A Gap Anywhere is a Gap Everywhere: Finding Comity in Worldwide Delisting Orders

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1. Introduction

"The Internet has no borders — its natural habitat is global."[1] These were the words of the Supreme Court of Canada in upholding an injunction against Google that required it to delist[2] the websites of an intellectual property infringer worldwide. The words are, at least in our most common experience of the Internet, undoubtedly true. But they also highlight an important discrepancy: the Internet may have no borders, but the law does. So when courts choose to apply their domestic law to the Internet with worldwide effect, as the Supreme Court of Canada did, it sets the stage for an international showdown between courts and laws, the resolution of which affects Internet users around the world.

It may be no surprise, then, that this is precisely what happened following the Supreme Court of Canada's ruling. Almost immediately, Google began the process of eviscerating the Canadian order through the US courts on grounds including freedom of speech and comity, resulting in an injunction being granted that prevents the Canadian order from being enforced in the United States.[3] Given that the Supreme Court of Canada found that the website delisting had

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[1] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 41 [*Google v Equustek* SCC].
[2] Here to "delist" websites means to remove them from search results that users see when using a search engine. This is also sometimes referred to as "de-indexing" or "de-referencing." All such terms are interchangeable.
[3] *Google LLC v Equustek Solutions et al.*, USDC, Northern District of California, San Jose Division, case No. 5:17-cv-04207-EJD, re: Dkt No 53, December 14, 2017 (granting default judgment and a permanent injunction).

to be worldwide for it to be an effective remedy,[4] should Google now choose not to delist the subject websites for American users, the Canadian injunction will be rendered largely futile.

The case may well set a dangerous international precedent that courts follow in attempting to force Internet intermediaries to delist websites or remove content without considering the international effect, but it also demonstrates the equally dangerous potential responses Internet intermediaries can take that may well put more power in their hands. It raises important questions about comity, the conflict of laws, and the international enforcement of rights in the Internet context. If a right granted by a domestic law requires an Internet intermediary to remove access to content worldwide to have the desired effect, what happens when that intermediary, or even foreign citizens, have rights in another jurisdiction that prevent that removal? The same question can be asked in the context of the attempt by European privacy agencies to enforce the "right to be forgotten" worldwide.[5] If a person has a right to be forgotten, does everyone in the world have an obligation to forget? What if they have a right not to?

This paper attempts to untangle these question by exploring the different possible principles of comity that courts might adopt in deciding both whether to issue a worldwide takedown order against an Internet intermediary, such as Google or Facebook, and whether to enforce such orders. The question is not whether courts can issue such orders, but what principles should restrain their discretion in doing so. Unfortunately, no matter the outcome, the domestic law of one state will be undermined. And where worldwide delisting orders are made,

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[4] *Google v Equustek* SCC, *supra* note 1 at para 41.
[5] *Google Spain SL and Google Inc v Agencia Española de Protección de Datos* (AEPD) and Mario Costeja González (13 May 2014) C-131/12, online: EUR-Lex <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0131&qid=1492359576318&from=EN> [*Google Spain*].

transnational non-state Internet intermediaries thus have an important regulatory role to play as worldwide takedown orders grant them the discretion of whether, and where, to challenge such orders. A central danger is that the intermediary may not challenge the order in all jurisdictions in which it might succeed, denying residents there access to information. An individual generally cannot sue an intermediary to reinstate removed content on the grounds that she has right to see it.

Ultimately, this paper argues that the courts of those nations that attempt to limit online speech are likely to lose the legal tug-of-war in the long run, since, in these cases, a gap anywhere undermines the entire order. It therefore undermines their power and legitimacy to attempt to push domestic remedies internationally. It argues that, absent international agreement, under principles of comity and respect for sovereign equality, courts should consider the freedom of expression rights of impacted citizens of foreign jurisdictions and the rights granted to the intermediary by foreign law. Ultimately, the courts should balance the importance of the right or interest the delisting order seeks to protect against the foreign public policies that may be undermined by it. The order is both contrary to comity and unlikely to be effective otherwise. In cases where a worldwide order is inappropriate, this paper suggests that a better solution is to work with intermediaries to tailor a solution that gives maximum effect to the right in question without offending the law of other sovereign states.

Part 2 of this paper explores the nature of the problem through two contentious and ongoing international disputes involving Google: the aforementioned Canadian case of *Google v Equustek*, and the ongoing litigation in Europe concerning the right to be forgotten. It demonstrates how the open and borderless nature of the Internet is in constant tension with the

power of sovereign states to enforce their laws against citizens or businesses with assets or employees on their territory. These cases demonstrate the problem the courts face: limiting the order to domestic application may undermine the right being protected, but worldwide application may run afoul of foreign interests and is likely to end up undermined anyway. Further, since the power to challenge the law internationally is left largely in the hands of the intermediary, the intermediary may choose only to selectively challenge enforcement of the order in its home jurisdictions, leaving the citizens of other nations unprotected from the overreach of foreign courts. The ultimate effect, no matter the outcome, is that the domestic law of some sovereign states is undermined, while the effective regulatory power of the intermediary is increased.

Part 3 then turns to private international law, also known as the conflict of laws, to see if a resolution can be found there. It specifically looks to the often-overlooked and loosely-defined concept of comity to understand what principles may help resolve the tension, if any. In this, it concludes that comity is best understood in the context of the extraterritorial application of domestic law to persons abroad as a matter of foreign relations. That is, recourse to the concept of 'comity' allows courts to import political and international relationships into private law and to balance domestic and foreign interests. It looks to the reasonableness factors of the US Restatement (Third) of Foreign Relations Law of the United States[6] with respect to when courts should refuse jurisdiction to provide a framework from which to consider issues of comity.

[6] Restatement, Third, Foreign Relations Law of the United States (Revised) § 403.

Part 4 then applies this framework to the context of worldwide delisting orders to elucidate a number of specific factors courts should consider in these cases. It argues that, while there are no perfect solutions, courts should attempt to balance domestic interests in protecting the right the order seeks to provide a remedy for against the presumed international interest in freedom of expression on the Internet, as well as against potential interference with other public policy interests of other states.

This paper concludes by suggesting that where the extraterritorial scope of a delisting order is inappropriate, a better path may be to work with the intermediary to tailor a solution that gives maximum effect to the infringed right without impinging upon the foreign rights of either the intermediary or foreign citizens.

