

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

BETWEEN:

GOOGLE INC.

APPELLANT
(Appellant)

– and –

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

RESPONDENTS
(Respondents)

– and –

ATTORNEY GENERAL OF CANADA (AND OTHERS*)

Interveners

FACTUM OF THE INTERVENERS
THE INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY,
MUSIC CANADA, THE CANADIAN PUBLISHERS' COUNCIL AND
THE ASSOCIATION OF CANADIAN PUBLISHERS, THE INTERNATIONAL
CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS, THE
INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS and THE
WORLDWIDE INDEPENDENT NETWORK

Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156

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PART I — OVERVIEW

1. This appeal raises fundamental issues about the rule of law on the Internet. Courts have consistently held that orders may be granted against non-parties where necessary to protect or enforce rights. Over time, courts have developed equitable principles for granting such orders and have applied them flexibly in a wide range of circumstances. This case considers whether court orders against non-parties are similarly available in an Internet setting, or whether the Internet stands alone as a medium in which these long-established principles do not apply.

2. As commerce and communications have migrated to the Internet, inevitably so too has illegal activity. For all its beneficial uses, the Internet is frequently used to make available all manner of illegal materials. The offenders operate under cloaks of anonymity. They flout court orders, acting as if they are above the law. Voluntary takedown requests are ignored or deteriorate into a futile game of whack-a-mole. Claimants have few if any direct means of enforcing court orders against these offenders.

3. The offenders use the facilities of search engines and other online service providers (OSPs) to carry out unlawful acts. OSPs provide the means by which offenders distribute illegal materials, including by providing Internet connectivity, hosting content, or operating a social network. Search engines provide the means by which illegal sites are found and accessed. While OSPs may not have initiated the wrongful behavior, they facilitate and frequently profit from it.

4. Often, the only practical means to stem such illegality is via these Internet gatekeepers. Courts can and must be able to issue injunctions against search engines and other OSPs to protect rights and promote the rule of law while paying due regard to freedom of expression and comity concerns. While courts should be sensitive to overreach, the Internet need not be a lawless space, nor its gatekeepers beyond the powers of courts to grant injunctions when they facilitate, aid, or abet illegal activity or violation of court orders.

5. Injunctive orders against OSPs are a natural evolution of courts' inherent powers, are common worldwide, and can balance the interests of claimants, OSPs and the public. Such relief should not be based on an inappropriate test that assumes that any online activity is "expression" deserving of the highest level of protection and thus trumping all other rights and rendering third-party relief virtually unattainable.

PART II — STATEMENT OF POSITION

6. The Interveners submit that Canadian courts are able to grant relief against search engines and other OSPs when they facilitate or are otherwise mixed up in illegal online activities.

7. The Interveners take issue with Google’s primary position that it is free to “truthfully inform” users about any Internet site and cannot be “deputized” by a court to deindex a site even if it is found to be illegal and enjoined on that basis. Google itself removes contents it deems illegal or offensive from its search engines. By denying the courts’ right to make orders against it, Google, in essence, argues that it alone can determine which materials breaching a court order are offensive enough to remove. If encouraged by the outcome of this appeal into believing that no site, however illegal, is beyond the law’s reach, other search engines may take this as an invitation to “truthfully inform” users about all manner of illegal activities and resist attempts to enforce other orders. Courts have and must have the power to grant orders against search engines when their systems are being used to facilitate illegal activity or breach a court order.

PART III — STATEMENT OF ARGUMENT

A. Courts May Make Deindexing Orders Against Search Engines

8. Common-law courts enjoy an equitable jurisdiction to grant injunctive relief “where it is just and equitable” to do so. Although jurisdiction is exercised on a principled basis, these principles are “of great width and elasticity” and responsive to “new circumstances as they arise from time to time”. Equity has long conferred authority to issue orders binding on non-parties, even where no cause of action exists against them.¹ Examples include injunctions to avoid an injustice, to prevent aiding or abetting the violation or thwarting of a court order, to bar non-parties from aiding, abetting or facilitating infringement of an intellectual property right, and to enforce orders such as *Mareva* injunctions.² As these orders are *in personam*, they can oblige a

¹ Spry, *Equitable Remedies*, 9th ed. at 1, at 383, 389, **Interveners’ Authorities (“IA”)** Tab 107; Sharpe, *Injunctions and Specific Performance*, §1.1100-.1220, 6.260-.280 **IA103**; *Goddard v. Nationwide Building Society*, [1987] Q.B. 670 (C.A.) at 685 **IA30**.

