



Internet Committee Report

TARGETING AND THE PART IT PLAYS IN ESTABLISHING JURISDICTION IN CASES INVOLVING THE USE OF TRADEMARKS ON THE INTERNET

Published April 18, 2022

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This article considers recent appellate decisions in the United Kingdom, the United States, and Canada to consider the approach they have followed concerning the use of trademarks on the Internet and jurisdiction. We discuss several decisions and how the courts have determined when they would assume jurisdiction. In many decisions, the concept of “targeting” or whether the defendant manifested an intention to establish commercial relations with consumers in the that jurisdiction was considered. Targeting in this sense can be a useful way to approach what can be a difficult legal issue.

I. The United Kingdom

In *Merck KGaA v. Merck et al.*,¹ the English Court of Appeal summarizes the matters to be considered in determining when a court has jurisdiction concerning trademark related claims on the Internet.

In this action the European Merck companies and the U.S. Merck companies, which were separate businesses, had signed an agreement relating to their respective use of Merck formative trademarks and business names in the U.S. and Canada, Germany and all other countries. The agreement was amended in 1970 and 1975. In 2009 the U.S. Merck companies merged with a competitor, Schering-Plough, to form one of the largest healthcare organizations in the world. From this time the European Merck companies became increasingly concerned at what they perceived to be a substantial growth in the use by the U.S. Merck companies of the trademark “Merck” outside the U.S. and Canada including use on several websites.

The European Merck companies brought proceedings for trademark infringement and breach of the agreement in the U.K. The trial judge found that the U.S. Merck companies

were in breach of the agreement and engaged in trademark infringement because of their use of “Merck” in the U.K. as a business name and as a trademark. The U.S. Merck companies appealed to the U.K. Court of Appeal.²

The European Merck companies’ complaints primarily related to the use of the word “Merck” as part of the domain names by the U.S. Merck companies relating to websites alleged to be directed at the U.K.; and on the social media sites Facebook, Twitter, YouTube and LinkedIn; and other related uses.

Targeting

For a U.K. court to have jurisdiction the defendant trader must have manifested an intention to establish commercial relations with consumers in the U.K. The court must ascertain from the website of the trader or intermediary and the trader’s overall activity whether it envisaged doing business with such consumers.

The Court of Appeal considered decisions of the Court of Justice of the European Union³ and other U.K. courts of first instance and listed a number of applicable principles. First, in determining whether an advertisement of goods bearing a trademark on the website of a foreign trader constitutes use of the trademark in the UK, it is necessary to assess whether the advertisement is targeted at consumers in the UK and in that way constitutes use of the mark in relation to goods in the course of trade in the UK.

Second, the mere fact that a website is accessible from the UK is not a sufficient basis for concluding that an advertisement displayed there is targeted at consumers in the UK.

Third, the issue of targeting should be considered objectively from the perspective of average consumers in the UK. The question is whether those average consumers would consider that the advertisement was targeted at them. Evidence that a trader intended to

target consumers in the UK may be relevant in assessing whether its advertisement has that effect.

Fourth, the court must consider and evaluate of all the relevant circumstances. These may include any clear expressions of an intention to solicit business in the UK by, for example, in the case of a website promoting trademarked products, including the UK in a list or map of the geographic areas to which the trader is willing to send its products. But a finding that an advertisement is directed at consumers in the UK does not depend upon there being any such clear evidence. The court may decide that an advertisement is directed at the UK in light of the non exhaustive list of matters referred to by the Court of Justice. The appearance and content of the website will be significant, including whether it is possible to buy goods or services from it. However, the relevant circumstances may extend beyond the website itself and include, for example, the nature and size of the trader's business, the characteristics of the goods or services in issue and the number of visits made to the website by consumers in the UK.

The non-exhaustive list developed by the Court of Justice includes: the international nature of the activity; mention of itineraries from other Member States for going to the place where the trader is established; use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language; mention of telephone numbers with an international code; outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States; use of a top-level domain name other than that of the Member State in which the trader is established; and mention of an international clientele composed of customers domiciled in various Member States.⁴

The targeting approach followed by the UK Court of Appeal and the Court of Justice of the EU is clear in terms of the matters that a court will need to consider. The focus is on the average consumer and whether they would consider that the communication in issue was targeted at them.