2. The Two Google Sagas and the Problem of Worldwide Delisting Orders

It's important to understand the context in which world-wide delisting orders arise, as the question of whether such orders should be made will always depend on the facts in question and the relative importance of the rights being protected. This section therefore reviews two important examples of worldwide delisting orders to demonstrate to how such orders arise, why some courts consider them necessary, the observed responses of the target intermediary, and the potential problems they create.

a. Equustek v Google

The litigation that began the international saga of *Google v Equustek*[7] began rather prosaically as an intellectual property infringement case, and it didn't initially involve Google. Equustek Solutions Inc. is a manufacturer of various network devices based in British Columbia, and a company called Datalink Technology Gateways Inc.[8] was one of its distributors. Datalink began to relabel Equustek products and pass them off as its own. It also acquired trade-secrets belonging to Equustek that it used to manufacture its own products, which it then used to fill orders for Equustek products.[9] At trial, Datalink initially defended the claims, but after being subject to various injunctions compelling it to cease its infringing activities and to return all of Equustek's documents, it fled the jurisdiction and continued its operations from an undisclosed location.[10] Further remedies followed, including a *Mareva*[11] order that froze all of Datalink's assets and product inventory around the world, and a contempt order against Datalink's principal, Morgan Jack. However, Datalink had incorporated shell companies around the world, and continued to carry on business despite the Canadian remedies.[12] This had, apparently, caused Equustek's revenues to fall significantly.[13]

Equustek then approached Google directly to de-index Datalinks websites. Google refused to delist entire websites from its search engine, but eventually agreed to remove specific

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[7] *Google v Equustek* SCC, *supra* note 1.
[8] Not to be confused with the Datalink that is a division of Insight Direct USA, Inc.
[9] *Google v Equustek* SCC, *supra* note 1 at paras 2-3.
[10] *Ibid* at paras 5-8.
[11] A Mareva order is a (usually preliminary) injunction extending from the English case of *Mareva Compania Naviera SA v International Bulkcarriers SA*, [1975] 2 Lloyd's Rep 509 which prevents a defendant from moving or otherwise dispensing of assets from within the jurisdiction so as to prevent effective enforcement of a judgment. American courts have rejected importing the English doctrine: see *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund, Inc*, 527 US 308 (1999).
[12] *Google v Equustek* SCC, *supra* note 1 at paras 9-11.
[13] *Ibid* at para 9.

webpages. This proved ineffective as Datalink merely moved the infringing offerings and information around its website to webpages that remained accessible through Google. Equustek subsequently sought a third-party interlocutory injunction against Google, which was granted.[14] The order was upheld on appeal to the British Columbia Court of Appeal,[15] and eventually by the Supreme Court of Canada.[16]

The matter of whether the Court had *in personam* jurisdiction over Google had already been settled by the British Columbia Court of Appeal on the basis that Google carried on business in Canada, and this was not contested on appeal to the Supreme Court of Canada.[17] The Court also had no trouble dispensing with the argument that such injunctions could not apply to non-parties to the initial litigation, finding that many injunctions are regularly allowed against non-parties.[18] This left the question of whether the order could be given extraterritorial, and indeed, worldwide effect. The Court referred to previous Canadian authorities that suggested that injunctions, and especially *Mareva* orders could be made with international effect.[19] Notably, however, none of these domestic cases concerned injunctions that would not just affect a handful of entities, but the ability of people to access information worldwide. To that effect, the Court

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[14] *Ibid* at paras 12-16. An interlocutory injunction is a preliminary injunction that attempts to avoid the defendant or third parties taking steps that may cause irreparable harm to the plaintiff, or the ability of the case to be resolved, before the issue can be decided in full. However, Google argued that, as Datalink had fled the jurisdiction and that the litigation would never proceed, the interim injunction was actually a permanent and final remedy. The Court effectively held that that was irrelevant at para 51.
[15] *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265.
[16] *Google v Equustek* SCC, *supra* note 1.
[17] *Ibid* at para 37.
[18] *Ibid* at paras 31-35.
[19] *Ibid* at para 38. The only Canadian case not concerning a Mareva order referenced was *Impulsora Turistica de Occidente, SA de CV v Transat Tours Canada Inc*, [2007] 1 SCR 867 (granting an injunction against a Mexican corporation for breach of contract).

did make reference to the somewhat analogous European 'right to be forgotten' case involving Google.[20]

Ultimately, the central question before the Court was whether a worldwide injunction was justified and equitable in the circumstances. The Court found that it was necessary to order Google to remove the offending websites from all search results, given that Equustek had no other mode of redress and only a worldwide order would prevent Equustek from continuing to suffer irreparable harm.[21] The Court stated that "[t]he only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally."[22] It also found that it was relatively easy for Google to remove the content from its search results worldwide, and thus the order would not impose significant costs on the company.[23]

Finally, the Court very briefly addressed the issue of international comity and the order's effect upon freedom of expression. The Court held that Google's suggestion that the injunction would violate the laws of foreign jurisdictions was "with respect, theoretical."[24] In the Court's view, intellectual property rights were generally respected internationally, and that freedom of expression values were not meaningfully engaged in a way that would offend the core values of any nation. Google also offered no evidence that the order would violate the laws of any other nation. Should such evidence come to light, the Court suggested, Google could apply to the

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[20] *Google Spain*, *supra* note 5.
[21] *Google v Equustek* SCC, *supra* note 1 at para 38. It should be noted that these conclusions were vigorously challenged by a two judge dissent: they noted that Equustek did indeed have additional remedies available by pursuing an action in France —where the defendant appeared to have assets— and that there was absolutely no evidence the worldwide delisting order would be effective in preventing harm to Equustek: see paras 61-82 (per Côté and Rowe JJ).
[22] *Ibid* at para 41.
[23] *Ibid* at para 43.
[24] *Ibid* at para 44.

