INTERNET EXTRATERRITORIALITY: HAS CANADA REACHED TOO FAR BEYOND ITS BORDERS?

Sydney Wilson[*]

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[*]J.D. Candidate, University of Georgia School of Law, 2019. B.A. in Business Administration Risk Management and Insurance, University of Georgia, 2015.

I. INTRODUCTION

As the Internet reaches record amounts of users and is utilized for a variety of transactions and activities, how jurisdiction is exercised over those activities increases in complexity.[1] Questions of extraterritoriality arise as countries attempt to assert their authority over the Internet in ways that will affect the rights of people around the world. An example of recent extraterritoriality jurisdiction expansion is the Supreme Court of Canada's decision in *Google Inc. v. Equustek*.[2]

In the 7-2 decision of *Google Inc. v. Equustek*, the court ordered Google to delist certain universal source locators (URLs) from its search engine pending a trial for a patent infringement suit brought by Equustek against Datalink.[3] The underlying action alleged that Datalink sold an Equustek product as its own and created an infringing product after misappropriating Equustek's trade secrets.[4] The Supreme Court of Canada affirmed an interlocutory injunction against Google, a non-party to the litigation, requiring Google to delist the URLs globally because Equustek would "suffer irreparable harm if the injunction were not granted."[5]

Google unsuccessfully argued that the extraterritorial reach of this order was improper and that its right to freedom of expression should have tipped the typical balance of the convenience test in favor of denying the interlocutory injunction.[6] The court rejected this argument holding that jurisdiction was proper because Google conducted sufficient business in British Columbia to establish in personam jurisdiction, and that "[w]hen a court has in personam jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world."[7] The court found that if the injunction was restricted to Google Canada, the remedy would be deprived of its intended purpose of preventing irreparable harm, and thus, in order for it to be effective, it must apply globally as the "Internet has no borders – its natural habitat is global."[8]

Google also unsuccessfully argued that Canada's issuance of a global injunction "violates international comity" arguing "it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with

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[1] Bertrand De La Chapelle & Paul Fehlinger, *Jurisdiction on the Internet: How to Move Beyond the Legal Arms Race*, OBSERVER RESEARCH FOUNDATION (Oct. 14, 2016), https://www.cigionline.org/sites/default/files/gcig_no28_web.pdf (This article originally appeared in The Digital Debates: The CyFy Journal).

[2] Google Inc. v. Equustek Solutions Inc., [2017] 1 S.C.R. 34 (Can.).

[3] *Id.*

[4] *Id.* at ¶ 3.

[5] *Id.* at ¶ 42.

[6] *Id.* at ¶ 27.

[7] *Id.* at ¶ 37-38.

[8] *Id.* at ¶ 41.

it would result in Google violating the laws of that jurisdiction."[9] The court found this argument to be too theoretical finding it doubted freedom of expression issues would result in a case concerning violation of intellectual property rights.[10]

This Note focuses on the increasing trend of countries exercising extraterritoriality jurisdiction over Internet activities. Specifically, this Note argues that *Google Inc. v. Equustek* was wrongly decided, and that a country's ability to issue global injunctions should be prohibited as it sets a dangerous precedent for freedom of expression. This Note will suggest various other methods of dealing with the type of problem presented by the Equustek case. It will conclude by recommending that Equustek should have sought to recover monetary damages from Datalink in France and then requested that Google de-index URLs in countries with the highest volume of sales lost to Datalink. If Google did not comply with this request, Equustek should have sought an order in those countries compelling Google to de-index Datalink's URLs.

II. BACKGROUND

A. Internet Governance Generally

To fully understand the legal issues surrounding the *Google Inc. v. Equustek* decision, it is necessary to understand the main theories behind Internet governance as well as recent case law supporting an expansion of extraterritoriality jurisdiction over cyberspace.