² *Cartier International v. British Sky Broadcasting*, [2016] EWCA Civ 658 at ¶45-56 **IA13**, 72; *Norwich Pharmacal v. Customs & Excise Commrs*, [1974] A.C. 133 (C.A.) at 145-46, *rev’d on other grounds* [1974] A.C. 133 at 174-75 (H.L.) **IA52**; *British Telecom v. One in a Million Ltd.*, [1999] 1 W.L.R. 903 (C.A.) at 919-20 **IA8**; *L’Oréal v EBay International* [2009] EWHC 1094 (Ch) at ¶447-54 **IA38**; *AG v. Times Newspaper Ltd* [1992] 1 A.C. 191 at 203-207 **IA2**; *Customs and Excise v. Barclays Bank* [2006] UKHL 28 at ¶29 **IA21**; *Carey v. Laiken*, 2015 SCC 17 at ¶29-30, 39-41, 45-46 **IA11**; Riordan, *The Liability of Internet Intermediaries* at §9.115-116 **IA101**. In the U.S., see *Waffenschmidt v. MacKay*, 763 F. 2d 711 (5th Cir. 1985) at 717-23 (U.S. courts enforcing orders against persons

non-party to do, or refrain from doing, specified actions in a foreign country. Though they may have extraterritorial effects, they do not assert extraterritorial jurisdiction.³ Other legal systems have analogous laws to prevent systems of non-parties from being used to violate rights.⁴

9. Courts worldwide have recognized that the Internet is not “a no law land”. Just as they adapted the law to deal with previous novel situations, so have courts adapted the law to help address wrongs carried out over the Internet.⁵ Courts have recognized that OSPs offer access, hosting, domain name registration, and information location services that can facilitate illegal activities of others. Courts have found these gatekeepers to be sufficiently “mixed up” in the illegal activities to justify making orders against them, regardless of any finding of fault on their part. Examples include *Norwich* orders and injunctions requiring OSPs to take proportionate measures to prevent infringements such as by taking down, filtering, preventing re-uploading of, or disabling access to, illegal materials.⁶

10. The power to make orders against OSPs is essential to preserving the effectiveness of law online, including to address the gamut of illegal online activities such as cyber-hacking and

outside their territory who aid or abet the violation of an injunction) **IA86**; *Arista Records LLC v. Tkach*, 122 F.Supp.3d 32 at 33-38 (SDNY 2015) (Internet registrar aiding and abetting breach of injunction) **IA5**.

³ *Spry* at 37-44; Sharpe §2.900-910 **IA107**; *Fourie v. Le Roux* [2007] UKHL 1 at ¶25-33 **IA29**; *National Australia Bank v. Dessau*, [1988] VicRp 58 (S.C.) at 2 **IA50**; *R Griggs Group Ltd v Evans (No 2)* [2004] EWHC 1088 (Ch) at ¶69, 133 **IA57**; *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909 (Cal. App. Ct., 2001) at 916 **IA53**; *Google Spain v. González* (case no. C-131/12) at ¶45-60 (examining jurisdictional basis for requiring Google to deindex search results) **IA31**.

⁴ *Directive 2001/29/EC*, Art. 8(3) **IA112**; *Sony v. McFadden*, Case C-484/14 at ¶20-21, 101 **IA69**; *L'Oréal HC* at ¶455-463 (describing the German duty of *Störerhaftung*, which allows injunctions to be entered against non-parties contributing to a pattern of infringement) **IA38**; *RapidShare*, IZR 80/12 (August 2013) at ¶30-31, 44-47, 56-57, 63 **IA58**.

⁵ *Dow Jones & Company Inc v. Gutnick*, [2002] HCA 56 (H.C. Aust.) at ¶115 **IA27**; *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.) at ¶28-34 **IA7**; *Trkulja v Google Inc LLC (No 5)*, [2012] VSC 533 at ¶16-31 **IA77**; *Yeung v. Google Inc.* (HCA1383/2012) at ¶54 **IA90**; *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077 at 1098 (court adapting enforcement rules to modern means of communication) **IA25**.

⁶ Riordan, Ch. 16 **IA101**; *Cartier International v British Sky Broadcasting*, [2014] EWHC 3354 at ¶74, 111 **IA12**; aff'd *Cartier CA* ¶46-49, 51-56 **IA13**; *Canadian National Railway Company v. Google Inc.*, 2010 ONSC 312 **IA10**; *McKeogh v John Doe 1* (Irish H.C., case no. 20121254P) at ¶10-13, 17-21 **IA42**; *XY v Facebook Ireland Ltd* [2012] NIQB 96 at ¶13, 17-19 **IA89**; *Tata Sky Ltd v YouTube LLC* CS (Comm) 223/2016, ¶24 **IA73**; *Google SARL* (Case No. 14/55975, Trib. de Grande Instance) at 4 **IA62**; *Delta TV Programs SRL v Google Ireland*, 15218/2014 (Turin Lower Court) at ¶6.5-7.4 (Italian court ordering use of filter to prevent uploading of materials on YouTube) **IA22**; *Cinepoly Records v. Hong Kong Broadband Network*, [2006] HKCFI 84 at ¶64-71 **IA17**; *Rugby Football Union v Consolidated Information Services* [2012] UKSC 55 at ¶14-18 **IA75**; *Voltage Pictures v. John Doe*, 2015 FC 1364 at ¶52, 57 (Courts' policy in *Norwich* cases “should be to support measures that reasonably deter... illegal conduct”) **IA85**; also see authorities at footnotes 9 to 12. Generally, given the then-state of technology, ISPs have not been required to indiscriminately monitor or filter for illegal content: *Scarlet Extended* [2011] EUECJ C-70/10 at ¶35 **IA65**; *SABAM v. Netlog* [2012] EUECJ C-360/10 at ¶34-38 **IA61**; *RapidShare* ¶55-63 (approving targeted monitoring obligation) **IA58**.

