

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

GOOGLE INC.

Appellant
(Appellant)

and

EQUUSTEK SOLUTIONS INC., ROBERT ANGUS,
CLARMA ENTERPRISES INC.,

Respondents
(Respondents)

FACTUM OF THE APPELLANT, GOOGLE INC.
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

(a) Overview

1. At its core, this case is about the propriety of the Courts of British Columbia issuing a permanent, mandatory, worldwide injunction against Google Inc. (“Google”) intended to silence speech regarding the existence of publicly accessible websites on the Internet.

2. The Plaintiffs, designers of industrial equipment, sued Defendants for violation of the Plaintiffs’ trade secrets and development of derivative products for sale online. The Plaintiffs obtained orders that certain Defendants were prohibited from carrying on business over the Internet. Those Defendants did not comply with the orders. Google does not seek to excuse such non-compliance, which deserves censure in the strongest terms.

3. However, the underlying action has nothing to do with Google. Google is not a party. No cause of action has been asserted against it. Google has no connection to the operations or activities of the Defendants. It does not host or contribute any content to the Defendants’ websites. Google is incapable of taking these websites offline. It is incapable of stopping the Defendants from launching new websites. It is incapable of preventing users in Canada or anywhere else from accessing the websites at issue. It cannot prevent other third party websites from speaking as to the existence of those websites.

4. Google’s only link to this case is that it operates a popular search engine through which users can locate websites. In response to a user inquiry, a search engine merely displays the locations of publicly available websites, via hyperlinks, that are algorithmically relevant to the user’s search. This has the incidental effect of making it possible for users to find certain websites maintained by the Defendants, whether via Google’s search engine or those provided by others (e.g., Yahoo!, Bing and Baidu).

5. The Plaintiffs brought an application against Google as part of their British Columbia action against the Defendants. The Plaintiffs sought and obtained orders, unprecedented in Canada, enjoining Google from displaying hyperlinks to some of the Defendants’ publicly available webpages. Google is thus prohibited from displaying these links as search results to Internet users anywhere in the world (the “Worldwide Order”). The Worldwide Order against

Google does not (and cannot) affect the underlying websites of the Defendants, which continue to exist and proliferate, and can still be located using readily available information location tools, such as other search engines and social networking sites.

6. Neither the hosts of the Defendants' websites, nor the Internet service providers ("ISPs") offering users access to the Internet, nor the operators of other websites linking to Defendants' websites, were targeted by the Plaintiffs. Instead, the Plaintiffs sought to deputize Google alone, bringing it into the dispute between Plaintiffs and Defendants, notwithstanding the fact that no wrongdoing here (or anywhere) has been alleged against Google.

7. The effect of the Worldwide Order is that only Google's speech is restricted, as it is now prohibited from truthfully informing the global public (including users inside and outside Canada) about the existence of publicly and readily accessible webpages. Since the Worldwide Order was granted, the Plaintiffs have requested and obtained eight amendments to that order, requiring that numerous additional sites allegedly operated by the Defendants be blocked from Google's search results worldwide.

8. Although styled as interlocutory, the Worldwide Order is for all practical purposes final. The Defendants are not participating in the litigation and there will be no trial against them.

9. As recognized by the Courts below, the Worldwide Order represents a significant expansion of the injunctive powers of Canadian courts. The Worldwide Order is contrary to Canadian law in at least these ways:

(a) The Courts Below Improperly Granted an Ineffective Speech-Limiting Injunction.

The Worldwide Order blocks entire websites from appearing in Google search results everywhere in the world (i.e., not just Canada). It is a speech-limiting injunction prohibiting Google alone from truthfully informing users as to the existence of Defendants' publicly available websites via hyperlinks, notwithstanding the fact that under Canadian law, such hyperlinking is not unlawful. The courts below failed to consider or apply Canadian jurisprudence on speech-limiting injunctions, such as publication bans.

Parliament has directed that even where a search engine has infringed copyright (which is not the case here), an injunction will only be granted in very limited circumstances. The scope of the Worldwide Order is inconsistent with the guidance provided in the *Copyright Act* R.S.C., 1985, c. C-42 (the “*Copyright Act*”).

(b) The Non-Party Problem.

The Courts of British Columbia applied the *RJR MacDonald* interlocutory injunction test against a non-party to the action, in the absence of any cause of action pleaded against Google. By doing so, the courts below granted effectively permanent relief against Google on the basis of a balance of convenience, without establishing either that Google has committed any civil wrong or that the Plaintiffs enjoy a right as against Google to dictate what search results are seen by users around the world.

(c) The Order Offends International Comity.

The Worldwide Order could not have been obtained against Google in the United States, where Google is located. Even if the Canadian legal framework permitted courts to grant such an order, Canadian courts should not impose that framework on innocent foreign non-parties. Canadian courts would not enforce a comparable foreign order, and they therefore ought not craft such an order for export, as to do so offends the principles of international comity.

10. The appeal should be allowed.

(b) *Statement of Facts*

(i) **The underlying action against the Defendants**

11. Equustek Solutions Inc. (“Equustek”) designs and manufactures networking devices for industrial use. In April 2011, Equustek commenced an action against Morgan Jack, Andrew Crawford and the Datalink companies (these persons referred to throughout as the “Defendants”) alleging that they conspired to steal trade secrets in order to develop and market a competing

product.¹ Equustek alleged that the Defendants “passed-off” its product as an Equustek device through the use of Equustek’s trademarks. There were no findings of fact by the motions judge, the Honourable Justice Fenlon (as she then was), with respect to any intellectual property rights enjoyed by the Plaintiffs outside Canada.²

12. Equustek obtained interim orders against the Defendants, enjoining them from carrying on business over the Internet, from selling their product and from using Equustek’s proprietary materials on their websites. The Defendants breached these orders and have left the jurisdiction, resulting in their pleadings having been struck.³

(ii) Google

13. Google is a popular Internet search engine provider based in California. Search engines are a common way that users find content on the Internet. Google operates a complex system that automatically crawls, scans and indexes billions of web addresses (also known as “universal resource locators” or “URLs”), which Google then uses to generate search results responsive to inquiries by users. When a user searches for terms on Google’s search engine, Google provides a list of hyperlinks to potentially relevant webpages that are publicly and readily accessible on the Internet.

14. A website can comprise a single web page, or many individual web pages that refer to one another. Google does not control the content that is uploaded to these billions of web pages: it merely catalogues them in order to inform users of information residing on websites that are already accessible on the Internet.

15. When approached by the Plaintiffs, Google applied its internal policies to remove over 300 hyperlinks to specific web pages from search results on www.google.ca, the default search engine for individuals accessing Google from Canada.⁴ When the Plaintiffs asked Google to

¹ The Plaintiffs also named other defendants, who are represented by counsel and are defending the claims.

² Reasons for Judgment of the Honourable Justice Fenlon dated June 13, 2014, (“Injunction Decision”), at para. 5, Appellant Record (“AR”) at Tab A.

³ Injunction Decision at para. 6, AR at Tab A.

⁴ **Redacted Pursuant to Order of Brown J. dated July 19, 2016.**

remove those hyperlinks from all Google search results displayed anywhere in the world, Google declined because it had already removed the specific webpages at issue from www.google.ca.

(iii) Application Against Google

16. Equustek brought an application against Google seeking an order that it suppress information regarding certain websites purportedly operated by the Defendants from Google search results generated for users located anywhere in the world. Equustek did not do so by means of a separate lawsuit against Google, but rather brought the application as part of its pre-existing action against the Defendants.

17. Justice Fenlon granted the Worldwide Order, styled as an interlocutory injunction. She held that the court could grant this injunctive relief against non-party Google pursuant to the court's inherent jurisdiction, that the courts of British Columbia had jurisdiction to grant the order because the courts had jurisdiction over the underlying action between Equustek and the Defendants, and that the Plaintiffs' proprietary rights were moveable property located in British Columbia. She held that the injunction could apply to all of Google's services worldwide, regardless of whether they were being directed to, or used by, anyone in Canada.⁵

18. Justice Fenlon found that "[t]here is no evidence that Google acted in this case to deliberately flout this Court's order and assist the defendants."⁶ Despite this finding, she held that the applicable test for granting an injunction against non-party Google was the balance of convenience test. In conducting this analysis, Justice Fenlon asked simply whether the benefit to the Plaintiffs of obtaining the order outweighed any inconvenience to Google.

