

OPINION

Canadian courts wade into free-speech battle over Google case

Sweeping order:
Tech firm trying to stop search giant from listing sites that sell clones of their products

At a time when Apple is going to war against the FBI's disclosure order, the Supreme Court of Canada will hear Google's appeal against the long arm of B.C.'s courts.

In a case that has garnered international attention, the Internet giant is fighting a rare worldwide injunction issued by the B.C. Supreme Court and endorsed by the B.C. Court of Appeal.

The global order prohibits Google from displaying search results that include particular websites.

Google insists that is way beyond Canadian jurisdiction and a huge overreach that raises concerns about free speech and the use of such orders against parties not involved in a lawsuit.

That is why the high bench on Thursday waded into the latest clash in the struggle by the courts to bring the Internet to heel.

Equustek Solutions Inc., which makes complex communications hardware, alleged Vancouver-based Datalink Technologies Gateways Inc. and fellow defendants used its trade secrets to create competing products and employed bait-and-switch tactics as distributors to deliver clones when customers ordered Equustek products.

It obtained injunctions in 2014 against the firms, prohibiting them from doing business online.

And Google voluntarily removed hundreds of URLs from its search results on google.ca.

But these measures proved ineffective and Google balked at wider erasures and at delisting entire domains.

Equustek argued that such a restricted response made the injunction ineffective and the firms were continuing to sell the reputedly counterfeit products.



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Exacerbating the legal challenges for Equustek, the alleged scofflaws fled the country and Equustek found itself playing hide-and-seek with the putative pirates.

So the firm sought the sweeping court order against Google to prohibit it from displaying search results anywhere that included their websites.

Now-retired B.C. Supreme Court Justice Laura Ann Fenlon issued the extraordinary extra-territorial order on June 13, 2014 and the Court of Appeal upheld the ruling last June.

The province's top court said the judge had territorial competence over Google because the company does business here and she possessed an inherent jurisdiction to maintain the rule of law and protect the integrity of proceedings.

The power to grant injunctions is presumptively unlimited, injunctions aimed at maintaining order need not be directed solely at the parties involved in litigation and, in this case, one with worldwide effect was justified, the appellate bench added.

For civil libertarians and those interested in web freedom, the key worry is that if Canada endorses this kind of approach, countries with more repressive views or more malleable courts will abuse it.

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The French in 2000 slapped Yahoo for selling Nazi memorabilia.

Yahoo tried to litigate the case in the U.S., but the Ninth Circuit ruled in 2004 that the company hadn't established the French had done anything wrong to give a domestic court jurisdiction to strike down their decision.

In 2006, the French court reversed the ruling and the U.S. Supreme Court turned down the case.

In 2014, the European Court of Justice demanded the delisting of nasty personal links for people in a Spanish Google case dubbed "the right to be forgotten."

The repercussions of that are still being resolved because there is a chasm between European views of protecting feelings and the American free-speech free-for-all.

There are major problems with injunctions for reasons that are less black-and-white and engage complex constitutional rights rather than simple commercial interests.

We don't have a global sheriff because countries have different domestic laws and cultural approaches toward free speech, privacy and political satire.

This order may not offend anybody, what about the next one?

And questions about whether U.S. courts will respect such injunctions and apply sanctions remain open.

Still, although the Canadian Supreme Court probably won't rule until next year, I expect it to endorse such injunctions as the way of the future.

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