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Worldwide Delisting from Google Search Results: The Significance of *Equustek Solutions Inc. v Google Inc.*

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Case Commented On: *Equustek Solutions Inc. v Google Inc.*, 2015 BCCA 265

Last week the British Columbia Court of Appeal issued its much anticipated decision in *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, concerning an interlocutory injunction against Google requiring it to delist certain websites from its search results. There is much to analyze concerning this case. For the purposes of this post I will focus my discussion on why this case is of such significance, not only to Canada, but internationally, contextualizing the case within the wider international legal debates concerning the legal and social responsibilities of intermediaries such as Google.

Facts

Google is not a party to the underlying litigation. The defendants were distributors of the plaintiffs' product, an industrial network interface hardware, which is what facilitates communication between the different pieces of complex industrial equipment. The plaintiffs allege the defendants violated their trade secrets and trade marks by using trade secrets of the plaintiffs to design their own competing product and then passing off their product as that of the plaintiffs in third party sales. The plaintiffs sued the defendants and obtained various orders requiring the defendants to cease advertising the plaintiffs' products on their websites and redirect customers to the plaintiffs' website, as well as disclose their customers to the plaintiffs. The defendants failed to comply with the orders and all three statements of defence were eventually struck. The defendants also moved their operations from Vancouver to an unknown location outside of Canada and continued to sell their products online.

Google's Involvement

Google is embroiled in this lawsuit because the defendants' websites were appearing in Google search results. While the plaintiffs had tried to track down the defendants and eliminate the websites on their own, they were unsuccessful. Google voluntarily removed 345 specific URLs from its search results. However, it declined to remove any further URLs, and to delist entire domains. Google also restricted the delisting to google.ca. These two decisions are key. The desire of Google to avoid delisting entire domains (such as www.ucalgary.ca), preferring instead to delist specific web pages or URLs (such as http://law.ucalgary.ca/law_unitis/profiles/emily-laidlaw), is widely seen, for internet matters, as a more narrowly tailored solution that better

balances free speech concerns. This is because delisting from a search engine raises concerns over censorship, although note this simply removes the link from search results, it does not block access to the website itself.

While I generally agree that the most narrowly tailored solution is preferable, this does not mean delisting of an entire domain is always inappropriate. This was the case of *Equustek*. The plaintiffs rightly contended they faced a game of "whack-a-mole" – the defendants have effectively abandoned defence of their claim, but they continue to sell the allegedly counterfeit product on their websites, and every time that Google blocked access to a specific webpage, the defendants would move the content to a new webpage within their site. The defendants also sell their product to buyers outside of Canada and therefore delisting the URLs from google.ca alone is ineffective. The chambers judge ordered Google Inc. to cease indexing or referencing a list of websites in its search results *worldwide* (2014 BCSC 1063). This order is what was appealed to the BC Court of Appeal.

Court of Appeal Reasoning

The analysis here, for ABlawg purposes, will be necessarily focused on a few key issues, although I would encourage readers to read the entire judgment for more detail. The Court of Appeal addressed three issues to be discussed here: first, the territorial competence of the Supreme Court of BC over the injunction. The Court of Appeal disposed of this issue quickly, noting that since the underlying action is within the territorial competence of the Supreme Court, the injunction application was as well (at paras 29-45). Second, the Court examined whether Google is substantially connected with BC in a way that is sufficient for the Court to assume *in personam* jurisdiction over it. On this issue I will dwell.

Normally courts can assume *in personam* jurisdiction over a company by looking at the location of the behavior in dispute within a geographic area. This is more difficult, in some cases impossible, concerning online activities. Let us consider how we use Google. Is my search on Google from my office in Calgary the use of a passive website created by someone in another country? The Court of Appeal noted, in quoting from the lower court judgment (at para 52), that a passive website does not in itself give the court jurisdiction over the website creator. Nor does advertising by Google in Canada. It is understood that something more is needed, but how much more? The Court rightly notes the struggle in the global digital economy in addressing that line.

The Court pointed out three things that led it to conclude the BC Supreme Court had *in personam* jurisdiction (at para 52). First, Google's site isn't entirely passive. The auto-complete function (where you type in a search term and Google suggests completions) means Google is making suggestions to you based on your previous searches or those most commonly queried by other users. In other countries, such as Germany, Google has been held liable for defamation for auto-complete terms. Second, Google sold advertising to BC clients. While this was negotiated through Google Canada, the contract was with Google Inc. Additionally, the Court rightly noted that there is a difference between Google advertising its business in BC (no jurisdiction) and Google selling advertising space to BC companies, which was the situation here. The argument by Google that its advertising and search services were distinct was rejected by the Court. Indeed, the search results returned to us are determined by a bundle of factors, including advertising, our prior searches and other habits, our location, and searches of others. The Court of Appeal added a third, compelling reason (the first two points were made by the chambers judge) concerning our data, in effect making a property argument over personal data:

> In my view, it can also be said that the gathering of information through proprietary web crawler software ("Googlebot") takes place in British Columbia. This active process of obtaining data that resides in the Province or is the property of individuals in British Columbia is a key part of Google's business (at para 54).

