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Why the Canadian Supreme Court's Equustek decision is a good thing for freedom — even on the Internet
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Neil Turkewitz

*I recently published a piece in the Hill welcoming the Canadian Supreme Court's decision in Google v. Equustek. In this post I expand (at length) upon my assessment of the case.*

In its decision, the Court upheld injunctive relief against Google, directing the company to avoid indexing websites offering the infringing goods in question, regardless of the location of the sites (and even though Google itself was not a party in the case nor in any way held liable for the infringement). As a result, the Court's ruling would affect Google's conduct *outside* of Canada as well as within it.

The case raises some fascinating and thorny issues, but, in the end, the Court navigated them admirably.

Some others, however, were not so… welcoming of the decision (see, e.g., here and here).

The primary objection to the ruling seems to be, in essence, that it is the top of a slippery slope: "If Canada can do this, what's to stop Iran or China from doing it? Free expression as we know it on the Internet will cease to exist."

This is a valid concern, of course — *in the abstract*. But for reasons I explain below, we should see this case — and, more importantly, the approach adopted by the Canadian Supreme Court — as reassuring, not foreboding.

## Some quick background on the exercise of extraterritorial jurisdiction in international law

The salient facts in, and the fundamental issue raised by, the case were neatly summarized by Hugh Stephens:

> [The lower Court] issued an interim injunction requiring Google to de-index or delist (i.e. not return search results for) the website of a firm (Datalink Gateways) that was marketing goods online based on the theft of trade secrets from Equustek, a Vancouver, B.C., based hi-tech firm that makes sophisticated industrial equipment. Google wants to quash a decision by the lower courts on several grounds, primarily that the basis of the injunction is extra-territorial in nature and that if Google were to be subject to Canadian law in this case, this

> could open a Pandora's box of rulings from other jurisdictions that would require global delisting of websites thus interfering with freedom of expression online, and in effect "break the Internet".

The question of jurisdiction with regard to cross-border conduct is clearly complicated and evolving. But, in important ways, it *isn't* anything new just because the Internet is involved. As Jack Goldsmith and Tim Wu (yes, Tim Wu) wrote (way back in 2006) in *Who Controls the Internet?: Illusions of a Borderless World*:

> A government's responsibility for redressing local harms caused by a foreign source does not change because the harms are caused by an Internet communication. Cross-border harms that occur via the Internet are not any different than those outside the Net. Both demand a response from governmental authorities charged with protecting public values.

As I have written elsewhere, "[g]lobal businesses have always had to comply with the rules of the territories in which they do business."

Traditionally, courts have dealt with the extraterritoriality problem by applying a rule of comity. As my colleague, Geoffrey Manne (Founder and Executive Director of ICLE), reminds me, the principle of comity largely originated in the work of the 17th Century Dutch legal scholar, Ulrich Huber. Huber wrote that *comitas gentium* ("courtesy of nations") required the application of foreign law in certain cases:

> [Sovereigns will] so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.

And, notably, Huber wrote that:

> Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.

The basic principle has been recognized and applied in international law for centuries. Of course, the flip side of the principle is that sovereign nations also get to decide for themselves whether to enforce foreign law within their jurisdictions. To summarize Huber (as well as Lord Mansfield, who brought the concept to England, and Justice Story, who brought it to the US):

> All three jurists were concerned with deeply polarizing public issues — nationalism, religious factionalism, and slavery. For each, comity empowered courts to decide whether to defer to foreign law out of respect for a foreign sovereign or whether domestic public policy should triumph over mere courtesy. For each, the court was the agent of the sovereign's own public law.

## The Canadian Supreme Court's well-reasoned and admirably restrained approach in *Equustek*

Reconciling the potential conflict between the laws of Canada and those of other jurisdictions was, of course, a central subject of consideration for the Canadian Court in *Equustek*. The Supreme Court, as described below, weighed a variety of factors in determining the appropriateness of the remedy. In analyzing the competing equities, the Supreme Court set out the following framework:

> [I]s there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. **This will necessarily be context-specific**. *[Here, as throughout this post, bolded text represents my own, added emphasis.]*

Applying that standard, the Court held that because ordering an interlocutory injunction against Google was the only practical way to prevent Datalink from flouting the court's several orders, and because there were no sufficient, countervailing comity or freedom of expression concerns ***in this case*** that would counsel against such an order being granted, the interlocutory injunction was appropriate.

