Court of Appeal File No. CA041923

COURT OF APPEAL

On Appeal From: An order of the Supreme Court of British Columbia, dated June 13, 2014

BETWEEN:

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

RESPONDENTS
(PLAINTIFFS)

AND:

MORGAN JACK, DATALINK TECHNOLOGIES GATEWAYS INC., and DATALINK TECHNOLOGIES GATEWAYS LLC

RESPONDENTS
(DEFENDANTS)

AND:

GOOGLE INC.

APPELLANT
(RESPONDENT)

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OPENING STATEMENT

The Electronic Frontier Foundation ("EFF") appreciates the opportunity to share its views with the Court. EFF's interest and involvement in this appeal stems from its interest in the development of law as it affects the rights of Internet users, and in particular, the development of the appropriate balance when considering acts that may affect the free expression rights of foreign non-parties. EFF is concerned that a worldwide injunction would set a dangerous precedent that could be later used to limit the legal and equitable rights of others to receive speech.

PART 1: STATEMENT OF FACTS

1. EFF relies on the facts found by the chambers judge. In particular, EFF relies on the following facts:

2. Google, Inc. ("Google") is a publicly traded corporation, headquartered in Mountain View, California, United States. (RfJ; [30]). Google makes Internet search results available throughout the world through its websites, including "www.google.ca" (which is directed to users in Canada) and "www.google.com" (which is directed to users in the United States of America). (RfJ; [31]).

3. There are trillions of webpages available via the Internet. (RfJ; [32]). Because of this, the Internet cannot be successfully navigated without search services. (RfJ; [32]). Search services ensure that the Internet is a vibrant forum for the effective exchange of communications and information. (RfJ; [32]). Google's search engine is used to conduct 70-75% of all searches worldwide (RfJ; [32]).

4. This is an action for violation of trade secrets. (RfJ; [4]). The plaintiffs claim that certain defendants have violated the plaintiffs' trade secrets by offering products that embody the plaintiffs' trade secrets for sale via an Internet website. (RfJ; [4]). The defendants have failed to comply with court orders requiring defendants to cease carrying on business through any website. (RfJ; [7]).

5. Receiving no relief from the defendants directly, the plaintiffs requested that Google remove search results pointing to the defendants' allegedly infringing websites. (RfJ; [9]). Google agreed to remove search results for 345 specific URLs, but refused to remove links to entire categories of URLs, i.e. entire websites. (RfJ; [9]). Google's employee deposed that "URLs not specifically reviewed and identified may be used for any number of innocent purposes". (RfJ; [138]).

6. The plaintiff brought a successful application for an interim injunction against Google, obtaining an order requiring Google to de-index websites associated with the defendants. (RfJ; [161]). No determination regarding the specific content at the websites to be de-indexed was made. (RfJ; [137]).

7. The chambers judge concluded that the court has jurisdiction to grant an injunction against a foreign non-party which has admitted extraterritorial effects, despite the recognition that such an injunction may be inconsistent with the laws or equitable powers of foreign jurisdictions. (RfJ; [108] & [109]-[160]).

8. EFF was granted leave to intervene in this appeal on September 22, 2014.

PART 2: ISSUES ON APPEAL

9. In accordance with the order granting leave to intervene, EFF's submissions will be limited to the test in American jurisdictions for issuing mandatory injunctions on Internet content with explicit consideration of the public interest.

PART 3: ARGUMENT

10. In the United States, an injunction issued against a party before a final determination on the merits is known as a preliminary injunction. See Wright & Miller, *Purpose and Scope of Preliminary Injunctions*, 11A Fed. Prac. & Proc. Civ. § 2947 (3d ed.) ("a preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits").

11. These submissions will first address the test for preliminary injunctions generally in the U.S., focusing on the heightened requirements for mandatory injunctions. The submissions will then address preliminary injunctions that have the potential to restrain lawful speech, and the heavy burden that must be met in order for such an injunction to issue.

A. The Preliminary Injunction Test

12. U.S. courts must consider several factors before issuing a preliminary injunction. Specifically,

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favour, and that an injunction is in the public interest.
>
> *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006).

13. As the above suggests, the American test for issuing a preliminary injunction requires an explicit consideration of the public interest. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("courts of equity should pay particular regard for the public consequence in employing the extraordinary remedy of injunction"). Moreover, the public's interest may be separate and distinct from that of the parties. *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010) (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986)).

14. More broadly, U.S. law also requires that equitable relief "be tailored to remedy the specific harm alleged." *Park Village Apt. Tenants v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (citation and quotation omitted).

15. The standard for mandatory injunctions – injunctions that alter rather than maintain the status quo, such as by removing information from public view – is particularly high. In the Ninth Circuit, where Google is headquartered, the courts have emphasized that mandatory injunctions are "particularly disfavored." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994); see also *Cachchillo v. Insmed, Inc.*, 638

F.3d 401, 406 (2nd Cir. 2011); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3rd Cir. 1994).