(iv) Court of Appeal for British Columbia

19. The Court of Appeal dismissed Google's appeal and upheld the Worldwide Order. The Court held that:

⁵ Injunction Decision at paras. 26, 51 and 61, AR at Tab A.

⁶ Injunction Decision at para. 113, AR at Tab A.

- (a) The Court has territorial competence over the injunction application because it has territorial competence over the underlying litigation between the Plaintiffs and the Defendants;
- (b) Google carries on business in British Columbia because it sells advertising to British Columbia residents, and because it automatically indexes webpages hosted in British Columbia, thereby giving the courts of British Columbia personal jurisdiction over Google;
- (c) “The granting of injunctive relief against third parties as an ancillary means of preserving the parties’ rights is a well-established jurisdiction of the courts”;⁷ and
- (d) The balance of convenience favours Equustek.

(v) The Injunction Requires Continual Amendment and Supervision

20. Because the injunction as granted does not address the underlying conduct of the Defendants, it was doomed to be ineffective from the start. The relief against Google has been premised on the Defendants’ contempt of court orders, and the alleged sale of their impugned products via myriad websites that were created “automatically.” Justice Fenlon accepted this premise:

Websites can be generated automatically, resulting in an endless game of “whac-a-mole” with the plaintiffs identifying new URLs and Google deleting them.⁸

21. According to the Plaintiffs, this fact highlighted the need for the Worldwide Order. With respect, this factual finding is at the heart of why the Worldwide Order is, and always will be, ineffective. Since the grant of the Worldwide Order, the Plaintiffs sought and obtained eight amendments to address new and different websites.⁹ As of this writing, the Plaintiffs have a

⁷ Decision of the Court of Appeal of British Columbia dated June 11, 2015 (“Court of Appeal Decision”) at paras. 36, 54-55, 80 and 107, AR at Tab F.

⁸ Injunction Decision at para. 72, AR at Tab A.

⁹ Order of Justice Fenlon dated June 13, 2014 (addressing 33 sites, including 6 identified by the Plaintiffs during the hearing of the application), AR at Tab B; Order of Justice Fenlon dated November 27, 2014 (adding 22 new sites), AR at Tab C; Desk Order dated April 22, 2015 (adding 2 new sites), AR at Tab D; Desk Order dated June 4, 2015 (adding 2 new sites), AR at Tab E; Desk Order dated July 3, 2015 (adding four new sites), AR at Tab H; First Desk

pending application for a ninth amendment. No doubt recognizing the need for repeated future amendments to the Worldwide Order, the first such amendment included a special protocol whereby the Plaintiffs could further amend via Desk Order. The number of enjoined websites has more than tripled since the Plaintiffs' original request to Google. The Plaintiffs' requests for amendments could presumably continue for years. In other words, the "game of 'whac-a-mole'" will continue.

PART II - STATEMENT OF ISSUES

22. The Worldwide Order should be set aside for these reasons:

- (a) **Freedom of Expression.** The Worldwide Order is contrary to this Court's jurisprudence on orders that restrict freedom of expression, as well as Parliamentary guidance on granting injunctions against search engines;
- (b) **The Non-Party Problem.** The Courts of British Columbia erred in applying the *RJR MacDonald* interlocutory injunction test in the absence of a cause of action pleaded against Google connected with the dispute, and therefore erred in the nature and scope of the remedial injunction granted against non-party Google; and
- (c) **International Comity.** The universal application of the Worldwide Order is contrary to this Court's jurisprudence on comity.

23. Each of these errors is an error of law that attracts a standard of review of correctness.

PART III - STATEMENT OF ARGUMENT

(a) *Freedom of Expression*

24. The Worldwide Order is an expression-limiting injunction prohibiting Google alone from truthfully informing users about the existence of publicly accessible websites on the Internet. The approach adopted below is an improper and unprecedented extension of Canadian

Order dated September 15, 2015 (adding 4 new sites), AR at Tab I; Second Desk Order dated September 15, 2015 (adding 4 new sites), AR at Tab J; Desk Order dated January 12, 2016 (adding 15 new sites), AR at Tab K; and Desk Order dated March 30, 2016 (adding 17 new sites), AR at Tab L.

jurisprudence, and it does not incorporate the statutory guidance provided by Parliament for issuing injunctions against search engines.¹⁰

(i) The Worldwide Order Ignores Canadian Jurisprudence on Speech-Limiting Injunctions

25. As unanimously held by this Court in *Ford v. Quebec (Attorney General)*, it is “not only the speaker but the listener who has an interest in freedom of expression.”¹¹ Thus, freedom of expression includes the right to both write and read materials.

26. The courts below erred in focusing primarily on the speech of the tortfeasors. The Court of Appeal dismissed the suggestion that the order infringed freedom of expression since the courts had the right to limit the *Defendants’* speech, which is not the primary issue here.¹²

27. The injunction directly limits both Google’s speech (by prohibiting it from truthfully reporting to users the existence of publicly accessible websites) and that of the public (by preventing them from using Google’s search engine to find and access information that is publicly available on the Internet). The fact that there may be a justification for limiting the *Defendants’* speech should not allow a court to order Google, or any search engine, to inaccurately report the non-existence of a website that remains on the Internet.

28. In *Globe and Mail v. Canada (Attorney General)* (“*Globe and Mail*”), this Court drew a principled distinction between the liability of the tortfeasor and the rights of innocent parties who encounter the material. This Court adopted the holding of the Supreme Court of the United States in *Smith v. Daily Mail Publishing Co.* that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹³

29. Google is not liable for providing information about the location of readily and publicly accessible speech (i.e., links to websites) to its users, even when the speech on those sites is

¹⁰ Court of Appeal Decision at paras. 100-105; Injunction Decision at para. 153, AR at Tab F.

¹¹ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 759-60; See also *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, [2010] 1 S.C.R. 815 at paras. 30 and 31; *International Fund for Animal Welfare, Inc. v. Canada*, [1989] 1 F.C. 335 (C.A.) at para. 16.

¹² Court of Appeal Decision at para. 109, AR at Tab F.

¹³ *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.R. 592 [“*Globe and Mail v. Canada*”] at para. 85 quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

potentially problematic. A librarian is not liable for helping a reader find a book that contains hate speech, and a reporter is not liable for reporting that an individual made defamatory statements. There is no principled basis for providing less protection to online expression, particularly in view of this Court's acknowledgment of the critical importance of the Internet to the modern marketplace of ideas.

30. In *Crookes v. Newton*,¹⁴ the plaintiff sought damages from Mr. Newton for sharing the hyperlink of a website at which defamatory materials could be found. This Court reached two key findings which apply directly to this case:

- (a) Mr. Newton could not be held liable for merely sharing a link that facilitates access to another party's defamatory speech. This Court held that "[m]aking reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content."¹⁵
- (b) Mr. Newton's right to share that hyperlink engages his freedom of expression.

31. The majority in *Crookes* confirmed that the sharing of hyperlinks was crucial to the architecture and functioning of the Internet:

The Internet cannot ... provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential "chill" in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.¹⁶

32. The fact that the link provided by Mr. Newton was to defamatory speech did not defeat his right to provide that link. Similarly, the act of linking to websites does not confer liability on

¹⁴ *Crookes v. Newton*, [2011] S.C.R. 269 ["*Crookes*"].

¹⁵ *Crookes*, *supra* at para. 42.

¹⁶ *Crookes*, *supra*, at paras. 35-36.

search engine providers like Google for the content of third party websites, including those at issue in this case.

33. The courts below also failed to advert to *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, in which this Court recognized the crucial importance of the proper functioning of the Internet.¹⁷

34. Civil orders that impede the flow of information on the Internet should not be granted merely because they are “convenient.” This is especially true where the speech of non-parties is swept up in the order. This Court has repeatedly held that orders limiting speech, such as the Worldwide Order, should be granted sparingly. For example, a publication ban is an order in which speech is enjoined to prevent the public from reading and listening to that speech. Cases involving publication bans illustrate the caution courts must exercise when issuing a speech-limiting injunction.