I draw particular attention to the following from the Court's opinion:

> Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Fenlon J. noted, "Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong".
>
> And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. As Groberman J.A.

concluded:

> 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.

In fact, as Andrew Keane Woods writes at Lawfare:

> Under longstanding conflicts of laws principles, a court would need to weigh the conflicting and legitimate governments' interests at stake. **The Canadian court was eager to undertake that comity analysis, but it couldn't do so because the necessary ingredient was missing: there was no conflict of laws**.

In short, the Canadian Supreme Court, while acknowledging the importance of comity and appropriate restraint in matters with extraterritorial effect, carefully weighed the equities in this case and found that they favored the grant of extraterritorial injunctive relief. As the Court explained:

> Datalink [the direct infringer] and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. Equustek has made efforts to locate Datalink with limited success. Datalink is only able to survive — at the expense of Equustek's survival — on Google's search engine which directs potential customers to Datalink's websites. This makes Google the determinative player in allowing the harm to occur. **On balance, since the world-wide injunction is the only effective way to mitigate the harm to Equustek pending the trial, the only way, in fact, to preserve Equustek itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld**.

As I have stressed, key to the Court's reasoning was its close consideration of possible countervailing concerns and its *entirely* fact-specific analysis. By the very terms of the decision, the Court made clear that its balancing would not necessarily lead to the same result where sensibilities or core values of other nations would be offended. In this particular case, they were not.

## How critics of the decision (and there are many) completely miss the true import of the Court's reasoning

In other words, the holding in this case was a function of how, given the facts of the case, the ruling would affect the *particular* core concerns at issue: protection and harmonization of global intellectual property rights on the one hand, and concern for the "sensibilities of other nations," including their concern for free expression, on the other.

This should be deeply reassuring to those now criticizing the decision. And yet… it's not.

Whether because they haven't actually read or properly understood the decision, or because they are merely grandstanding, some commenters are proclaiming that the decision marks the End Of The Internet As We Know It — you know, it's going to break the Internet. Or something.

Human Rights Watch, an organization I generally admire, issued a statement including the following:

> The court presumed no one could object to delisting someone it considered an intellectual property violator. **But other countries may soon follow this example, in ways that more obviously force Google to become the world's censor. If every country tries to enforce its own idea of what is proper to put on the Internet globally, we will soon have a race to the bottom where human rights will be the loser**.

The British Columbia Civil Liberties Association added:

> Here it was technical details of a product, but **you could easily imagine future cases where we might be talking about copyright infringement, or other things where people in private lawsuits are wanting things to be taken down off  the internet that are more closely connected to freedom of expression**.

From the other side of the traditional (if insufficiently nuanced) "political spectrum," AEI's Ariel Rabkin asserted that

> [O]nce we concede that Canadian courts can regulate search engine results in Turkey, it is hard to explain why a Turkish court shouldn't have the reciprocal right. And this is no hypothetical — a Turkish court has indeed ordered Twitter to remove a user (AEI scholar Michael Rubin) within the United States for his criticism of Erdogan. Once the jurisdictional question is decided, it is no use

> raising free speech as an issue. Other countries do not have our free speech norms, nor Canada's. **Once Canada concedes that foreign courts have the right to regulate Canadian search results, they are on the internet censorship train, and there is no egress before the end of the line**.

In this instance, in particular, it is worth noting not only the complete lack of acknowledgment of the Court's articulated constraints on taking action with extraterritorial effect, but also the fact that Turkey (among others) has hardly been waiting for approval from Canada before taking action.

And then there's EFF (of course). EFF, fairly predictably, suggests first — with unrestrained hyperbole — that the Supreme Court held that:

> A country has the right to prevent the world's Internet users from accessing information.

Dramatic hyperbole aside, that's also a stilted way to characterize the content at issue in the case. But it is important to EFF's misleading narrative to begin with the assertion that offering infringing products for sale is "information" to which access by the public is crucial. But, of course, the distribution of infringing products is hardly "expression," as most of us would understand that term. To claim otherwise is to denigrate the truly important forms of expression that EFF claims to want to protect.

And, it must be noted, even if there *were* expressive elements at issue, *infringing* "expression" is *always* subject to restriction under the copyright laws of virtually every country in the world (and free speech laws, where they exist).