In its analysis, the Court noted that this collection of data was key to providing search results, and therefore the business conducted in BC was the same as was targeted in the injunction (at para 55). The Court also considered the extraterritorial effect of such an injunction, but rejected it was a bar to making the order. I comment more on this below.

The third issue was the power of the Court to grant injunctions against a non-party. The Court noted orders are routinely made against non-parties concerning, for example, garnishing orders or witness subpoenas (at para 64). The Court was particularly compelled by the analysis of a recent United Kingdom High Court decision, *Cartier International AG v British Sky Broadcasting Limited*, [2014] EWHC 3354 (Ch), wherein Justice Arnold issued an injunction against major internet service providers (ISPs) requiring blocking of access to sites that sold counterfeit goods. What is not mentioned in *Equustek* is that Justice Arnold has controversially issued an injunction against ISPs before in the context of illegal file sharing (concerning Newzbin2 and Pirate Bay). Applying *Cartier* to this case, the Court concluded that where there is a justiciable issue, the granting of injunctions against third parties is a well-established practice of the courts in preserving the rights of the parties (at paras 69-75, 80).

International Context

I have read commentaries about *Equustek* citing it as a disastrous overreach by a Canadian court seeking to impose its will across the world, and expressing fear that this will invite other, perhaps more socially repressive, countries to do the same (see e.g. here and here). The reality is that these courts can do this, have done it, and cases on this date back to the 1990s, which is generations ago in internet years. This can be seen in cases like *LICRA et UEJF v Yahoo! Inc, Ordonnance Refere,* TGI Paris, 20 November 2000*,* where Yahoo! was held liable for its French auction site selling Nazi memorabilia, something that is illegal in France but not in the USA (the case was also relevant as the attempt to enforce the judgment was in the USA). More recently, it can be seen in *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos, Marios Costeja Gonzalez* (2014) Case C-131/12, known inaccurately as "the right to be forgotten" case, where the European Court of Justice held, based on data protection principles, that Google must delist links upon request that are inadequate, irrelevant, no longer relevant or excessive. Google has been delisting the links in Europe only, although the Article 29 Working Party, the expert advisor on European data protection matters, recommended worldwide delisting much as has been ordered in *Equustek.* As I write this post, the French Data Protection authority, tasked with effecting *Google Spain* for France, has ordered Google to delist certain sites worldwide, otherwise face a sanction. Court orders with extra-territorial reach are, for practical purposes, the new reality for regulating abuse and other illegality online, particularly as against companies with global reach such as Google. The final hurdle of enforcement of an order or judgment in a US court remains unresolved.

More generally, *Equustek* reflects Google's anxiety over the growing attention it is receiving from governments, NGOs and courts concerning its central function in the digital economy. We are all googlefied to an extent. Anyone who has watched Hawaii 5.0 is amused at the alternate universe in which Steve McGarrett and his team try to solve their many vexing questions by declaring "let's Bing it". Google holds approximately 72% of the search market in Canada,

almost 65% in the US and 90% in the United Kingdom. The fear in a case like *Equustek* is that it opens the door to a court ordering Google to delist entire domains from its search results for other reasons that rub closer to the constitutional anxiety at issue: free speech. The American First Amendment offers greater free speech protections than other countries, including other western countries such as Canada, with narrower limits concerning hate speech, defamation and offensive speech.

This carries over to intermediaries, such as hosts of blogs and websites, or search engines such as Google, which are immune from liability for the content posted by others under s 230 of the *Communications Decency Act of 1996,* 47 USC § 230. The host of a site such as www.thedirty.com was held not liable for unlawful content posted on its site (see here), but in Canada, the UK or continental Europe, it might face liability once it becomes aware of the unlawfulness of the content and refuses to remove it. A case such as *Equustek* goes to the core of questions concerning how to regulate illegality on the internet in a global setting with conflicting domestic laws. The intellectual property laws in this case were aligned, but the message of arguments by counsel for Google was that this might not be the situation in the next case. The next case might be about hate speech. Or revenge porn. Or threatening speech. In all of these areas, Canadian and American laws are different. These issues are complicated and beyond the scope of a blog post, but it is important to understand these wider legal debates underlie the narrow decision in this case.

I suggest this case does not need to be read that widely, although there is some truth to the fears. As the Court noted,

> In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected (at para 93).

Indeed, the order is interlocutory in nature and can be varied by the Court. Therefore if the defendants suddenly re-purpose the site for non-infringing uses they can seek a court order removing the injunction from the prohibited list. The Court also noted the need in this area for judicial self-restraint (at paras 56, 60, 85-92). There is a rightful concern of extra territorial effect, but this can be addressed through judicial self-restraint rather than hiving off from judicial consideration any business with worldwide reach.

Certainly each case must be assessed in terms of the narrowness of the blocking measure. The initial position should be that any prior restraint of speech, or of being delisted from search results, offends free speech principles. Further, a minimally explored issue in this case was whether blocking the entire domain would even be effective. The defendants can simply register

a new domain name and start selling the goods there. The Court noted this, and resolved it by noting the slower pace at which this would happen compared to moving content to a new webpage (at para 27). However, the pace is slowed by days, perhaps even hours, only. The game of whack-a-mole, therefore, continues.

For a longer discussion of the significance of Google concerning freedom of expression and other concerns, see chapter 5 of my book Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility.

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