

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)

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, BRITISH
COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES
ASSOCIATION, ELECTRONIC FRONTIER FOUNDATION, HUMAN RIGHTS WATCH et
al., INTERNATIONAL FEDERATION OF FILM PRODUCERS ASSOCIATIONS,
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY et al.,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS et al., OPEN MEDIA
ENGAGEMENT NETWORKS, and WIKIMEDIA FOUNDATION

Interveners

REPLY FACTUM OF THE APPELLANT, GOOGLE INC.
(Delivered Pursuant to Order of this Court Dated August 10, 2016)

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**
Barristers
130 Adelaide Street West, Suite 2600
Toronto ON M5H 3P5
Tel: (416) 865-2893
Fax: (416) 865-2978

**Marguerite F. Ethier
William C. McDowell
Madison Robins**

Counsel for the Appellant, Google Inc.

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Jeffrey W. Beedell

Agents for Counsel for the Appellant,
Google Inc.

ROBERT FLEMING LAWYERS

915-925 West Georgia Street
 Vancouver, BC V6C 3L2
 Phone: (604) 682-1659
 Email: robbie@fleminglawyer.com

Robert S. Fleming
John Zeljkovich

Counsel for the Respondents Equustek
 Solutions Inc., Robert Angus and Clarma
 Enterprises Inc.

Jeffrey G. Johnston

Department of Justice Canada
 2127 - 284 Wellington Street
 Ottawa, ON K1A 0H8

Telephone: (613) 941-3528
 Fax: (613) 957-8412
 Email:
 jeffrey.johnston@justice.gc.ca

**Counsel for the Intervener,
 Attorney General of Canada**

John Corelli

Attorney General of Ontario
 10th Floor - 720 Bay Street
 Toronto, ON M7A 2S9

Telephone: (416) 326-4600
 Fax: (416) 326-4656
 Email: john.corelli@ontario.ca

**Counsel for the Intervener,
 Attorney General of Ontario**

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
 Ottawa, ON K2P 0R3
 Tel: (613) 695-8855
 Fax: (613) 695-8580

Marie-France Major

Ottawa Agent for Counsel for the Respondents
 Equustek Solutions Inc., Robert Angus and
 Clarma Enterprises Inc.

Christopher Rupar

William F. Pentney, Q.C.
 Deputy Attorney General of Canada
 50 O'Connor Street
 5th Floor, Room 557
 Ottawa, ON K1A 0H8

Telephone: (613) 670-6290
 Fax: (613) 954-1920
 Email: christopher.rupar@justice.gc.ca

**Agent for the Intervener,
 Attorney General of Canada**

Robert E. Houston, Q.C.

Burke-Robertson LLP
 441 Maclaren Street, Suite 200
 Ottawa, ON K2P 2H3

Telephone: (613) 706-0020
 Fax: (613) 235-4430
 Email: rhouston@burkerobertson.com

**Agent for the Intervener,
 Attorney General of Ontario**

**Joe McArthur, Mathew P. Good,
and Tom Posyniak**

Blake, Cassels & Graydon LLP
595 Burrard Street, Suite 2600
Vancouver, BC V7X 1L3

