S.C.C. Court File No. 36602

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

GOOGLE INC.

Appellant

and

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

Respondents

and

MORGAN JACK, ANDREW CRAWFORD, DATALINK TECHNOLOGY GATEWAYS INC., DATALINK 5, DATALINK 6, JOHN DOE, DATALINK TECHNOLOGIES GATEWAYS LLC, and LEE INGRAM

Non-Parties to the Appeal

and

THE INTERNATIONAL FEDERATION OF FILM PRODUCERS ASSOCIATIONS AND OTHERS*

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER,
INTERNATIONAL FEDERATION OF FILM PRODUCERS ASSOCIATIONS/
FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DES PRODUCTEURS DE FILMS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW

1. This appeal raises the issue of Canadian courts' competence to enforce claimants' rights in the borderless context of the internet. The rule of law is threatened if claimants cannot obtain a meaningful remedy to vindicate their rights, and if those who commit unlawful acts are able to flout court orders.

2. Canadian courts have equitable jurisdiction to grant ancillary orders against non-parties to give effect to existing orders. This authority is not new, and it is not limited to persons interacting face-to-face or businesses operating in bricks-and-mortar shops. This authority also applies to the internet, provided that the court has jurisdiction in respect of the relevant parties.

3. The British Columbia Supreme Court's order against Google is not groundbreaking. It is a principled and necessary application of the Court's inherent and equitable jurisdiction to the realities of e-commerce in an increasingly interconnected marketplace. Canadian courts have jurisdiction to grant equitable relief to enforce orders concerning unlawful activity online, including by enlisting intermediaries' assistance to curtail wrongdoers' attempts to circumvent the rule of law.

4. The Order granted below is just and equitable, and does not run afoul of freedom of expression. A court should undoubtedly consider how granting equitable relief may materially affect other interests. In cases such as this, however, where the content at issue is commercial speech promoting infringing products, contrary to court orders, freedom of expression interests do not outweigh the claimant's rights or the public interest in meaningful enforcement of judicial decisions.

5. The International Federation of Film Producers' Associations ("**FIAPF**")[1] represents the interests of motion picture and television producers worldwide. FIAPF intervened in this appeal because it raises fundamental questions respecting Canadian courts' authority to constrain unlawful activities on the internet and the scope of orders for such relief, both of which are issues on which FIAPF and its members have extensive experience internationally.

PART II – STATEMENT OF POSITION ON QUESTIONS IN ISSUE

6. This appeal raises the question: Do Canadian superior courts have jurisdiction to make an order with worldwide effect against a non-party internet intermediary to enforce an existing order?

7. FIAPF submits the answer to this question is "yes". Orders against internet intermediaries such as the Order granted below are consistent with Canadian courts' equitable jurisdiction and with international jurisprudence confirming the need for such remedies to maintain the rule of law.

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[1] The acronym derives from the organization's French name, Fédération Internationale des Associations des Producteurs de Films.

PART III – STATEMENT OF ARGUMENT

A. *Canadian courts' jurisdiction to grant equitable relief*

8. Canadian courts have jurisdiction to grant equitable relief against non-party internet intermediaries in order to effectively enforce judicial orders constraining illegal activities online.

9. A superior court's inherent jurisdiction is broad and unlimited. Superior courts have a "mandate to administer justice", and as such their inherent jurisdiction includes the authority to control the process of the court and ensure the machinery of the court functions in an orderly and effective manner.[2] Thus, in *AG Canada v Law Society of BC,* this Court confirmed that superior courts have inherent jurisdiction to issue ancillary orders to ensure the effectiveness of their dispositions.[3]

10. This Court stated in *R v Caron* that courts' inherent jurisdiction "may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways", adding:

> The inherent jurisdiction of the provincial superior courts is broadly defined as "a residual source of powers, which the court may draw upon as necessary ***whenever it is just or equitable to do so***". These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner"…[4]

