Goodmans LLP Update

Technology

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Global Effects of Google's Interlocutory Injunction

Last week, the Supreme Court of Canada, in *Google v. Equustek Solutions Inc.*, ruled that Google could be ordered by a Canadian court to delist worldwide the website of an organization that had been found to be infringing the intellectual property right of a Canadian. We understand this to be the first ruling of its kind against Google by the most senior court of a country.

The Supreme Court of Canada's decision provides victims of wrongs facilitated by internet intermediaries an opportunity to obtain an effective remedy, particularly when the wrongdoer has not complied with an injunctive order of a Canadian court.

Background

Equustek Solutions Inc., a small technology company in British Columbia and maker of industrial networking gear, sought to stop one of its distributors, Datalink, from misusing Equustek's trademarks online. Equustek claimed that Datalink, while acting as a distributor of Equustek's products, re-labelled one of Equustek's products and passed it off as a Datalink product. Equustek also claimed that Datalink acquired confidential information and trade secrets from Equustek, using them to design and manufacture a competing product. In September 2011, a trial-level court granted Equustek an injunction prohibiting the sale of inventory and the use of Equustek's intellectual property. Datalink then abandoned the proceedings and left the jurisdiction without complying with this court order.

Datalink continued to sell Equustek's products on Datalink's websites to customers around the world. Finding that Datalink had not complied with the original court order, a separate injunction was issued by the Supreme Court of British Columbia ordering Datalink to cease operating or carrying on business through any website. When Datalink again did not comply, Equustek requested that Google de-index Datalink's websites. Google partially did so.

This partial response from Google did not satisfy Equustek, so it sought a court order requiring Google to de-index all of Datalink's websites. The Supreme Court of British Columbia ruled in favour of Equustek and issued an injunction compelling Google to remove search results for Datalink throughout the world. Google appealed to the British Columbia Court of Appeal, but the court dismissed Google's appeal and upheld the injunction against Google.

The Supreme Court of Canada Decision

Google argued that a Canadian court compelling it to de-index a website worldwide would be "worldwide censorship based on local norms." Google maintained that its right to freedom of expression includes the right to make its own editorial decisions about what content to take down and which websites to de-list, and that an interlocutory injunction ordered against Google would violate that right.

The Supreme Court of Canada ruled otherwise. In weighing the balance between freedom of expression and the rights of Equustek, the SCC held that "[e]ven if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders."

The Supreme Court was not overly concerned that a worldwide order would have an impact on the Google's operations outside Canada:

> Where it is necessary to ensure the injunction's effectiveness, a court can grant an injunction enjoining conduct anywhere in the world. The problem in this case is occurring online and globally. The Internet has no borders — its natural

> habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. If the injunction were restricted to Canada alone or to google.ca, the remedy would be deprived of its intended ability to prevent irreparable harm, since purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could find Datalink's websites even if those websites were de indexed on google.ca.

Interestingly, the Supreme Court also noted that Google had adduced no evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, a circumstance that could be different in another case. The Supreme Court noted that, in this case, the "limited ancillary order made against Google, designed to ensure the plaintiffs' core rights are respected" does not violate the core value of any nation."

This case concerned a clear wrongdoer that did not participate in the hearing before the Supreme Court of Canada, and an internet intermediary, that could not point to any concrete harm of a worldwide order being made. It will be interesting to see if Canadian courts will make orders dealing with the Internet worldwide when the allegation of wrongdoing is not so clear-cut and the effect of a worldwide order may be inconsistent with the laws of another jurisdiction.

Goodmans Tech Group

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