The United Nations created the Working Group on Internet Governance (WGIG) to identify public policy issues affecting Internet governance and to determine how national governments, international organizations, the private sector, and individuals around the world should work together in the development and governance of the Internet.[11] WGIG defined Internet governance as "the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and [programs] that shape the evolution and use of the Internet."[12] At the 2015 United Nations meeting of the General Assembly on the overall review of the implementation of outcomes of the World Summit on the Information Society (WSIS), the United Nations affirmed the

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[9] *Id.* at ¶ 44.

[10] *Id.* at ¶¶ 44-45.

[11] Working Group on Internet Governance, *Rep. of the Working Group of Internet Governance*, ¶ 3, U.N. Doc. 05.41622 (June 2005), http://www.wgig.org/docs/WGIGREPORT.pdf.

[12] *Id.* at ¶ 4.

multistakeholder approach to Internet cooperation.[13] The multistakeholder approach is designed to provide a balance of control amongst states and other stakeholders, as opposed to the multilateral approach for which China argued, where states regulate the Internet in their respective countries.[14] The multistakeholder model of the United Nations encourages the governance of the Internet by "civil society, businesses, academic institutions, engineers, and government."[15] While the United Nations rejected the multilateral approach, the organization recognized the Internet fosters continuing threats of curtailing freedom of expression, invasion of privacy, and invasion and dispersion of private information and that states must take appropriate measures to protect human rights.[16]

Some countries reject the multistakeholder approach to Internet governance in favor of a model of Internet sovereignty. Proponents of Internet sovereignty argue that each nation should have an "unfettered right" to regulate the Internet in its territory and to censor and restrict information within and across its boarders.[17] China is the leading proponent of Internet sovereignty. While China's constitution provides for freedom of speech and press, the country requires all Internet users within China to abide by Chinese law and for censorship of the Internet that reflects the authority and wishes of its political party.[18] Websites such as Wikipedia, search engines, and social media platforms such as Facebook and Twitter are fully blocked or shut down during controversial events.[19] China bans photos, video, and search terms that could spark social unrest. [20] China requires Google to de-index sites its government finds objectionable and utilizes The Golden Shield Program, known as the Great Firewall, to block its people from viewing foreign websites on the basis that these websites contain information they deem "a threat to national security."[21] The government has left this term vague. Additionally, Google lost a key dispute with the Chinese government when the company agreed to disable a censorship alert that was displayed when Chinese users accessed the search

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[13] G.A. Res. 70/125 (Dec. 16, 2015), http://workspace.unpan.org/sites/Internet/Documents/UNPAN96078.pdf.

[14] William H. Dutton, *Multistakeholder Internet Governance*, WORLD DEV. REPORT (2016), http://pubdocs.worldbank.org/en/591571452529901419/WDR16-BP-Multistakeholder-Dutton.pdf.

[15] Dan Levin, *At U.N., China Tries to Influence Fight Over Internet Control*, N.Y. TIMES (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/technology/china-wins-battle-with-un-over-word-in-internet-control-document.html.

[16] G.A. Res. 70/125, *supra* note 13, ¶ 49.

[17] Levin, *supra* note 15.

[18] Beina Xu & Elanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS (Feb. 17, 2017), https://www.cfr.org/backgrounder/media-censorship-china.

[19] *Id.*

[20] *Id.*

[21] *Id.* Levin, *supra* note 15.

engine.[22] China is joined in its quest for Internet sovereignty by Russia and the Group of 77, an organization comprised of developing countries.[23]

B. Jurisdiction

The issue created by the Canadian decision in *Google Inc. v. Equustek* is that the Canadian court is seeking to assert jurisdiction and sovereignty over globalized information. In response to *Microsoft v. USA*, the Internet Governance Project indicated that this "clash between cyberspace and political space" would provide countries with two basic choices and the following effects:

> Either 1) isolate themselves completely by requiring every Internet service to keep all of their facilities and data in their jurisdiction and completely regulating all cross-border movements of data; or 2) extend their jurisdiction beyond their territory and try to regulate services globally. The first option, taken to its extreme, ends the Internet – it destroys the network effects and efficiency of the global Internet and creates a set of national walled gardens. The second option destroys the whole model of national sovereignty, and opens up Internet services to a welter of conflicting jurisdictional requirements.[24]