11. A superior court's inherent jurisdiction to grant equitable remedies is flexible, and can be applied to new circumstances where injustice arises. As Lord Nicholls of Birkenhead stated in *Mercedes Benz AG v Herbert Heinz Horst Leiduck*: "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but ***the criterion is injustice***."[5] This Court echoed this principle in *Canada (Human Rights Commission) v Canadian Liberty Net*, noting that the purpose of inherent jurisdiction is to ensure that where there is a right, there is a court competent to vindicate that right.[6]

12. The oft-cited House of Lords decision in *Norwich Pharmacal* provides a classic example of a court applying its equitable authority to order a non-party to assist a wronged party to obtain a legal remedy.[7] Canadian courts have adopted the Norwich order, and accordingly have granted various

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[2] *R v Cunningham*, 2010 SCC 10 at para 18, citing IH Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr Legal Probs 23, at pp 27-28.
[3] *AG Canada v Law Society of BC,* [1982] 2 SCR 307 at 330.
[4] *R v Caron*, 2011 SCC 5 at paras 24 and 29, citing IH Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr Legal Probs 23 [emphasis added, references omitted].
[5] *Mercedes Benz AG v Herbert Heinz Horst Leiduck*, [1996] AC 284 at 308 (JCPC) [emphasis added], dissenting on other grounds, cited with approval in *Cartier International AG v British Sky Broadcasting Limited*, [2016] EWCA Civ 658, per Lord Justice Kitchin.
[6] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 32.
[7] *Norwich Pharmacal Co. v Customs and Excise Commissioners* (1973), [1974] AC 133 (HL) [*Norwich Pharmacal*].

injunctions in respect of non-parties,[8] including orders with extra-territorial effect. For instance, in *Barrick Gold Corp v Lopehandia*, the Ontario Court of Appeal enjoined an individual resident in British Columbia from making defamatory statements on the internet, in part on the basis that the injunction would prevent Yahoo Canada, an internet message board operator with offices in Ontario, from posting the defamatory material on its message boards, which were accessible worldwide.[9]

13. The Order in this case is simply another example of a superior court exercising its equitable jurisdiction to order a non-party to assist a wronged party in enforcing its legal rights. The fact that the non-party is a search engine is immaterial. Canadian courts have authority to order search engines to frustrate access to unlawful activity on the internet by delisting websites from search results, whether accessed through a Canadian domain (e.g., www.searchengine.ca), a generic top-level domain (e.g., www.searchengine.com), or another country domain (e.g., www.searchengine.fr).

B. *Orders against non-party internet intermediaries: an international perspective*

14. The Order granted below is not unique. Courts around the world have recognized the need to grant equitable relief involving non-party internet intermediaries where an ancillary order is needed to provide a meaningful remedy for the infringement of a wronged party's legal rights.

15. Two important principles emerge from the international case law:

a. Internet intermediaries are active participants in the online marketplace, and are optimally positioned to help prevent the infringement of rights online by ceasing to provide access and support to websites with primarily illegal content; and

b. Orders respecting unlawful activity on the internet cannot be restricted to a single country domain if such orders are to be effective and meaningful.

16. The cases below demonstrate that courts around the world have agreed that orders against internet intermediaries, including search engines, are not only appropriate but necessary to enforce parties' legal rights and maintain the rule of law.

a. Intermediaries are best placed to prevent the infringement of rights online

17. As was noted in a Hong Kong decision against Google: "a search engine is [a user's] portal to the internet. It enables the user to peruse a huge volume of websites which would otherwise be an

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[8] See *Glaxo Wellcome PLC v Canada (Minister of National Revenue)*, [1998] 4 FC 439 (CA); *Alberta (Treasury Branches) v Ghermezian*, [2002] AJ No 524, 51 Alta LR (4th) 94 (CA), leave to appeal dismissed [2002] SCCA No 235; *Isofoton SA v Toronto Dominion Bank* (2007), 85 OR (3d) 780 (SCJ); *York University v Bell Canada Enterprises* (2009), 99 OR (3d) 695 (SCJ)
[9] *Barrick Gold Corp v Lopehandia*, [2004] OJ No 2329 (CA) at paras 77 & 79.