II. The United States

In determining whether specific personal jurisdiction is established, U.S. courts examine whether the defendant “purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”⁵ Purposeful availment means more than placing goods into a stream of commerce that ultimately reaches the forum state.⁶ In the United States, recent appellate decisions have examined the effect of “targeting” intellectual property owners in a particular forum as a basis for personal jurisdiction.

Under *Calder v. Jones*,⁷ a trademark or copyright owner could historically obtain personal jurisdiction over an infringer in the state where the owner was located on the grounds that the owner was targeted in that state and suffered injury there⁸ (the “Effects Test”). However, the ability to obtain jurisdiction under the Effects Test was limited in 2014 by *Walden v. Fiore*, where the Supreme Court held that merely “targeting” a plaintiff in its home state is not sufficient absent some other connection between the defendant and that state.⁹

The Supreme Court in *Walden* rejected prior decisions holding that a defendant's knowledge of the plaintiff's strong forum connections, plus the foreseeable harm the plaintiff suffered in the forum, comprised sufficient minimum contacts.¹⁰ The Court held that such approach impermissibly allowed a *plaintiff's* contacts with the defendant and forum to drive the jurisdictional analysis,¹¹ and that courts must look to a *defendant's* contacts with the forum, not its knowledge of a *plaintiff's* connections to a forum.¹²

After *Walden*, it is no longer sufficient to allege that a defendant “intentionally infringed” the plaintiff’s intellectual property rights knowing that the plaintiff was located in the forum state;¹³ a theory of “individualized targeting” may be relevant to the minimum contacts inquiry, but it will not, on its own, support the exercise of specific personal jurisdiction.¹⁴

The weight of U.S. appellate decisions since *Walden* has leaned against the efforts of plaintiffs to obtain personal jurisdiction in trademark and copyright infringement cases under the Effects Test based on the “targeting” an intellectual property owner, e.g.:

- *A Corp. v. All American Plumbing, Inc.* (1st Cir. 2016) (rejecting plaintiff’s claim that defendant was committing infringement on its website which was “interactive” and “continuously accessible in Massachusetts,” and that the infringement interfered with the plaintiff’s franchise agreement with its Arizona franchisee);¹⁵
- *Triple Up Ltd. v. Youku Tudou Inc.* (D.C. Cir. 2018) (dismissing action against Chinese internet television company);¹⁶
- *C5 Medical Werks, LLC v. Ceramtec GmbH* (10th Cir. 2019) (jurisdiction not established by defendant’s attendance at three national industry conferences in Colorado, or the defendant’s seizure of the plaintiffs’ goods in France, or a cease-and-desist letter sent by the German defendant to the plaintiff in Colorado);
- *AMA Multimedia, LLC v. Wanat* (9th Cir. 2020) (dismissing action by producer of online adult entertainment against adult website where defendant never visited the United States, never paid taxes in the United States, did not have a U.S. visa, never derived profit from activities in the United States, and maintained no offices or agents in the United States, and content was stored on a server in the Netherlands, even though some 20% of its visitors were in the United States, making the United States its largest market, rejecting plaintiff’s claim that defendant’s geo-located advertisements provided by a third-party advertising company were directed at the forum).¹⁷

At the same time, the following U.S. appellate decisions since *Walden* have upheld claims of personal jurisdiction, demonstrating the continuing vitality of the Effects Test in cases not based exclusively on allegations of individualized targeting of the intellectual property owner, e.g.,

- *Plixer Int'l, Inc. v. Scrutinizer GmbH* (1st Cir. 2018) (jurisdiction established against German operator of interactive English-language website under the Federal long-arm statute¹⁸ where defendant had nationwide online contacts, engaged in \$200,000 worth of business with customers in United States over four years, targeted the United States for business, noting that modern travel “creates no especially ponderous burden for business travelers” and that such challenges “can be resolved through the use of affidavits and video devices”);¹⁹ and
- *Curry v. Revolution Laboratories, LLC* (7th Cir. 2020) (upholding action against competitor of trademark owner who created a fake ESPN article touting its product, advertised and promoted it on the Internet, and in seven months received more than \$1.6 million in sales of which at least 767 were to consumers in the forum state).²⁰

The consequences of *Walden* are illustrated in *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*,²¹ where a foreign defendant targeted the plaintiff in the forum state but the court concluded that such “individualized targeting” could no longer satisfy the Effects Test after *Walden* absent a sufficient connection between the defendant and the forum.²² *C5 Medical Werks, LLC v. CeramTec GmbH*²³ is also notable for being the only appellate decision to reverse a lower court based on *Walden*’s mandate that merely interacting with a plaintiff known to bear a strong connection to the forum is not enough to establish jurisdiction.²⁴