35. In *R. v. Mentuck*,¹⁸ this Court unanimously adopted the following two-part test for ordering a publication ban at common law:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

¹⁷ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [“SOCAN”], [2004] 2 S.C.R. 427 at para. 40. SOCAN refers to the copyright principles of balancing so as to achieve fairness to copyright owners. SOCAN pertained to the role of ISPs in a tariff analysis under the *Copyright Act*. It therefore presented a very different procedural posture than the present case, where any balancing to be done is between a potential rights holder and a non-party, as compared to the copyright balancing between a creator and an alleged infringer. As noted by the Court in SOCAN at para. 131, “It is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.” To similar effect is the concern expressed, in *obiter*, by this Court in *Club Resorts v. Van Breda*, [2012] 1 S.C.R. 572 [“*Van Breda*”] at para. 87 regarding the potential for a universal assertion of jurisdiction over the Internet.

¹⁸ *R. v. Mentuck*, [2001] 3 S.C.R. 442 at para. 23 [“*Mentuck*”].

36. While the *Dagenais/Mentuck* test was initially developed in the context of publication bans, this Court underlined that this test, with necessary modification, should be applied whenever a litigant is asking the court to limit freedom of expression in the context of litigation.¹⁹

37. This Court has applied the *Dagenais/Mentuck* test to other contexts where litigants seek to limit freedom of expression and access to information in the context of litigation. For instance, this Court applied *Mentuck* in *Sierra Club of Canada v. Canada (Minister of Finance)* when determining whether a confidentiality order, another type of speech-limiting order, could be imposed to seal court records from public access. The Court tied the confidentiality order to the applicant's right to a fair trial:

[P]reventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial.²⁰

38. The policy behind this Court's test on publication bans and confidentiality orders is to ensure that courts resort to banning publicly available information only in extraordinary circumstances, and in compliance with the *Charter* value of expression that animates the common law.

39. The Worldwide Order does not satisfy any of the exacting requirements for speech-limiting injunctions. While the Plaintiffs certainly have an interest in stopping the conduct of the Defendants, that interest is strictly private. The underlying action is a commercial dispute between commercial parties.

(ii) The Worldwide Order is Ineffective and the Courts of British Columbia Failed to Properly Assess the Risk to Freedom of Expression

40. Moreover, the salutary effects (if any) of the Worldwide Order are fleeting, but its deleterious effects are significant. The Worldwide Order is, and is doomed to be, ineffective, as discussed above. The Court of Appeal also failed to assess properly the risk to freedom of

¹⁹ As held by this Court in *Vancouver Sun (Re)*, “[w]hile the [*Mentuck*] test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings.” *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at para. 31.

²⁰ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 50.

expression posed by an order of this type, and it made three key errors in evaluating the interest of freedom of expression.

41. First, this case is about compelling Google to intentionally mislead users worldwide in its search results about the existence of relevant and publicly accessible websites, notwithstanding the public's right to access information, one of the central purposes underlying freedom of expression. Freedom of speech protects the the right to both write and read materials, which this Court has found to include the dissemination of hyperlinks on the Internet:²¹

The Internet's capacity to disseminate information has been described by this Court as “one of the great innovations of the information age” whose “use should be facilitated rather than discouraged” (SOCAN, at para. 40, per Binnie J.). Hyperlinks, in particular, are an indispensable part of its operation. As Matthew Collins explains, at para. 5.42:

Hyperlinks are the synapses connecting different parts of the world wide web. Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it.

42. These observations are particularly applicable to Google. Google merely provides a catalogue, allowing users to easily search for and locate information among the trillions of publicly available webpages on the Internet.

43. Second, as stated by Justice Gonthier in *Dagenais*,²² “[a] ban must thus be carefully limited both in terms of temporal and geographic application.” For example, in overturning a publication ban imposed in *Globe and Mail*,²³ this Court underlined that it was “a blanket prohibition, and no indication was given as to when it would expire.” Similarly, in *R. v. O.N.E.*,²⁴ this Court limited the publication ban on the identity of undercover police officers to one year, stating:

But I would still restrict the term of this ban to a period of one year from the date on which this judgment is released. The identity of police officers should not be, as a matter of general practice, shrouded in

²¹ *Crookes, supra*, at para. 34.

²² *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [“*Dagenais*”] at 923 (dissenting, but not on this point).

²³ *Globe and Mail v. Canada, supra* at para. 95.

²⁴ *R. v. O.N.E.*, [2001] S.C.R. 478 at para. 14.

secrecy forever, absent serious and individualized dangers. A force of anonymous, undercover police is not the sort of institution the courts may legitimately, in effect, create; such would be the appearance of an order restraining publication of their identities in perpetuity.

44. Here, the courts of British Columbia made no attempt to reasonably limit the application of the Worldwide Order temporally (e.g., one year) or geographically (e.g., Canada), instead imposing the broadest possible global ban. The Worldwide Order applies everywhere in the world, seemingly for all time, notwithstanding that the trade secret and intellectual property rights pleaded by the Plaintiffs are often restricted as to both geography and time.²⁵ The court rejected the suggestion that the injunction should only be limited to www.google.ca on the basis that it would be more effective if the order was applied universally, expanding the effect of the order from 35 million Canadians to the entire globe—a 200-fold increase, with almost no consideration of the consequences of that expansion on Google, its users outside of Canada, or the speech of other innocent parties on the Internet more generally.

45. Third, the courts below never addressed how or why the Worldwide Order should be granted against only Google, rather than all search engines and other speakers on the Internet that link to the Defendants' websites. In *Dagenais*, this Court held that a court evaluating a publication ban must consider whether the ban would be effective.²⁶ A publication ban against a single entity such as Google is simply not effective.

46. It is undisputed that the underlying websites exist independently of Google or any other search engine. The Worldwide Order prohibits only Google from informing its users about the existence and availability of the Defendants' websites. Many of the webpages covered by the Worldwide Order are still publicly available and appear in search results on other search engines, such as Yahoo!, Bing, Yandex, Duckduckgo or Baidu, some of which enjoy tremendous popularity in countries covered by the Worldwide Order.²⁷ The impugned websites can also still be accessed through other means, such as navigating to the site from a browser's address bar, or

²⁵ There were no findings of fact made below regarding ownership of any proprietary rights outside of Canada.

²⁶ *Dagenais*, *supra*, at 890-91.

²⁷ For example, web searches conducted for "GW1000" in May of 2016 on www.yandex.com, www.duckduckgo.com, www.bing.com, and www.yahoo.com all display hyperlinks to Datalink websites listed in the Worldwide Order (and its eight (8) amendments to date).

by linking from a previous bookmark, an email, shopping, social media or other sites. In other words, notwithstanding removal of the Defendants' websites from Google's search engine globally and eight or more amendments to the Worldwide Order, the content can still be accessed through other direct and indirect means.

47. In sum, the courts below failed to appreciate the magnitude of the deleterious effects posed by the Worldwide Order, an injunction which is inherently ineffective. Properly balanced, these harmful effects illustrate why this Court should not endorse the type of order that would become commonplace on the reasoning below.

48. The effective protection of freedom of expression is rooted in the free circulation of information. In the context of speech-limiting injunctions, the *RJR MacDonald* test relied on by the courts below has been rejected as inappropriate. This Court in *Canada (Human Rights Commission) v. Canadian Liberty Net* ("*Canada Liberty Net*") considered when a speech-limiting interlocutory injunction should issue in cases of alleged hate speech or defamation. The Court endorsed the view that injunctions that impact freedom of expression should only be granted in the "rarest and clearest of cases":

With the coming into force of the Canadian Charter and the Quebec Charter, these safeguards protecting freedom of expression and freedom of the press have become even more compelling.

The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases [Emphasis added.]²⁸

49. The Court also cited with approval Justice Sharpe's treatise on injunctions²⁹ in explicitly rejecting the "balance of convenience" test for speech-limiting injunctions:

²⁸ *Champagne v. Collège d'enseignement général et professionnel (CEGEP) de Jonquière*, [1997] J.Q. no. 2863 (C.A.) at paras. 42-43 [*"Champagne"*], cited in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 [*"Canada Liberty Net"*] at para. 49; *Niemela v. Malamas*, 2015 BCSC 1024 (CanLII) [*"Niemela"*] at paras. 18-35

²⁹ *Canadian Liberty Net*, *supra*, at para. 49, citing R. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)) at paras. 5.40-5.70 (pp. 5.2-5.4).

