Canada

Canadian Supreme Court on Google: Effective Legal Protection Tops Jurisdictional Boundaries

*Christina Etteldorf**

On 28 June 2017, the Supreme Court of Canada issued a judgment related to a long-standing trademark and copyright dispute put forward by Equustek Solutions Inc (Equustek).[1] The decision, however, is of interest for its potential significance beyond the area of intellectual property. It touches a core question of data protection law reach when considering services of search engines. According to the core statement of the decision, Google will be obliged to not only remove search results within the country of complaint (in this case Canada, and subsequently <www.google.ca>), but also worldwide. Two of the nine judges dissented from the final ruling and advanced important arguments, warning against the risk of the decision setting a momentous precedence.

I. The Facts of the Case

The decision is based on a legal dispute between Equustek, a software company, and its competitor Datalink (Morgan Jack, Datalink Technology Gateways Inc, and Datalink Technologies Gateways LLC). Equuestek successfully prosecuted Datalink for marketing its products using incorrect information. Datalink was enjoined from distributing the rights holder's products, with a focus on prohibiting sales on the internet. As a result, Google Inc blocked a number of internet sites linked on its search engine, which were related to Datalink's infringing products. However Google only did this for search results on the Canadian version of its search engine. Equustek subsequently asked Google via a court order to block access to the sites in question on its search engines around the globe. It argued that these sites, which contained the infringing products, were still easily accessible for Canadian users. In particular, the company pointed out that Canadian users would not face any language barriers on the French or US American Google search engines. The infringing content would therefore be particularly easy to access for these users. The lower Canadian courts granted the request which was finally upheld by the Supreme Court.

II. Supreme Court: Effectiveness of Court Decision Can Only Be Achieved by International Enforcement

The Canadian Court of Canada agreed with Equustek in that the aim of ending the infringement was not achieved if internet users were able to continue to access the sites of Datalink beyond <www.google.ca>, and if they were able to order the infringing products from there. The legitimate interests of the applicant could only be protected if access from these sites was blocked too. In the words of the Supreme Court:

> When a court has in personam jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world.[2]

Google argued against this, claiming that even a global injunction did not guarantee an effective protection of Equustek Solutions. The internet sites of Datalink were still live and could be found via other channels, independent from them being listed by Google. This was rejected by the judges. Any attempt by Equustek to enforce against Datalink had so far

DOI: 10.21552/edpl/2017/3/14

* Christina Etteldorf, research associate with the Institute of European Media Law (EMR). For correspondence: <c.etteldorf@emr-sb.de>.

1 Supreme Court of Canada, Judgment of 28 June 2017, *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, Case no 36602 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do> accessed 6 October 2017.

2 ibid para 38.

been unsuccessful, in particular since Datalink now operates from a place outside of Canada. Given these circumstances action had to be taken against the search engine operator, even if it was only indirectly involved in the intellectual property infringement:

> Datalink is only able to survive — at the expense of Equustek's survival — on Google's search engine which directs potential customers to its websites. In other words, Google is how Datalink has been able to continue harming Equustek in defiance of several court orders.[3]

In an interesting twist, the Supreme Court compared its decision with the *Mareva injunction*, a means of provisional protection and enforcement in English law, by means of which the applicant can freeze all of the defendant's assets, worldwide. However, the Canadian judges do not elaborate further on the problems of jurisdiction and enforcement at national level resulting from this. Moreover, the two dissenting judges rightfully point out that there were clear differences between *Mareva injunctions* and blocking orders:

> Mareva injunctions are granted to freeze assets until the completion of a trial — they do not enforce a plaintiff's substantive rights (...). In contrast, the Google Order enforces Equustek's asserted intellectual property rights by seeking to minimize harm to those rights. It does not freeze Datalink's assets (and, in fact, may erode those assets).[4]

While the judges did consider the implications for Google on implementing this international blocking order, they finally deemed them insignificant. Google need not to worry that the damage caused would amount to more than mere inconvenience. After all, it was not necessary to take action across the world. Google just needed to effect change at the place where its search engine was programmed. This was relatively easy to accomplish, according to the person responsible at Google. In addition, the search engine operator had never claimed that implementing the court decision would mean spending significant time and effort, which would hinder its implementation.

III. Fears over Threats to Freedom of Expression

Unlike the (technical) execution of international blocking orders, the decision and its implementation remain far more problematic from a legal point of view. In the court proceedings Google called upon the argument

> ... that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction....[5]

Seen in this light, the consequences of the Supreme Court's decision are not yet foreseeable. However, it is feared that companies and politicians could see it as an opportunity to censor freedom of expression on the Internet. For example, the Washington Post[6] titled its coverage of the Canadian judgment 'How a Supreme Court case in Canada could force Google to censor speech worldwide'. National laws offer different levels of protection for freedom of opinion, press and information. For example, while an injunction under Turkish law could not be objectionable, in Germany it could interfere with freedom of expression as guaranteed by fundamental rights.

The Supreme Court did appreciate this problem, but dismissed it as theoretical. The judges did not see any reason to delve into the wider consequences of an international blocking order: intellectual property, which was the subject of the *Equustek* case, was protected by legal systems worldwide. There were no other points of objection and if so, Google, could and should make them:

> If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.[7]

---

3 ibid para 52.

4 ibid para 72.

5 ibid para 44.

6 Hamza Shaban, 'How a Supreme Court case in Canada could force Google to censor speech worldwide' *The Washington Post* (29 June 2017) <https://www.washingtonpost.com/news/the-switch/wp/2017/06/29/how-a-supreme-court-case-in-canada-could-force-google-to-censor-speech-worldwide/?utm_term=.e5411b1377ae> accessed 6 October 2017.

7 *Google Inc v Equustek Solutions Inc* (n 1) para 46.

Equustek, on the other hand, could be reasonably expected to explain or even prove that this order is permissible in all other countries in which Google's services are available. 'Even if it could be said that the injunction engages freedom of expression issues,' the judges said, 'this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders'.[8]

However, the decision does not appear to attempt any more general conclusion about the possible effects of cross-border blocking orders on freedom of speech:

> And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case.[9]

It remains to be seen whether the argument developed by the Court would also potentially apply to an efficient enforcement of a data protection case, eg when it is regarded necessary that search results about persons containing personal data should be erased from search lists. It is recalled that Google in reaction to the Court of Justice of the European Union in *Google Spain*[10] accepted to remove search results, but not from its search engines running at top level domains outside the territory of the European Union.

8 ibid para 49.

9 ibid para 45.

10 Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317.