

FEDERAL COURT

B E T W E E N:

INDIGO BOOKS & MUSIC INC.

Moving Party / Plaintiff

- and -

**JOHN DOE 1 dba INDIGO KILLS KIDS
JOHN DOE 2 dba INDIGOKILLSKIDS.CA
JOHN DOE 3 dba INDIGOKILLSKIDS.COM**

Defendants

- and -

**BELL CANADA
ROGERS COMMUNICATIONS CANADA INC.
TELUS COMMUNICATIONS INC.
VIDEOTRON LTD.
FREEDOM MOBILE INC.**

Third Party Respondents

**AMENDED NOTICE OF RETURN OF MOTION
FOR INTERLOCUTORY RELIEF AND SITE BLOCKING ORDER**

TAKE NOTICE THAT the Plaintiff Indigo Books & Music Inc. (“**Indigo**”) will make an *ex parte* motion before Justice Fuhrer at the Federal Court on Tuesday, October 22, 2024, at 10:00 in the forenoon or as soon thereafter as the motion can be heard at via Zoom Video-Conference.

The estimated duration of the hearing of the motion is 2 hours.

THIS MOTION IS FOR:

1. **AN ORDER** for an interlocutory injunction, pursuant to subsection 53.2(1) of the *Trademarks Act*, RSC 1985, c. T-13, subsection 34(1) of the *Copyright Act*, and section 44 of the *Federal Courts Act*, RSC 1985, c F-7, ordering John Doe Defendant 1, John Doe Defendant 2, and the John Doe Defendant 3, by themselves or by their employees, representatives and agents, or by any company, partnership, trust, entity or person under their authority or control, or with which they are associated or affiliated, to immediately:
 - (a) take down and cease operating or carrying on business through the infringing website domains: www.indigokillskids.ca and www.indigokillskids.com (collectively, the “**IKK Domains**”), and any confusingly similar domains, or IKK Social Media accounts identified in (c)(i)-(iv) below;
 - (b) take down and cease operating the website hosted at www.indigokillskids.ca (the “**IKK Website**”) and any other website, domain or subdomain, including IKK Social Media accounts identified in (c)(i)-(iv) below, that is being used to provide access to, or redirect or forward to, the website, webpages, and/or website content of the IKK Website;
 - (c) take down and remove all copies of the infringing material, including any mark, design, word, title or name that uses or infringes the Plaintiff’s INDIGO Marks (as defined below) or INDIGOKIDS Work (as defined below), or any confusingly similar marks or substantial copies of works, including from:

- i. the IKK Website, and any other website, domain, subdomain that is being used by the John Doe Defendants to publish infringing material or content;
- ii. the Instagram accounts: www.instagram.com/indigokillskids/ and www.instagram.com/indigokillskids.ca/;
- iii. Tiktok [@indigokillskids](https://www.tiktok.com/@indigokillskids); and
- iv. X Corp. (formerly Twitter) account: x.com/indigokillskids/; and

(d) And to cease these infringing activities on any other websites or social media accounts for a period of two (2) years, to allow for identification of the Defendants and/or recovery of the disputed domain names and cancellation or suspension of the IKK Domains and IKK Social Media;

2. **AN ORDER** authorizing service of the Notice of Return of Motion and any future Orders of the Court upon the Defendants by e-mail at indigokillskids@proton.me, the contact email provided on the IKK Website;
3. **AN ORDER** extending the interim Order issued on September 17, 2024 to an Order for an interlocutory injunction, in respect of the Third Party Respondents, to block access by their respective internet service customers, including customers of cellular or mobile network services and fixed Internet services, to each of the domains and subdomains identified in Schedule 1 of the prior Order, subject to any subsequent variance to the Order or amendment to Schedule 1, for a period of two (2) years; and
4. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

I. The Parties

1. The Plaintiff Indigo Books & Music Inc. (“**Plaintiff**” or “**Indigo**”) is a corporation incorporated pursuant to the laws of Ontario with its head office located in Toronto, Ontario, and carries on business as a book, gift and specialty toy retailer across Canada.
2. The John Doe Defendants are unidentified individual(s), identity unknown, operating under the name IndigoKillsKids, through the Internet addresses or the domain names, indigokillskids.ca and indigokillskids.com, as well as similar handles on other social media platforms. It is acknowledged that all the John Does may be one and the same person or persons acting in concert.