British Columbia courts to vary the injunction.[25] Notably, however, the Court never discussed why it should be Google's responsibility to offer such evidence and protect the domestic law of foreign nations. Ultimately, it was the Court's view that any effects on freedom of expression were outweighed by the irreparable harm Equustek would face.[26]

This Supreme Court of Canada's view that the extraterritorial effects would not injure the values of any other nation very quickly proven to be mistaken. Google almost immediately challenged the enforcement of that order in the US via the California courts[27] on the basis that enforcement of the Canadian injunction in the US would violate the First Amendment, international comity, and the safe-harbour provisions granted to Internet intermediaries under section 230 of the *Communications Decency Act*.[28] Google succeeded and obtained a preliminary injunction on November 2, 2017.[29] While the injunction was granted primarily on the basis that the Canadian order would interfere with the protections afforded to Google by federal law under the *Communications Decency Act*, the District Court also stated that enjoining the Canadian order would serve the public interest on the grounds that "free speech on the internet would be severely restricted if websites were to face tort liability for hosting user-generated content"[30] and

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[25] *Ibid* at para 46.
[26] *Ibid* at para 49.
[27] *Google Inc v Equustek Solutions Inc et al,* Complaint of Google Inc (filed 24 July 2017), case 5:17-cv-04207 in the United States District Court for the Northern District of California, San Jose Division, online: <https://assets.documentcloud.org/documents/3900043/Google-v-Equustek-Complaint.pdf>.
[28] 47 US Code § 230. This provision provides immunity for providers of "interactive computer service[s]" from liability stemming from their treatment as a "publisher or speaker of any information provided by another information provider." This, in effect, immunizes search engines like Google from any responsibility for the content contained on third-party websites they may link to.
[29] *Google LLC v Equustek Solutions et al.*, USDC, Northern District of California, San Jose Division, case No. 5:17-cv-04207-EJD, re: Dkt No 16, November 2, 2017.
[30] *Ibid* at 5.

that the "Canadian order […] threatens free speech on the global internet."[31] A permanent injunction was granted on default judgment just over a month later.[32]

The case has attracted international attention for raising the spectre of a single domestic legal system being used to control a multinational organization worldwide, and the problem of a conflict of laws.[33] As counsel for Google put it in response to the Supreme Court of Canada's decision, "one country shouldn't be able to decide what information people in other countries can access online … Undermining this core principle inevitably leads to a world where internet users are subject to the most restrictive content limitations from every country."[34]

At the time of writing, it remains to be seen whether Google will seek to vary the Canadian order on the basis of the American injunction. Google can, after all, still be held in contempt of court in Canada for violating the Canadian order if it chooses not to comply. However, it seems unlikely that this will be the result given the American injunction.

Indeed, Google's success has, in a sense, demonstrated the ineffectiveness of such orders where they infringe the domestic law of another state, especially that of the United States where most major Internet companies call their home. But as I will discuss below, this does not resolve

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[31] *Ibid* at 6.
[32] *Google LLC v Equustek Solutions et al, supra* note 3.
[33] See e.g. Aleksandra Kuczerawy & Jef Ausloos, "From Notice-and-Takedown to Notice-and-Delist: Implementing Google Spain" (2016)14 J on Telecommunication & High Tech L 219 at 220; Davey Alba, "Google Fights Against Canada's Order to Change Global Search Results," *Wired* (24 July 2017), online: <https://www.wired.com/story/google-fights-canada-order-global-search-results/>; Peter Leung, "Google Asks U.S. Court to Block Canadian Order," *Bloomberg BNA* (25 July 2017), online: <https://finance.yahoo.com/news/u-government-no-longer-controls-160017929.html>; Electronic Frontier Foundation, "Google v. Equustek," online: <https://www.eff.org/cases/google-v-equustek>.
[34] Alba, *ibid* (quoting David Price, senior product counsel at Google).

the problem, and the state of affairs created by the Supreme Court of Canada's decision and Google's response to it is not one that we should applaud or seek to repeat in the future.

First, however, I turn to a second, and far more famous story.

b. Google and the Right to be Forgotten

Perhaps the greatest example of a worldwide delisting order is the ongoing epic of attempts by Spanish and, recently, French privacy agencies to enforce the European Union's "right to be forgotten" worldwide.[35] Prior to the enactment of the General Data Protection Regulation (GDPR) in 2016, European privacy regulations required that personal data only be processed (including by search engines) to the extent that the information was, among other things, accurate, up to date, relevant and not excessive for the purposes.[36] The GDPR, which repealed the old regulations, provides individuals a right to have their personal data erased by a data controller where that data is "no longer necessary in relation to the purposes for which they were collected or otherwise acquired."[37] This includes scenarios in which the data was 'processed' for the purposes of news reporting in the public interest.[38]

The saga began in 2010 when Mario Costeja González, a resident of Spain, launched a complaint with the Spanish Data Protection Agency (AEDP) complaining of the fact that a

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[35] Prior to the enactment of the General Data Protection Regulation (EC Regulation 2016/679) in 2016, EU privacy legislation did not refer directly to a "right to be forgotten," but this was frequently the term given to some of the provisions of Articles 6 and 7 of European Union Directive 95/46/EC. See e.g. Alan Travis & Charles Arthur, "EU court backs 'right to be forgotten': Google must amend results on request," The Guardian (13 May 2014) online: <https://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-eu-court-google-search-results>. However, the English version of the current EU General Data Protection Regulation, which repeals Directive 95/46/EC, does use this term expressly in Article 17 and the preamble.

[36] European Union Directive 95/46/EC, articles 6 & 7.

[37] EC Regulation 2016/679, article 17.

[38] See *ibid*, articles 5, 6 & 89.

Google search of his name would return links to the pages of a local newspaper from 1998 which announced the forced sale of his home to pay off his debts.[39] He sought to have both the newspaper take down the information from their website archives and to have Google remove any links to such material from its search results.[40] The AEPD rejected the claim concerning the newspaper, as it had published the notice under a legal obligation, but accepted that Google was required to do so under data protection regulations. Google appealed the ruling to Spain's Audencia Nacional, which then referred questions to the Court of Justice of the European Union (CJEU) to decide the matter under the data protection regulation then in force.[41]

The European Court of Justice (ECJ – a Court of the CJEU) handed down its decision in 2014. Most of the decision concerned jurisdiction questions aimed at assessing whether the regulations, and the Court's authority, applied to the activities of the American-based Google Inc. in this case. The ECJ concluded that they did. On the substantive question of whether a search engine like Google could be required to remove search results under the regulations, the court concluded that the regulations required "a balancing of the opposing rights and interests concerned"[42] Specifically, the ECJ required consideration of the complainant's fundamental right to privacy and the protection of personal data under Articles 7 and 8,[43] respectively, of the Charter of Fundamental Rights of the European Union.[44] Against this must be weighed "the

[39] *Google Spain*, *supra* note 5 at para 14.
[40] *Ibid* at para 15.
[41] *Ibid* at paras 17-20.
[42] *Ibid* at para 74.
[43] *Ibid* at para 81.
[44] Charter of Fundamental Rights of the European Union, 2012/C 326/02, articles 7 & 8.

interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life."[45]

Notably, the ECJ held that an individual may bring a claim to the 'data controller' itself (in this case, Google), "who must then duly examine their merits and, as the case may be, end processing of the data in question"[46] In effect, the ECJ required that Google, and any similar entity, effectively become a court of first instance in any right to be forgotten claim. While the ECJ provided that an individual could still seek enforcement through domestic agencies and courts,[47] the mandatory language with respect to the "data controller" required that it effectively establish a process by which to deal with such complaints and consider them on the merits.