unmanageable task".[10] In this unique role as "portal to the internet", search engines and other intermediaries are optimally positioned to assist our courts in providing a remedy for unlawful activity online.[11]

18. The decisions of foreign courts are illustrative. In *Google Spain v Mario Costeja González* ("***Google Spain***"),[12] the Court of Justice of the European Union ("**CJEU**") held that a search engine must delist private information from search results upon a citizen's request, and that this "right to be forgotten" overrides the economic interest of the search engine operator.[13] The CJEU highlighted that search engines have obligations respecting the links they make accessible to internet users, noting that "activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user… including to internet users who otherwise would not have found the web page on which those data are published".[14]

19. Similarly, in *APC v Orange SA* ("***Allostreaming***") the Paris Court of Appeal ordered two search engines to delist numerous websites with unlawful content. The court squarely rejected the argument that search engines play a neutral and purely technical role in the dissemination of content, holding: "search engines on the Internet – which do not have only a limited and purely indexing and referencing function – actually participate, like the Internet service providers, in the transmission on the network of an infringement of a protected work committed by a third party…".[15]

20. Most recently, the Court of Appeal of England and Wales in *Cartier International AG v British Sky Broadcasting* ("***Cartier***") upheld an injunction requiring an internet intermediary to block access to websites selling counterfeit goods. In so doing, Lord Justice Kitchin highlighted that the court has authority not only in relation to wrongdoers, but to grant an injunction "in all cases in which it appears to be just and convenient to do so". He also drew an apposite analogy to Norwich orders: "once [an intermediary] has become aware that its services are being used by third parties to infringe an intellectual

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[10] Y*eung v Google Inc*, No 1383/2012, High Court of the Hong Kong Special Administrative Region, 5 August 2014, at para 23 [*Yeung*].
[11] Google did not contest the assertion that the defendants could not be commercially successful if they could not be found through a Google search: Factum of the Respondent, Equustek Solutions Inc, dated August 8, 2016, at para 19 [Equustek Factum]; *Equustek Solutions Inc v Jack*, 2014 BCSC 1063 at para 152.
[12] *Google Spain v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Case C-131/12, Court of Justice of the European Union (Grand Chamber), 13 May 2014 (translated from Spanish) [*Google Spain*].
[13] *Google Spain, supra,* at paras 81 & 88.
[14] *Google Spain, supra,* at para 36. See also para 87 ("the inclusion in the list of results displayed following a search… makes access to that information appreciably easier for any internet user… and may play a decisive role in the dissemination of that information").
[15] *Association des Producteurs de Cinéma (APC) v Orange SA*, Case No 14/01359, Paris Court of Appeal, Unit 5 – Chamber 1, 15 March 2016, at p. 14 [*Allostreaming*].

property right, then it becomes subject to a duty to take proportionate measures to prevent or reduce such infringements even though it is not itself liable for them".[16]

21. The need for an ancillary order against non-party intermediaries is amplified when the websites featuring unlawful activity are hosted abroad. As noted by the CJEU Advocate General in *UPC Telekabel Wein v Constantin Film Verleih* ("***Telekabel***"), in such circumstances "…the website and its operators often cannot be prosecuted. The intermediary remains as the appropriate starting point."[17] In ordering an ISP to assist in effecting a remedy for widespread copyright infringement in *Disney v Telenor Norge AS*, the Oslo District Court put the matter simply: "As neutral intermediaries, they have the best opportunity to stop the infringements by blocking their customers' access to websites where infringements take place on a large scale".[18]

22. In addition to the cases noted above, other foreign courts have granted numerous orders requiring non-party internet intermediaries to assist in the enforcement of recognized rights, including in the United States,[19] Spain,[20] Germany,[21] Norway,[22] Finland,[23] and Romania.[24]

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[16] *Cartier International AG v British Sky Broadcasting Limited*, [2016] EWCA Civ 658 at paras 36, 40-46 & 55-56 [*Cartier*]. *Cartier*, along with a number of other foreign decisions respecting the enforcement of rights online, pertains to another internet intermediary, an internet service provider ("ISP"). Although ISPs typically operate in a particular geographic area, unlike global search engines, the same principles can apply and have been applied to both types of intermediaries.

