whether to grant an interlocutory injunction:

(a) An initial assessment is made of the merits of the case to ensure there is a serious question to be tried;

(b) It must be determined whether the applicant would suffer irreparable harm if the application were refused;

(c) An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of an interlocutory injunction pending a final decision on the merits.

"Irreparable" refers to the nature of the harm rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, frequently because one party cannot collect damages from the other.

The Federal Court of Appeal has strictly required that an applicant present evidence of irreparable harm which is clear and not speculative. Proof of irreparable harm cannot be inferred and it is not sufficient that such harm might likely be suffered. It must be shown that it would be suffered.

#### **f) The Decision**

Faced with this record, the Judge granted an interlocutory injunction which prevented the defendants from publicly showing and exhibiting, performing or decoding, decrypting or

downloading the plaintiff's broadcasts without the written authorization and consent of the plaintiff.

### **Comment**

In intellectual property cases, apart from claims for patent infringement, the Federal Court Judges have strained to balance the plaintiff's right to obtain prompt relief against the defendant's right to a full trial.

In the past, one of the mechanisms used to control the granting of an interlocutory injunction was the requirement that the plaintiff establish a strong *prima facie* case. However, this requirement was replaced by an obligation to show that there was a serious question to be tried. This resulted in many plaintiffs seeking interlocutory injunctions and the disposition of many cases based on affidavit material only and without a full trial.

Eventually, the Federal Court of Appeal responded by setting a high test for showing irreparable harm. After this very few interlocutory injunctions were granted in the Federal Court. It remains to be seen whether this decision is an attempt to revisit that test or an exception.