Google did just that. Google began accepting requests by individuals in Europe to have specific search results removed. Google states that it weighs "the privacy rights of the individual with the public's interest to know" in determining whether to remove the search results, thereby becoming a juridical body for the adjudication of the personal privacy rights of EU citizens.[48] Indeed, Google states that it has hired a team directly for these purposes:

> Google Inc. staff make the relevant determinations. We have a team of specially trained reviewers for this purpose, based primarily in Dublin, Ireland. Our team

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[45] *Google Spain, supra* note 5 at para 81. Ironically, for Mr. Costeja González, his success at the ECJ had the opposite effect on his privacy from what he sought. The AEPD subsequently rejected his attempts to have links to comments relating to him and the ECJ case removed, given the public interest in the case: Miquel Peguera, "No More Right-To-Be-Forgotten For Mr. Costeja, Says Spanish Data Protection Authority," The Center for Internet and Society (3 October 2015), online: <http://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority>.

[46] *Ibid* at para 77.

[47] *Ibid.*

[48] See Google, "Search removal request under data protection law in Europe", online: <https://support.google.com/legal/contact/lr_eudpa?product=websearch>.

> uses dedicated escalation paths to senior staff and attorneys at Google to adjudicate on difficult and challenging cases.[49]

This, however, was not the end of issue. While the ECJ held that the legislation could have extraterritorial scope in reach the operations of the American Google Inc., as opposed to its Spanish subsidiary,[50] it did not reach a finding on the question of whether the right to be forgotten required Google to delist search results on all of its domains. Google thus limited its delisting in response such applications to its European subdomains (e.g. google.fr, google.de), while maintaining the links from subdomains outside of Europe including its primary google.com domain.[51]

Subsequently, the French data protection agency, Commission nationale de l'informatique et des libertés (CNIL), received hundreds of complaints from French nationals and in June of 2015 ordered Google to delist search results on all of its domains worldwide.[52] Google informally appealed that ruling within the agency later that same year and was rejected by CNIL's President.[53] It then appealed to France's Supreme Administrative Court, the Conseil d'Etat, who in July of 2017 referred the central questions of the extraterritorial scope of the right to be forgotten back to the Court of Justice of the European Union.[54] We currently await the decision in this case.

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[49] Google, Transparency Report, Requests to Remove Content, "Frequently Asked Questions," online: <https://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en#how_does_googles_process>.
[50] *Google Spain, supra* note 5 at paras 45-60.
[51] Commission nationale de l'informatique et des libertés, "CNIL orders Google to apply delisting on all domain names of the search engine," *CNIL* (12 June 2015), online: <https://www.cnil.fr/fr/node/15790>.
[52] *Ibid.*
[53] Commission nationale de l'informatique et des libertés, "Right to delisting: Google informal appeal rejected," *CNIL* (21 September 2015), online: <https://www.cnil.fr/en/right-delisting-google-informal-appeal-rejected-0>.
[54] Conseil d'Etat, CE, 19 juillet 2017, Google Inc., Case No. 399922, online: <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-19-juillet-2017-GOOGLE-INC>.

Should the CJEU decide that the right does have extraterritorial scope and that Google is required to delist offending websites across all of its domains, we may expect that Google will follow the same route as it did in the *Equustek* case and seek to challenge their enforcement in American courts. Naturally, American courts cannot prevent European agencies and courts from enforcing their orders against Google's assets in Europe. But, as will be discussed, a decision that suggests the order violates American public policy, as was suggested by the District Court for the Northern District of California in *Equustek*,[55] may be enough to push back enforcement against American technology companies. It will be especially interesting to see if the CJEU references the Supreme Court of Canada's *Equustek* decision in its own reasons.

c. The Problem

A consideration two cases above suggest a number of potential problems with the status quo, regardless of whether the CJEU decides that the EU's right to be forgotten requires worldwide delisting of search results. The first problem, as identified by counsel for Google,[56] is that, should these worldwide delisting orders become commonplace, the most restrictive domestic laws will quickly determine what information is available to those around the world, regardless of whether their domestic laws would allow the information to be accessible.

The issue is complicated by the fact that search engines and online platforms, such as Facebook that may also be targeted by similar orders, are private entities entitled to enforce their own policies. This means that, absent legislative intrusion, there is little the citizens of a state can do to enforce a positive obligation on these corporations to list, or re-list, certain content should

[55] *Google LLC v Equustek Solutions et al*, *supra* note 29 at 4.
[56] Alba, *supra* note 33.

the corporation not wish to. This issue was briefly addressed by the District Court for the Northern District of California in granting the preliminary injunction against the Canadian order in *Equustek* when it stated that the order "threatens free speech on the global internet."[57]

Following the CJEU's decision in the case of *Costeja González,* The Council of Europe's Commissioner for Human Rights also commented on this problem, stating that:

> the CJEU then left it entirely up to Google to process and adjudicate on any complaints that it received from users, despite the fact that the court had acknowledged a fluid set of criteria for assessing such complaints and a potential undermining of the right of the public to have access to certain information. This created a legal environment where Google had a clear incentive to react positively to complaints and little or no counterbalancing incentive (or guidance from the court to decide how, if and when) to turn down complaints.[58]

While Google may attempt in good faith the balance the privacy rights of a given complainant with the public interest, their processes remain opaque, and they have come under scrutiny for their sometimes questionable delisting activities.[59] The CJEU decision required Google to consider the public interest, and presumably, maintain links to information that is in the public interest, it is unclear how there could be any oversight for overreaches on Google's part in delisting material. Individuals generally have no legal means to enforce their right to see delisted information, or to have their websites listed by Google.

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[57] *Google LLC v Equustek Solutions et al, supra* note 29.
[58] Council of Europe Commissioner for Human Rights, "The Rule of Law on the Internet and in the Wider Digital World" (December 2014) *Issue Paper,* online: Council of Europe <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da51> [COE Rule of Law] at 63.
[59] See e.g. Andrew Orlowski, "Google de-listing of BBC article 'broke UK and Euro public interest laws' - So WHY do it?" (4 July 2014) *The Register,* online: <http://www.theregister.co.uk/2014/07/04/google_peston_bbc_delisting_not_compliant_w_public_interest_law_says_expert/>; Adi Robertson, "Google 'right to be forgotten' requests keep piling up" (25 November 2015) *The Verge*, online: <https://www.theverge.com/2015/11/25/9801130/google-transparency-report-right-to-be-forgotten-2015>.

