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Intellectual Property

U.S. court issues injunction on SCC global deindexing order

By **Dan Pollack**

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(November 30, 2017, 8:45 AM EST) -- The Supreme Court of Canada's controversial decision to issue a global deindexing order in *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34 has hit a significant roadblock. In a recently issued ruling (*Google LLC v. Equustek Solutions Inc.*, Case No. 5:17-cv-04207-EJD (N.D. Cal. 2017), a U.S. Federal Court has issued a preliminary injunction against enforcing the Supreme Court's order in the United States.

First, some background. In 2011, Equustek sued Datalink, a rival computer company in British Columbia for stealing its trade secrets and misleading customers into believing that they were purchasing Equustek's products. Equustek obtained multiple orders against Datalink, but had no practical recourse after Datalink moved to an unknown location and continued to sell the allegedly infringing goods. Equustek then turned to the courts to have Google remove Datalink's websites from its search results not only in Canada, but throughout the world. The trial court issued an interlocutory injunction requiring Google to delist Datalink's search results worldwide. The injunction was upheld by the B.C. Court of Appeal and Google appealed to the Supreme Court of Canada.

The Supreme Court upheld the worldwide injunction. In doing so, the court rejected Google's arguments that (1) non-parties should be immune from interlocutory injunctions; (2) it is improper to issue an interlocutory injunction with extraterritorial effect; and (3) it would violate principles of international comity, including freedom of expression principles. Writing on behalf of the 7-2 majority, Justice Rosalie Abella noted that Canadian courts have issued analogous orders against non-parties and that the injunction is necessary to prevent irreparable harm because it would be "commercially impossible" for Datalink to conduct its business "without Google's facilitation."

The court also rejected international comity arguments as it would unfairly put the onus on Equustek to demonstrate the countries where the order would be permissible and Datalink selling unlawful goods did not raise freedom of expression values on its face.

The court's international ruling generated international headlines. The decision was widely criticized by free speech advocates — who were well represented as interveners before the Supreme Court — as a dangerous precedent that could result in the removal of legitimate content from the Internet. Conversely, groups representing rightsholders, also represented as interveners, were generally pleased with the decision as it could be an effective tool against rampant infringement in the borderless online world as opposed to litigating claims in multiple jurisdictions.

Naturally, since Google's efforts in the Canadian courts were exhausted, it did what any Silicon Valley behemoth would do: it brought an action for declaratory relief in the U.S. courts to prevent enforcement of the Supreme Court's order in the United States. And it won!

In an uncontested ruling (Equustek did not appear), the trial court held that the Supreme Court of Canada decision violated section 230 of the *Communications Decency Act* (CDA), which provides immunity if the following criteria are satisfied: (1) Google is a provider or user of an interactive computer service; (2) the information in question was provided by another information content

provider; and (3) the Canadian order would hold Google liable as the publisher of that information. The court held that Google satisfied all three elements as Google is undeniably an interactive computer service; Datalink provides the content that Google is accessing; and an intermediary such as Google is treated as a "publisher" when it is compelled to remove third party content. In contrast to the Supreme Court's views on international comity, the U.S. court noted that an injunction against the order serves the public interest because it would constitute a severe restriction of free speech on the Internet.

What happens next? Keep in mind that the District Court's ruling was an uncontested default judgment. Section 230 of the CDA is complicated and there is case law that may contradict the U.S. court's ruling. Google can now present evidence to the British Columbia courts that complying with the worldwide injunction would require it to violate U.S. law. Equustek could then challenge the U.S. ruling in a B.C. court. If the worldwide injunction remains in place, Google will probably not risk violating the injunction and subjecting itself to liability in Canada, where it has an active presence. Equustek could also appeal the U.S. court's decision, but that seems unlikely given that Equustek did not even appear before the trial court.

One thing is clear — unlike most cases, the Supreme Court has not had the final word in this matter and the ongoing saga of Equustek and Google bears close watching.

Dan Pollack is a Toronto-based lawyer who primarily focuses on intellectual property, new media and entertainment law through his firm Dan Pollack Law.