The jurisdiction of individual countries in cyberspace is complicated and problems arise because the Internet is trans-border and thus, not bound by traditional territorial lines.[25] This creates issues because certain Internet content may be considered illegal or criminal in some countries while being legal in others.[26] The Internet reaches over four billion users from almost 200 countries.[27] Today most transactions or activities involve multiple jurisdictions and create possible conflicts of law as nations work to extend their jurisdiction extraterritoriality.[28]

Canada follows the principle of comity and has arranged for reciprocal enforcement agreements with countries such as the United States, Australia,

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[22] Xu & Albert, *supra* note 18.

[23] Kristen E. Eichensehr, *The Cyber-Law of* Nations, 103 GEO. L.J. 317 (2015).

[24] Milton Mueller, *What's Really at Stake in the Microsoft v. USA Decision*, INTERNET GOVERNANCE PROJECT (July 15, 2016), http://www.internetgovernance.org/2016/07/15/whats-really-at-stake-in-the-microsoft-v-usa-decision/.

[25] De La Chapelle & Fehlinger, *supra* note 1.

[26] *Id.*

[27] *Id.*

[28] *Id.*

and the United Kingdom.[29] Thus, Canada relies on agreements with other countries to enforce its jurisdiction beyond its borders. Canada approaches jurisdiction over the Internet in a way very similar to the United States by applying a "real and substantial connection" test.[30] The Supreme Court of Canada has interpreted this to be a test "intended to capture the idea that there must be some claims to jurisdiction," and suggested there was a need for "greater comity in our modern era when international transactions involve a constant flow of products, wealth and people across the globe."[31] Thus, the jurisdiction of Canadian courts is not bound by its territory.

C. Cases Expanding Jurisdiction Extraterritoriality

Prior to the final decision in *Google Inc. v. Equustek*, a British Columbia court heard *Niemela v. Malamas*, in which the plaintiff sought an injunction to compel Google Inc. to block 146 URLs that lead to websites providing defamatory comments about the plaintiff.[32] Google voluntarily de-indexed the URLs on Google Canada, however refused to do so worldwide.[33] The court refused to issue an injunction on the grounds that it would not be complied with because U.S. federal statues protect Google by blocking orders that would infringe on the right to free speech under the First Amendment. However, Google may elect to voluntarily comply with such an order, because the federal statutes only prohibit a U.S. court from issuing an order compelling Google, Inc. to comply in the United States.[34] In this case, the court narrowly rejected the claim "without really coming to grips with the extraterritoriality problem."[35]

Canada has not extended its jurisdiction extraterritoriality to defamation or right to privacy cases because the country prioritizes freedom of speech over privacy.[36] However, there is an alarming trend in the European Union to restrict freedom of speech in favor of privacy by requiring Google to de-index

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[29] Arlan Gates, *Canadian Law on Jurisdiction in Cyberspace*, CHICAGO-KENT COLL. OF LAW (1999), http://www.kentlaw.edu/cyberlaw/docs/rfc/canadaview.html.

[30] *Id.*

[31] *Id.*; Hunt v. T&N plc, [1993] 4 S.C.R. 289, para. 58.

[32] Niemela v. Malamas, [2015] B.C.S.C. 1024 (Can.).

[33] David Post, *Worldwide Injunctions from British Columbia*, WASH. POST (July 27, 2015), https://www.washingtonpost.com/news/volokhconspiracy/wp/2015/07/27/worldwide-injunctions-from-british-columbia/?utm_term=.312de2ad372a.

[34] *Id.*

[35] *Id.*

[36] Karen Zimmer, *Privacy vs. Free Speech on the Internet: An update on the Right to be Forgotten and What is Happening at Home*, DEFAMATION + PUBL'N RISK MGMT. L. BLOG (Aug. 22, 2017), http://defamationandrisklawblog.ahbl.ca/2017/08/22/privacy-vs-free-speech-internet-update-right-forgotten-happeninghome/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

URLs. Thus, the Canadian court is not the first court to issue orders for removal of Internet content beyond its borders.