Walden “reined in broad applications of *Calder*, which lower courts had employed in cases concerning online contacts.”²⁵ However, *Walden* left “questions about virtual contacts for

another day,”²⁶ and has been criticized for leaving a “figurative cloud of uncertainty hanging over personal jurisdiction in the digital cloud.”²⁷ While that uncertainty does not appear in open disagreements or splits among the Circuit Courts, there are differences in results. In particular, there is a notable preponderance of decisions in the Ninth Circuit holding jurisdiction not established²⁸ in comparison to those holding jurisdiction established.²⁹ There is also a tilt in the Eleventh Circuit, where all or most of the decisions to consider the issue since *Walden* have held jurisdiction established.³⁰

Finally, the decision in *Curry v. Revolution Laboratories, LLC*³¹ is notable for finding jurisdiction established as a matter of law based on a narrow interpretation of *Walden*.³² Under *Curry* there is no *per se* requirement that a defendant especially target the forum in its business activity, and it is sufficient that the defendant reasonably could foresee that its infringing product would be sold in the forum.³³

In summary, the *Calder* Effects Test remains the law, but in the wake of *Walden* it is no longer sufficient merely to allege that a defendant intentionally infringed the plaintiff’s intellectual property rights knowing that the plaintiff was located in the forum state. The courts must look to a defendant’s contacts with the forum, not its knowledge of the plaintiff’s connections to the forum.

III. Canada

The rights associated with a registered trademark are territorial and a Canadian court does not have jurisdiction concerning infringement that takes place abroad.³⁴ There are three ways jurisdiction may be asserted against an out of province defendant: (1) presence jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction.³⁵

To determine when jurisdiction should be assumed, Canadian courts apply the “real and substantial connection” test as adopted and developed by the Supreme Court of Canada.³⁶ The test was designed to “prevent overreaching...and [to restrict] the exercise of jurisdiction over extraterritorial and transnational transactions.”³⁷ The “real and substantial connection” allows the court to have *jurisdiction simpliciter* (i.e. to assume jurisdiction).³⁸

The Supreme Court of Canada has identified the following presumptive connecting factors as grounding a court’s assumption of jurisdiction in *Club Resorts Ltd. v. Van Breda*:³⁹

- 1) The defendant is domiciled or resident in the province;
- 2) The defendant carries on business in the province;
- 3) The tort was committed in the province; or
- 4) A contract connected with the dispute was made in the province.

The plaintiff must demonstrate the existence of at least one of the four rebuttable presumptive connecting factors listed above before a court in Canada will assume jurisdiction over an action involving a foreign defendant.⁴⁰ The factors have been applied differently depending on the underlying cause of action. The Supreme Court of Canada has yet to consider the application of this approach in a trademark case involving the Internet.

In a copyright case,⁴¹ the Supreme Court of Canada stated that the relevant connecting factors in cases involving jurisdiction and the Internet should be decided on a case-by-case basis considering many factors including “the situs of the content provider, the host server, the intermediaries and the end user.”⁴² The situs of Internet-based defamation was determined to be the place where defamatory statements are read, accessed, or downloaded by the third party.⁴³

Targeting

The degree of interaction the consumer has with the website has been considered in applying the “real and substantial connection” test.

The issue in *Equustek*⁴⁴ was whether Google carried on business in British Columbia through its websites. The chambers Judge accepted that the concepts of interactivity and targeting were of assistance in assessing whether Google carried on business in British Columbia through its websites.

Google’s Internet search websites are not passive information sites. As a user begins to type a few letters or a word of their query, Google anticipates the request and offers a menu of suggested potential search queries. Those offerings are based on that particular user’s previous searches as well as the phrases or keywords most commonly queried by all users.

In addition to its search services, Google sells advertising to British Columbia clients. Although Google’s advertising business is marketed in Canada by Google Canada, British Columbia residents who wish to advertise on Google’s webpages contract directly with Google and make payments directly to Google. Although those contracts stipulate that all disputes will be governed by California law and adjudicated in California courts, the “choice of laws” provision in those contracts does not alter the fact that Google is carrying on a business in this province through advertising contracts with British Columbia residents.