16. There is a good policy reason for this caution. Where an injunction alters rather than preserves the status quo, the risk of harm to the parties and the public interest is high. The public may be deprived of valuable information and/or services, or an innovative business may be forced to close its doors forever, even though its business could ultimately prove lawful. Cf. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (reversing trial court grant of a preliminary injunction on Google from creating and displaying thumbnails of infringing copyrighted images); *Author's Guild v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (granting summary judgment to Google that its mass digitization of copyrighted literary works is fair use).

B. The Test for Speech in Particular

17. The U.S. Constitution recognizes that the public's right to "receive information and ideas, regardless of their social worth, is fundamental to [America's] free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal citations omitted). "[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (citation and quotation omitted).

18. The right to receive information applies fully to receiving such content over the Internet. See *Reno v. ACLU*, 521 U.S. 844, 870-71 (1997).

19. Under U.S. law, Internet search results themselves constitute speech and are protected by the First Amendment to the U.S. Constitution. *See, e.g., Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); *Zhang v. Baidu.com, Inc.*, 2014 WL 1282730 (S.D.N.Y. 2014); Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Search Results*, 8 J.L. Econ. & Pol'y 883 (2012).

20. Accordingly, under U.S. law any injunction requiring a company to limit search results implicates the public interest in free expression. Where a party seeks an interim

injunction to remove speech from the public eye, the scales are tipped sharply in favour of judicial restraint. *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004).

21. As the U.S. Supreme Court has observed, where liability lies on the line between unlawful and protected speech, an "[e]rror in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000). If the line is drawn incorrectly so as to encompass legitimate speech, fundamental rights are abridged:

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.
>
> *Id.*

22. Thus, "[w]here...there is at least some risk that constitutionally protected speech will be enjoined, only a particularly strong showing of likely success, and of harm to the defendant as well, could suffice" to justify an injunction. *Overstreet v. United Bhd. of Carpenters & Joiners of Am. Local Union No. 1506*, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005).

23. This is because where a party seeks to enjoin speech, that injunction constitutes a "prior restraint." *Tory v. Cochran*, 544 U.S. 734, 738 (2005); *Overstreet*, 409 F.3d at 1218. And "[a]ny system of prior restraints . . . bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

24. Moreover, this rule applies even if enjoined speech may be entirely unlawful. As long ago recognized by Justice Blackmun,

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this most extraordinary remedy only where the evil that would result from the [speech] is

> both great and certain and cannot be militated by less intrusive measures.

CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations and quotations omitted). See *Near v. Minnesota*, 283 U.S. 697, 706 (1931) (invalidating statute allowing courts to enjoin publication of future issues of newspaper based on previous editions found to be "'chiefly devoted to malicious, scandalous and defamatory articles'"); cf. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their ... commercial self-interest simply does not qualify as grounds for imposing a prior restraint."). Consequently, the plaintiff has an extremely high burden to meet in order to show a preliminary injunction should enter.

25. Where it may implicate speech, even a post-trial injunction is often an impermissible prior restraint. See Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157, 165 (2007); see also *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089 (C.D. Cal. 2012) ("Injunctions against any speech, even libel, constitute prior restraints: they prevent[] speech before it occurs, by requiring court permission before that speech can be repeated.") (citation omitted).

C. The Injunction at Issue

26. Here, the trial court issued an injunction against indexing any and all speech on certain websites because of who operated them. (RfJ; [137]). The court found it was more convenient for Google to de-index entire sites, as it viewed the only other alternative (de-indexing specific URLs) insufficient because it would require the plaintiff to engage in an "endless game of whack-a-mole." (RfJ; [72]). In the court's analysis the plaintiffs' private commercial interests and convenience weighed more heavily than any public interest.

27. Without opining as to the correctness of the Reasons for Judgment as determined by Canadian law, under U.S. law that analysis would likely be seen as improper.

28. First, the court below considered the public's interest only to extend to "the ab[ility] to find and buy the defendants' products as easily[.]" (RfJ; [155]). The court did not consider the public's interest in the free flow of information, a consideration required by U.S. law.

29. As noted, under U.S. law, when an injunction has potential implications for speech, the public interest consideration necessarily includes an assessment of any potential impact on free speech and access to information as a factor separate and apart from balancing the equities between the parties.[1] See *Procter & Gamble Co.*, 78 F.3d at 227 (to justify an interlocutory injunction on speech, "publication must threaten an interest more fundamental than the First Amendment itself."). "Indeed, the [U.S.] Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Id.*

30. Second, the injunction as entered by the court is not narrowly tailored to affect only the allegedly unlawful disclosure of trade secrets. The trial court has attempted to restrain the receipt of all information from a *particular speaker* at *all websites*, based on findings regarding certain information contained at certain URLs. (RfJ; [137]). Thus, the order may well require Google to block lawful as well as unlawful content. Under U.S. law, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone[.]" *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted). Yet that is precisely what is contemplated in this order.

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[1] In addition to the "public interest" in the content of the speech itself, courts have emphasized that free speech concerns must be taken into account in weighing the "irreparable harm" and "balance of equities" factors. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

PART 4: NATURE OF THE ORDER SOUGHT

31. EFF takes no position on the order sought by the appellant.

32. EFF respectfully requests leave to make oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 29 Sep 2014

David Wotherspoon
Counsel for the Intervenor, Electronic Frontier Foundation

LIST OF AUTHORITIES