In 2010, a Spanish citizen filed a complaint against Google Spain and Google Inc., claiming his privacy rights were violated by a newspaper article containing an old auction notice that appeared when his name was searched.[37] Spain referred the case, *Google Spain v. AEPD, Marcio Osteja Gonzalez*, to the Court of Justice of the European Union.[38] The court decided that EU laws apply to search engines if they have a branch or subsidiary in a Member State, that data protection laws apply to search engines, and that individuals have "the right to be forgotten" which includes the power to ask search engines to remove links providing the public with their personal information when the information is inaccurate, inadequate, irrelevant, or excessive.[39] However, the court indicated that "the right to be forgotten" is not absolute and that the determination should be made on a case-by-case basis so as to protect freedom of expression and other rights.[40] This right was based on European Union data protection legislation, Directive 95/46/EC, which provides in Article 12 "Rights of Access" that

> Member States shall guarantee every data subject the right to obtain from the controller: . . . (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.[41]

Google was found to be a data controller because when a Google search of a person's name is conducted the search engine processes personal data from third party web pages and formulates links to web pages with information regarding the person.[42] Additionally, the Directive provides in Article 14, the right for the subject of the online data to object to the "processing of data relating to him . . . [and] [w]here there is a justified objection, the processing instigated by the controller [of the data] may no longer involve those data."[43] This provision permitted the lawsuit against Google and the Directive

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[37] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 EUR-Lex CELEX LEXIS 612CJ0131 (May 13, 2014).

[38] Global Freedom of Expression*, Google Spain SL v. Agencia Española de Protección de Datos*, COLUMBIA UNIV., https://globalfreedomofexpression.columbia.edu/cases/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos-aepd/ (last visited Mar. 21, 2019).

[39] Case C-131/12, *supra* note 37.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

applies throughout the European Union for protection beyond the domain of Google Spain.[44]

In 2017, the Netherland's highest court found a man had a right to be forgotten after conviction due to a viral video depicting him soliciting a hit on a pimp. Google argued it was in the public interest for people to know about criminal activities. However, the court expanded the right to be forgotten. France is now approaching the question of whether it was sufficient for Google to make infringing content inaccessible from all European domains, as a French data protection agency is arguing the links must be de-indexed worldwide.[45] As France considers issuing the same order Canada issued in *Google Inc. v. Equustek* to de-index URLs worldwide, the EU's right to be forgotten has resulted in extensive requests for the search engine to remove content. As of June 16, 2017, Google had received 734,289 requests from people within the European Union, approximately 43% of which were complied with.[46]

Google Inc. v. Equustek is not a defamation or privacy case. However, it is being utilized in Canada to support the exercise of jurisdiction over the Internet in privacy matters. The Office of the Privacy Commission of Canada (OPCC) brought a claim that Globe24h.com was disseminating sensitive information "in relation to personal matters such as divorce proceedings, immigration matters, health issues, and personal bankruptcies."[47] The complainants were "alleging that links to Canadian court and tribunal decisions containing their personal information were appearing prominently in search results when their names were entered in common search engines."[48] In reaching its decision, the court acknowledged it would analyze the applicable law, the Personal Information Protection and Electronics Documents Act (PIPEDA), under the presumption that, "in the absence of clear words to the contrary, [] Parliament did not intend its legislation to receive extraterritorial application."[49] In *T. (A.) v. Globe24h.com*, a Canadian federal court held the Romanian operated website, www.Golbe24h.com, violated PIPEDA, and ordered the website operator "to remove all Canadian court and tribunal decisions containing personal information . . . and [to] take the necessary steps to remove these decisions from search engine caches."[50] In *T. (A.) v. Globe24h.com*, the court relied on *Google Inc. v. Equustek*. The Supreme Court subsequently upholding *Google Inc. v. Equustek* gives further credence to the federal court decision in *T. (A.) v. Globe24h.com*.[51] Thus, Canada is

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[44] Zimmer, *supra* note 35.