Ultimately, this means that considerably more power over information is put in the hands of Google. The CJEU decision effectively deputizes Google to act with legal authority when adjudicating the rights of both EU citizens with respect to the right to be forgotten, and people worldwide with respect to their rights to freedom of expression.

Indeed, the increased power of the target intermediary in worldwide delisting orders is also a major problem in the Supreme Court of Canada's decision in *Equustek*. The Court, in dealing with the concern about the effects of the order on rights internationally, brusquely suggested that the onus was on Google to demonstrate that the order would violate the laws of another country.[60]

This is problematic for the obvious reason that it demands that Google be the guardian of international comity and Internet freedoms. Google is a for-profit private entity. It very well could have simply complied with the Canadian order and thereby undermined what the Californian court held was American public policy.[61] No private entity in the United States would be able to challenge Google's decision to comply with the Canadian order on public policy grounds. No cause of action lies there.

Furthermore, even if Google was to demonstrate that the order violated the domestic law of another nation, it's unlikely that Google would offer such evidence concerning *every* nation where it might succeed. Likely, Google would only demonstrate how the order offended domestic law in the handful of nations of most concern to Google's business interests. If the Court subsequently carved out those nations for which evidence of a conflict was provided, then

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[60] *Google v Equustek* SCC, *supra* note 1 at para 46.
[61] *Google LLC v Equustek Solutions et al*, *supra* note 29.

other nations whose laws may equally be interfered with are left without recourse. The Supreme Court of Canada's decision gave no consideration to these issues, instead tacitly suggesting that the onus was on Google to protect against the overreach of the Canadian courts.

The approach of the Supreme Court of Canada and France's data protection agency in both of these legal sagas lead a sort of zero-sum game, which positions the enforcement of important domestic rights against foreign interests. Part of the problem is that the rights in question demand worldwide compliance: the privacy right to be forgotten can be infringed by anyone in the world, as can one's intellectual property rights. Thus, either the worldwide injunction applies, or Equustek faces irreparable harm from a denial of its intellectual property rights. Either the offending links are removed around the world, or EU citizens are denied their privacy rights.

Positioned this way, there is no clear resolution that maintains the integrity of domestic law in all states impacted by the order. It may be that there is nothing new here: choice of law rules in the private international law context often involve the application of one nation's laws to a transaction at the expense of another nation's, and such choices of law may have significant spillover effects.[62] But that does not lessen the fact that it remains a problem, especially when the spillover effects are worldwide in scope. Courts must therefore be careful to navigate these issues with respect for comity and sovereign equality.

And the outcome in *Equustek,* may be the worst of all worlds. The Supreme Court's approach suggests that in cases of proposed worldwide delisting orders, international comity and

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[62] Jack Goldsmith, "Against Cyberanarchy" (1998) 65 U Chi L Rev 1199 at 1208.

the rights of foreign citizens could be effectively ignored *unless* the targeted intermediary brought evidence suggesting that the order would create a conflict. Of course, as discussed, that intermediary is under no obligation, and may have little incentive, to so challenge an order. Where they fail to do so, the interests of foreign nations and the rights of foreign citizens go unprotected. Where they do so, or later challenge the order through foreign courts, as Google did, the domestic rights of the party initially seeking the delisting order may be undermined. Either way, it is placed in the hands of the intermediary to decide which laws are given effect, and which laws are, in practice, subordinated.

On balance, however, the facts of the *Equustek* saga suggest that the laws of the nation that chooses to impose worldwide delisting orders are the laws most likely to be subordinated. This is because a gap anywhere in the worldwide delisting (or at least any sizeable gap) may effectively undermine the right being protected. Thus, a state seeking to enforce such an order is, in a sense, at the mercy of the laws of every other nation so long as the intermediary is willing to challenge the order in any one of those nations. And if Google is any indication, it appears that intermediaries may well be motivated to so challenge these orders in the markets most central to their business interests, if not elsewhere. Indeed, Google's motivation appears to be the fear that such orders will force a race-to-the-bottom, in which Google must enforce the domestic law worldwide of every state in which it operates.[63]

There is also the risk that intermediaries may simply choose not to establish any physical presence in, or may remove all assets from, a jurisdiction from which it is likely to face onerous

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[63] See e.g. Peter Fleischer, "Reflecting on the Right to be Forgotten" (9 December 2016) *The Keyword* (Google's blog), online: https://blog.google/topics/google-europe/reflecting-right-be-forgotten/>.

delisting orders so as to make itself judgment proof. Such an outcome is quite clearly in no one's interest: the intermediary is denied a potential business opportunity, while the jurisdiction is denied both the potential benefits of that business and the ability to give effect to domestic rights through that intermediary. This scenario should obviously be avoided, and militates towards judicial restraint.

Of course, it is an open question whether the domestic rights that these delisting orders seek to protect can only be legitimately protected through orders with worldwide effect, and a detailed discussion of that issue is beyond the scope of this paper.

One might be tempted to draw a distinction between the two legal sagas on the grounds that the *Equustek* decision merely attempted to protect intellectual property rights and the financial interests of a corporation, while the right to be forgotten saga concerns a core right to privacy of European citizens enshrined in their Charter of Fundamental Rights.[64] The latter, it might be said, engages far more pressing interests than the former.

This may well be true, but in the majority of the Supreme Court of Canada's view, the order was indeed necessary "to ensure that the plaintiffs' core rights are respected."[65] Perhaps then, intellectual property rights and economic interests are, from the Supreme Court's perspective, 'core rights.' And while the dissent in *Equustek* argued that the order was indeed unnecessary and was unlikely to be effective in any event,[66] we can assume that similar future

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[64] Charter of Fundamental Rights of the European Union, 2012/C 326/02, articles 7 & 8.
[65] *Google v Equustek* SCC, *supra* note 1 at para 45, quoting Groberman JA in *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265 at para 93.
[66] *Google v Equustek* SCC, *supra* note 1 at paras 61-82.

orders will be adopted on settled ground that they are indeed necessary to give full effect to the rights in question. Such cases offer the purest and most difficult challenge for resolution.

Regardless, however, of whether both sagas engage core rights and demand worldwide delisting to give effect to those rights, it would indeed appear the Internet has created an environment that inherently puts domestic and foreign interests in tension.

I now turn to the principles of comity to see whether we can find a normative resolution to this disorder.