Telephone: (604) 631-3300
Fax: (604) 631-3309
Email: joe.mcarthur@blakes.com

**Counsel for the Intervener,
Canadian Civil Liberties Association**

Avnish Nanda

Nanda & Company
3400, 10180 - 101 Street NW
Edmonton, AB T5J 4K1

Telephone: (780) 801 -5324
Fax: (587) 318-1391
Email: avnish@nandalaw.ca

**Counsel for the Intervener,
OpenMedia Engagement Network**

Nancy Brooks

Blake, Cassels & Graydon LLP
340 Albert Street, Suite 1750
Ottawa, ON K1R 7Y6

Telephone: (613) 788-2247
Fax: (613) 788-2218
Email: nancy.brooks@blakes.com

**Agent for the Intervener,
Canadian Civil Liberties Association**

Cynthia Khoo

Barrister and Solicitor

Telephone: (604) 725-5484
Email: cynthia@openmedia.org

**Agent for the Intervener, OpenMedia
Engagement Network**

Iris Fischer and Helen Richards

Blake, Cassels & Graydon LLP
 199 Bay Street, Suite 4000
 Toronto, ON M5L 1A9

Telephone: (416) 863-2408
 Fax: (416) 863-2653
 Email: iris.fischer@blakes.com

**Counsel for the Interveners,
 Reporters Committee for Freedom of the
 Press, American Society of News Editors,
 Association of Alternative Newsmedia,
 The Center for Investigative Reporting,
 Dow Jones & Company, Inc., First
 Amendment Coalition, First Look Media
 Works, Inc., New England First
 Amendment Coalition, Newspaper
 Association of America, AOL Inc.,
 California Newspaper Publishers
 Association, The Associated Press, The
 Investigative Reporting Workshop at
 American University, Online News
 Association and Society of Professional
 Journalists**

Paul Schabas and Kaley Pulfer

Blake, Cassels & Graydon LLP
 199 Bay Street, Suite 4000
 Toronto, ON M5L 1A9

Telephone: (416) 863-4274
 Fax: (416) 863-2653
 Email: paul.schabas@blakes.com

**Counsel for the Interveners,
 Human Rights Watch, ARTICLE 19,
 Open Net (Korea), Software Freedom
 Law Centre, Center for Technology and
 Society**

Nancy Brooks

Blake, Cassels & Graydon LLP
 340 Albert Street, Suite 1750
 Ottawa, ON K1R 7Y6

Telephone: (613) 788-2218
 Fax: (613) 788-2247
 Email: nancy.brooks@blakes.com

**Agent for the Interveners,
 Reporters Committee for Freedom of the
 Press, American Society of News Editors,
 Association of Alternative Newsmedia, The
 Center for Investigative Reporting, Dow Jones
 & Company, Inc., First Amendment Coalition,
 First Look Media Works, Inc., New England
 First Amendment Coalition, Newspaper
 Association of America, AOL Inc., California
 Newspaper Publishers Association, The
 Associated Press, The Investigative Reporting
 Workshop at American University, Online
 News Association and Society of Professional
 Journalists**

Nancy Brooks

Blake, Cassels & Graydon LLP
 340 Albert Street, Suite 1750
 Ottawa, ON K1R 7Y6

Telephone: (613) 788-2218
 Fax: (613) 788-2247
 Email: nancy.brooks@blakes.com

**Agent for the Interveners,
 Human Rights Watch, ARTICLE 19, Open
 Net (Korea), Software Freedom Law Centre,
 Center for Technology and Society**

David T.S. Fraser/Jane O'Neill

McInnes Cooper
1300- 1969 Upper Water Street
Halifax Nova Scotia B3J 2V1

Telephone: (902) 444-8535
Fax: (902) 425-6350
Email: david.fraser@mcinnescooper.com

**Counsel for the Intervener,
Wikimedia Foundation**

Jeffrey W. Beedell

Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

**Agent for the Intervener,
Wikimedia Foundation**

Justin Safayeni and Carlo Di Carlo

Stockwoods LLP
TD North Tower
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Telephone: (416) 593-7200
Fax: (416) 593-9345
Email: justins@stockwoods.ca

**Counsel for the Intervener,
British Columbia Civil Liberties
Association**

Yael Wexler

Fasken Martineau DuMoulin LLP
1300 - 55 Metcalfe Street
Ottawa, ON K1P 6L5

Telephone: (613) 696-6860
Fax: (613) 230-6423
Email: ywexler@fasken.com

**Counsel for Intervener,
British Columbia Civil Liberties Association**

David Wotherspoon and Daniel Byma

Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3

Telephone: (604) 631-3131
Fax: (604) 631-3232
Email: dwotherspoon@fasken.com

**Counsel for the Intervener,
The Electronic Frontier Foundation**

Yael Wexler

Fasken Martineau DuMoulin LLP
1300 - 55 Metcalfe Street
Ottawa, ON K1P 6L5

Telephone: (613) 696-6860
Fax: (613) 230-6423
Email: ywexler@fasken.com

**Agent for the Intervener,
The Electronic Frontier Foundation**

Gavin MacKenzie and Brooke MacKenzie

MacKenzie Barristers
120 Adelaide Street West, Suite 2100
Toronto, ON M5H 1T1

Telephone: (416) 304-9293
Fax: (416) 304-9296
Email: gavin@mackenziebarristers.com