[17] *UPC Telekabel Wein GmbH v Constantin Film Verleih GmbH*, Case C-314/12 (translated from German) at para 57, Opinion of Advocate General Cruz Villalón, delivered on 26 November 2013.

[18] *Disney Entertainment Inc v Telenor Norge AS*, Case No 16-072899TVI-OTIR/08, Oslo District Court, 22 June 2016, at p. 5 [*Disney v Telenor*]. European Union Directive 2001/29/EC addresses precisely this issue, stating: "…in a digital context, it is possible that third parties use intermediary services ever more frequently to carry out unlawful activities. In many cases, these intermediaries are those that are in the best position to put an end to said unlawful activities … rightholders must have the possibility to request protective measures against the intermediary that transmits via the network the infringement…": recital 59, cited with approval in *Asociacion de Gestion de Derechos Intelectuales v Jazz Telecom*, Judgment No. 219/16, 2nd Commercial Court of Barcelona, 25 July 2016 ["*Derechos*"]; *Cartier, supra*.

[19] *Richemont International SA v Tony Chen*, Civil Action No 12-CV-6689 (WHP), US Dist Ct (SD New York), 4 January 2013 (permanent injunction against numerous non-parties, including Google, to prevent continuing infringements by the sale of counterfeit goods online); *Arista Records LLC v Tkach*, 122 F Supp 3d 32 (SDNY 2015) [*Arista*] (see esp. p 38: "It is not determinative that CloudFlare's services are automated, that CloudFlare lacks a specific desire or motivation to help the Defendant violate the injunction, or that the Grooveshark sites would continue to exist even without CloudFlare's assistance."); *Dish Network v Miles Dillion*, 2012 WL 368214, No 12-CV-157 BTM (NLS), US Dist Ct (SD California), 3 February 2012; *True Religion Apparel Inc. v Xiaokang Lei*, Case No 11-Civ-8242 (HB), US Dist Ct (SDNY), 12 March 2012; *Paramount Pictures v John Does*, Case No 15-CV-5819 PAC, US Dist Ct (SD New York), 24 November 2015; *ABS-CBN Corporation v Jeffrey Ashby*, Case No 14-CV-1275 HU, US Dist Ct (Oregon, Portland Div), 8 August 2014; *ABS-CBN Corporation v Buhaypinoyofw.net*, Case No 14-CV-62664-UU, US Dist Ct (SD Florida), 9 February 2015; *Warner Bros. Entertainment Inc. v John Doe*, Civil Action No 14-CV-3492 KPF, US Dist Ct (SDNY), 3 October 2014.

[20] *Google Spain, supra*; *Asociacion de Gestion de Derechos Intelectuales v Jazz Telecom*, Judgment No. 219/16, 2nd Commercial Court of Barcelona, 25 July 2016

[21] *UPC Telekabel Wein GmbH v Constantin Film Verleih GmbH*, Case C-314/12, Court of Justice of the European Union (Fourth Chamber), 27 March 2014 (translated from German) [*Telekabel*]; *Senator Home Entertainment GmbH v 1API GmbH*, Case No 14 O 332/15, Regional Court of Cologne, 14th Civil Chamber, 22 December 2015.

[22] *Disney v Telenor, supra*; *Warner Bros. Entertainment Norge AS v Telenor Norge AS*, Case No 15-067093TVI-OTIR/05, Oslo District Court, 1 September 2015 [*WB v Telenor*].

[23] *Finnish National Group of IFPI v Anvia Oyj*, Docket No 2015/625, Decision 243/16, Market Court (Finland), 29 April 2016.

[24] *Twentieth Century Fox Film Corporation v Voxility S.R.L.*, File No 36942/3/2013, Bucharest Tribunal – 3rd Civil Section, 22 September 2014 (translated from Romanian).