There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded. . . .

The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.

. . . it seems clear that the rule is unaffected by the *American Cyanamid* case and that the balance of convenience is not a factor.

50. While these cases dealt with defamatory speech (e.g. *Champagne* and *Niemela*) and hate speech (e.g. *Canada Liberty Net*), they nonetheless reflect a principle of restraint that must be applied by courts when crafting any injunction that would limit freedom of expression. They also explicitly reject the legal test that was used by the courts of British Columbia in this matter. For that reason alone, the appeal should be allowed.

(iii) The Higher Standard for Injunctions Against Search Engines

51. The growth and utility of the Internet has depended largely on the ability of service providers such as search engines, to connect people searching for information with those seeking to provide it. Parliament has expressly recognized the importance of limiting the liability of information location tools, such as search engines, in the context of intellectual property infringement. Recent amendments to the *Copyright Act* immunize information location tools (such as search engines) from infringement damages. Even where a search engine has been found by a court to have infringed copyright by reproducing a protected work, the availability of injunctive relief against the search engine is quite limited.³⁰

52. Under the *Copyright Act's* provisions, courts are required to review a range of statutory considerations when granting an injunction against the provider of an information location tool. Section 41.27(4.1) of the *Copyright Act*³¹ provides specific guidance on the factors to be considered prior to granting injunctive relief:

(4.1) If it grants an injunction as set out in subsection (1), the court shall, among any other relevant factors, consider the following in establishing the terms of the injunction:

³⁰ *Copyright Act*, R.S.C., 1985, c. C-42, s. 41.27(1). There have been no reported decisions under this section of the *Copyright Act*.

³¹ *Copyright Act*, R.S.C., 1985, c. C-42, s. 41.27(4.1).

(a) the harm likely to be suffered by the copyright owner if steps are not taken to prevent or restrain the infringement; and

(b) the burden imposed on the provider and on the operation of the information location tool, including

(i) the aggregate effect of the injunction and any injunctions from other proceedings,

(ii) whether implementing the injunction would be technically feasible and effective in addressing the infringement,

(iii) whether implementing the injunction would interfere with the use of the information location tool for non-infringing acts, and

(iv) the availability of less burdensome and comparably effective means of preventing or restraining the infringement.

53. These factors confirm that even after a finding of copyright infringement, an injunction should only be granted after heightened scrutiny and a careful weighing of interests. A court considering such an injunction must consider the aggregate effect of its contemplated order, as well as the impact of orders from other proceedings. Critically, the court is also directed to consider whether the order will be effective, and if other, less-burdensome means could achieve a similar result.

54. If this is Parliament's approach to enjoining search engines that have been found to have infringed copyright, the test for an injunction against an innocent search engine like Google should reflect an even more searching standard, particularly where no infringement by Google has been alleged and the Plaintiffs have no actionable claim against Google. A proposed test is provided and discussed at paras. 110-114, below.

(b) *The Non-Party Problem*

55. The courts below created an extraordinarily broad new form of civil remedy. They have created a right belonging to a party to litigation to compel an innocent third party to police a court order restraining a defendant from violating a plaintiff's rights.

56. This new civil remedy created by the courts below is unique because it is obtainable on an interlocutory application without any clear explanation of why the plaintiff is entitled to relief against Google. The plaintiff established no substantive law entitlement to relief against Google,

nor did the plaintiff even allege or establish via competent evidence violation of its rights *outside* of Canada. Rather, in place of delineating the requirements of this new cause of action, the courts below adopted the test for granting an interlocutory injunction found in *RJR MacDonald v. Canada (Attorney General)* (“*RJR MacDonald*”), which imported the “balance of convenience” test set out in *American Cyanamid Co. v. Ethicon Ltd.* (“*American Cyanamid*”).³²

57. Interlocutory relief is always moored in a plaintiff’s right to obtain final relief. The approach of the courts below repurposed the test in *RJR MacDonald*, which was designed for interim and interlocutory orders that preserve remedies against parties to the litigation, and turned it into the basis for a free-standing cause of action against innocent strangers. The object of the *RJR MacDonald* test is to evaluate the strength of a plaintiff’s claim to obtain final relief against the defendant in order to determine whether interlocutory relief should even be granted.

58. By applying the *RJR MacDonald* test here, the lower courts have subjected Google to ongoing orders requiring extensive and repeated supervision. They did so because the plaintiff established a serious issue to be tried in litigation involving a defendant with which Google has no connection, and because it would allegedly be less inconvenient to compel Google to assist the plaintiff than to deprive the plaintiff of Google’s assistance. By this means, the plaintiff obtained a remedy against Google without demonstrating *any* substantive entitlement to that remedy.

59. As held in *City of London v. Talbot Square Ltd.*,³³ where relief is sought on an interlocutory basis, such relief is granted “only with a view to assuring that the rights of the plaintiff asserted in the action may be effectually enforced by the Court in the event that the action ultimately succeeds.” And as recently held in *Pusateri’s Yorkville Ltd. v. Toronto (City)*,³⁴ the purpose of such an order is to “maintain a reasonable state of affairs so that the trial court may do justice at the end of the case.”

³² Court of Appeal Decision at paras. 100-105, AR at Tab F; Injunction Decision at para. 153, AR at Tab A; *RJR MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [“*RJR MacDonald*”] at pp. 335-37; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] All E.R. 504 (H.L.) [“*American Cyanamid*”].

³³ *City of London v. Talbot Square Ltd.* (1978), 22 O.R. (2d) 21 (Div. Ct.) at p. 10.

³⁴ *Pusateri’s Yorkville Ltd. v. Toronto (City)*, 2013 ONSC 6860 at para. 9, quoting *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 1535 (S.C.J.) at paras. 29, 31-33.

60. The limited purpose of an interlocutory injunction (which simply preserves a state of affairs) is the only justification for the relaxed merits test associated with it. Given the relaxed merits, plaintiffs are not entitled to simply obtain interlocutory injunctions and then take the benefits of them without taking steps to ensure that their entitlement to final relief is established according to law. As Mackay J. noted in *Ciba-Geigy Ltd. v. Novopharm Ltd.*:³⁵

An interlocutory injunction is an extraordinary and drastic restraint on the liberty of action of the enjoined party, in circumstances where the merits of the other party's complaints have yet to be determined. That infringement on the liberty of action of the enjoined party is only justifiable where it is temporary, and meant merely to maintain the status quo until such time as the judicial process can be completed.

61. The orders below give inadequate consideration to the fundamental principle that the extraordinary remedy of an interlocutory injunction “is only justifiable where it is temporary.” The courts below acknowledged that the trial against the Datalink Defendants would never occur because the Plaintiffs assert they have effectively obtained everything they can expect to obtain as against them. Their pleadings were struck before the Plaintiffs even sought the order against Google. Google is now subject to a seemingly endless series of additional amendments to the Worldwide Order. Courts in other contexts have expressed concern about interlocutory processes sweeping in strangers and thereby taking on an indeterminate and uncontrolled life of their own.³⁶

62. The principal justification for the orders granted below was the balance of convenience.³⁷ But “convenience” has never been a basis for any recognized civil claim. Both the Ontario Court of Appeal and the British Columbia Court of Appeal have recently recognized that where an applicant seeks a final (as opposed to an interlocutory) order, the balance of convenience does

³⁵ [1998] 2 FC 527 at para. 17.

³⁶ See *Akagi v. Synergy Group (2000) Inc.* 2015 ONCA 368 at para. 100, where the court expressed concern about the “faulty premise” that a series of motions in a receivership application could justify “a broad, stand-alone, investigative inquiry – the civil equivalent of a criminal investigation or public inquiry – for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor.”

³⁷ Injunction Decision at paras. 134, 150, AR at Tab A; Court of Appeal Decision at para. 102, AR at Tab F.

not play the same role as it plays in the context of an interlocutory injunction.³⁸ In the case of a final injunction, the court's focus is on whether a plaintiff has established a recognized legal right to relief. Considerations similar to those influencing the balance of convenience may be relevant to the exercise of the Court's discretion, but they do not create an entitlement to final relief where none existed before.

