



Ontario Superior Court Adopts “Carrot and Stick” Approach in Determining Appropriate Penalty for Contempt in Shava TV Case

May 30, 2022

By Bruna D.D. Kalinoski, Tamara Céline Winegust, Adam Aucoin

The last year has seen numerous contempt proceedings against defendants in copyright litigations. The Ontario Court’s decision in *Dish Network L.L.C. et al v. Butt et al.*, [2022 ONSC 1710](#), is another recent example of the court considering the appropriate penalty for the defendants’ contempt in a copyright infringement context. The contempt hearing itself occurred last year, following which, in March 2021, the Judge found the individual personal defendants in contempt of a court order issued in a U.S. proceeding, and recognized as enforceable in Ontario. The order enjoined the Defendants from infringing the Plaintiffs’ copyrights and trademarks. Contempt was found based on the Defendants’ continuing to operate services that streamed the Plaintiffs’ television and movie content over various networks and sell set-top boxes that could access such services (2021 ONSC 1582). At the sentencing hearing, the Plaintiffs sought six and four-month prison terms for each of the two personal defendants, respectively. However, the Court found that since being held in contempt in Ontario, the Defendants had taken steps to comply with the original court order (although some issues did remain). As a consequence, the Court found it more appropriate to deliver a sentence of a conditional discharge subject to probation of two years less a day

The sentencing decision in *Dish Network* is the latest in a series of decisions that reflects a trend of courts granting significant weight to defendants’ attempts to make positive changes to their conduct after being found in contempt when determining the appropriate penalty for such contempt in copyright infringement proceedings. Last year, in *Warner Bros. Entertainment Inc. v. White (Beast IPTV)*, [2021 FC 996](#), the defendant’s making good faith efforts to comply with an interim order and cooperate with the plaintiffs before the contempt hearing led the Federal Court to forego contempt charges (see our article, [here](#)). By contrast, in *Canadian Standards Association v. P.S. Knight Co. Ltd.*, [2021 FC 1346](#), the defendants’ continued infringement even after being found in contempt and their open and public defiance of the court order for a long period of time led the Court to impose a hefty fine and a prison term of not less than 6 months (see our article, [here](#)). Along similar lines, the *Dish Network* decision suggests that a change in conduct bears weight with the court even after a finding of contempt and is likely to influence the court’s determination of an appropriate penalty.

Determining the Appropriate Penalty

The Court considered the following factors in determining the appropriate penalty for the Defendants’ contempt: (a) the gravity of the offence; (b) the Defendants’ ability to pay a fine; (c) the presence of mitigating factors; (d) the presence of aggravating factors; and (e) deterrence and denunciation of the offending conduct.

The Court called the Defendants’ offences serious, as these offences spanned a prolonged period of time across multiple countries. However, the Court recognized that, by the time of the sentencing hearing, the Defendants had substantially ceased the offending conduct, and were making serious efforts to comply with the underlying injunction. For example, they had stopped streaming the Plaintiffs’ content, made efforts to shut down the offending servers, and assigned their copyrights and trademarks related to the offending corporate entity to the Plaintiffs. Moreover, while the breadth and scope



of the Defendants' infringement was an aggravating factor, the substantial harm to the Plaintiffs was already compensated through damages awarded at trial. The Court also found a fine was likely inappropriate, as the evidence suggested the Defendants would not have been able to pay any meaningful amount, and such fine would likely also diminish the Plaintiffs' ability to recover costs.

On deterrence and denunciation, the Court's message was that contempt of court aims primarily to persuade defendants to comply with court orders rather than to punish defendants who fail to comply. Justice Koehnen did not feel that prison terms were warranted in this case, particularly since imprisoning the Defendants after they made attempts to comply with the Order could disincentivize others from complying with court orders. In his view, conditional discharge subject to probation was more appropriate because it enabled the adoption of a "carrot and stick" approach: the Defendants could comply and avoid prison, or if they failed to fully comply, they would face criminal charges that could lead to even longer prison terms.

Content shared on Bereskin & Parr's website is for information purposes only. It should not be taken as legal or professional advice. To obtain such advice, please contact a Bereskin & Parr LLP professional. We will be pleased to help you.