23. These cases highlight that an internet intermediary need not entirely block access to an offending website in order to achieve a meaningful remedy. The recent decision in *Cartier* is exemplary. Like Google in this case,[25] the intermediaries in *Cartier* argued that the rightsholders had not demonstrated that the order would be "effective" in defeating the infringement of its rights. The Court of Appeal disagreed, holding that "the applicable criterion of efficacy when considering a website blocking order is whether the measures required by the order will *at least seriously discourage* users from accessing the target website".[26] The Hamburg Regional Court also applied this principle in ordering Google to delist search results linking to a claimant's private images, stating: "The fact that these images, if blocked by the defendant, can still be distributed via other search engines and in particular social networks, does not relieve the defendant of the obligation to which it is subject.[27]

b. Orders respecting unlawful online activity cannot be limited to a country domain

24. Google suggests that it delist the defendants' websites from only its Canadian domain, www.google.ca.[28] This proposal would not provide a meaningful remedy; it is akin to an order requiring a store selling counterfeit goods to board up the front door, while leaving the side door wide open.

25. Other jurisdictions have rejected similar proposals. For example, in *Allostreaming*, the Paris Court of Appeal rejected the search engines' argument that their websites with a .fr domain were "geared specifically to the French public", so a delisting order should be limited to those domains.[29] The Court found that search engines' sites with .com and other country domains were easily accessible in France (and displayed results in French), and that French users' searches on those domains would still show the offending websites if the injunction were limited to .fr domains.[30] The Court thus ordered the search engines to delist the websites on all domains for all requests from French territories.[31]

26. Another French Court rejected a nearly identical argument in *Max Mosley v Google France SARL* ("***Max Mosley***"), which concerned a request to delist private images from Google Images results. Google argued that the prohibition should be ordered only in respect of www.google.fr, on the basis that its other sites were "not directed towards a French audience".[32] The Court disagreed, holding that

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[25] Google Factum at para 21.
[26] *Cartier*, *supra*, at paras 107-109 [emphasis added].
[27] *Max Mosley v Google Inc.*, Case No 324 O 264/11, Hamburg Regional Court, 24 January 2014 (translated from German) at p. 20. See also the CJEU's comments to similar effect in *Telekabel*, *supra*, at paras 58 & 62
[28] Factum of the Appellant, Google Inc, dated June 13, 2015 at paras 15, 44, 108 & 111 [Google Factum].
[29] *Allostreaming*, *supra*, p. 28.
[30] *Allostreaming*, *supra*, p. 29.
[31] *Allostreaming*, *supra*, p. 30.
[32] *Max Mosley v Google France SARL*, Docket No 11/07970, Regional Court of Paris, 17th Chamber, 6 November 2013 (translated from French), at p. 12 [*Max Mosley*].

Google's other sites nevertheless had an impact on French territories, and ordered Google to remove the offending images from all versions of the Google Images search engine accessible in France.[33]

27. In both these cases, the delisting order was made in respect of access from the jurisdiction, using geolocation.[34] Although it is an improvement to Google's ".ca proposal", a geolocation option will not cure the injustice caused by the defendants' acts. The Order below is ancillary to orders that are worldwide in scope, for the precise reason that the defendants sought to evade the rule of law by fleeing the jurisdiction, and operating their websites and selling to customers both in and outside of Canada, in violation of Canadian court orders.[35] These underlying orders cannot be effectively enforced by an order that is geographically limited. This would force the claimants to seek the same relief against the same intermediary in every jurisdiction where the defendants' websites are accessible by search. This would make enforcement of the claimants' legal rights infeasible.