63. In the case of a permanent injunction, it is even more critical that the applicant establish a legal right to the relief sought.³⁹ The courts below never explained how the Plaintiffs had a legal right to deputize an innocent non-party like Google to assist them against the Defendants. The courts below instead misused the device of an interlocutory injunction to achieve a purpose that interlocutory injunctions were never intended to fulfill. They created a free-standing remedy against a search engine, without establishing an entitlement to that relief as against that search engine. In other words, the decisions create remedies in the absence of a right.

64. The Plaintiffs have no right as a matter of substantive law to conscript Google's assistance in attempting to make a remedy that they may have against the Defendants more effective. This Court has recognized that "the common law is a jealous guardian of individual autonomy" and that even in a case of apprehended danger to others, in the absence of some legal

³⁸ *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 at paras 78-79; *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680 at paras. 27-28.

³⁹ All of the foregoing assumes that the Court even had jurisdiction to grant the order. The Courts below were unclear as to the basis on which they asserted jurisdiction over the injunction against Google. Indeed, the Courts below disagreed whether a "proceeding" under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 is the underlying claim or the injunction application. The confusion in both Courts obscured the vital distinction between jurisdiction over people and jurisdiction over claims. When a court has jurisdiction over a person, it has *jurisdiction simpliciter* over that person with respect to viable worldwide claims against that person, subject to *forum non conveniens* arguments. This is the kind of universal jurisdiction that this Court warned against in *Van Breda*, *supra*, at para. 87, if it is predicated merely on carrying on business virtually without a physical presence. Because the Courts below never identified a substantive claim against Google over which they were asserting jurisdiction, they must be taken to have asserted universal jurisdiction over Google simply because it carried on business in British Columbia. This is a significant step with serious implications for international comity, and was taken without appropriate regard for this Court's caution in *Van Breda*. For Google, it would mean that the Courts of British Columbia, subject to *forum non conveniens* arguments, can now assert jurisdiction over a claim against Google brought by anyone asserting any claim against it arising anywhere in the world.

relationship imposing a duty to act, there is no “free standing” duty on a private party to act to avoid that danger.⁴⁰

65. The common law’s respect for individual autonomy is of special significance where the conduct sought to be enjoined involves a proposed interference with indexing and hyperlinking on the Internet, which have been recognized as being an “indispensable” part of the operation of the Internet, and whose use engages *Charter*-protected freedom of expression, as discussed above.⁴¹ Far from imposing a positive duty to police the content of hyperlinks on Internet users who did not themselves create or make available the linked content, this Court affirmed in *Crookes v. Newton* that the mere creation of a hyperlink to a page containing defamatory material by itself is not a tortious publication of the defamatory material.

66. Whether and how Canadian courts should assert a right to control what the rest of the world sees on the Internet are serious questions with global implications. They cannot be fairly evaluated where courts assert such control not based on any clear test, but rather on an *ad hoc* and case-by-case assessment of the balance of convenience in individual cases.

67. Justice Fenlon justified her extension of the law on the basis of three exceptions to the general rule barring injunctive relief against non-parties: the “contempt” exception, “*Norwich Orders*”, and *Mareva* injunctions. Justice Fenlon found that an order should not issue against Google under the contempt exception, as Google had not knowingly aided the Defendants.

68. However, both Justice Fenlon and the Court of Appeal erred in relying on *Norwich Orders* and *Mareva* injunction jurisprudence by extension and analogy. Neither body of law authorizes an injunction against an innocent non-party in these circumstances.

(i) *Norwich Pharmacal and its Progeny do not Justify the Worldwide Order*

69. Both Justice Fenlon and the Court of Appeal relied heavily on the decision of the House of Lords in *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, (“*Norwich Pharmacal*”),⁴²

⁴⁰ *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 at para. 31. Later, in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at para. 108, this Court observed that “positive duties in tort law are the exception rather than the rule.”

⁴¹ *Crookes*, *supra*, at para. 34

⁴² *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 [“*Norwich Pharmacal*”]; Injunction Decision at paras. 117-21, AR at Tab A; Court of Appeal Decision at paras. 64-65, AR at Tab F.

as an example of courts granting relief against non-parties where, “through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing.”

70. The House of Lords in *Norwich Pharmacal* agreed that a party could compel the assistance of a third party in limited circumstances, including where the information being sought was practically unavailable from any other source. A *Norwich* Order therefore obliges a respondent to assist the person who has been wronged by providing information about, and disclosing the identity of, the wrongdoers so that a case may proceed against them.

71. Such relief is typically discrete—i.e. handing over the identity of an anonymous agent — and engages only the privacy interests of the intended defendant. Nothing in *Norwich Pharmacal* assumes an overriding plenary jurisdiction to deputize innocent third parties in an effort to assist frustrated plaintiffs dealing with defendants who are in contempt.

72. In contrast, the Worldwide Order is ongoing and engages interests broader than those of the Plaintiffs and the Defendants. The Worldwide Order already has been, and likely will continue to be, repeatedly amended. Google will continue to remain embroiled in litigation to which it is not a party.

73. Moreover, broader speech and policy interests are engaged in this case than the narrow individual privacy interest considered in the *Norwich* Order analysis. Notably, in *Norwich Pharmacal*, the House of Lords considered—and rejected—the kind of relief provided in the Worldwide Order.

74. The plaintiffs in *Norwich Pharmacal* alleged that customs officials were infringing their patent by allowing the importation of infringing goods. They also alleged that the customs officials profited from the infringement of others by collecting excise taxes. Finally, the plaintiffs argued that the customs officials were obliged to seize the offending goods as they passed through the customs officials’ warehouses.

75. These arguments were rejected forcefully. Lord Denning held that there was “no conceivable” action against the customs officials for their role in the alleged wrongdoing. Critically, the customs officials were not required by statute or common law to take affirmative steps to seize the impugned materials:

Finally, on this part of the case the plaintiffs suggest that, when goods are imported which infringe their patent, they are prohibited goods and are liable to forfeiture under section 44 (b) of the Customs and Excise Act 1952: and, therefore, the commissioners are in a position to make use of them. But that prohibition of imports is only available when the prohibition is imposed “under or by virtue of an enactment”: as, for instance, when injurious drugs are prohibited. It does not apply to goods which infringe a patent. By no stretch of the imagination could the commissioners be expected to “police” imports so as to see that patents are not infringed. ... [Emphasis added.]⁴³

76. Since *Norwich Pharmacal* was decided, it has been used in Canada to grant disclosure orders against third parties to enable plaintiffs to ascertain the identity of unknown defendants and then proceed against those defendants.⁴⁴

77. The English Courts have resisted extending *Norwich Pharmacal* to injunctions against search engines, on the basis that such injunctions are not “realistic”. For example, in *Cartier International AG. et al. v. British Sky Broadcasting Ltd. et al.*, (“*Cartier I*”),⁴⁵ Justice Arnold granted an injunction against an ISP. In doing so, he did not apply either *American Cyanamid* or *Norwich Pharmacal*. Instead, he considered the provisions of the European Enforcement Directive,⁴⁶ which requires that enforcement measures be fair, equitable, effective, proportionate and dissuasive.

78. In conducting his proportionality analysis, Justice Arnold observed that the following considerations are particularly important:

- (a) the comparative importance of the rights that are engaged and the justifications for interfering with those rights;
- (b) the availability of alternative measures which are less onerous;
- (c) the efficacy of the measures which the orders require to be adopted by the ISPs;

⁴³ *Norwich Pharmacal*, *supra*, at 139, per Lord Denning.

⁴⁴ See, e.g. *Voltage Pictures LLC v. John Doe et al.*, 2015 FC 1364 at para. 6.

⁴⁵ *Cartier International AG. et al. v. British Sky Broadcasting Ltd. et al.*, [2014] EWHC 3354 (Ch) at paras. 82-83 [“*Cartier I*”], appeal heard and under reserve.

⁴⁶ European Parliament and Council Directive 2004/48/EC at Articles 1 and 2, cited in *Cartier I* at paras. 82 - 83.