privacy breaches, cyber-fraud, terrorism, defamation, stolen credit cards, divulging state secrets, fenced goods, counterfeiting and other intellectual property infringement, and dissemination of malware. Obtaining a remedy against a search engine or other OSP is often the only practical solution to enforcing rights. Further, as illegal online conduct can take place in multiple territories simultaneously, and as courts with personal jurisdiction over a defendant have the power to adjudicate claims under foreign laws,⁷ it is vital that remedies with extraterritorial effects be available so that legal proceedings involving such wrongs do not need to be brought in every country in which illegality occurs and search engines operate.⁸

11. While deindexing orders are comparatively new, the power to grant them is consistent with principled bases for making orders against non-parties.⁹ They have been used extensively in the EU to limit access to sites that make illegal materials available or as a means of making court orders effective.¹⁰ Beyond this case, deindexing orders have been made in Canada against Google to prevent dissemination of illegal content to protect rights of claimants.¹¹ Google depicts the U.S. as a jurisdiction where court-ordered deindexing could not occur, yet global deindexing orders against search engines to protect intellectual property rights have been made there also.¹²

⁷ *Lucasfilm v Ainsworth* [2011] UKSC 39 at ¶99-110 IA40; *Tolofson v. Jensen* [1994] 3 SCR 1022 at 1048-50 IA76.

⁸ Riordan §1.26, 1.89, 1.96-1.98, 3.25-.34, 4.145-.149, 13.144, Ch 15 IA101; Sookman, *Computer, Internet and Electronic Commerce Law* at §11.8(c) IA105; *Directive 2001/29/EC*, recital 59 IA113; Cory, “How Website Blocking Is Curbing Digital Piracy Without ‘Breaking the Internet’” at 12-13 IA93. Interpol member countries have agreed to a resolution encouraging use of all tools to combat dissemination of child sexual abuse images, including via site-blocking: *Resolution AG-2009-RES-05* IA115. See Barry Sookman, “Internet Justice: *Mosley v Google*”, Feb. 2, 2015, highlighting the problem of proceeding country-by-country IA106.

⁹ Canada’s treaty obligations also require expeditious remedies to prevent violations of trade secret and other intellectual property rights, thus providing other principled bases for making orders against non-parties. *TRIPs Art. 41* IA110, *NAFTA Art. 1714* IA116 and *WCT Art. 14* IA118 require Canada to guarantee effective and expeditious remedies to prevent infringements; Art. 27 of the Universal Declaration of Human Rights provides all persons with “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” IA117; also International Covenant on Economic, Social and Cultural Rights, Art. 15(1)(c) IA114. The need for consistency between Canadian law and treaty obligations was recently emphasized in *B010 v. Canada*, 2015 SCC 58 at ¶47-48 IA9.

¹⁰ Riordan §16.01-16.09, 16.39-16.110 IA101; *PJS v. News Group Newspapers* [2016] UKSC 26 at ¶7, 63 (Court stating search engines should deindex foreign websites to enforce a privacy injunction) IA54; *APC v. Auchan Telecom S.A.S.*, Paris Reg. Ct. case no. 11/60013 (Nov. 28, 2013) at 2.8 IA3, aff’d *APC v. Orange SA* (Paris C.A.) at 33, 35-36 IA4; *Mosley v. Google* [2015] EWHC 59 at ¶24, 55 IA46. See also the authorities in footnote 25.

¹¹ *Nazerli v. Mitchell*, 2011 BCSC 1581 at ¶22-23 (reasons for interlocutory injunction against Google search results), 2016 BCSC 810 at ¶194-96 (granting a permanent injunction in respect of the results) IA48; *Langlois v. Google Canada*, 2014 QCCS 6507 IA39.