**Counsel for the Intervener,
International Federation of Film
Producers Associations**

Barry Sookman**Daniel G.C. Glover****Miranda Lam**

McCarthy Tetrault LLP
Suite 5300, Toronto-Dominion Bank Tower
B0x 48, 66 Wellington Street West
Toronto Ontario M5K 1E6

**Counsel for the Interveners The
International Federation of the
Phonographic Industry, Music Canada,
The Canadian Publishers' Council and
the Association of Canadian Publishers,
the International Confederation of
Societies of Authors and Composers, The
International Confederation of Music
Publishers and The Worldwide
Independent Network**

Mark C. Power

Power Law
Suite 1103, 130 Albert Street
Ottawa, ON K1P 504

Telephone: (613) 702-5562
Fax: (613) 702-5562
Email: mpower@ipowerlaw.ca

**Agent for the Intervener,
International Federation of Film Producers
Associations**

Robert E. Houston, Q.C.

Burke-Robertson LLP
441 Maclaren Street, Suite 200
Ottawa, ON K2P 2H3

Telephone: (613) 706-0020
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

**Agent for the Interveners The International
Federation of the Phonographic Industry,
Music Canada, The Canadian Publishers'
Council and the Association of Canadian
Publishers, the International Confederation of
Societies of Authors and Composers, The
International Confederation of Music
Publishers and The Worldwide Independent
Network**

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Part I - OVERVIEW

1. Google Inc. ("Google") delivers this factum in reply to the factums of the Interveners the International Federation of the Phonographic Industry et al. (the "Music Interveners") and the International Federation of Film Producers Associations (the "Film Interveners").

2. The submissions of the Film and Music Interveners ask this Court to turn Canada into the destination of first resort for plaintiffs seeking worldwide protection of intellectual property rights. Intellectual property rights are, for the most part, territorial. The Film and Music Interveners' submissions concerning the need for effective protections for intellectual property rights, *i.e.*, private commercial assets, obscure the real impact of their submissions, which is to create a new form of intellectual property protection in Canada that is exportable to other jurisdictions by seeking injunctions against third parties like Google which operate globally.

3. Contrary to the suggestion of the Music Interveners, Google does not and has never contended that the Internet is a "no law" land. What these Interveners are really concerned about is not the absence of law from the Internet, but rather elimination of the long established territorial limitations of legal jurisdiction. What they really want is a new form of transnational made-in-Canada law on the web.

4. In its most basic sense, the word "jurisdiction" means "to speak the law". The submissions of the Film and Music Interveners contend for a theory of Internet jurisdiction that too easily permits the courts of individual provinces in Canada to "speak the law" to the entire world.

Part II - STATEMENT OF ARGUMENT

5. The Film and Music Interveners go to great lengths to create the impression that what occurred in the Courts below was the natural outgrowth of a body of Internet jurisprudence endorsing global remedial jurisdiction for national courts in civil disputes involving rights and their infringement where the Internet is involved.

6. These submissions obscure the reality that the British Columbia Courts did something new that raises concerns about comity that require principled consideration by this Court.

7. The issues of comity that arise from the orders granted below are new. Yet at paragraph 20 of their factum, the Music Interveners contend that deindexing orders do not raise any special issues of comity because they apply to persons over which the Court has personal jurisdiction.

8. To provide any assistance to this Court, it is insufficient to say that worldwide orders are permissible so long as personal jurisdiction exists. “Jurisdiction” and even “personal jurisdiction” are wide concepts whose use can easily obscure important issues of policy as to the legitimate scope of court orders. In the *Fourie v. Le Roux* case cited by the Film Interveners, the Court observed that the word “jurisdiction” is “a word of some ambiguity.”¹

9. The existence of personal jurisdiction does not remove legitimate concerns as to proper territorial limitations on the scope of court orders. Nor does it legitimize the making of overtly extraterritorial orders simply on a balance of convenience test.

10. A compelling example of the need for caution is the decision of the United States Court of Appeals for the Second Circuit in *Microsoft v. United States*,² where the Court quashed a warrant served on Microsoft at its head offices seeking to reach certain electronic communications of a Microsoft customer stored on servers in Ireland. The fact that personal jurisdiction over Microsoft unambiguously existed did not justify the extraterritorial reach of the warrant.