II. The Business and Rights of the Plaintiff

3. The Plaintiff is Canada's largest and most recognized book, gift, home décor, stationery and specialty toy retailer. Indigo opened its first retail store in 1997 and, in August 2001, Indigo and Chapters Inc. merged to form the largest book retailer in Canada. Indigo currently operates stores in all ten provinces and one territory. Retail operations are seamlessly integrated with Indigo’s online storefront and through the website domains owned by Indigo, which include, among others: www.indigo.com, www.indigo.ca, www.indigokids.com and www.indigokids.ca (collectively, the “**Indigo Websites**”).
4. Throughout its history, Indigo has prioritized the importance of its brand and has made significant expenditures and investments in branding, marketing and promotion of its retail and online offerings, establishing itself as an important part of the Canadian

business community with annual aggregate spend in the millions of dollars across multiple advertising mediums, channels and markets. On an annual basis, these investments also include the creation of proprietary intellectual property, including the creation and registration of trademarks and copyright.

Trademark Rights and Copyrights

5. The Plaintiff is the owner of registered trademarks in Canada consisting of or comprising the “INDIGO” word mark, “!NDIGO” design mark, “!NDIGO KIDS” word mark, and “!NDIGOKIDS” design mark (collectively the “**INDIGO Marks**”), which have been used by the Plaintiff in association with goods and services at its retail and online stores and have appeared in online advertising and promotional materials used by the Plaintiff for over 15 years.
6. The Plaintiff is also the owner of a custom stylized design comprising the copyright in a work featuring “!NDIGOKIDS” in a colourful design, as shown below (the “**!NDIGOKIDS Work**”):



7. Among other uses, the INDIGO Marks are prominently displayed in Indigo’s retail stores, on the Indigo websites, the Company’s digital app and are used in association with the goods and services sold by Indigo both at retail and online, including in association with Indigo websites at www.indigo.com, www.indigo.ca, www.indigokids.com and

www.indigokids.ca, and social media accounts, including Facebook (www.facebook.com/IndigoKids), X Corp. (formerly, Twitter) (x.com/chaptersindigo), and Instagram (www.instagram.com/indigokids).

8. As a result of extensive use and significant sales, advertising, and promotional efforts, the INDIGO Marks have at all material times enjoyed a great deal of reputation and goodwill across Canada. The Plaintiff has invested a great deal of time and resources into developing the valuable goodwill attaching to the INDIGO Marks

III. The Defendants' Unlawful Activities

9. In or around August 19, 2024, the Plaintiff was made aware of a website hosted at the domain www.indigokillskids.ca (the “**Infringing Website**”), which is registered since July 2, 2024 and held anonymously via Public Domain Registry, a business of Endurance International Group (India) Private Limited, an Indian corporation, such that their identity cannot yet be ascertained.
10. The Plaintiff subsequently discovered the registration of the domain name in the top level generic domain www.indigokillskids.com (collectively with www.indigokillskids.ca, the “**IKK Domains**”), which redirects to the Infringing Website, along with a number of social media accounts on [Instagram.com/indigokillskids/](https://www.instagram.com/indigokillskids/) and [instagram.com/indigokillskids.ca/](https://www.instagram.com/indigokillskids.ca/); X Corp. (formerly Twitter): x.com/indigokillskids/ and TikTok [@indigokillskids](https://www.tiktok.com/@indigokillskids).
11. The Defendants have taken steps to remain anonymous, including hosting the Infringing Website through a website hosting company based in Iceland that is known for maintaining anonymity of the website owners to contest court orders.

12. Without any authorization, license or permission whatsoever from Indigo, the Defendants are featuring content and using domains with the Infringing Website that copies, trades off of and damages the reputation associated with the INDIGO Marks and the !NDIGOKIDS Work. An example of how the Defendants substantially copy of elements of the !NDIGOKIDS Work and infringe the INDIGO Marks, is shown below:

The design and work used by Indigo



The design used by Indigokillskids.ca



13. The Infringing Website also features disturbing messaging aimed at accusing Indigo of being responsible for murdering children and calls for a boycott of the Company's stores, redirects visitors to competitors of Indigo and alludes a day of action against Indigo on September 25, 2024, which is likely protests. The actions of the Defendants are deliberately aimed at damaging the business and substantial reputation of Indigo in Canada. Using the INDIGO Marks alongside false allegations that Indigo is complicit in the killing of children unavoidably depreciates the significant goodwill associated with the brand promise.
14. As a result of the Defendants' unlawful activities, the Plaintiff has suffered serious and incalculable losses, including significant and untold damage to its goodwill and loss of control over its trademarks.