3. Comity

Can private international law principles can assist in finding a proper resolution to these problems? It must be remembered, however, that few traditional questions of the conflict of law,[67] including the assumption of jurisdiction, the appropriateness of the forum, or the applicability of foreign law are relevant here. The question is not even whether legislation or judicial remedies can have an extraterritorial effect, as that is a largely settled matter.[68] Thus, the question is not whether courts *can* interpret legislation and issue remedies having extraterritorial effect, but whether they *should* under concepts of comity.

As noted earlier, when the Supreme Court of Canada was faced with the question of whether to enjoin Google worldwide, the true question was not whether it could do so, but whether it should exercise its discretion to do so. The preliminary issues of whether the court

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[67] See generally Stephen G A Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2016); Lawrence Collins et al, ed, *Dicey & Morris on The Conflict of Laws*, 13th ed (Toronto: Sweet & Maxwell, 2000).
[68] See e.g. *R v Hape*, *supra* note [2007] 2 SCR 292; *Impulsora Turistica de Occidente, SA de CV v Transat Tours Canada Inc*, [2007] 1 SCR 867 (in Canada); Restatement, Third, Foreign Relations Law of the United States (Revised) § 402 (in the US); *Babanaft International Co SA v Bassatne*, [1990] 1 Ch 13 (CA) (in England).

could issue a worldwide injunction under private international law were effectively no longer at issue. Specifically, whether the British Columbia courts had *in personam* jurisdiction were not appealed.[69] There was also no issue of the choice of applicable law, or whether the British Columbia courts were the appropriate forum. Thus, the primary issue in the international private law context was whether the extraterritorial reach of the injunction against Google violated international comity and the sovereign equality of nations, and thus would militate against making such an order.

The same is true in the right to be forgotten saga. There is no question of whether the European Union can create legislation with extraterritorial effect.[70] As it stands, however, we await the result of the forthcoming CJEU's decision on the question of whether the right to be forgotten does indeed impose obligations on search engines to delist offending websites worldwide.[71] The question is thus one of interpretation, and Google is arguing on appeal to the CJEU that principles of comity and non-interference recognized by international law should govern that interpretation.[72] Thus, in both cases, the question of to what extent the courts should consider comity and non-interference with sovereign jurisdiction is germane.

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[69] *Google v Equustek* SCC, *supra* note 1at para 37.
[70] Whether or not an extraterritorial effect can be given to the right to be forgotten legislation with respect to the activity of Google may be a matter for international law, and depend on the choice of law theory applied: see e.g. William S Dodge, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilaterlism" (1998) 39 Harv Int'l LJ 101. However, these issues are moot as the CJEU has already ruled that Google Inc. is subject to EU law, and that "the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope": *Google Spain*, *supra* note 5 at paras 54, 60.
[71] Conseil d'Etat, CE, 19 juillet 2017, Google Inc., Case No. 399922, online: <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-19-juillet-2017-GOOGLE-INC>.
[72] *Ibid* at para 15.

Comity is of course a loose concept. As Joel Paul has written,

> Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, 'a moral necessity,' expediency, reciprocity or "considerations of high international politics concerned with maintaining amicable and workable relationships between nations."[73]

Further, it's a concept that is often treated differently by different courts. Courts in the United States and Canada have tended to give comity a great deal of respect in their reasons, if not perhaps in effect.

For example, in Canada, the Supreme Court of Canada has said that comity is the "informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory."[74] It has said that "comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states."[75] Regardless, "the principle of comity […] should govern legal relationships between modern democratic states".[76] And further: "[t]his Court has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity."[77] A justification for comity has also been offered by that Court: "acts of comity are justified on the basis that they facilitate interstate relations and global co-operation."[78]

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[73] Joel R Paul, "Comity in International Law" (1991) 32 Harv Int'l LJ 1 at 3-4.
[74] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1095.
[75] *Club Resorts Ltd v Van Breda*, [2012] 1 SCR 572 at para 74.
[76] *Ibid* at para 63
[77] *R v Terry*, [1996] 2 SCR 207 at para 16.
[78] *R v Hape*, [2007] 2 SCR 292 at para 50.

The Supreme Court of the United States has also given comity a significant amount of respect. Perhaps the most famous statement on comity was in the case of *Hilton v Guyot*, where comity was defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[79] Part of the rationale for the respect for comity is that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[80] Indeed, the concept of comity has been invoked commonly, and perhaps uniquely so, in the American context.[81]

On the other hand, English courts have largely rejected the use of comity as a basis for recognizing foreign judgments,[82] but has been used judicially to address foreign relations concerns and questions of whether injunctions should be granted with extraterritorial effect.[83]

Regardless, comity is somewhat ambiguous because it "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[84] It is, as Joel Paul writes, "at once legally compelled and discretionary,"[85] and thus a difficult doctrine to apply with any certainty or clarity.

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[79] *Hilton v Guyot*, 159 US 113 at 163-64 (1895).
[80] *Underhill v Hernandez*, 168 US 250 at 252 (1897).
[81] See generally Paul, *supra* note 73.
[82] Collins et al, *supra* note 67 at 6.
[83] *Ibid.*
[84] *Hilton v Guyot*, 159 US 113 at 163-64 (1895).
[85] Paul, *supra* note 73 at 11.

Given this uncertainty, Michael Ramsey has suggested abandoning the term 'comity' in the United States on the basis that it is merely an umbrella for a variety of distinct concepts that each apply in different contexts.[86] These contexts are "(1) recognition of foreign judgments; (2) interpretation of foreign law; (3) limits on extraterritorial reach of […] law; and (4) enforcement of foreign law."[87] Here, of course, we are concerned with the extraterritorial reach of domestic law. And while abandoning the term comity may or may not be warranted, as comity is still widely used in judicial decisions from some nations' highest courts, I'll continue to use it for present purposes. But it is indeed important to understand comity within the context of the extraterritorial application of law, which is the present concern, rather than its many other possible understandings.

Relatedly, William S Dodge, has argued that, in the US, comity is best understood as "deference to foreign government actors that is not required by international law but is incorporated in domestic law."[88] He similarly divides comity into a number of distinct rules or doctrines, which fall into two main categories: principles of recognition, and principles of restraint.[89] The US presumption against extraterritoriality falls squarely in the latter category, and, to adopt his approach, it is clearly the category with which we are concerned. Indeed, Professor Dodge states that one of the motivating justifications for the presumption against extraterritoriality is the concern that "[i]t serves to protect against unintended clashes between

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[86] See Michael D Ramsey, "Escaping "International Comity"" (1998) 83 Iowa L Rev 893.
[87] *Ibid* at 897.
[88] William S Dodge, "International Comity in American Law" (2015) 115 Colum L Rev 2071 at 2078.
[89] *Ibid* at 2079.

our laws and those of other nations which could result in international discord".[90] This sort of "international discord" is precisely the concern identified in Part 2 of this paper with respect to overregulation of Internet intermediaries and interference with foreign policy objectives.

