Published on *The National Law Review* https://natlawreview.com

California Court Enjoins Canadian Court's Global De-listing Order to Google as Contrary to CDA

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In a decision that sets up a potential international comity showdown, a California district court granted Google's request for a preliminary injunction preventing enforcement in the U.S. of a Canadian court order that compelled Google to globally de-list certain search results of a former distributor that had allegedly used its websites to unlawfully sell the defendant Equustek Solutions's ("Equustek") intellectual property. (*Google LLC v. Equustek Solutions Inc.*, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017)).

In granting Google's request for a preliminary injunction, the court found that Google likely satisfied all three elements of qualifying for immunity under Section 230 of the Communications Decency Act, 47 U.S.C. §230(c)(1) (the "CDA" or "Section 230") as a service provider that linked to third-party content, and that the Canadian court's order implicated online free speech concerns. Indeed, the court concluded its opinion with language that surely buoyed many online providers and open internet advocates that had previously expressed concerns about the extraterritorial effort of the Canadian order:

> "By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 immunity and threatens free speech on the global internet."

In 2011, Equustek filed suit in Canada against Datalink Technology Gateways ("Datalink") alleging certain intellectual property violations, and obtained several Canadian court orders against Datalink. In 2012, after discovering Datalink was violating court orders and carrying on its business at an unknown location, Equustek asked Google to de-list Datalink's websites from search results. Google refused and Equustek moved for a court order. The Canadian court granted Equustek's request for injunctive relief against Datalink and, as a result, Google de-indexed over 300 Datalink webpages from appearing in its Canada-specific search results at www.google.ca.

Google did not, however, remove Datalink websites from search results targeted to users outside of Canada, such as at google.com. Equustek sought another Canadian court order requiring Google to

remove Datalink websites from its global search results. In 2014, a Canadian trial court issued an order requiring Google to delist Datalink search results worldwide —an order which was affirmed by an appeals court – prompting Google to comply with the order. On further appellate review, in June 2017, the Canadian Supreme Court affirmed, concluding that the only effective way to preserve Equustek's position pending the resolution of its litigation against Datalink was to issue a global de-listing order.

With no more options left in Canada, Google brought this federal court action against Equustek to prevent enforcement of the Canadian court's order in the U.S. Google argued that the Canadian order was "unenforceable in the United States because it directly conflicts with the First Amendment, disregards the Communication Decency Act's immunity for interactive service providers, and violates principles of international comity."

Examining the likelihood of success on the merits, the court found Google likely satisfied all three elements of qualifying for CDA Section 230 immunity. To qualify for Section 230 immunity, Google must show that (1) it 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 foreign court order would treat it as the "publisher or speaker" of that information. When a user queries Google's search engine, Google responds with links to relevant websites and short snippets of their contents – as the court reasoned, while such a service helps users access content on third-party websites, "Google does not 'provide' that content within the meaning of Section 230." (See e.g., *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (Google not liable "for merely providing access to, and reproducing, the allegedly defamatory text" in the form of links and snippets in search engine results)). The court also found that the Canadian order would likely treat Google liable as the "publisher or speaker" of the content of Datalink's websites, as it would require Google to remove content, which is "something publishers do." As to irreparable harm, the court determined that Google is harmed because the Canadian order restricts online free speech and e-commerce activity that Section 230 protects, and, on the whole, the balance of equities favored Google because the injunction would deprive it of the benefits of U.S. federal law.

Interestingly, the Canadian Supreme Court, in its June order, stated that a global de-listing order would not violate international comity because any violation of foreign laws was "theoretical." Yet, the court may have left a small window to revisit its order when it qualified its statement: "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." Perhaps, with a U.S. court order in its back pocket, Google will request a chance to re-litigate the scope of global de-listing order and argue that the U.S. injunction is concrete evidence that the Canadian order violates foreign law and principles of international comity. How the Canadian court will rule is uncertain and even more uncertain is which court order Google will follow if the Canadian court declines to limit the injunction – such a decision will likely be based on both legal and business concerns.

This dispute evokes a host of large free speech and e-commerce issues similar to what the EU Court of Justice is now considering as it decides whether the EU's "right to be forgotten" should be interpreted to apply to online searches within EU domains or globally. Regardless, with many technology companies having a global footprint in Canada, the EU and beyond, this will not be the last time the issue of extraterritorial application of laws to the global internet will arise.

National Law Review, Volume VII, Number 313