[45] *Id.*

[46] *Id.*

[47] T. (A.) v. Globe24h.com, [2017] F.C. 114, ¶ 11 (Can.).

[48] *Id.* ¶ 12.

[49] *Id.* ¶ 55.

[50] *Id.* at Judgment 2.

[51] Post, *supra* note 33.

expanding its extraterritorial reach over Internet jurisdiction more frequently and over diversified types of claims.

III. ANALYSIS

A. Expansion of Power

The *Google Inc. v. Equustek* decision expands the power of a nation's court to control the Internet around the world by issuing an order to compel Canada to de-index URLs worldwide.[52] This overstep of authority is vastly greater than the exertion of authority demonstrated in the right to be forgotten cases arising in Spain and the Netherlands, because as member countries of the European Union they essentially function as states of the same nation in the context of the right to privacy.[53] The effects of the decisions reached by the European Court of Justice on European Union countries are analogous to the effects of a decision reached by the United States Supreme Court on every state. Canada, on the other hand, is attempting to exert jurisdiction over countries it does not consider part of a cohesive functioning body with itself. Further, Canada is increasingly expanding the reasons for extending jurisdiction beyond its borders by issuing an injunction in an intellectual property case. The URLs at issue led to websites for the sale of Datalink's infringing property and were thus commercial speech.[54] Commercial speech receives "more limited protection under international law."[55] However, this decision has the potential "to be used as precedent to justify abusive restrictions on the right to freedom of expression on a global scale by legitimizing the use of global takedown orders" and can lead to forum shopping.[56]

The decision by Canada's highest court stands directly against the Constitution of the United States and the statutory speech protections that United States citizens esteem.[57] The Electronic Frontier Foundation intervened in *Google Inc. v. Equustek* to explain how

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[52] *Id.*

[53] Stefan Kulk, *Freedom of Expression and 'Right to be Forgotten' Cases in the Netherlands After Google Spain*, 2 EUR. DATA PROTECTION L. REV. 113, 115 (2015).

[54] Google Inc. v. Equustek Solutions Inc., [2017] 1 S.C.R. 34 (Can).

[55] Global Freedom of Expression*, Google Inc. v. Equustek Solutions*, COLUMBIA UNIV., https://globalfreedomofexpression.columbia.edu/cases/equustek-solutions-inc-v-jack-2/ (last visited Mar. 11, 2019).

[56] Aaron Mackey, Corynne McSherry & Vera Ranieri, *Top Canadian Court Permits Worldwide Internet Censorship*, ELECTRONIC FRONTIER FOUND. (June 28, 2017), https://www.eff.org/deeplinks/2017/06/top-canadian-court-permits-worldwide-internet-censorship.

[57] *Id.*

> [i]ssuing an order that would 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.[58]

Canada's ability to remove Internet content worldwide sets a dangerous precedent and legitimizes the practice for countries with repressive regimes that drastically restrict freedom of expression. If this decision is effective in its goal, what would stop China from attempting to restrict Google's conduct around the world in the same way it does within its own country? The Electronic Frontier Foundation further argued that Canada's approach would lead to "a race to the bottom . . . [with] individuals engag[ing] in international forum-shopping to impose the one country's restrictive laws regarding free expression on the rest of the world."[59] Those seeking to remove content from the Internet, which countries such as the United States or Canada might find to be within the protection of the freedom of expression, might seek its removal from the judiciary in nations like China or Iran. This forum shopping has been referred to as creating the potential for "censorship tourism" in British Columbia.[60] The Supreme Court of Canada largely ignored the concerns raised, because Google was subject to Canadian jurisdiction due to its substantial contact with the country.[61] The court indicated that it did not see freedom of expression concerns weighing in Google's favor after a balance of the convenience test and held that "[i]f Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly."[62]

The burden of proof should not be on a non-party to show that an injunction violates the laws of another country.[63] "[I]nnocent third part[ies] to a lawsuit should not have to shoulder the burden o[f] proving whether an injunction violates the laws of another country. Although companies like Google may be able to afford such costs, many others will not, meaning many

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[58] *Id.*

[59] Mackey, *supra* note 54.