28. Other government bodies have maintained that neither a geolocation option nor suggestions akin to Google's .ca proposal are sufficient to vindicate claimants' rights. Earlier this year, France's data protection agency, the Commission nationale de l'informatique et des libertés ("**CNIL**") penalized Google for refusing to delist offending websites from all its domains. The CNIL held that while country domains provide "multiple technical paths", Google's search service is, in reality, a "single processing operation" and must be treated accordingly.[36] Although noting that it would be "an improvement" over a domain-limited order, the CNIL rejected a geolocation option as inadequate to ensure individuals' rights to receive "effective and complete" protection, finding that "only de-listing across the entire search engine would enable effective protection of the rights of the individuals."[37]

29. In addition to CNIL, American courts have ordered injunctions against internet intermediaries without any geographic limitations, including against search engines with notice of the injunction.[38]

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[33] *Max Mosley, supra*, at p. 13.

[34] *Ibid* & *Allostreaming, supra,* at p. 30. "Geolocation" refers to the process of identifying the real-world geographical location of an internet user using digital identifiers such as the user's IP address. International jurisprudence and other secondary sources disclose that Google and other search engines use geolocation: see, e.g., *Allostreaming, supra*, at p. 30; *Google CNIL, infra*, at pp. 8-9; Peter Fleischer, "Adapting our approach to the European right to be forgotten", *Google Europe Blog*, 4 March 2016, available online: https://europe.googleblog.com/2016/03/adapting-our-approach-to-european-right.html.

[35] These orders, whose validity has not been challenged, include a *Mareva* injunction and a confidentiality order, both of which effectively prohibit the Datalink defendants from carrying on business in and outside of Canada: see Equustek factum at paras 11-15.

[36] Commission Nationale de l'informatique et des Libellés, Decision No 2016-054 of 10 March 2016 of the Restricted Committee issuing Google Inc. with a financial penalty (translated from French) [*Google CNIL*], at pp 6-7 ("Restricting delisting to European extensions seems unfounded to the extent that the various domain names (google.fr for France, google.es for Spain, google.com.au for Australia, etc.) are only technical paths providing access to a single processing operation, and it seems imperfect to the extent that the delisted links remain accessible from the search engine's non-European extensions."). Google is appealing the decision.

[37] *Google CNIL* at p. 8.

[38] *ABS-CBN Corporation v Jeffrey Ashby*, Case No 14-CV-1275 HU, US Dist Ct (Oregon, Portland Div), 8 August 2014 (various intermediaries including search engines ordered to "cease facilitating access to any or all domain names and websites through which the Defendants engage in" copyright infringement, without geographic limitation); *Arista, supra,* (content delivery network

C. *Factors to consider in granting orders against non-party internet intermediaries*

30. In crafting an order against an internet intermediary, Canadian courts must strike a balance; they must ensure judicial orders can be meaningfully enforced, while also respecting freedom of expression and the legitimate interest in the dissemination of and access to *lawful* content online.

31. When granting orders against internet intermediaries, foreign courts have conducted a proportionality analysis to balance the interests involved.[39] Canadian courts can similarly achieve the appropriate balance in assessing whether a delisting order will be "just or equitable" in a particular case by considering a number of factors that emerge from the case law: (1) the likely effectiveness of the order in remedying the harm caused to the claimants, and the availability of alternative remedies; (2) the cost to the intermediary of implementing the order; (3) the impact of the order on freedom of expression; and (4) evidence that the order will have extra-territorial effect in a manner that offends comity.

32. The international case law provides some guidance as to how these factors should be evaluated to determine whether an order would be just and equitable:

33. ***An Order must be reasonably necessary and discourage infringement***: As noted above, to be "effective" a delisting order need not entirely *eliminate* infringement, but must *discourage* infringement.[40] Foreign courts have found that claimants who first tried to assert their rights directly against a fugitive wrongdoer have established that there is no reasonable alternative to an order against an intermediary,[41] and that search engines are appropriate intermediaries to discourage infringement.[42]

34. ***An Order must not be unduly costly or difficult for the intermediary***: As a preliminary matter, intermediaries should bear the cost of implementing a delisting order because they stand to profit from access to the offending websites (for example, through advertising revenue), whereas the rightsholders' economic position has already been threatened by the infringements.[43] On this basis, the Court of Appeal in *Cartier* distinguished the holding in *Norwich Pharmacal* that the costs of an order against a non-party ought be borne by the claimant.[44] Indeed, courts in France and the UK have held that placing the costs

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held to be "in active concert or participation with (i.e. aiding and abetting)" a website that infringed copyright, and held to be bound by an injunction to cease "directly or secondarily infringing Plaintiffs'" copyright, without geographic limitation). See also *ABS-CBN Corporation v Buhaypinoyofw.net*, Case No 14-CV-62664-UU, US Dist Ct (SD Florida), 9 February 2015.