- (d) the costs associated with those measures and their implementation;
- (e) the dissuasiveness of those measures (in the sense of whether the remedies would dissuade third parties from infringing in the future); and
- (f) the impact of those measures on lawful users of the Internet.⁴⁷

79. Justice Arnold specifically considered a search engine de-indexing order as an alternative to the order made against the ISP. Relying on the European *Costeja* case cited by the British Columbia Court of Appeal,⁴⁸ he noted that search engines can be required to de-index webpages on privacy grounds, but “it is not at all clear at present that any EU court would have power to order de-indexing on the basis of intellectual property infringement”.⁴⁹

80. He also noted that a de-indexing order against a search engine would not be effective:

...even if search engine providers de-index the URL or even the entire website, it will remain accessible on the internet. In particular, it would remain accessible to consumers who had previously visited the website and either had it bookmarked or could remember its domain name. It would also remain accessible to new consumers who were sent the link either in spam e-mails or via social networks.⁵⁰

81. In *Cartier I*, Justice Arnold incorporated a sunset provision in the order against the ISP, provisionally proposed as two years. This is consistent with the Canadian law on publication bans, discussed earlier, which requires that a ban be carefully limited in both temporal and geographic application.

82. Also in Europe, the Court of Justice of the European Union has ruled that when considering entry of an injunction against an ISP to block a website for reasons of intellectual property infringement, it is “necessary to strike a balance, primarily, between (i) copyrights and

⁴⁷ *Cartier I*, *supra* at paras. 178, 189

⁴⁸ *Google Spain SL, Google Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez*, [2014] 2 All ER (Comm) 301, cited at para. 95 of the Court of Appeal Decision, AR at Tab F.

⁴⁹ *Cartier I*, *supra* at para. 212.

⁵⁰ Although *Cartier I* was cited by the British Columbia Court of Appeal in support of its jurisdiction conclusions, the Court did not advert to the comments of Justice Arnold regarding de-indexing injunctions against search engines. To similar effect is *Cartier International Ltd. v. British Telecommunications plc et al.* [2016] EWHC 339 (Ch) (“*Cartier II*”) where Hacon J. confirmed at para. 59 that de-indexing orders were not a “realistic alternative way” of dealing with websites offering counterfeit merchandise. *Cartier II* is also under appeal but not yet heard.

related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter [of Fundamental Rights], (ii) the freedom to conduct a business, which economic agents such as ISPs enjoy under Article 16 of the Charter, and (iii) the freedom of information of Internet users, whose protection is ensured by Article 11 of the Charter.”⁵¹

83. The Plaintiffs here have taken the same approach that was soundly rejected in *Norwich Pharmacal* and its English progeny. They know that there is no cause of action against Google, yet they have asserted that Google is facilitating and assisting the Defendants.⁵² The Plaintiffs have done this in pursuit of their real goal: an injunction against a non-party to which they are not entitled.

84. Put another way, the Plaintiffs claim an entitlement to an injunction against Google because it is “mixed up in” the activities of the Defendants. On that theory, not only Google, but all other information location tools on the Internet, payment processors, domain name registrars, website hosts, and all ISPs are similarly “mixed up in,” and subject to potential injunctions concerning, trillions of webpages published from countries all over the world. That conclusion must be rejected as a matter of law, policy, and common sense.

(ii) *Mareva* Injunctions do not Justify the Worldwide Order

85. A *Mareva* injunction typically deals with commercial entities such as banks, brokerage houses and the like, which directly hold the property of a defendant or otherwise act as a defendant’s agent. Enjoining those entities brings about the desired result (i.e. the freezing or transfer of funds), and it affects only the interests of the defendant.

86. Here, Google is not an agent of the Defendants. Google does not host their websites or safeguard their assets. Other companies, unnamed in the Worldwide Order, provide those services.⁵³

⁵¹ *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH & anor*, Case C-314/12, 27 March 2014, at para. 57.

⁵² Notice of Application dated November 13, 2012, at paras. 13,14, AR at Tab M.

⁵³ Using the CanLII website (www.canlii.org) as a simple example, the website provides access to judicial decisions, as well as commentary about legal developments. The CanLII URL for the Injunction Decision is <http://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc1063/2014bcsc1063.html>. A commentary about the hearing of this case in the BC Court of Appeal is found at <http://canliiconnects.org/en/commentaries/36516>. The CanLII

87. If a provider of Internet search tools can be enjoined on this basis, it is difficult to imagine a limit to the scope of similar orders. Certainly other search engines would be subject to the same kind of exposure. Providers of Internet services such as Rogers or Bell could be enjoined when their infrastructure is used to visit the Defendants' websites. If the Defendants' physical address could be ascertained, perhaps the Plaintiffs could enjoin the local power company from delivering electricity to that address.

88. Each of these scenarios would certainly assist the Plaintiffs in addressing the Defendants' contempt of the lower court's orders. One could even argue that they would minimally inconvenience the targeted non-parties. But the absurdity is palpable: it is legally improper to grant the extraordinary remedy of a worldwide interlocutory injunction against an innocent non-party to achieve ends that the device of an interlocutory injunction was never intended to achieve.

(iii) The Right to be Forgotten Cases do not Justify the Worldwide Order

89. The Court of Appeal also drew support from European jurisprudence in which certain injunctions against Google have been granted. The Court noted that "the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects."⁵⁴ As noted by Arnold J. in *Cartier I*, "it is not clear at present that any EU court would have the power to order de-indexing on the basis of intellectual property infringement."⁵⁵

90. The cases cited by the British Columbia Courts below typically concern rights established under statutes directed at protecting interests deemed important as a matter of policy, notably privacy considerations. They are grounded in positive law and not granted merely because a private party seeks Google's help against defendants in a private dispute.⁵⁶

website is administered by the Federation of Law Societies. The CanLII website registrar is NameScout. The CanLII site, including the decisions and commentary described above, is hosted by yet another company. The content can be accessed by the public in Canada through ISPs such as Bell, Rogers, Shaw, and Telus.

⁵⁴ Court of Appeal Decision at para. 95, AR at Tab F.

⁵⁵ *Cartier I*, *supra* at para. 212.

⁵⁶ In the context of privacy/data protection and the so-called 'right to be forgotten', the French data protection agency has taken the position that Google should implement delistings worldwide and this is the subject of appeal to the Conseil d'Etat. Importantly, other European data protection agencies have taken the position that delistings

(c) *The Worldwide Order Offends International Comity*

91. The Worldwide Order blocks the search results for users of Google around the world, not just in Canada. In jurisdictions like the United States (where Google is located), such an order is legally impermissible and contrary to public policy. As this Court has made clear repeatedly, courts should account for Canada's international commitments and obligations when balancing freedom of expression against other interests.⁵⁷ As a result, the courts below should have declined to grant the Worldwide Order out of respect for international comity.

92. Even if Canadian legal and constitutional principles permitted the granting of such an order *in Canada*, that framework cannot be imposed on other countries, in violation of their own laws and protections for the values of freedom of speech and Internet policy.

93. The Court of Appeal erred in its comity assessment. It merely asked whether the order against the *Defendants* was consonant with the law of other jurisdictions:

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.⁵⁸

94. Given that the Court of Appeal asked the wrong question, it is not surprising that it arrived at the wrong answer. The issue was not whether a British Columbia court could order the Defendants to remove websites, but whether it could order Google, a corporation based in California, to remove search results provided to users in every jurisdiction around the world. There was no finding of fact by the Courts below that any intellectual property or other right

should have national rather than extraterritorial effect. For example, the UK data protection agency has ordered "delisting[s] from all versions of the Google search service directly accessible from within the UK", and the Spanish data protection agency's orders are limited to searches conducted in the country. See United Kingdom Enforcement Notice of the Information Commissioner's Office dated August 18, 2015 under the Data Protection Act, 1998, at paras. 31 and 32; see also File No. E/02887/2015, Spanish Data Protection Agency Issuance Number 337482/2015.

⁵⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467 ["*Whatcott*"] at para. 67. See also *R. v. Cook* [1998] 2 S.C.R. 597 at para. 26, where this Court held that the principle of sovereign equality of states generally prohibits the extraterritorial application of domestic law.