On appeal, Groberman J.A. found that territorial jurisdiction existed and the proceedings regarding the injunction arose out of an action within the jurisdiction of the courts of British Columbia. The injunction granted against Google was also within the jurisdiction of the court.⁴⁵

Groberman J.A. also agreed with the decision below that Google's connections to the province were sufficient to give the court jurisdiction over it.⁴⁶ While Google does not have servers or offices in the province, he agreed with the chambers judge's conclusion that key parts of Google's business are carried on in the province. The judge concentrated on the advertising aspects of Google's business in making her findings. In addition, the gathering of information through proprietary web crawler software ("Googlebot") takes place in British Columbia. This active process of obtaining data that resides in the province or is the property of individuals in the province is a key part of Google's business.

While the Supreme Court of Canada was primarily concerned with the global reach of the injunction, it agreed with the courts below there was sufficient personal and territorial jurisdiction because Google carried on business in the province through its advertising and search operations in British Columbia.⁴⁷ This decision follows the approach that targeting may establish a "real and substantial connection".

This approach is somewhat similar to the American "active/passive test" adopted in *Zippo Manufacturing v. Zippo Dot Com Inc.*⁴⁸ where the court found that a claim for personal jurisdiction is directly proportional to the interaction that the consumer has with the website.⁴⁹ In *Zippo*, it was said that there were three categories of websites: first, the active website, where defendants actively do business and enter into contracts, or "purposefully direct[ing] business activities...then "deliberately and repeatedly" transmitting files to the jurisdiction;⁵⁰ second, the passive website, which provides information or advertises goods or services, in which case personal jurisdiction is generally not found; third, a hybrid, where a website allows a user to exchange information but does not do business directly with the user.⁵¹

Canadian decisions, including the *Equustek* decision, have considered the *Zippo* decision.⁵² The chambers judge in *Equustek* noted that the popularity of *Zippo* has

declined, but suggested that the concepts in *Zippo* are still relevant to cases like the one before her.⁵³

“American courts began to feel uncomfortable with the vague “interactivity” concept of *Zippo* and moved towards a test that focussed on “targeting” a jurisdiction, which fit more easily in areas like defamation where the *Zippo* test was particularly inadequate. The concepts of interactivity and targeting are of assistance in assessing whether Google carries on business in British Columbia through its websites. The interactivity of the website with the consumer has been considered in various Canadian cases in determining whether a “real and substantial connection” exists.”

The Canadian approach is not completely clear since the issue has not been considered directly by an appellate court. However, it seems likely that targeting will be a part of the approach.

Conclusion

The courts in the EU and UK, the US and Canada take different approaches concerning jurisdiction. In the EU and UK the focus is on the average consumer and whether they would consider that the communications in issue were targeted at them. In the US courts examine whether the defendant has purposefully availed itself of the privilege of conducting activities within the forum state. It is no longer sufficient to allege that the defendant intentionally infringed the plaintiff’s trademark rights knowing the plaintiff was located in the forum state. The courts must look to a defendant's contacts with the forum. In Canada the courts apply the "real and substantial connection test" but the key factor is the degree of interaction that consumers have with the defendant.

Each approach considers the actions of the party disputing jurisdiction. Jurisdiction can be exercised depending on the degree to which those actions are directed or targeted at consumers in the country in issue, or at least the extent to which the defendant had some meaningful relationship with the forum that bears a relationship to the litigation.

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¹ *Merck KGaA v. Merck et al.*, [2017] EWCA Civ 1834, *see also Tunein Inc. v. Warner Music U.K. Limited* [2021] EWCA Civ 441 at para. 59

² *Merck KGaA v. Merck et al.*, [2017] EWCA Civ 1834

³ *Id.* at para 154, 157, 159, 172-4, 289, 307.

⁴ *Id.* at para 156

⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

⁶ *Asahi Metal Industry Co., Ltd. v. Sup. Ct. of California, Solano County*, 480 U.S. 102, 112 (1987).

⁷ 465 U.S. 783, 787 (1984).

⁸ McCarthy on Trademarks and Unfair Competition (5th ed.), § 32:38.

⁹ *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

¹⁰ 134 S.Ct. at 1124–25.

¹¹ *Id.* at 1125.

¹² *Id.* at 1124–25.