11. Microsoft at least was domiciled in the place whose courts were asked to order it to turn over foreign data over which it had control. The personal jurisdiction claimed here is even more remote. Central to the claimed jurisdiction in this case was that Google was found to be carrying on business in British Columbia, a fact that this Court has specifically found needs to be treated with caution where personal jurisdiction is based upon business carried on over the Internet.³

¹ *Fourie v. Le Roux & Ors* [2007] UKHL 1 at para. 25, Book of Authorities of the Film Interveners [Film BOA] at Tab 17, Book of Authorities of the Music Interveners [Music BOA] at Tab 29

² *Microsoft v United States*, Docket No. 14-2985, United States Court of Appeals for the Second Circuit (July 13, 2016), Book of Authorities of the Intervener Attorney General of Canada at Tab 13

³ *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572 para 87, Book of Authorities of the Appellant [Appellant BOA] at Tab 7

Caution should not bar entirely the granting of such orders in appropriate cases, but care needs to be taken in defining exactly how to best accommodate legitimate concerns about the territorial scope of enforcement jurisdiction where the person sought to be enjoined is domiciled outside Canada.

12. The cases that the Music Interveners rely upon in support of their claim that extraterritoriality is permissible where personal jurisdiction exists do not minimise what should be proper concerns about extraterritorial reach. In most of these cases, there is some specific substantive-law basis to justify extraterritorial effects.

13. The *Pavlovich* case⁴ cited by the Music Interveners, for example, involved wrongful conduct that was intended to have detrimental effects within the jurisdiction of the court. As a matter of commonly accepted principles of civil jurisdiction, such activity was actionable in the place where the effects were intended to be felt.

14. The *Gonzalez* “right to be forgotten” case⁵ involved the Court interpreting the intended scope of a stipulation of positive law. The case concerned whether Directive 95/46/EC could reach the search activities of Google Inc. Applicable legislation can always stipulate that it is intended to operate extraterritorially, and domestic courts charged with interpreting such legislation have the authority to interpret it as having that effect. This fact says nothing about whether it is consistent with principles of international comity for a court to pronounce orders with extraterritorial effect as a pure exercise of enforcement jurisdiction involving no substantive right.

15. As this Court in *Pro Swing Inc. v. Elta Golf Inc.* noted in commenting on the lack of territorial restrictions on a foreign order respecting certain trademarks:

Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems. In the future, when considering cases that are likely to result in proceedings in a foreign jurisdiction, judges

⁴ *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909 (Cal App Ct, 6th Dist. 2001), Music BOA at Tab 53

⁵ *Google Spain SL, Google Inc v Agencia Española de Protección de Datos*, Mario Costeja González, C-131/12 [2014], CURIA, Appellant BOA at Tab 29, Music BOA at Tab 31, Film BOA at Tab 19

will no doubt be alerted to the need to be clear as regards territoriality. Until now, this was not an issue because judgments enforcing trademark rights through injunctive relief were, by nature, not exportable.⁶

16. The concerns raised by the Music Interveners' submissions obscure the fact that in this case there has been no finding of the infringement of intellectual property rights outside of Canada, and that even in Canada, the only finding that has been made is as to the existence of a serious issue to be tried as to infringement of Canadian IP rights.⁷

17. The submissions of both the Film and Music Interveners provide little assistance to this Court as to whether the unrestricted worldwide scope of the order granted below was justified. Of all of the voluminous authorities they cite, only the *CNIL* decision purports to require Google to delist certain search results globally without regard to whether the user initiating the search resides in the territorial jurisdiction granting the order.⁸ The *CNIL* explicitly rejected Google's proposed solution of delisting results based on the geographic location of the requesting IP address, a position contrary to decisions issued in other European countries.⁹

18. That *CNIL* order has been appealed by Google to the Conseil d'Etat in France. Moreover, the *CNIL* decision is simply an outgrowth of the *Gonzalez* decision concerning the right to be forgotten, and an indirect application of the same substantive law jurisdiction invoked in that case. That substantive law jurisdiction creates a right belonging to one party, as against a search engine, to compel the search engine to take certain steps to de-list results associated with that person.