⁵⁸ Court of Appeal Decision at para. 93, AR at Tab F.

owned by the Plaintiffs outside of Canada was infringed, whether by the Defendants or by Google.

95. The Court of Appeal was incorrect to suggest that the Worldwide Order is a “very limited ancillary order” which requires no independent evaluation in terms of comity. The reasoning which underlies the order against Google offends the holding of the United States Supreme Court in *Smith v. Daily Publishing*, adopted by this Court in *Globe and Mail*,⁵⁹ that illegal conduct of the speaker will not undermine the First Amendment rights of the listener. If this Court now wants to depart from this principle in Canadian law, that holding at a minimum should be limited to Canadian Internet users.

96. Moreover, by requiring Google to purge entire websites from its search results, the injunction contravenes First Amendment protections of speech in the United States. It is well established in American jurisprudence that “[f]oreign judgments that impinge on First Amendment rights will be found to be ‘repugnant’ to public policy.”⁶⁰ Google’s search results, reporting on the existence of publicly available websites on the Internet, constitute protected speech, as “the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”⁶¹

97. In addition to violating constitutional rights in the United States, the order is also contrary to strong public policy, as articulated by the United States Congress in § 230 of the *Communications Decency Act (“CDA”)*,⁶² which declares that it is the “policy of the United States” to “promote the continued development of the Internet and other interactive computer services and other interactive media” and to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”

⁵⁹ *Globe and Mail v. Canada, supra*, at para. 85 quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

⁶⁰ *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007). See, e.g., *Telnikoff v. Matusевич*, 702 A.2d 230 (Md. 1997); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992).

⁶¹ *Sorrell et al. v. IMS Health et al.*, 131 S. Ct. 2653, 2667 (2011, U.S. Sup. Ct.), citations omitted. See also *Jian Zhang et al. v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (2013) [“Zhang”] at 7 [“[T]here is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation.”].

⁶² 42 U.S.C. § 230(b).

98. American courts have repeatedly applied this provision to bar claims for monetary or injunctive relief against Internet search engines (including Google) for merely providing links to third-party websites that contain objectionable or unlawful information.⁶³

99. The United States Congress made this policy choice because it recognized that:

[T]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.⁶⁴

100. Under the *CDA*, Google could not be ordered in the United States to remove search results linking to the Defendants' websites absent any allegations or evidence establishing that the Defendants' activities violate any U.S. laws. Nor was it alleged or proven below that Google's inclusion of information regarding the Defendants' websites in search results independently violates any U.S. laws, trade secret or otherwise. By nonetheless ordering Google to remove the Defendants' websites from Google search results in the U.S. (and globally) in this Canadian trade secrets case, the Worldwide Order is repugnant to the Congressional policy reflected in the *CDA* and for that reason as well could not be enforced in the United States.

101. The injunction was issued against Google, even though it is not a party to the underlying case and has no relationship with the actual parties. This is a clear violation of due process. As held by the United States Supreme Court in *Hansberry v. Lee*:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of

⁶³ See, e.g., *Parker v. Google*, 422 F. Supp. 2d 492, 500-01 (E.D. Penn. 2006); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007).

⁶⁴ *Zeran v. AOL*, 129 F.3d 327, 331 (4th Cir. 1997); see also *Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

the United States prescribe; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.⁶⁵

102. This due process principle is reflected in the basic rule governing injunctions in the United States that:

[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it.⁶⁶

103. In view of the principle of comity, courts in other jurisdictions have ordered that materials be removed within their jurisdiction, not in all jurisdictions, for instance by employing geo-blocking, which limits accessibility of the materials at issue to the jurisdictions where the proceedings are based.⁶⁷ A user's country location can be determined with high accuracy based on signals like their IP address.

104. This issue was addressed by the U.S. District Court in *Yahoo Inc. v La Ligue Contre le Racisme et L'Antisemitisme*, in which the court considered a French order, limited to France, requiring that the search engine Yahoo! remove certain search results:

The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press.⁶⁸

105. The court noted that the order was limited to France, and that otherwise, the question of enforcement would be much easier: "If it were true that the French court's orders by their terms

⁶⁵ *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (internal citations omitted).

⁶⁶ *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); see also *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945), *People ex rel. Gwinn v. Kothari*, 83 Cal. App. 4th 759, 769 (4th Dist. 2000) (citing *Regal Knitwear*, 324 U.S. 9, 13 (1945)); see also, e.g., *Berger v. Superior Court of Sacramento County*, 175 Cal. 719, 722 (Cal. 1917).

⁶⁷ See e.g. *Enforcement Notice of the Information Commissioner's Office* dated August 18, 2015, pursuant to the Data Protection Act 1998.

⁶⁸ *Yahoo Inc. v La Ligue Contre le Racisme et L'Antisemitisme* (2001), 169 F Supp 2d 1181 [*Yahoo Inc.*] at 1186-1187 (rev'd on other grounds (2006) 145 F Supp 2d 1168).

require Yahoo! to block access by users in the United States, this would be a different and much easier case.”⁶⁹ It would be “easy” because such an order would be rejected immediately.

106. Canadian courts, faced with whether to enforce a foreign order that is contrary to the Charter and which could not be obtained in Canada, would certainly and appropriately decline to enforce such an order. That result would be demanded by the principles of comity and reciprocity.⁷⁰ It is legally incorrect and improper for Canadian courts to grant injunctions against foreign parties in circumstances where they know such an injunction would run directly counter to another country’s sovereign laws.

107. It is a real danger if the scope of injunction granted by the British Columbia courts is ratified by this Court. If Canadian courts assert the power to prohibit Google’s search results worldwide on the basis of a private dispute by a British Columbia resident, without any finding that the activity at issue violates laws outside of Canada, then on what principled basis can Canada object when other countries make worldwide orders? Canada would serve as a catalyst in a move towards the lowest common denominator of free speech on the Internet. Should Turkey grant orders prohibiting Canadians from finding and reading political commentary written about its former Prime Minister Ataturk? Should Russia grant orders prohibiting Canadians from finding and reading websites that contain anti-Kremlin content? Should Thailand grant orders prohibiting Canadians from finding and watching videos critical of the King of Thailand? Failure to limit the scope of a remedial interlocutory injunction to Canada’s territorial boundaries puts Canadian citizens at risk of overbroad orders made in other countries that do not share our commitment to freedom of speech and an “embracing marketplace of ideas.”⁷¹

108. In addition to the Plaintiffs’ failure to satisfy the injunction and other legal principles described above, the courts below should have declined to grant the Worldwide Order, or strictly limited its effect to Canada.

⁶⁹ *Yahoo Inc.*, *supra*, at 1238 (Fisher, J., dissenting in part).

⁷⁰ See, e.g. *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 at para. 58, where this Court rejected an attempt to enforce a US order pertaining to US trademark rights: “Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection.”

⁷¹ *Whatcott*, *supra* at para. 171.

(d) *The Proper Injunction Test*

109. It is clear that the granting of the Worldwide Order ran afoul of numerous areas of substantive Canadian law and policy. It should never have been granted and should be set aside. Going forward, Google submits that speech-limiting injunctions against non-parties should only be considered in light of the principles set out above. The proper test for such an injunction should abide by the same principles illustrated in the context of other speech-limiting injunctions, including publication bans, confidentiality orders, and the *Copyright Act*, as well as respecting Canada's commitment to international comity. While these legal constructs are not directly applicable to the novel problem presented in this case, they can help to shape a nuanced and principled extension to the law.