¹³ *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1069-70 (9th Cir. 2017) (citing *Walden v. Fiore*, 571 U.S. at 287-88 (requiring court to focus on a defendant's "own contacts" with the forum, not a defendant's knowledge of a plaintiff's connections to a forum)).

¹⁴ *Id.* at 1070. *See, e.g., ABC Phones of North Carolina, Inc. v. Yahyavi*, No. 5:20-cv-0090, 2020 WL 4208923 (E.D. N.C. 2020) (granting motion to dismiss tortious interference claim, holding jurisdiction not established by mere allegation that defendant hired plaintiff's former employee in violation of former employee's non-competition

contract with plaintiff where plaintiff did not contend that defendant took an action inside forum to induce the alleged breach).

¹⁵ 812 F.3d 54, 57 (1st Cir. 2016).

¹⁶ No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018) (unpublished).

¹⁷ 970 F.3d 1201 (9th Cir. 2020). The court also rejected the defendant’s argument that the website’s “terms of service” established contracts with U.S. residents because anyone who visited the site had to agree to them, and held that use of a U.S.-based DNS provider did not establish targeting the United States because the U.S. was not the “focal point” of the website “and of the harm suffered.” *Id.* at 1212.

¹⁸ Federal Rule of Civil Procedure 4(k)(2) authorizes personal jurisdiction over a defendant who does not reside in the United States and lacks contacts with a single state sufficient to justify personal jurisdiction, but has enough contacts with the United States as a whole to satisfy due process requirements. To establish jurisdiction under Rule 4(k)(2), plaintiff must prove that: (1) the claim arises under federal law; (2) the foreign defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction in the United States; and (3) the exercise of personal jurisdiction must comport with due process. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir. 2006).

¹⁹ 905 F.3d 1 (1st Cir. 2018). The court rejected the defendant’s argument that it merely entered its product into the stream of commerce, and that its contacts with the United States were the result of its customers’ unilateral actions. *Id.* at 8.

²⁰ 949 F. 3d 385 (7th Cir. 2020).

²¹ *See supra* n.13.

²² *Id.* at 1070.

²³ 937 F.3d 1319 (10th Cir. 2019).

²⁴ *Id.* at 1324.

²⁵ *Kleven, Adam R., Minimal Virtual Contacts: A Framework for Specific Jurisdiction in Cyberspace*, 116 Mich. L. Rev. 784, 793 (2018).

²⁶ *Walden*, 571 U.S. at 291 n. 9.

²⁷ *Schildknecht, William, Specific Personal Jurisdiction Over Internet Torts in the Wake of Walden v. Fiore*, 56 Santa Clara L. Rev. 1, 33 (2016).

²⁸ *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972 (9th Cir. 2021); *Janus v. Freeman*, 840 Fed. Appx. 928 (9th Cir. 2020); *Sussman v. Playa Grande Resort, S.A. de C.V.*, 839 Fed. Appx. 166 (Mem.) (9th Cir., March 8, 2021); *Backgrid USA, Inc. v. Nodern Notoriety Inc.*, CV 21-03318-RSWL-(Pdx), 2021 WL 4772474 (C.D.Cal. Sept. 15, 2021); *Graco Minnesota Inc. v. PF Brands, Inc.*, 18-cv-1690-WQH-AGS, 2019 WL 1746580 (S.D.Cal. April 17, 2019); *Hungerstation LLC v. Fast Choice LLC*, 857 Fed. Appx. 349 (9th Cir. April 29, 2021); *Maxim v. Guangzhou Netease Computer System Co., Ltd.*, 2:20-cv-11331-AB-JC Maxim, 2021 WL 4839579 (C.D.Cal. Aug. 11, 2011); *Modulus Financial Engineering Inc. v. Modulus Data USA Inc.*, CV-19-04685-PHX-SMB, 2020 WL 2512785 (D.Ariz. May 15, 2020); *Poulin Ventures, LLC v. MoneyBunny Co.*, 1:19-cv-01031-JCH-GBW, 2021 WL 2142420 (D.N.M. May 26, 2021); *Trustee of Summers Family Trust TA Neak Products Buff WA Pty, Ltd. v. National Distribution Warehouse, Inc.*, 2:20-cv-10741-CAS-Ex, 2021 WL 2354507 (C.D.Cal. June 7, 2021); *Will Co. Ltd. v. Lee*, C20-5802 BHS, 2021 WL 2682642 (W.D.Wash. June 30, 2021); *Wonderful Company LLC v. Nut Cravings, Inc.*, 2:20-cv-11738-SVW-JEM, 2021 WL 3598859 (C.D.Cal. April 22, 2021).

