

To Boldly Go... towards a global system of accountability – Google Inc. v. Equustek Solutions Inc.

Freedom of Expression | Injunctions | Intellectual Property | Litigation | Litigation & Dispute Resolution | Supreme Court of Canada | Technology

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In true common law tradition, let's start this blog post with some obligatory Latin: *audentes Fortuna iuvat*. "Fortune favours the bold."

This might have been the principle that governed the behaviour of Datalink Technologies Inc. when it decided to start counterfeiting the products (networking devices) of its erstwhile client, Equustek Technologies Inc. Previously entrusted by Equustek to distribute its products, Datalink began passing those products off as its own. Bold indeed.

Equustek inevitably discovered what was going on and obtained an injunction ordering Datalink to cease its counterfeiting operation and return all property. Datalink, however, responded by fleeing the jurisdiction (British Columbia) and continuing to sell its counterfeited wares to the world at large via its string of websites. Bolder still. But this post isn't about the boldness of counterfeiters. Rather, I'd like to talk about the (relative) boldness of our legal system in an era of globalizing business with technology to match.

One of the interesting facts of 21st century e-commerce is the importance of "optimizing for Google". When looking for a needle in the digital haystack that is the world wide web, Google is the undisputed metal detector of choice. And Google's stranglehold as the world's search engine makes it the filter which online businesses must either successfully navigate or perish. Optimizing online businesses for Google's algorithms has become more than just a cottage industry, and by extension this is also great business for Google (as of May 2017, Forbes valued the brand at over \$100 billion USD). However, in accordance with Christopher Wallace's notorious 1997 algorithm (Bay Boy Records): more money = more problems. For its dominion over global e-commerce, Google is coming under increasing pressure to manage its gateway, and to limit (i.e. – de-list) webpages that link browsers of the web to deplorable content. In fact, Google already reportedly de-lists web-pages related to hate-speech or child pornography and with that, we return to the case at hand.

Unable to shut down Datalink's activities by attacking the source, Equustek turned its sights on Google. Equustek again applied to the Supreme Court of British Columbia, but this time for an injunction ordering Google to de-index any and all webpages put up by DataLink to sell its counterfeited wares, not only across the Google Canada platform, but worldwide. To Google's chagrin, the Court said yes. Google appealed to the Court of Appeal for British Columbia, but lost there too. Finally, Google appealed to the Supreme Court of Canada.

Google's argument against the injunction was essentially three-fold: (1) as a non-party, it cannot be subject to an injunction; (2) the injunction was not necessary to prevent the harm and would not be effective; and (3) the Court could not grant an order that was extra-territorial in scope and an infringement of the right to freedom of expression.

On 28 June 2017, Justice Abella writing for the majority of the Supreme Court of Canada (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34) released its split decision (7-2) upholding the order of the court of first instance and granting the injunction against Google as requested.

The decision is an interesting one from many different perspectives. Ultimately, however, its most interesting precedential value may have less to do with the legal principles that govern the granting of injunctions than with the willingness of the courts to "contextualize" in order to keep up with a globalizing economy and the technology that abets it, for better or worse. The arguments raised by Google were not without merit. However, the majority found that freedom of expression was

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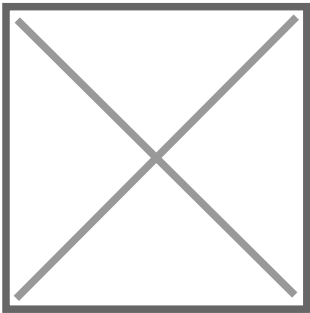
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not truly what was at stake given the discretionary nature of the court to grant injunctions and to differentiate remedies on a case by case basis as needed. Injunctive relief against non-parties is also not without precedent (*Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.)) and in the context of a truly global problem, a failure to apply with extra-territorial effect would likely render the injunction largely ineffective.

It may well be that this decision raises as many questions about non-party injunctions and extra-territorial effect as it answers. However, imperfections aside, it cannot be said that the Supreme Court of Canada on this instance buried its head in the sand as the dust swell approached, or got itself stuck in a jurisdictional rut that would prove difficult to extract itself from in the future. Rapidly evolving technologies will continue to connect companies and individuals in ways that leap ahead of our traditional strictures of accountability. Either our governments and courts do their best to keep up, or they themselves will surely decrease in meaning and the governance of commerce will be ceded to the Google's of the world in any event. As always, *audentes Fortuna iuvat*.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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