Case In Point

BCCA Affirms Order Requiring Google to Render Domains Unsearchable

Date: June 15, 2015

Last Thursday, the Court of Appeal for British Columbia issued an important decision in Equustek Solutions Inc. v. Google Inc. about the power of a domestic court to make orders against non-party, internet "intermediaries" – in this case, search engine provider Google.

The matter involved an order made to help a network hardware manufacturer enforce its intellectual property rights against a former distributor who had gone rogue. After the plaintiff sued the former distributor, it went underground – essentially running a "clandestine" effort to pass off its own products as the plaintiff's products. This scheme relied on the internet and, to a degree, Google's market-dominant search engine.

Google voluntarily took steps so searches conducted at the Google.ca search page would not return specific web pages published by the defendants. The plaintiffs sought and obtained an order to block entire domains and to block searches originating from all jurisdictions. Google appealed, making a number of broad arguments about the impact of the order (and its kind) on comity principles of private international law as well as international (internet-based) freedom of expression.

The Court of Appeal dismissed Google's appeal, demonstrating significant sympathy for the perils facing the British Columbia plaintiff. And while the Court was sensitive to the principles raised by Google (along with the Canadian Civil Liberties Association and the Electronic Frontier Foundation as interveners), it held that the principles were not engaged in the matter:

[…] Courts should be very cautious in making orders that might place limits on expression in another country. Where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values, the order should not be made.

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.

This reasoning by the Court of Appeal relates back to a significant admission by Google – an

admission recorded by the chambers judge as follows: “Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong.”

The Court of Appeal decision is therefore relatively balanced. Global internet intermediaries like Google process and store such significant volumes of information today that their cooperation can be important to advancing a civil action or, like in this case, obtaining an effective remedy. In general, this British Columbia case will help organizations deal with global internet intermediaries. However, global search engine “takedown orders” of the kind issued in this case will not necessarily be easy to obtain and enforce.

Adapted from “All About Information” by Dan Michaluk