110. By way of summary, the publication ban test and the *Copyright Act* injunction test frameworks are provided here, together with the *RJR MacDonald* test applied by the Courts below:

<p><i>RJR MacDonald Inc. v. Canada (Attorney General)</i>, [1994] 1 S.C.R. 311, at 332-33</p>	<p><i>R. v. Mentuck</i>, [2001] 3 S.C.R. 442, at para. 23</p>	<p><i>Copyright Act</i>, Section 41.27(4.1)</p>
<p>The applicant must prove that:</p> <p>(a) there is a serious question to be tried;</p> <p>(b) the applicant will suffer irreparable harm if the injunction is not granted; and</p> <p>(c) the balance of convenience favours the granting of the injunction.</p>	<p>A publication ban should only be ordered when:</p> <p>(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and</p> <p>(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.</p>	<p>... [T]he court shall, among any other relevant factors, consider the following in establishing the terms of the injunction:</p> <p>(a) the harm likely to be suffered by the copyright owner if steps are not taken to prevent or restrain the infringement; and</p> <p>(b) the burden imposed on the provider and on the operation of the information location tool, including</p> <p>(i) the aggregate effect of the injunction and any injunctions from other proceedings,</p> <p>(ii) whether implementing the injunction would be technically feasible and effective in addressing the infringement,</p> <p>(iii) whether implementing the injunction would interfere with the use of the information location tool for non-infringing acts, and</p> <p>(iv) the availability of less burdensome and comparably effective means of preventing or restraining the infringement.</p>

111. Thus, in the submission of the Appellant, and keeping in mind the requirements of international comity, if an injunction were to issue against a third party who has not done anything wrong, it should be limited to Canada, and should only issue where the plaintiff has demonstrated:

- (a) a serious question to be tried against the underlying defendant;
- (b) the impugned conduct of the defendant will irreparably harm the interests of the plaintiff;
- (c) the order will be technically feasible and effective, and reasonable alternative measures will not prevent the irreparable harm; and
- (d) the salutary effects of the order outweigh the deleterious effects on the rights and interests of the enjoined party and the public, including the effects on the right to free expression.

112. In addition, the reasonable costs of complying with the injunction should be paid by the party seeking the injunction.

113. Applying this proposed test to the present case, it is clear that no injunction should have issued here. The Plaintiffs would likely establish a serious question to be tried against the Defendants. However, it is plain that an ever-changing order against a single innocent non-party, which must be constantly monitored and amended by the Court, is neither effective nor feasible. Many of the underlying websites remain active and accessible by other means. As well, the salutary effects for the Plaintiffs will be fleeting, as proven by the fact that the Worldwide Order has already been amended multiple times. Putting Google, or any other search engine, in such a position with respect to every private litigation involving access to a website would be an unacceptable burden on the functioning of the Internet.

(e) Conclusion

114. The courts below issued the Worldwide Order, and its amendments, without regard to the status of Google as a non-party, and without appropriate consideration of the important national

and international interests at stake. Properly analyzed, the Worldwide Order is contrary to Canada's well-established protections for freedom of expression and information location tools such as search engines. It cannot be saved by the reasoning of *Norwich* Orders and *Mareva* Injunctions, which are distinct in their origins, availability, and scope.

115. These legal errors are magnified by the futility of the relief granted. The Worldwide Order has not, and will not stop the Defendants' misconduct.

116. This Court and Parliament have already articulated frameworks for dealing with injunctions for Internet-related speech, and the limits on burdening innocent third-parties with purely private enforcement responsibilities. The Worldwide Order does not fit within these parameters and it should thus be set aside or, at a minimum, limited to Canada.

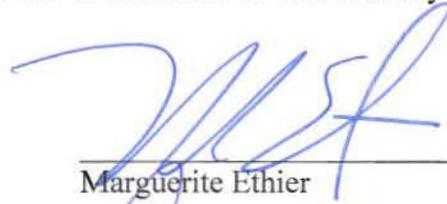
PART IV - SUBMISSIONS ON COSTS

117. The Appellant requests its costs in this Court and throughout.

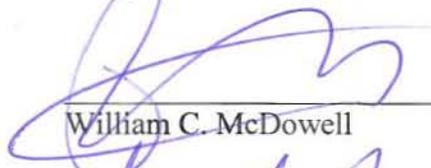
PART V - ORDER REQUESTED

118. The Appellant asks this Court to set aside the order of the Supreme Court of British Columbia with costs in this Court and throughout. In the alternative, the Appellant asks that the order be limited to Google's search results in Canada alone, again with costs in this Court and throughout.

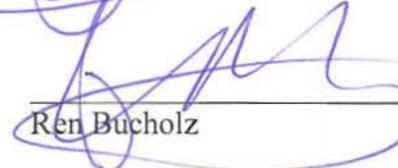
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2016.



Marguerite Ethier



William C. McDowell *per*



Ren Bucholz

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Counsel for the Appellant, Google Inc.

PART VI - TABLE OF AUTHORITIES

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7. <i>Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)</i> , 2010 BCCA 396 (CanLII)	62
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15. <i>City of London v. Talbot Square Ltd.</i> (1978), 22 O.R. (2d) 21 (Div. Ct.)	59
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49. <i>Voltage Pictures LLC v. John Doe et al.</i> , 2015 FC 1364 (CanLII)	76
50. <i>Yahoo Inc. v La Ligue Contre le Racisme et L'Antisemitisme</i> (2001), 169 F Supp 2d 1181	104-105
51. <i>Zeran v. AOL</i> , 129 F.3d 327 (4th Cir. 1997)	99

(b) Secondary Authorities

N/A

PART VII - STATUTORY PROVISIONS

Copyright Act
R.S.C., 1985, c. C-42

[...]

Injunctive relief only — providers of information location tools

41.27 (1) In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject-matter or by communicating that reproduction to the public by telecommunication.

[...]

Factors — scope of injunction

(4.1) If it grants an injunction as set out in subsection (1), the court shall, among any other relevant factors, consider the following in establishing the terms of the injunction:

(a) the harm likely to be suffered by the copyright owner if steps are not taken to prevent or restrain the infringement; and

(b) the burden imposed on the provider and on the operation of the information location tool, including

(i) the aggregate effect of the injunction and any injunctions from other proceedings,

(ii) whether implementing the injunction would be technically feasible and effective in addressing the infringement,

(iii) whether implementing the injunction would interfere with the use of the information location tool for non-infringing acts, and

(iv) the availability of less burdensome and comparably effective means of preventing or restraining the infringement.

Limitation

(4.2) A court is not permitted to grant an injunction under section 39.1 against a provider who is the subject of an injunction set out in subsection (1).

(5) In this section, *information location tool* means any tool that makes it possible to locate information that is available through the Internet or another digital network.

Loi sur le droit d'auteur

L.R.C. 1985, ch. C-42

[...]

Injonction : fournisseurs d'outils de repérage

41.27 (1) Dans les procédures pour violation du droit d'auteur, le titulaire du droit d'auteur ne peut obtenir qu'une injonction comme recours contre le fournisseur d'un outil de repérage en cas de détermination de responsabilité pour violation du droit d'auteur découlant de la reproduction de l'oeuvre ou de l'autre objet du droit d'auteur ou de la communication de la reproduction au public par télécommunication.

[...]

Facteurs : portée de l'injonction

(4.1) S'il accorde l'injonction mentionnée au paragraphe (1), le tribunal tient compte lorsqu'il en établit les termes, en plus de tout autre facteur pertinent, de ce qui suit :

a) l'ampleur des dommages que subirait vraisemblablement le titulaire du droit d'auteur si aucune mesure n'était prise pour prévenir ou restreindre la violation;

b) le fardeau imposé au fournisseur de l'outil de repérage ainsi que sur l'exploitation de l'outil de repérage, notamment :

- (i) l'effet cumulatif de cette injonction eu égard aux injonctions déjà accordées dans d'autres instances,

(ii) le fait que l'exécution de l'injonction constituerait une solution techniquement réalisable et efficace à l'encontre de la violation,

(iii) la possibilité que l'exécution de l'injonction entrave l'utilisation licite de l'outil de repérage,

(iv) l'existence de moyens aussi efficaces et moins contraignants de prévenir ou restreindre la violation.

Limite

(4.2) Le tribunal ne peut accorder l'injonction visée à l'article 39.1 si le fournisseur est déjà visé par une injonction au titre du paragraphe (1).

(5) Au présent article, *outil de repérage* s'entend de tout outil permettant de repérer l'information qui est accessible sur l'Internet ou tout autre réseau numérique.

Communications Decency Act of 1996
47 U.S.C. § 230

[...]

(b) POLICY It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**Directive 2004/48/EC of the European Parliament and of the Council
of 29 April 2004
on the enforcement of intellectual property rights**

[...]

Article 1

Subject matter

This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term 'intellectual property rights' includes industrial property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 thereof or in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.