19. But that is as far as it goes. The Film Interveners assert, relying upon the *CNIL* decision, that "other government bodies have maintained that neither a geolocation option nor suggestions akin to Google's .ca proposal are sufficient to vindicate claimants rights."¹⁰ The force of this

⁶ *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 SCR 612 at para 58, Appellant BOA at Tab 51

⁷ *Equustek Solutions Inc. v Jack*, 2014 BCSC 1063 at para 151, Appellant's Record at Tab A; *Equustek Solutions Inc. v Google Inc.*, 2015 BCCA 265 at para 110, Appellant's Record at Tab F

⁸ *Commission Nationale de l'informatique et des Libelles*, Decision No. 2016-054 of 10 March 2016 (Restricted Committee), Film BOA at Tab 12

⁹ *Max Moseley v Google Inc.*, Case No 324 O 264/11, Hamburg Regional Court, 24 January 2014, Film BOA at Tab 23, Music BOA at Tab 47. See also the UK and Spanish decisions cited in Footnote 56 of Appellant's Factum.

¹⁰ Film Interveners Factum at para. 28.

submission, however, depends upon the plaintiff demonstrating that his or her right is a substantive law right to worldwide protection. It does not follow that simply because an overtly extraterritorial order would provide enhanced protection to a claimed right, the Court must have jurisdiction to impose it, and should not be concerned about the comity implications of doing so.

20. It is therefore necessary to treat with some caution the volume of authorities that the Film and Music Interveners rely upon. Each case depends upon its own context and none, with the possible exception of the *CNIL* decision, which is under appeal, would support the worldwide order granted in this case.

21. Many of the cases cited by the Film and Music Interveners are careful on their face to indicate that they are only meant to affect Internet users in the tribunal's territory:

- (a) In *APC v Orange SA*, the order was on its face limited to requests emanating from French territory. The order under appeal in that case stipulated that it would:

Order Google Inc., Google France, Microsoft Inc., Microsoft France, Yahoo! Inc., Yahoo! France Holdings and Orange (formerly Orange Portails GIE) to take or have any and all useful measures taken in order to prevent the appearance of any response or any result on their services referring to any of the pages of the websites fifostream and dpstream, and insofar as necessary, to any of the pages of the websites "allostreaming", "alloshowtv", "allosshare" and "allomovies" *in response to any request stemming from surfers, in the French departments and uni-communities, as well as the islands of Wallis and Futuna, in New Caledonia and in the French Southern and Antarctic Territories, immediately and at the latest within fifteen days as of the service of its decision, for a period of twelve months as of the implementation of said measures.*¹¹

- (b) Similarly, the order granted in *Asociacion de Gestion de Derechos Intelectuales v Jazz Telecom* also contained explicit territorial limits. The respondents were ordered to:

¹¹ *APC v Orange SA* Case No 14/-1359, Paris Court of Appeal, 15 March 2016 at p. 6, Music BOA at Tab 4

Adopt, (...), all the necessary measures, and to take all necessary steps to fully and effectively impede access, *from the Spanish territory*, to the infringing website www.exvagos.com.¹²

(c) In *Max Mosley v Google France*, the order provided that:

...an injunction will be issued, on pain of a monetary penalty, as specified in terms of the judgment, to GOOGLE Inc. to remove from and cease posting on the *Google Images* search engine that it operates, *accessible in France*, the nine images appearing on pages 16 and 17 of Max Mosley's submissions duly served electronically on November 5, 2012, for a period of five years starting from the expiry of the two month period following the handing down of this decision.¹³

(d) The order sought and obtained in the German "Max Mosley" case was confined to German ".de" domains.¹⁴

(e) Similarly, the order granted in *APC et al. v. Auchan Telecom et al.* expressly restricted its scope to requests made by users in French territories:

Their claims should be allowed within the limits specified in the operative part of the judgment by ordering the defendant search engine providers to take or cause to be taken all appropriate measures to prevent any response and any result linking to one of the fifostream and dpstream site pages, and if need be to one of the pages of the "allostreaming", "alloshowtv", "allosshare" and "allomovies" sites showing up on their services *in response to any query from Internet users in the French departments and single administrative units as well as in the territories referred to above*.¹⁵

22. Moreover, the injunctions against ISPs that are referenced throughout the submissions of the Film and Music Interveners are inherently territorial in scope. In such cases, a rights-holder seeks out the service provider who is actively facilitating a breach of that party's rights. That

¹² *Asociacion de Gestion de Derechos Intelectuales v Jazz Telecom*, Judgment No. 219/16, Second Commercial Court of Barcelona, 25 July 2016 at p 69, Film BOA at Tab 7