IV. Necessary Steps Taken by Indigo

15. Upon discovering the Infringing Website and IKK Social Media, the Plaintiff acted swiftly to obtain the identities of the Defendants and to dismantle the domain names and social media accounts attaching to the IKK Platforms, but has met with road blocks and delays due to the cunning use of these same tools that shield the identity of cyber criminals and are outside the reach of Canadian courts.
16. All reasonable steps to have the domain names blocked and the social media sites shut down quickly have been taken, including demand letters to all of the registrars, servers and social media hosting companies, and the commencement of online arbitration proceedings. Despite these efforts, the infringing activities continue as does the harm to Indigo's business.
17. The only recourse that would be effective and more immediate for stopping the ongoing harm to the business of Indigo and denigration of the INDIGO Marks is to seek injunctive relief for third parties to block access to the offensive and harmful domains, social media links and their content that all use the "indigokillskids" domain or handle.

V. The Need for a Site Blocking Order Binding the Third Party Respondents

18. The Third Party Respondents are Internet Service Providers ("ISPs") that provide their customers with, among other things, access to cellular/mobile and residential internet services by providing the necessary infrastructure to connect their customer's devices to the rest of the internet (and thus ultimately to the John Doe Defendants' IKK Website and IKK Domains). They represent approximately 90 percent of the mobile (cellular) and fixed internet services in Canada.

19. The most direct manner of suspending the Defendants' harmful and infringing activities is to have the Infringing Website blocked as well as blocking access to the IKK Social Media.
20. Obtaining an injunction enjoining the John Doe Defendants, who are anonymous website owners and operators will be completely meaningless and ineffective due to "bulletproof" hosting and domain registering services located outside of the Court's jurisdiction.
21. It would be unjust in the face of the ongoing egregious harm to the Plaintiff to suggest that it attempt to enforce an injunction against the anonymous Defendants who may maintain anonymity and ignore an injunction. The Defendants may never be known and even if an identity is ever discovered, there is no likelihood of recovering any damages for the harms caused.
22. In such a situation where rightsholders and the Courts in Canada cannot effectively stop the operation of a malicious website or the use of infringing content, an effective alternative is to disable access to the node for users located in Canada (referred to as "site blocking"). This form of relief, which requires the assistance of ISPs, has the same practical effect: impeding access to these services so that Internet and cellular or mobile customers in Canada cannot receive or access the infringing content.
23. The Third Party Respondents are not wrongdoers. However, due to the nature of their operations as ISPs and the fact that they provide an essential link for the Defendants' blatant acts of trademark and copyright infringement in Canada, they are in the best position to stop the Joe Doe Defendants' unlawful conduct and halt the corresponding irreparable harm to the Plaintiff.

VI. Domain Blocking is a Practical Remedy that Removes Risk of Over-blocking

24. ISPs all use a Domain Name System (DNS) server to translate domain names (i.e., "www.domainname.ca") into numeric IP addresses that are used to route traffic over the Internet. The ability to disable access to a specific list of domains through a DNS server (i.e., by not returning the associated IP address in response to a look-up) is now a standard feature on DNS platforms. This feature is sometimes called a Response Policy Zone (RPZ).
25. ISPs could take reasonable steps to disable access to specified piracy sites simply by keying the specified domains into the relevant list or RPZ. The DNS would then be set either to return no result for those domains or, more likely, to return some form of landing page explaining why the site is not available and providing other relevant information to the user.
26. DNS blocking eliminates any risk that websites not targeted a blocking order are affected, even without additional safeguards. That is because the DNS blocking would only address the specific IKK Domains of the IKK Website. By definition, using the DNS server to disable access to a website would only disable access to the site with that domain name (which would be what is intended) and would not impact any other sites. DNS blocking is therefore effective without giving rise to a danger of 'overblocking' legitimate websites.
27. DNS blocking is very low-cost option readily available to ISPs to disable access to a website. DNS blocking is already a standard feature in DNS systems, the only cost

associated with adding a site to the list is the staff time associated with keying in the domain. This process can also be easily automated.