Nevertheless, EFF writes that the decision:

> [W]ould cut off access to information for U.S. users would set a dangerous precedent for online speech. In essence, it would expand the power of any court in the world to edit the entire Internet, whether or not the targeted material or site is lawful in another country. That, we warned, is likely to result in a race to the bottom, as well-resourced individuals engage in international forum-shopping to impose the one country's restrictive laws regarding free expression on the rest of the world.
>
> Beyond the flaws of the ruling itself, the court's decision will likely embolden other countries to try to enforce their own speech-restricting laws on the Internet, to the detriment of all users. **As others have pointed out, it's not difficult to see repressive regimes such as China or Iran use the ruling to order Google to de-index sites they object to, creating a worldwide**

**heckler's veto**.

As always with EFF missives, *caveat lector* applies: None of this is fair or accurate. EFF (like the other critics quoted above) is looking only at the *result* — the specific contours of the global order related to the Internet — and not to the *reasoning* of the decision itself.

Quite tellingly, EFF urges its readers to ignore the case in front of them in favor of a theoretical one. That is unfortunate. Were EFF, *et al.* to pay closer attention, they would be celebrating this decision as a thoughtful, restrained, respectful, and useful standard to be employed as a foundational decision in the development of global Internet governance.

The Canadian decision is (as I have noted, but perhaps still not with enough repetition…) predicated on achieving equity upon close examination of the facts, and giving due deference to the sensibilities and core values of other nations in making decisions with extraterritorial effect.

Properly understood, the ruling is a *shield against* intrusions that undermine freedom of expression, and not an *attack* on expression.

EFF subverts the reasoning of the decision and thus camouflages its true import, all for the sake of furthering its apparently limitless crusade against all forms of intellectual property. The ruling can be read as an attack on expression *only* if one ascribes to the distribution of infringing products the status of protected expression — so that's what EFF does. But distribution of infringing products is *not* protected expression.

## Extraterritoriality on the Internet is complicated — but that undermines, rather than justifies, critics' opposition to the Court's analysis

There will undoubtedly be other cases that present more difficult challenges than this one in defining the jurisdictional boundaries of courts' abilities to address Internet-based conduct with multi-territorial effects. But the guideposts employed by the Supreme Court of Canada will be useful in informing such decisions.

Of course, some states don't (or won't, when it suits them), adhere to principles of comity. But that was true long before the *Equustek* decision. And, frankly, the notion that this decision gives nations like China or Iran political cover for global censorship is ridiculous. Nations that wish to censor the Internet will do so regardless. If anything, reference to this decision (which, let me spell it out again, **highlights the importance of avoiding relief that would interfere with core values or sensibilities of other nations**) would undermine their efforts.

Rather, the decision will be far more helpful in *combating* censorship and *advancing* global freedom of expression. Indeed, as noted by Hugh Stephens in a recent blog post:

> While the EFF, echoed by its Canadian proxy OpenMedia, went into hyperventilation mode with the headline, "Top Canadian Court permits Worldwide Internet Censorship", respected organizations like the Canadian Civil Liberties Association (CCLA) welcomed the decision as having achieved the dual objectives of recognizing the importance of freedom of expression and limiting any order that might violate that fundamental right. As the CCLA put it,
>
> > **While today's decision upholds the worldwide order against Google, it nevertheless reflects many of the freedom of expression concerns CCLA had voiced in our interventions in this case**.

As I noted in my piece in the Hill, this decision doesn't answer all of the difficult questions related to identifying proper jurisdiction and remedies with respect to conduct that has global reach; indeed, that process will surely be perpetually unfolding. But, as reflected in the comments of the Canadian Civil Liberties Association, it is a deliberate and well-considered step toward a fair and balanced way of addressing Internet harms.

With apologies for quoting myself, I noted the following in an earlier piece:

> I'm not unsympathetic to Google's concerns. As a player with a global footprint, Google is legitimately concerned that it could be forced to comply with the sometimes-oppressive and often contradictory laws of countries around the world. But that doesn't make it — or any other Internet company — unique. Global businesses have always had to comply with the rules of the territories in which they do business… There will be (and have been) cases in which taking action to comply with the laws of one country would place a company in violation of the laws of another. But principles of comity exist to address the problem of competing demands from sovereign governments.

And as Andrew Keane Woods noted:

> Global takedown orders with no limiting principle are indeed scary. But Canada's order has a limiting principle. As long as there is room for Google to say to Canada (or France), "Your order will put us in direct and significant violation of U.S. law," the order is not a limitless assertion of extraterritorial jurisdiction. In the instance that a service provider identifies a conflict of laws, the state should listen.