¹³ *Max Mosley v Google France, SARL* Docket No. 11/07970, Regional Court of Paris, 17th Chamber, 6 November 2013 (translated from French) at p. 13, Film BOA at Tab 21, Music BOA at Tab 45

¹⁴ *Max Mosley v Google Inc.*, Case No. 324 O 264/11, Hamburg Regional Court, 24 January 2014 (translated from German), Film BOA at Tab 23, Music BOA at Tab 47

¹⁵ *APC et al. v. Auchan Telecom et al.*, 11/60013, Judgment of November 28, 2013 (Tribunal de Grand Instance de Paris) at para. 2.8.2.1, Music BOA at Tab 3

normally occurs where the ISP is physically domiciled, such that these cases raise no inherent territoriality problems.¹⁶

23. These territorial scope limitations reflect established principles of international law recognized by this Court. As this Court noted in *Tolofson v. Jensen*:

On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits.¹⁷

24. The order granted by Fenlon J. and affirmed by the Court of Appeal is almost unprecedented in that it does not evidence any territorial restrictions. Affirming the power of Canadian courts to make such a sweeping order risks turning Canada into an attractive forum shopping destination offering a superficially appealing remedy that simulates a remedy that would be available if intellectual property rights were not territorial.

25. The Film Intervenors incorrectly claim at paragraph 29 of their factum that "American courts have ordered injunctions against Internet intermediaries without any geographic limitations, including against search engines with notice of the injunctions." Two of these

¹⁶ For example, copyright holders were required to seek injunctions requiring ISPs to block access to the copyright-infringing website "The Pirate Bay" in multiple jurisdictions because of the limited territorial scope of blocking orders: Belgium: *BAF v Begacom and Telenet*, 2010/AR/2541, final ruling (26 September 2011)(Court of Appeal), Music BOA at Tab 6; Germany: *Senator Home Entertainment GmbH v IAPI GmbH*, Case No 14 O 332/15, Regional Court of Cologne, 14th Civil Chamber, 22 December 2015, Film BOA at Tab 29; Denmark: *Telenor v MUSIC Denmark et al*, 153/2009, Decision (May 27, 2010) (Danish Supreme Court), Film BOA at Tab 74; Iceland: *STEF v Fjarskptim hf*, Case K-8/2013 D.C. Reykjavik, October 14, 2014, Music BOA at Tab 71; Sweden: *Columbia Pictures Industries Inc v Portlane AB* (Swedish Court of Appeal, 4 May 2010), cited in *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWCA 1981 (Ch) at para 96, Music BOA at Tab 78; Norway: *Nordic Records Norway AS v Telenor ASA* (Borgarting Court of Appeal, 9 February 2010), cited in *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWCA 1981 (Ch) at para 96, Music BOA at Tab 78. Similarly, rights holders only obtained injunctions to prevent the main retail ISPs in the United Kingdom from providing their domestic customers with access to infringing websites in *Cartier International AG & Ors v The British Sky Broadcasting Limited & Ors*, [2016] EWCA CIV658 (CA) at paras 1-2, Appellant BOA at Tab 11, Music BOA at Tab 13, and *Twentieth Century Fox Film Corporation v British Telecommunications PLC*, [2011] EWHC 2714 (Ch) at paras 7-9, Film BOA at Tab 32 and Music BOA at Tab 79

¹⁷ *Tolofson v. Jensen* [1994] 3 SCR 1022 at para. 37, Music BOA at Tab 76

authorities are unpublished default orders.¹⁸ No context is supplied illustrating whether these orders were granted over the objections of intermediaries subject to them. Nor is there any indication of whether they were ever enforced against any Internet intermediaries.

26. The only decision cited in this paragraph that advances substantive reasoning in support of the proposition contended for is *Arista Records LLC v Tkach*.¹⁹ That case, however, did not concern a search engine but rather CloudFlare, a domain name service provider. The order was granted on the basis of the court's assumption that the defendants engaged CloudFlare to convert the domain name into the IP address for the website associated with the domain name. *Arista* involved a situation where the intermediary in question was directly facilitating the breach of a court order by providing the technological means by which the defendant actually continued to breach it.