¹² *Hermes v. Doe*, Case 12 Civ. 1623 at 5, 10 (SDNY April 30, 2012; IA34; *Chanel Inc. v. Does 400-628*, Case 2:11-cv-01508-KJD-PAL at 11 (D. Nev., Nov. 14, 2011); IA16; *ABS-CBN Corporation v. Ashby*, Case 14-CV-1275-

12. Google portrays itself as an “innocent stranger” whose role is to truthfully inform the public about the contents of the Internet. It also claims there is no principled basis for making an order against it.¹³ These assertions are incorrect. Search engine operators program and constantly revise proprietary algorithms dictating what sites are selected and indexed; assign rankings to sites; suppress materials they regard as offensive; manually alter, delete, promote and demote results; and decide what information about sites is presented in search results. Even “automated” functions are a product of their judgment about which search results to return.¹⁴ Without these significant efforts, illegal content on the Internet would remain unknown or difficult to find.¹⁵ In privacy cases, courts have described search engines as “controllers” of information who play a “decisive role” in exposing it to public view.¹⁶

13. Google’s control over how it provides search results makes it much more than an “innocent”, “passive” or “purely technical” service provider, or “innocent disseminator” of information.¹⁷ Further, once a search engine like Google has knowledge that it is making available content that cannot be disseminated legally – such as being informed of a court order that the dissemination is illegal – the question of “innocence”, to the extent it is exculpatory, becomes irrelevant. In such circumstances, the search engine must cease facilitating the wrongdoing.¹⁸ At the very least, given a search engine’s role in aiding, abetting, and facilitating

HU (Dist. Or. Aug. 8, 2014) at 5-8 IA1; *Richemont International SA v Chen*, Case 12-CV-6689 (WHP) (SDNY Jan. 4, 2013) IA59, each making deindexing orders against all search engine sites and injunctions against other OSPs such as social media sites and domain name registrars, all with worldwide effects.

¹³ Google factum, e.g., ¶28, 57, 61, 63, 68, 71, 78, 113, 118.

¹⁴ *Google v. Hood*, 822 F.3d 212 at 216-17 (5th Cir. 2016) (noting Google take-down of 222 million pages in 2013) IA33; *Maier v. ASOS plc*, [2013] EWHC 2831 at ¶132-33 IA41; *APC* ¶2.8.1.1 IA3; *Yeung* ¶22-33, 116-18 IA90; *Mosley (Hamburg)* at 20 IA47; Riordan §16.26-16.33 IA101; Kuhn, “Google: The Rise and Rise of Online Intermediaries” at 193-97, 219-20 IA98.

¹⁵ *Yeung* ¶23 IA90; *Duffy v. Google Inc.* [2015] SASC 170 at ¶204 IA28; Millward Brown Digital, “Understanding the Role of Search in Online Piracy” (2014) IA99; Sivan, “Do Search Engines Influence Media Piracy?” IA104.

¹⁶ *González* at ¶32-41 IA31; *Mosley (UK)* at ¶22-23 IA46. Also *Vancouver Community College v. Vancouver Career College*, 2015 BCSC 1470 at ¶167 (Google algorithm controls advertising search results) IA84.

¹⁷ *SOCAN v. CAIP*, ¶92-102; 124-127 (describing innocent intermediary defence and explaining why creating embedded links automatically precipitating a telecommunication may ground liability for communicating a work) IA68; *Crookes v Newton*, 2011 SCC 4 ¶18, 20 (describing attributes of an innocent disseminator) IA20; *Yeung* ¶72-108 (reviewing leading Commonwealth cases on whether a search engine is an “innocent disseminator”) IA90; *Pritchard v. Van Nes*, 2016 BCSC 686 at ¶117-19 IA55; *Weaver v. Corcoran*, 2015 BCSC 165 at ¶283-87 IA88; *McKeogh* ¶14 IA42; *L’Oréal ECJ* ¶113-116, 141-44 IA37; *Google France (CJEU case no. C-238/08)* ¶112-20 IA32; *McFadden* ¶6, 60 IA69; *Twentieth Century Fox (No. 1)* ¶145 IA78; *Tamiz v. Google*, [2013] EWCA Civ 68 at ¶32-35 IA72; *CG v. Facebook Ireland Ltd*, [2015] NIQB 11 at ¶104-105 IA15.