That is precisely what the Canadian Supreme Court's decision contemplates.

No one wants an Internet based on the lowest common denominator of acceptable speech.

Yet some appear to want an Internet based on the lowest common denominator for the protection of original expression. These advocates thus endorse theories of jurisdiction that would deny societies the ability to enforce their own laws, just because *sometimes* those laws protect intellectual property.

And yet that reflects little more than an arbitrary prioritization of those critics' personal preferences. In the real world (including the real online world), protection of property is an important value, deserving reciprocity and courtesy (comity) as much as does speech. Indeed, the G20 Digital Economy Ministerial Declaration adopted in April of this year recognizes the importance to the digital economy of promoting security and trust, including through the provision of adequate and effective intellectual property protection. Thus the Declaration expresses the recognition of the G20 that:

> [A]pplicable frameworks for privacy and personal data protection, as well as **intellectual property rights, have to be respected as they are essential to strengthening confidence and trust in the digital economy**.

Moving forward in an interconnected digital universe will require societies to make a series of difficult choices balancing both competing values and competing claims from different jurisdictions. Just as it does in the offline world, navigating this path will require flexibility and skepticism (if not rejection) of absolutism — including with respect to the application of fundamental values. Even things like freedom of expression, which naturally require a balancing of competing interests, will need to be reexamined. We should endeavor to find that fine line between allowing individual countries to enforce their own national judgments and a tolerance for those countries that have made different choices. This will not be easy, as well manifested in something that Alice Marwick wrote earlier this year:

> But a commitment to freedom of speech above all else presumes an idealistic version of the internet that no longer exists. And as long as we consider any content moderation to be censorship, minority voices will continue to be drowned out by their aggressive majority counterparts.
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> * * *
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> We need to move beyond this simplistic binary of free speech/censorship online. That is just as true for libertarian-leaning technologists as it is neo-Nazi provocateurs.… Aggressive online speech, whether practiced in the profanity and pornography-laced environment of 4Chan or the loftier venues of newspaper comments sections, positions sexism, racism, and anti-Semitism (and so forth) as issues of freedom of expression rather than structural oppression.
>
> Perhaps we might want to look at countries like Canada and the United Kingdom, which take a different approach to free speech than does the United States.

> These countries recognize that unlimited free speech can lead to aggression and other tactics which end up silencing the speech of minorities — in other words, the tyranny of the majority. Creating online communities where all groups can speak may mean scaling back on some of the idealism of the early internet in favor of pragmatism. But recognizing this complexity is an absolutely necessary first step.

While I (and the Canadian Supreme Court, for that matter) share EFF's unease over the scope of extraterritorial judgments, I fundamentally disagree with EFF that the *Equustek* decision "largely sidesteps the question of whether such a global order would violate foreign law or intrude on Internet users' free speech rights."

In fact, it is EFF's position that comes much closer to a position indifferent to the laws and values of other countries; in essence, EFF's position would essentially always prioritize the particular speech values adopted in the US, regardless of whether they had been adopted by the countries affected in a dispute. It is therefore inconsistent with the true nature of comity.

Absolutism and exceptionalism will not be a sound foundation for achieving global consensus and the effective operation of law. As stated by the Canadian Supreme Court in *Equustek*, courts should enforce the law — whatever the law is — to the extent that such enforcement does not substantially undermine the core sensitivities or values of nations where the order will have effect.

EFF ignores the process in which the Court engaged precisely because EFF — not another *country*, but EFF — doesn't find the enforcement of intellectual property rights to be compelling. But that unprincipled approach would naturally lead in a *different* direction where the court sought to protect a value that EFF *does* care about. Such a position arbitrarily elevates EFF's idiosyncratic preferences. That is simply not a viable basis for constructing good global Internet governance.

If the Internet is both everywhere and nowhere, our responses must reflect that reality, and be based on the technology-neutral application of laws, not the abdication of responsibility premised upon an outdated theory of tech exceptionalism under which cyberspace is free from the application of the laws of sovereign nations. That is not the path to either freedom or prosperity.

To realize the economic and social potential of the Internet, we must be guided by both a determination to meaningfully address harms, and a sober reservation about interfering in the affairs of other states. The Supreme Court of Canada's decision in *Google v. Equustek* has planted a flag in this space. It serves no one to pretend that the Court decided that a country has the unfettered right to censor the Internet. That's not what it held — and we should be grateful for that. To suggest otherwise may indeed be self-fulfilling.

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