[39] *Cartier, supra,* at paras 125-129, 166, 173 & 177; *Disney v Telenor, supra,* at pp. 16-19; *WB v Telenor, supra,* at p 10, 16-18.

[40] *Telekabel, supra,* at paras 58 & 62; *Cartier, supra,* at paras 107-109. See also *Disney v Telenor, supra,* at p. 17: "It is true that the disappearance of unlawful services does not mean that all users will start to use lawful services, but it must be assumed that, if the unlawful services become more difficult to access, this will lead to more users utilising existing lawful alternatives."

[41] See, e.g., *WB v Telenor, supra,* at p. 18.

[42] See, e.g., *Google Spain, supra,* at para 36 & *Allostreaming, supra,* at p. 14.

[43] *Allostreaming, supra,* at p. 35. One notes in this case that the wrongdoers paid Google for advertising services: see Equustek Factum at para 33.

[44] *Cartier, supra,* at paras 121-122, 135, 143 & 148, citing *Telekabel* at para 50; *Norwich, Pharmacal, supra*; and *Twentieth Century Fox Film Corpn v British Telecommunications plc* [2011] EWHC 2714 (Ch) at paras 32-33 [*Twentieth Century Fox*].

of implementation on intermediaries is most appropriate unless it is disproportionate on the facts of the case (for example, if it jeopardizes the intermediary's economic viability).[45] This allocation principle finds support in Canadian jurisprudence; this Court has observed that an intermediary's costs of enforcing a court order are anticipated costs of doing business.[46]

35. For a delisting order to be proportionate, the measures required of the intermediary must not be unnecessarily costly or difficult.[47] The courts below found that the Order would not inconvenience Google or cause it to incur expenses.[48] When Google has argued elsewhere that a delisting order would result in exorbitant costs, this argument has been specifically rejected; the court in *Max Mosley* found that the measures required to implement a delisting order are "simple, not very costly, and within reach of a 'moderately experienced programmer'".[49]

36. ***An Order ought not improperly infringe the freedom of expression interests of lawful users***: Google and certain interveners have raised concerns about the potential effect of the Order on freedom of expression. With respect, these concerns are overstated. Search engines undoubtedly play an important role in organizing information online, and there is no dispute that courts ought to consider the effect of their equitable orders on public freedoms. However, freedom of expression must be considered in context. The expression at stake ought to be considered in a court's proportionality analysis – there is no basis to dismiss delisting orders out of hand because they may affect expression.

37. Google raises sensational examples of Turkey and Russia granting orders requiring search engines to delist websites featuring political criticism. This is an *in terrorem* argument. Where political speech is at issue, freedom of expression values are likely to weigh against granting such an order. This case, however, falls on the opposite side of the spectrum; the Order concerns purely commercial speech promoting unlawful products, contrary to court orders and infringing others' legal rights. In such a case, freedom of expression values do not outweigh the claimant's rights or the public interest in meaningful enforcement of judicial decisions.[50]