27. There is a material difference between arguably being in a position to stop or frustrate illegality on the one hand, and actively participating in the defendant's illegal efforts on the other. The intermediary in *Arista Records* was specifically told that its domain name service—which was the means by which a court order was being breached—was having that effect. Once the intermediary had that knowledge, it came under an obligation not to further involve itself in the breach of a court order.

28. This one example illustrates what is a general tendency of the Film and Music Interveners to elide material distinctions between cases and to abstract from cases propositions that are far broader than are justified by their facts. Among the material distinctions that these Interveners gloss over in their submissions are the following:

- (a) **Enablers and Bystanders.** The distinction between a third party who becomes the means by which a wrongdoer commits a wrong and a third party who is arguably merely in a position to stop it. Google is not an enabler but rather is only

¹⁸ *ABS-CBN Corporation v. Jeffrey Ashby*, Case No 14-CV-1275 HU, US Dist Ct (Oregon, Portland Div), 8 August 2014, Film BOA at Tab 2, Music BOA at Tab 1; *ABS-CBN Corporation v. Buhaypinoyofw.net*, Case No 14-CV-62664-UU, US Dist Ct (SD Florida), 9 February 2015, Film BOA at Tab 3

¹⁹ 122 F Supp 3d 32 (SDNY 2015), Film BOA at Tab 6, Music BOA at Tab 5

a bystander with the ability to censor speech on a single Internet service on behalf of someone having suffered a harm that Google had no part in causing;

- (b) **Substance and Procedure.** The distinction between substantive, positive-law rights against third parties (such as, for example, a person's right as against search engines to be delisted and "forgotten") and civil remedies against third parties that are ancillary to proceedings not involving them.

29. Before one can obtain any guidance from the jurisprudence relied upon by the Film and Music Interveners, it is necessary to pay careful attention to the specific context in which each of the cases was decided.

30. These Interveners provide little assistance to this Court as to how exactly the mass of international judicial experience they have presented should influence the Court in resolving the issues in this case. They seem to suggest only that the concept of an *Equustek* order *can* be done because something remotely like it has been done elsewhere, which as described above, is not accurate.

31. The issue that this Court must decide is whether it *should* be done. Google is a bystander, an unconnected third party who is asked to be drawn into litigation in which it has no involvement.

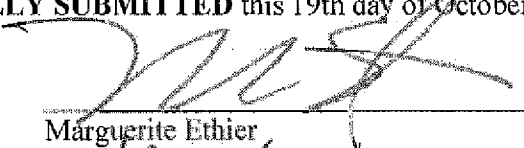
32. Pure procedural remedies unconnected with a substantive merits test should not be obtained against mere bystanders, but should be reserved for situations closely analogous to the *Mareva* cases or the contempt cases involving aiding and abetting the breach of court orders. A *Mareva* respondent has direct control over the very substance of the litigation involving the plaintiff's rights. A party aiding and abetting a contempt directly involves him or herself in the conduct sought to be enjoined. There are principled reasons why cases granting orders against third parties should only embrace third parties with so close and direct a connection to the wrongdoing at issue. It may be that direct enablers like web hosting services, ISPs, and domain name service companies²⁰ *could* fall within this category.

²⁰ Most of the Internet injunction cases relied upon by the Film and Music Interveners fall into this category.

33. Where, as here, a pure third party is involved, it is necessary to identify a clear and principled substantive law test to delineate when, how, and for how long an innocent third party can be deputized to assist the plaintiff. Google submits that cases like *Norwich Pharmacal* are examples of such a case. To achieve a third party's help, it should be necessary for a plaintiff not simply to issue a notice of motion or interlocutory application against that party and establish that the balance of convenience favours it. Rather, a party seeking such relief should issue an originating application claiming a clear entitlement to it as a matter of substantive law to claim the third party's help. Third parties require greater guidance than a simple balance of convenience test in order to know whether and how they owe positive-law duties to come to the assistance of rights holders.

34. Neither the Film and Music Interveners, the Respondents, nor the Courts below, offered any clear test to delineate when such orders should be granted. The judgments below granted profoundly intrusive and extraterritorial relief based almost entirely on a balance of convenience standard. The values implicated in cases like these, including most importantly international comity and freedom of expression, should demand much more than this.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2016.



Marguerite Ethier

William C. McDowell

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**
Counsel for the Appellant, Google Inc.

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