[60] Post, *supra* note 34 (explaining that plaintiffs could "combin[e] a nice vacation in beautiful Vancouver while also getting a court to issue you a worldwide injunction against Google listings for sites against which you might have some sort of a claim."). *See also* David Post, *Worldwide Injunctions From British Columbia*, WASH. POST (July 27, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/27/worldwide-injunctions-from-british-columbia/?utm_term=.aec3ef08f4bc.

[61] Mackey, *supra* note 54.

[62] Google Inc. v. Equustek Solutions Inc., [2017] 1 S.C.R. 34 (Can.).

[63] Mackey, *supra* note 54.

overboard and unlawful orders may go unchallenged."[64] If the court decides the situation demands such an order, the burden should be on the party seeking the order to establish there is no violation of foreign laws protecting free speech.[65]

B. How should Google Inc. v. Equustek have been decided

The court held that "it hardly seems equitable to deny Equustek the extra-territorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible."[66] This seems at odds with the court's prior interpretations of Canadian legislation. The court has indicated in prior decisions that,

> While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This is because "[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally respected."[67]

Thus, the issuing of injunctions worldwide should be presumed impermissible, until demonstrated otherwise. The court should have exercised caution in extending its jurisdiction beyond its borders and demonstrated respect for traditional territorial jurisdiction.

Google Inc. v. Equustek was wrongly decided. The dissent in *Google Inc. v. Equustek* argued that the court had jurisdiction to grant the order against Google. However, the dissent argued the court should have exercised judicial restraint because

> the Google Order enjoins a non-party, yet Google has not aided or abetted Daltalink's wrongdoing; it holds no assets of Equustek's and has no information relevant to the underlying proceedings. The Google order is mandatory and requires

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[64] *Id.*

[65] *Id.*

[66] Google, [2017] 1 S.C.R. ¶ 47.2.

[67] T. (A.) v. Globe24h.com, [2017] F.C. 114, ¶ 54 (Can.) (quoting Tolofson v. Jensen, [1994] 120 D.L.R. (4th) 289, ¶ 54 (Can.)).

> court supervision. It has not been shown to be effective, and Equustek has alternative remedies.[68]

The court could have handled the resolution of the case in a way that poses less of a threat to the freedom of expression on the Internet. "An equitable remedy is not required unless there is no other appropriate remedy at law."[69] The dissent correctly argued in agreement with the Court of Appeals of British Columbia that Equustek should seek a remedy in France because it appeared that Datalink's associates currently reside in France and "French courts will assume jurisdiction and entertain an application to freeze the assets in that country."[70] This option would allow a remedy at law through financial compensation, awarding Equustek damages out of Datalink's assets located in France.

Google voluntarily de-indexed the URLs in Canada. Instead of issuing a worldwide injunction, the court could have requested a voluntary de-indexing in the countries where Equustek was suffering the greatest loss of sales to Datalink. The European "right to privacy" cases have resulted in Google receiving requests for removal of personal information. Google then evaluates the request.[71] A similar strategy could have been adopted here. Google may have found a request for de-indexing only in the countries where Datalink is receiving the most sales to be less threatening to its rights as a search engine than a demand for de-indexing globally.

Additionally, Equustek could have sought an injunction in countries around the world where significant sales were lost to Datalink. This approach would have allowed each country to maintain jurisdiction over commercial speech and sales of infringing products.

The best way for the Supreme Court of Canada to have responded in this case was a combination of all three suggestions. By following this Note's suggested approaches, the Supreme Court of Canada could have protected Equustek's interest in its sales. Equustek would be financially compensated with damages for lost sales, and if Google refused to de-list the URLs in countries with the highest amount of infringing sales Equustek could have sought an injunction in those countries. The majority believed since the problem occurred online, it occurred globally, and thus, the only way to prevent irreparable harm would be de-indexing the URLs globally.[72] That assertion is not true. Instead if an injunction was issued in countries that produced the most sales for Datalink, Equustek would no longer suffer irreparable harm.