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[45] *Allostreaming, supra,* at p. 35; *Twentieth Century Fox, supra,* at paras 32-33.
[46] *Tele-Mobile Co. v Ontario*, 2008 SCC 12 at para 60; see also *R v Telus*, 2013 SCC 16 at para 193 (per Cromwell J, in dissent).
[47] *Cartier, supra,* at para 127.
[48] *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265 at para 103 [BCCA Decision].
[49] *Max Mosley, supra,* at pp. 11-12. See also *Max Mosley v Google Inc*, [2015] EWHC 59 (QB) at para 54, which held that existing technology permitted Google to complete the delisting required in that case "without disproportionate effort or expense".
[50] There are numerous examples in Canadian and international jurisprudence of other rights and interests outweighing freedom of expression: see, e.g. *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at paras 68, 94 & 115 (advertising for lawful tobacco products is expression of "low value"); *A.B. v Bragg Communications Inc*., 2012 SCC 46 (freedom of expression and the open courts principle are minimally affected by, and did not prevent, a victim of cyberbullying from proceeding with a civil claim anonymously); *A&M Records, Inc. v Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (the First Amendment did not protect the publication of a "directory" to facilitate copyright infringement); *DVD Copy Control Association Inc. v Bunner*, 75 P.3d 1 Case No S102588 (Sup Ct California, 2003) ("The First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right."); *Disney v Telenor, supra,* at pp. 17-18; *WB v Telenor, supra*, at p. 17 ("When it, as the case is

38. ***An Order may inevitably have extra-territorial effect, but must not offend comity***: As a starting point, where a court has equitable jurisdiction *in personam* in respect of a party, it may order the party to do something outside the jurisdiction.[51] Google has not appealed the findings below that British Columbia courts have *in personam* jurisdiction over Google in this case.[52]

39. Google argues that the Order ought not have been granted because of its potential to affect internet users worldwide.[53] What follows from this, however, is that the internet would be immune from judicial decree. In general, information on the internet can be accessed from anywhere. Accordingly, any court order respecting content on the internet – whether an order to remove defamatory statements from a message board, to take down intimate images invading one's privacy, or to delist websites largely dedicated to selling stolen technology – will have extra-territorial effect.

40. In determining whether an order is just and equitable, courts can assess whether there is evidence that the order would offend core values of other jurisdictions, in light of considerations of comity.[54] However, a bare assertion that an order respecting online activity will affect users outside Canada, without evidence that such an order offends comity, should not be a barrier to a Canadian court's legitimate exercise of its jurisdiction to protect Canadians' rights. This would severely restrict courts' authority in respect of the internet, which would be inimical to the rule of law.[55]

PART IV – SUBMISSIONS ON COSTS

41. FIAPF seeks no costs and asks that no costs be ordered against it.

PART V – ORDER REQUESTED

42. FIAPF respectfully seeks to present oral submissions not to exceed ten minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2016.

Gavin MacKenzie

Brooke MacKenzie

in this matter, is a website that almost exclusively makes available content without the consent of the rights holders, it is obvious to the court that freedom of speech and information cannot get in the way for the kind of order requested by the rights holders.")

[51] Justice Robert Sharpe, *Injunctions and Specific Performance*, (Toronto: Carswell, Nov 2015), s 1.1190, p 1-61, citing, *inter alia*, *Minera Aquiline Argentina v IMA Exploration*, 2007 BCCA 319. See also *Fourie v Le Roux*, [2007] UKHL 1 at paras 25 & 30.

[52] BCCA Decision at paras 54-55; Google Factum at para 22; Equustek Factum at para 60 & fn 129. FIAPF takes no position on the issue of the Court's *in personam* jurisdiction over Google.

[53] Google Factum at para 91.

[54] As the BCCA held, "Where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values, the order should not be made". In this case, however, the Order is "a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected": BCCA Decision at paras 92-94.

[55] In *Yeung v Google Inc*, the Court agreed that "We must not simply throw up our hands in despair and moan that the internet is uncontrollable": *Yeung*, *supra*, at para 54, citing *J (A Child), Re*, [2013] EWHC 2694 (Fam) at para 43. See also *Du v Gutnick*, [2002] HCA 56 at para 186, in which the High Court of Australia squarely rejected the notion that "any attempt to control, regulate, or even inhibit its operation, no matter the irresponsibility or malevolence of a user, would be futile, and that therefore no jurisdiction should trouble to try to do so."

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39.	Justice Robert Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto, Carswell, Nov 2015).	38

PART VII – LEGISLATION

None