Taken together, we can see that the issue of comity in our two legal sagas is a question of whether the courts should employ a principle of restraint in dealing with the question of the extraterritorial reach of law, regardless of whether that law is enacted by legislation or by imposing a judicial remedy so as to avoid potential international discord. This question is obviously tied up with international political relationships, and what may be described as foreign affairs policy. But as Joel Paul has written, comity often serves to bridge the gap between the rules of positive law and considerations of international relationships:

> comity may infuse a private-law dispute between the policies of a domestic and a foreign authority with political significance, and thus allow the court to decide the outcome as a choice between competing domestic and foreign public policies.[91]

This was the approach taken by the section 403 of the US Restatement (Third) of Foreign Relations Law of the United States, despite claiming to be a principle of international law separate from that of comity.[92] This section of the Restatement requires that, even where a state has jurisdiction over a matter, a state must not "prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[93]

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[90] *Ibid* at 2102, citing *EEOC v Arabian Am Oil Co*, 499 US 244 (1991) (citing *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 US 10 at 20-22 (1963)).
[91] Paul, *supra* note 73 at 6-7.
[92] Restatement, Third, Foreign Relations Law of the United States (Revised) § 403 and commentary. William S Dodge notes, however, that lower courts have typically applied this section as being relevant to considerations of comity: Dodge, *supra* note 88 at 2103.
[93] Restatement *ibid.*

The section then lays out a number of relevant factors to a determination of unreasonableness, including "the degree to which the desirability of such regulation is generally accepted; […] the existence of justified expectations that might be protected or hurt by the regulation; […] the importance of the regulation to the international political, legal, or economic system; [and] the likelihood of conflict with regulation by another state."[94] It further provides that when "the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction […] [A] state should defer to the other state if that state's interest is clearly greater."[95]

In essence, these factors suggest that the courts, when giving extraterritorial effect to the law of the state must take into account the relative importance of the right being given effect and the impact of the rights on foreign citizens, as well as the possibility that the order might be challenged in foreign courts.

This sort of interest-balancing approach seems germane to preventing 'international discord,' and reflects the Supreme Court of the United States' view in *F Hoffman-La Roche Ltd v Empagran S A*, in which section 403 of the Restatement was quoted with approval in considerations of international comity.[96] Indeed, in that case, the Court considered, and agreed with, the *amici curiae* briefs of several foreign governments that argued that an extraterritorial application of US law would infringe with their domestic interests.[97]

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[94] *Ibid.*
[95] *Ibid.*
[96] *F Hoffman-La Roche Ltd v Empagran S A*, 542 U.S. 155 (2004).
[97] *Ibid.*

In my view, the interest-balancing approach is the proper one to apply with respect to worldwide delisting orders. It helps prevent international discord and overregulation of intermediaries by preventing court overreach where the potential international scope on foreign nations and people outweighs the domestic benefits to the order, while still allowing for the flexibility to allow the extraterritorial reach of delisting orders where the domestic interests reasonably outweigh the overseas effects. Indeed, the most important aspect of this approach may be that it establishes grounds on which a foreign court, facing a challenge, such as the one launched by Google in the California courts in the *Equustek* saga, can choose to give deference to a foreign order with worldwide effect. The argument is that, by reasonably considering the extraterritorial impact of such an order on the laws and rights of foreign nations, entities and people, a foreign court may be more inclined to allow domestic enforcement of the order on the basis that issues of comity and the impact on that jurisdiction's laws and rights have already been given due consideration, but are outweighed by the overarching importance of protecting a particular right within the ordering state.

I now turn to discussing how such an interest balancing approach might operate in the context of worldwide delisting orders, and specifically how it might apply to worldwide delisting orders.

4. Tailoring the Interest-Balancing Approach to Worldwide Delisting Orders

This paper has adopted the kind of interest-balancing approach to comity in cases of extraterritorial jurisdiction generally outlined by the Restatement (Third) of Foreign Relations in

the United States.[98] But the Restatement, unmodified, is not a sufficient test for comity considerations. Indeed, it must be remembered that the context here is the attempt by one state to regulate the Internet, which, as a result, may well affect the rights of people around the world to access information, and may infringe upon the domestic law of numerous other nations. Thus, it may be the case that there is no single nation with a competing interest in the matter, but rather a large and indeterminate number of potential conflicts. This does not necessary sit well with the Restatement, which appears to contemplate potential conflicts with only a limited number of other states. This is observable in subsection (3), which concerns the case where "the two states are in conflict",[99] as well as the reasonableness factor in subsection (2)(g): "the extent to which another state may have an interest in regulating the activity."[100] In Internet delisting cases, it's quite possible that any state may have an interest in regulating the activity, given that it necessarily impacts the interests of every state connected to the Internet. The limited nature of the Restatement's contemplation is also observable in the cases referred to in the commentary, many of which concern the effects of antitrust law on one or a handful of other states, or maritime law disputes between two states.

It is not my purpose, however, to address each factor in the Restatement and ask whether it is relevant or not. Indeed, even the Restatement itself notes that the factors are not exhaustive, nor of equal weight.[101] My purpose is instead to propose factors that are relevant to the consideration following only generally the model and approach used in the Restatement.

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[98] Restatement, Third, Foreign Relations Law of the United States (Revised) § 403.
[99] *Ibid,* § 403(3).
[100] *Ibid,* § 403(2)(g).
[101] *Ibid*, comment (b).

Another important consideration unique to the Internet delisting context is that such orders necessarily impact freedom of expression. While "free speech on the global internet"[102] can be articulated as a public policy goal of the United States, it can also be articulated as a basic human right applicable to all people and within presumptive public policy of all United Nations members under the Universal Declaration of Human Rights,[103] and certainly within the public policy of those nations that have ratified the International Covenant on Civil and Political Rights.[104] This right includes the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"[105] Thus, global delisting orders can be assumed to interfere with the ability of users around the world to access information contrary to international public policy. This is not determinative; such an interference with freedom of expression may be considered trivial, or outweighed by other factors. Freedom of expression is by no means absolute. But due consideration must be given to the fact that such orders do interfere with freedom of expression internationally, and may affect the rights of millions or billions of people, which inherently interferes with most states' public policy.