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[68] Google, [2017] 1 S.C.R. ¶67 (Côté and Rowe JJ., dissenting).

[69] *Id.* ¶81.

[70] *Id.*

[71] Eloïse Gratton & Jules Polonetsky, *Droit A'L'Oubli: Canadian Perspective on the Global 'Right to be Forgotten Debate'*, 15 COLO TECH. L.J. 337, 341-42 (2017).

[72] *Id.*

It may be argued that individuals in countries where an injunction has taken effect can circumvent this restriction by accessing the Internet through a virtual private network (VPN). VPNs could be used to access a server outside of the country of residence to access Internet that contains Datalink URLs. For example, VPNs are frequently utilized in China to "tunnel[] traffic to a server outside of China with unfiltered Internet" to circumvent the extensive censorship.[73] Buyers of Equustek products seem unlikely to go through this much effort to purchase technology from Datalink that is readily available from Equustek.

Others may argue that it is not economically feasible for Equustek to seek an injunction in multiple forums. However, this does not justify an improper exercise of jurisdiction.

IV. CONCLUSION

The Supreme Court of Canada's decision in *Google Inc. v. Equustek* is part of an increasing trend for one country to decide access to the Internet and Internet content beyond its borders.

> The decision affords a new – but exceptional – remedy to victims of IP infringements, and possibly of privacy violations, data breaches, and defamatory comments. In some circumstances, such victims might be able to obtain a court order that will impede access to the objectionable content, not just within Canada but anywhere in the world.[74]

Both the majority and minority of the court focused narrowly on the factual situation of the case before it, without elaborate response to the concerns raised about the issues this precedent could create for freedom of expression.[75]

The case was wrongly decided and could lead to unfortunate limitations on free speech as oppressive regimes attempt to exert the same type of worldwide injunctive power over Internet search engines, social media platforms, and webpages generally. The target content of oppressive regimes could be "politically or religiously sensitive material."[76] If Canada legitimizes control

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[73] James Griffiths, *Great Firewall rising: How China wages its war on the Internet*, CNN (Oct. 25, 2015), http://www.cnn.com/2015/10/25/asia/china-war-internet-great-firewall/index.html.

[74] Eloise Gratton, *Google Inc. v. Equustek Solutions Inc.: Supreme Court Gives the Green Light to Global Orders to Take Down Search Results* (July 5, 2017), http://www.eloisegratton.com/blog/2017/07/05/%E2%80%8Bgoogle-inc-v-equustek-solutions-inc-supreme-court-gives-the-green-light-to-global-orders-to-take-down-search-results/.

[75] *Id.*

[76] *Id.*

over the Internet worldwide, it is easy for jurisdictions "that might not share our conception of fundamental rights and freedoms" to exert the same power by citing *Google Inc. v. Equustek* as precedent.[77]

Even though its decision was limited to the narrow case before it, the Supreme Court of Canada should have followed the recommended approach when faced with the Equustek issue. Courts should not attempt to exert extraterritoriality jurisdiction over the Internet in pursuit of stopping infringing technology sales when there are alternative resolutions to the issue and when harm to an innocent third party results as it did here. Monetary damages should have been recovered in France and the court should have requested Google to de-index URLs in areas of high Datalink sales. If Google refused to de-index the URLs then injunctions should have been sought in the countries with high Datalink sales.

Canada erred in its decision and Google should not comply with the current injunction. Canada should not attempt to force Google into compliance. Instead, countries should work together following the multistakeholder approach to Internet governance to effect change and combat Internet crime without one country gaining too much power or control over the Internet and its content. The multistakeholder approach must consider not only the goal of stopping crime but the equally important goal of maintaining freedom of expression. It must be remembered that even countries with liberal laws regarding freedom of expression diverge on priorities, so if this decision stands it has the potential to create disputes between the United States and the European Union, who differ greatly on the importance of the "right to be forgotten."[78]

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[77] *Id.*

[78] Gratton & Polonetsky, *supra* note 70, 391-92.