¹⁸ See note 17. Upon notice, a search engine would have common law responsibility based on (i) its control over search results, (ii) knowledge it is communicating illegal materials, and (iii) aiding and abetting a breach of the court

conduct enjoined by a court, the principled bases for making orders against non-parties justifies making a deindexing order against a search engine, even in the absence of any fault or liability on its part. Such orders are necessary as voluntary policies have been found to fall far short of what is reasonably necessary or effective to address illegal online activity.¹⁹

14. The fact that search engines may operate semi-autonomously provides no basis for any special immunity to orders of courts. The law has long made people responsible for the acts of their machines and computerized tools. As with any other person using a computer to achieve a task, search engine operators are neither exempt from complying with court orders because computers carry out automated instructions, nor are they immune to the equitable powers of courts to make orders requiring them to address harms caused by their computerized tools.²⁰

B. Factors to Be Considered in Granting Orders

15. Courts in many other jurisdictions have dealt with the issue of making orders against OSPs to help enforce rights against sites that are a source of illegal content. In the EU, the factors most often considered in making such orders include whether the relief is **reasonably necessary**, **reasonably effective**, **proportionate**, whether **territorial limitations** are justified, and the likelihood of **freedom of expression impacts on lawful users of the Internet**. Applying these factors, courts will grant injunctions to block or deindex sites or impose other injunctions when the order is targeted and proportionate and does not unduly prevent access to lawful content.²¹

order. Also, under *Norwich HL* a party can be “entirely innocent” but still impressed with an equitable duty if that person has become “mixed up in the tortious acts of others so as to facilitate their wrong-doing”: 174-75; *Norwich CA* at 140, 145-46 makes it clear that the equitable duty triggers “as soon as he is aware of this fact” **IA52**.

¹⁹ See paras. 8-9 above. Also see Riordan §16.18-38 **IA101**; *L'Oréal (ECJ)*, C-324/09 [2011] at ¶141 **IA37**; *Mosley (UK)* ¶4 (Google’s takedown policy creates a “Sisyphian task” for a party asserting a right, as “even when a number of sites are blocked, many remain and some appear anew”) **IA46**; *Mosley (Hamburg)* at 21 (notice and take down insufficient to fulfil Google’s duty) **IA47**; *McKeogh* at ¶10, 17 (describing Google and Facebook policies as posing “an almost impossible task for the amateur” and ordering removal of content) **IA42**; Pasquale, “Beyond Innovation and Competition” *104 Northwestern L.R.* 105 (2010) **IA100**; Scassa & Currie, “New First Principles” (2010) 42 *Geo. J. Int’l L.* at 1068-69 **IA102**.

²⁰ *Century 21 v. Rogers Communications*, 2011 BCSC 1196 at ¶127-129 **IA14**; *Yeung* ¶122 **IA90**; *Public Performance of Musical Works 1996, 1997, 1998* at p. 37 (Cpy Bd) **IA56**; *Arista Records LLC v. Tkach*, *122 F.Supp.3d* 32 at 33-38 (SDNY 2015) (Internet registrar aiding breach of injunction using automated systems) **IA5**. *Duffy* ¶205-06 **IA28**; *State Farm v. Bockhorst*, *453 F.2d* 533 at 536-37 (10th Cir. 1972) **IA70**; Sookman at §2.18(i)-(ii), 10.5(a) **IA105**; Chopra & White, *A Legal Theory for Autonomous Artificial Agents* at 119-51 **IA92**; Kuhn at 193-95, 202-03 (questioning whether Google should get the benefits of automation without carrying the burden of legal accountability) **IA98**.

²¹ Riordan, Ch. 13 **IA101**; *Cartier CA* ¶127-178, 157-59 **IA13**, *Cartier* ¶4, 158, 194-96 **IA12**; *Twentieth Century Fox v. Sky UK*, [2015] EWHC 1082 at ¶5 **IA80**; *UPC Telekabel Wien*, C-314/12 [2014] at ¶62-64 **IA83**; *L'Oréal*

16. The question of whether the relief is **reasonably necessary** considers the efficiencies of seeking relief against a service provider rather than pursuing claims against many individual wrongdoers. The remedy need not be a “measure of last resort” or “indispensable” to protect a right. Rather, courts can consider if alternative measures are available that are less onerous.²²

17. In considering the question of whether the relief is **reasonably effective**, courts do not require an order to eradicate the illegal behaviour. Orders may be made even if only to dissuade some users from accessing the illegal site and even if additional Internet locations have to be added later to address efforts to circumvent the orders either by site operators or users.²³

18. The question of effectiveness also goes to the breadth and territorial reach of an order. If the evidence suggests that URL-specific measures would be ineffective, or that the dominant or only use of a site is for illegal purposes, courts will order measures against the entire site.²⁴ If a deindexing order against a country-specific search engine site, e.g., google.ca, would not be effective, courts will make orders, like the order made by the Chambers Judge, requiring all sites operated by a search engine, e.g., google.com and google.fr, to deindex the content so that it cannot be accessed via the search engine in territories where it is illegal or is illegal to make available, including worldwide orders if the underlying relief requires it.²⁵ These kinds of orders do not exercise extraterritorial jurisdiction, but are an “inevitable”, “legitimate” and “very

ECJ ¶139-44 **IA37**; *McFadden* ¶84-101 **IA69**; *Mosley UK* ¶52-54 **IA46**. The Australian *Copyright Act 1968*, s. 115A(5) also identifies relevant factors **IA111**. Google advances a *Copyright Act* argument referring to s. 41.27(4.1). It should be rejected because: (a) it is advanced for the first time in this Court; (b) there are no Canadian cases dealing with eligibility of search engines for this defence, let alone in a case involving trade secrets; (c) it disregards this Court’s holding in *SOCAN v. CAIP* that exceptions apply to intermediaries only “[t]o the extent they act as innocent disseminators” (¶89, 95, 110, 124-25 **IA68**); and (d) it does not address making orders against search engines to enforce court orders. This provision should be interpreted only when it is squarely before this Court.