This alone allows us to focus the relevant factors largely to the issue of balancing the rights of those the order seeks to protect against the rights of those with whom the order interferes. This, of course, assumes that there is a sufficient connection between the regulating

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[102] *Google LLC v Equustek Solutions et al.*, USDC, Northern District of California, San Jose Division, case No. 5:17-cv-04207-EJD, re: Dkt No 16, November 2, 2017 at 6.
[103] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR Paris, 3rd Sess, Supp No 13, UN Doc A/810 (1948) art 19.
[104] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 19.
[105] *Ibid*, art 19. The UDHR language is similar.

state and the target of the delisting order to otherwise meet other conflict of laws requirements for jurisdiction.

I would thus propose that the relevant factors are as follows: 1) the extent to which the order conflicts with the identifiable public policy of a friendly[106] foreign nation; 2) the extent to which the type of regulation is generally accepted by the international community; 3) the importance of the interests or rights being protected by the order as a matter of public policy; 4) the necessity and effectiveness of the order in protecting those rights or interests; 5) the degree to which the order will interfere with the public interest in accessing the information delisted; 6) the degree to which the order will interfere with the freedom of expression of the speaker of the information; and 7) the extent to which the order interferes with the freedom of expression, or imposes costs, on the targeted intermediary.

The first of these factors exists to consider cases where there may be an identifiable public policy of a foreign nation, beyond merely the protection of freedom of speech, that conflict with the order given. This may, for example, include the United States' policy under section 230 of the *Communication Decency Act* "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation".[107]

The second factor may militate towards the order being reasonable where the international community largely accepts the right being protected and the type of regulation being imposed. This was effectively an argument of the Supreme Court of Canada in *Equustek*

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[106] I.e. a state with whom the regulating state is not at war.
[107] 47 US Code § 230 (b)(2)

when it quoted the trial judge as saying that "Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong."[108]

The remaining factors suggest a fundamental rights balancing between all of the relevant interests: the freedom of expression rights of those affected, the interests and rights of those being protected by the delisting order, and the interests and rights of the speaker and intermediary. The necessity and effectiveness of the order in protecting the interest or right being protected is a key part of this: an unnecessary or ineffective order should weigh very heavily against its imposition.

I would add that equal consideration must be given to domestic and foreign effects, and courts should give no preference to domestic law or rights over those of foreign parties. Put another way, for a comity analysis with respect to extraterritorial delisting, the courts should put themselves in the position of a neutral arbiter balancing the salutary and deleterious effects of the delisting. The threshold for finding a worldwide delisting is justified must also be high enough that it is likely to earn the deference of foreign courts should its enforcement be challenged there.

It is also important that courts consider these issues without it being argued by the parties, or the targeted intermediary where it is a third party, given that there may be little reason for them to do so. Such orders or requirements may often go unopposed. Indeed, as previously mentioned, the danger of over-compliance with such delisting rules on these grounds was raised by the Council of Europe's Commissioner for Human Rights as a major concern stemming from

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[108] *Google v Equustek* SCC, *supra* note 1 at para 44 (quoting Fenlon J in *Equustek Solutions Inc v Jack*, 2014 BCSC 1063 at para 144).

the CJEU's *Google Spain* decision.[109] Thus, it's incumbent upon courts to at very least consider the freedom of expression concerns inherent in worldwide delisting, even if they are unable to determine whether such delisting interferes with other public policy objectives of foreign states.

One might argue that looking at the effects of a delisting order or requirement on the individual human rights of foreigners is not generally within the ambit of comity considerations, given that comity is traditionally associated with the respect for the equality of sovereign nations, rather than a lack of interference with individual rights. However, as I've argued, human rights are presumptively within the public policy of most nations. Thus, to interfere with freedom of expression globally is to interfere with that policy and thus the sovereign interests of other states. The District Court for the Northern District of California, in *Equustek*, made this connection quite clear when it justified its injunction against that order, in part, on the basis that the Canadian order threatened free speech on the Internet.[110]

An ancillary, but important, benefit of placing a significant justificatory burden on the imposition of the order is that, where a right is of overriding importance to warrant a global delisting order, it will likely attract deference from foreign courts, and may not be thereby undermined. Indeed, should the domestic analysis meet these requirements, comity would then demand that foreign courts not interfere with such orders.

5. Conclusion

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[109] Council of Europe Commissioner for Human Rights, "The Rule of Law on the Internet and in the Wider Digital World" (December 2014) *Issue Paper*, online: Council of Europe <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da51> [COE Rule of Law] at 63.

[110] *Google LLC v Equustek Solutions et al.*, USDC, Northern District of California, San Jose Division, case No. 5:17-cv-04207-EJD, re: Dkt No 16, November 2, 2017 at 6.

This paper has attempted to show that worldwide delisting create serious problems for both international comity and freedom of expression around the world. They tend to turn intermediaries into gatekeepers of the international order, and undermine foreign public policy objectives, human rights, and the freedom to access information around the world. They're also likely to be undermined in foreign courts and rendered ineffective if delisting isn't done carefully.

Principles of international comity demand that this interference should not go without due consideration. At the same time, however, global delisting may be justified where the right or interest being protected is of overriding importance. Thus, it's important for courts to establish a considered test for when worldwide delisting is legitimate, whether providing a remedy in the form of worldwide injunction, or whether interpreting legislation. Such a test should impose judicial restraint before imposing the domestic will upon the citizens of other sovereign states, while allowing for states to remove access to content worldwide in the rare cases when doing so is demonstrably justified. The standard of justification must be high enough that it's likely to earn deference from foreign courts, so that an intermediary cannot undermine the order by obtaining an injunction against its enforcement in, for example, its home territory.

This paper has therefore used existing principles of comity to establish a proposed test. In the vast majority of cases, the test would, I expect, militate against worldwide delisting. In such cases, it may well leave an important domestic right or interest unprotected. However, in many such cases, it is likely that creative solutions can be reached by working with the intermediaries in question. For example, an intermediary may not only remove the results from the domestic subdomain, but also institute geo-blocking to remove the relevant results from

anyone searching from within the regulating jurisdiction. A search engine may be able to lower its search result ranking, rather than removing it. It could, in certain situations, potentially place a warning with the link that the site has, for example, been found to be illegal in a certain jurisdiction, or that it is selling counterfeit wares. There are many possible solutions, and we should incentivize aggrieved parties and regulating nations to explore those solutions, rather than jump to the most heavy-handed approach.