28. In light of the above, the Third Party Respondents are capable of implementing the Order sought by the Plaintiff, pursuant to which the Third Party Respondents would temporarily block, or attempt to block, access by their respective internet service customers, including customers of cellular or mobile network services and fixed internet services, to the IKK Domains subject to any subsequent variance to this Order or amendment to Schedule 1, for a period of two (2) years.

VII. The Federal Court Has Jurisdiction to Grant the Orders Sought

29. The Applicants seek an injunction directed at the Third Party Respondents on the basis that they play a crucial role in halting the Defendants' acts of continuous infringement of the Applicants' legal rights in Canada.
30. It is well established that the Federal Court has jurisdiction to issue injunctions that bind third parties if their assistance is necessary to preserve the Applicants' rights. The availability of site blocking orders (i.e., injunctions enjoining third party ISPs to block their subscribers' access to certain websites or services) has been recognized in Canada by this Court and the Federal Court of Appeal in the *Media Inc. v. GoldTV.Biz* (2019 FC 1432) and *Teksavvy Solutions Inc. v. Bell Media Inc.* (2021 FCA 100) and by this Court in *Rogers Media Inc. v. John Doe 1* (2022 FC 775) and *Bell Media Inc. v. John Doe 1* (2022 FC 1432).
31. The Court has jurisdiction to issue such site blocking injunction for a number of reasons enumerated by the Federal Court of Appeal, including pursuant to section 44 of the

Federal Courts Act and subsection 34(1) of the *Copyright Act*, which is analogous to subsection 53.2(1) of the *Trademarks Act*.

VIII. The Plaintiff Meets the Test for the Issuance of the Orders

32. The Plaintiff have a strong *prima facie* case that the John Doe Defendants have engaged in acts of direct infringement of the Applicants' rights in the INDIGO Trademarks and INDIGO Work.
33. The harm to the goodwill and reputation of Indigo is not only irreparable because it cannot be calculated, it will be unrecoverable because the Defendants are faceless Internet trolls that will continue to avoid detection. Even if an actual Defendant is ever identified, that person may be using a fake identity that will make it impossible for Indigo to ever recover damages.
34. The Order sought is proportional and reflects a careful weighing of the rights of those involved, including the Plaintiff, the John Doe Defendants, the Third Party Respondents, and members of the public.
35. The Order sought of a static domain blocking order is very limited in reach and will therefore not impact the rights of third parties to distribute legitimate content on the internet, or of the public to access that content. The Order is only aimed at blocking access to the specific IKK Domains, and there is no risk of over-blocking or blocking beyond the named domains.

36. The Order sought will also not prejudice the Third Party Respondents, as its implementation leverages tools that are already at their disposal and the reasonable marginal cost of its implementation (if any) would be borne by the Plaintiff.

IX. Ancillary Relief Concerning Rules and Service

37. The Moving Party has not been able to identify the Defendants, because of their obvious efforts to remain anonymous. As a consequence, the Applicants submit that the most efficient, if not the only way, to attempt to serve John Doe Defendants is by e-mail at indigokillskids@proton.me, the contact email provided on the IKK Website, and by way of delivery through CIRA's Message Delivery Form platform, which delivers the communication the registrant of the domain: www.indigokillskids.ca;

38. The Federal Courts Rules contain certain Rules which should not apply to the service of interlocutory proceedings of an urgent nature and the action, for practical considerations, and the Plaintiff seeks to have the Court and Third Party Respondents waive compliance with Rules 362, 364 and 365, and seeks permission to proceed with the motion based on short service.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Damien Liddle, sworn September 11, 2024;
2. The Affidavit of Colleen Stanley, sworn September 11, 2024;
3. The additional Affidavits of Andrew Johnston, sworn September 17, 2024;

4. The Affidavit of Damien Liddle, sworn September 26, 2024;
5. The Pleadings and proceedings herein; and
6. Such further and other material as counsel may advise and this Honourable Court may permit.

DATED AT Toronto, Ontario, on October 7, 2024



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Solicitors for the Plaintiff / Moving
Party

TO: **THE ADMINISTRATOR**
Federal Court

AND TO: **BELL CANADA**

AND TO: **VIDEOTRON LTD.**

AND TO: **ROGERS COMMUNICATIONS CANADA INC.**

AND TO: **TELUS COMMUNICATIONS INC.**

AND TO: **FREEDOM MOBILE INC.**