²² *Cartier CA* ¶174-78 **IA13**; *Cartier* ¶160-62, 197-217 **IA12**; *Universal Music v. Telefonica Germany*, 1 ZR 174/14 at ¶82-83, 84-87 **IA82**. The same approach to deindexing was adopted in *González* at ¶63, 84 **IA31**.

²³ *Twentieth Century Fox v British Telecommunications (No. 1)* [2011] EWHC 1981 at ¶185, 192-98 **IA78**; *Cartier CA* ¶157-59 **IA13**; *Cartier* ¶173-76, 204, 246-48 **IA12**; *Telekabel Wien* ¶63 **IA83**; *APC* ¶2.7.1.3.4, 2.7.1.4 **IA3**; *Twentieth Century Fox v. British Telecommunications (No. 2)* [2011] EWHC 2714 at ¶12-14 **IA79**; *BAF v. Belgacom & Telenet*, (Court of Appeal, Case 2010/AR/2541) at 13-14 **IA6**; *Telenor v. IFPI Denmark* (Danish Supreme Court, case no. 153/2009) at 5 **IA74**; *Universal Music Australia v. Sharman* [2005] FCA 1242 (F.C. Aust.) at ¶290, 294 **IA81**; *Yeung* ¶54 **IA90**.

²⁴ *Telekabel Wien* ¶63 **IA83**; *APC* ¶2.8.2.1 **IA3**; *BAF* ¶12-14 **IA6**; *Twentieth Century Fox (No. 1)* ¶96, 150-58 **IA78**; *Dept of Electronics v. Star India R.P.* No. 131/2016 at ¶10-14 (explaining necessity of whole site blocking) **IA23**.

²⁵ *APC* ¶2.8 **IA3**; *APC v. Orange SA* at 33, 35-36 **IA4**; *González* ¶2, 88, 100 **IA31**; *Mosley France* at 9-13 **IA45**; *Mosley (Hamburg)* at 3-4 **IA47**; *Google SARL* at 4 **IA60**; Article 29 Working Party Opinion **WP 225** at ¶20 **IA91** and CNIL decision No. 2016-054 at 8-9 (explaining why limiting deindexing to EU domains would not be “a sufficient means to satisfactorily guarantee the rights of data subjects”) **IA18**; the U.S. authorities in footnote 12; *Arista Records* at 36-39 (dealing with non-U.S. domains) **IA5**; *Delta* ¶7.4 (worldwide takedown) **IA22**.

common” assertion of territorial jurisdiction that may have extraterritorial impacts.²⁶ In *Mareva* cases, courts have recognized the need to *carefully* but *effectively* exercise jurisdiction to deal with ways sophisticated operators thwart enforcement of orders outside the territories of courts.²⁷

19. Courts also examine whether a deindexing or blocking order is **proportionate**. This involves examining whether the likely burden on the intermediary is justified by the efficacy of the remedy and the benefit to the claimant.²⁸ Deindexing has been viewed as a more proportionate remedy than requiring a claimant to seek individualized relief against each and every site violating a person’s rights.²⁹ In this case, Google has not claimed that deindexing would be costly or an inconvenience.³⁰ In cases where costs are involved, courts have viewed certain expenses as a cost of doing business to avoid aiding and abetting a wrong and as a *quid pro quo* for the immunities from liability which providers seek.³¹

20. A deindexing order does not inherently raise any special **issues of comity**. These kinds of orders are not intrinsically extraterritorial or “global”, but rather apply to persons over whom the court has personal jurisdiction.³² Further, there are good policy reasons for making orders with extraterritorial effects, such as to address internationally accepted wrongs like cross-border trade secret misappropriation.³³ Comity issues can arise if enforcement of an order would be illegal in a foreign jurisdiction. However, principles of private international law provide national courts with tools to assess the appropriateness of a foreign state’s overreach in a given situation. Evidence as to the likely effect of an order are matters for the court’s exercise of discretion.³⁴

²⁶ Scassa 1069-71 IA102; Goldsmith, “Unilateral Regulation of the Internet,” 11 Eur. J. of Int’l L. 135, 135-39 (2000) IA95.

²⁷ *JSC BTA Bank v Ablyazov (Rev 1)* [2013] EWCA Civ 928 at ¶34-36 IA35.

²⁸ Riordan §15.11 IA101; *Cartier* ¶162, 197-217, 261 IA12; *Cartier CA* ¶127-78 IA13; *Twentieth Century Fox (No. 1)* at ¶199-201 IA78; *Telekabel Wien* ¶46-56 IA83; *SNEP c. Microsoft*, TGI No. 16-53589, p. 9 (rejecting deindexing that blocks lawful sites) IA67.

²⁹ *González* at ¶63, 84 IA31.

³⁰ *Chambers Decision* ¶153; *BCCA Decision* ¶92-93, 103. Google voluntarily deindexes: Riordan §16.26-16.35 IA101.

³¹ *Cartier* ¶242-53 IA12; *Cartier CA* ¶171-73 IA.

³² See the authorities in footnote 3.

³³ *Libman v. the Queen*, [1985] 2 S.C.R. 178 at 213-14 (justifying assumption of jurisdiction over transnational matters on the basis that “we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother’s keepers.”) IA36; *SOCAN v. CAIP* ¶60, 78 (justifying real and substantial connection test in Internet context) IA68; Arts. 39 and 41 of WTO TRIPs require all 164 Contracting Parties to protect and provide remedies for trade secret misappropriation IA110; Understanding The WTO IA108.

³⁴ Scassa 1017-1018, 1052-54, 1069-70 IA102; Goldsmith, “Against Cyberanarchy” at 1217, 1219-20 IA94; Goldsmith & Wu, *Who Controls the Internet* at 156 IA96; Spry at 419-420 IA107; Sharpe §1.1210-.1230 IA103;

21. Foreign courts also consider possible impacts on **freedom of expression on lawful users of the Internet**. As representatives of cultural industries, including those of music, publishing, and the dramatic and visual arts, the Interveners place great importance on this value, but Google takes it to an unwarranted extreme by suggesting that *any* online information – even materials found by a court to be illegal – is expression that should be treated with the heightened sensitivity reserved for “free press” and “open court” cases. This alarmingly impractical, inappropriate and non-technologically neutral rule could shelter online illegal forms of expression (such as fraudulent speech or hate speech) that would clearly be enjoined in another medium. This rule could encourage online illegal and harmful behaviour because of protections that do not exist offline. It would also completely eschew the important analytical framework used by this Court and foreign courts to contextually balance competing interests.³⁵ Google also claims that if this Court affirms the Decision, it could serve as a catalyst for repressive regimes to ban political speech accessible to Canadians. Such regimes could, of course, find any rationale for taking such action if desired. However, this straw man claim confuses such injunctions with the one issued in this case, where the court carefully balanced interests and where no legitimate expressive values were engaged.

22. Courts in the EU considering freedom of expression issues balance the prospect of harm to a claimant against whether an order would unnecessarily curb access to lawful expression. They recognize the public interest in preventing illegal conduct such as intellectual property infringement and in enforcing orders of the court. They also recognize that site operators whose primary aim is to violate the rights of others (such as purveyors of counterfeit goods) have no expressive right that requires protection, and that Internet users have no expressive interest in

Sarl Louis Feraud v. Viewfinder 489 F. 3d 474 at 479-83 (2nd Cir. 2007) (U.S. courts will recognize a foreign judgment “unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense” and “foreign decrees and proceedings will be given respect... even if the result under the foreign proceeding would be different than under American law”) IA63; *De Fontbrune v. Wofsy*, case no. 14-15790 (9th Cir., 2016) at 4, 17-19, 21-30 (courts must discern whether a foreign remedy “is designed to ‘punish an offense against the public,’ or is in the nature of a ‘grant of a civil right to a private party.’”) IA24

³⁵ Wu, “Machine Speech” at 1508, 1525-31 (explaining why search results may be a form of communication, but not protected speech absent censorial motive by a government) IA109; *Saskatchewan v. Whatcott*, 2013 SCC 11 at ¶112-14 IA64; *Sierra Club of Canada v. Canada*, 2002 SCC 41 at ¶86 (it is an error to “balance one value at large and the conflicting value in its context”) IA66. It is also noteworthy that Google appears to be simultaneously saying that its *own* expression rights are at risk, but *also* that it is not a publisher for liability purposes: Factum ¶7, 32. Either Google is a speaker and responsible for its speech, or it is not a speaker and must carefully maintain the neutrality required by the innocent disseminator defence, particularly after it receives notice of illegality.

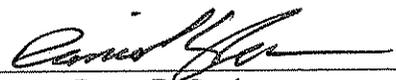
accessing counterfeit or pirated digital goods or instructions on how to acquire them.³⁶ Nor are freedom of expression rights of OSPs violated by having to block or disable access to such sites. An order will not be improper if it is targeted so that it does not unnecessarily deprive users of lawful uses of information on sites. As in this case, when there is no realistic claim that the sites under scrutiny further expressive values or have any significant lawful purpose, courts have found that deindexing, site blocking and content filtering orders do not violate freedom of expression values of any person.³⁷

23. This approach is consonant with Canadian *Charter* cases, which balance the values underlying freedom of expression with other values and do not provide absolute freedom to disseminate unlawful materials.³⁸ This approach is also consistent with settled law that private parties have no *Charter* freedom of expression right to exploit or use another person's private property and that the *Charter* does not apply to common law rules governing relations between private parties. As in this case, injunctive relief safeguarding rights and interests in a private dispute cannot be evaded through reference to the *Charter*.³⁹

PART V — ORDER SOUGHT

24. The Interveners request permission to present oral argument at the hearing of the appeal for a period not to exceed 15 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF OCTOBER, 2016



For Barry B. Sookman
Daniel G.C. Glover
Miranda Lam

³⁶ Deindexing orders only make content harder to find; the content remains accessible by users.

³⁷ *Cartier* ¶85-86, 158, 184-89, 194-96 IA12; *Cartier CA* ¶114, 125-129 IA13; *Twentieth Century Fox (No. 1)* at ¶200-01 IA78; *Telekabel Wien* ¶56, 63 IA83; *L'Oréal ECJ* ¶141-44 IA37; *APC* ¶2.7.2.3, 2.7.2.4, 2.8.2.5 IA3; *APC v. Orange SA* at 33, 35-36 IA4; *Warner Bros. v. Telenor Norge* (Oslo Dist. Ct. 15-067093TVI-OTIR/05) at 17 IA87; *Universal Music (Germany)* ¶53-55 IA82; *STEF v Fjarskipti* Case K-8/2013 D.C. Reykjavik Oct. 14, 2014 at 15 IA71; *Neij v. Sweden* (ECHR Case 40397/12) at 8, 10-12 IA51.

³⁸ *Whatcott* at ¶64-67 IA64.

³⁹ *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139 at 228 IA19; *Montréal v. 2952-1366 Québec Inc.*, 2005 SCC 62 at ¶61-62 IA44; *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at ¶26-33 IA60; Hogg §43-17, 43-44 IA97; *Michelin v. CAW*, (1996), 71 C.P.R. (3d) 348 at 388 IA43; *Dish Network v. Rex*, 2012 BCCA 161 at ¶28-29, 52-53 IA26; *De Fontbrune* at 28-30 (distinguishing *Yahoo! v. La Ligue Contre Le Racisme* as a case in which French penal law was being exercised for violations of “public rights and duties” as opposed to a “private dispute”) IA24.

PART VI — TABLE OF AUTHORITIES

No.	Authority	Paras. cited
1.	<i>ABS-CBN Corporation v Ashby</i> , No 14-CV-1275-HU (Dist.Or. Aug. 8, 2014)	11
2.	<i>AG v. Times Newspaper Ltd</i> [1992] 1 A.C. 191 (HL)	8
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9.	<i>B010 v. Canada (Citizenship and Immigration)</i> , 2015 SCC 58	11
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11.	<i>Carey v. Laiken</i> , <u>2015 SCC 17</u>	8
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26.	<i>Dish Network L.L.C. v. Rex</i> , 2012 BCCA 161	23
27.	<i>Dow Jones and Company Inc v Gutnick</i> [2002] HCA 56	9
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31.	<i>Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González</i> , <u>C-131/12</u> [2014], CURIA	8, 12, 16, 18, 19
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38.	<i>L'Oreal SA & Ors v eBay International AG & Ors</i> [2009] EWHC 1094 (Ch), [2009] RPC 21	8, 15,
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56.	<i>Public Performance of Musical Works 1996, 1997, 1998</i> (Copyright Board, decision of October 27, 1999)	14
57.	<i>R Griggs Group Ltd & Ors v Evans & Ors (No 2)</i> [2004] EWHC 1088 (Ch), [2004] FSR 48	8
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GOOGLE INC. - and - EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, and
CLARMA ENTERPRISES INC.

S.C.C. File No. 36602

- and - ATTORNEY GENERAL OF CANADA (AND OTHERS*)

SUPREME COURT OF CANADA

FACTUM OF THE INTERVENERS
THE INTERNATIONAL FEDERATION OF THE
PHONOGRAPHIC INDUSTRY, MUSIC CANADA, THE
CANADIAN PUBLISHERS' COUNCIL AND
THE ASSOCIATION OF CANADIAN PUBLISHERS,
THE INTERNATIONAL CONFEDERATION OF
SOCIETIES OF AUTHORS AND COMPOSERS, THE
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