²⁹ *Cleanfish, LLC v. Sims*, 19-cv-03663-HSG, 2020 WL 1274991 (N.D.Cal. March 17, 2020); *Entrepreneur Media, Inc. v. Rugged Entrepreneur*, 8:21-cv-00390-JVS-ADS, 2021 WL 4497891 (C.D.Cal. July 14, 2021); *JHR Manufacturing, LLC v. Puffle, Inc.*, No. C20-6115 BHS, 2021 WL 2805333 (W.D.Wash. July 6, 2021); *Reflect Media, Inc. v. Luxy Limited*, 2:20-cv-00423-RGK-KS, 2021 WL 945248 (C.D.Cal. Feb. 5, 2021); *Talavera Hair Products, Inc. v. Taizhou Yunsung Electrical Appliance Co., Ltd.*, 18-cv-823 JLS (JLB), 2021 WL 3493094 (S.D.Cal. Aug. 6, 2021).

³⁰ *Parsons v. Regna*, 847 Fed. App’x 766 (11th Cir. 2021); *Galaxy America, Inc. v. EX Inflatables, Inc.*, 2:19-cv-855-JES-MRM, 2021 WL 1909647 (M.D.Fla. May 12, 2021); *GLD, LLC v. Gold Presidents, LLC*, 20-21617-civ-MORENO, 2021 WL 148737 (S.D.Fla. Jan. 15, 2021); *Max’s Creations, Inc. v. Individuals Identified on Schedule “A,”* 21-cv-22920-BLOOM/Otazo-Reyes, 2021 WL 4307189 (S.D.Fla. Sept. 22, 2021); *Moccio v. The BossBabe Societe, Inc.*, 8:21-cv-0210-KKM-AEP, 2021 WL 4847034 (M.D.Fla. Oct. 18, 2021).

³¹ 949 F.3d 385 (7th Cir. 2020).

³² *Id.* at 396 (“[T]he Supreme Court . . . confirmed [in *Walden*] that the inquiry into specific jurisdiction has not changed.”).

³³ *Id.* at 399-400; *accord, Mutnick v. Clearview AI, Inc.*, No. 20 C 0846, 2020 WL 4676667, at *3 (N.D.Ill. Aug. 12, 2020).

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- ³⁴ *Beloit Canada Ltée/Ltd. Et al. v. Valmet-Dominion Inc. (now Valmet Montreal Inc.)* (1997), 73 C.P.R. (3d) 321. (F.C.A.); *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 (S.C.C.); *Magnum Integrated Technologies Inc. v. Integrated Industrial Systems* (2010), 84 C.P.R. (4th) 211 (Ont.S.C.)
- ³⁵ *Muscutt v. Courcelles*, 2002 44957 (ON CA) at para 19.
- ³⁶ *Morguard Investments Ltd. v. De Savoye* [1990] 3 SCR 1077]
- ³⁷ Paragraph 60 in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 SCR 427 (“SOCAN”)
- ³⁸ *Haaretz.com v Goldhar*, [2018] SCC 28 at para 26. (“Haaretz”)
- ³⁹ [2012] 1 SCR 572 and *Haaretz* at para 36.
- ⁴⁰ *Haufler v. Hotel Riu Palace Cabo San Lucas*, 2013 ONSC 6044 at para 5.
- ⁴¹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 SCR 427 and see *Pourshian v Walt Disney Company*, 2019 ONSC 5916 (Divisional Court)
- ⁴² SOCAN as referred to in *HomeAway.com, Inc. v. Hrdlicka*, 2012 FC 1467 at para 18.
- ⁴³ *Haaretz* at para 36.
- ⁴⁴ *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063.
- ⁴⁵ *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265 at para 40.
- ⁴⁶ *Ibid* at para 54.
- ⁴⁷ *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 SCR 824 at para 37.
- ⁴⁸ *Zippo Manufacturing v. Zippo Dot Com Inc.*, 952 F Supp 1119 (WD Pa 1997).
- ⁴⁹ *Id.* at 1124.
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063 at para 42. Cases include *Braintech, Inc. v. Kostiuk*, 1999 BCCA 169 [*Braintech*], *Pro-C Ltd. v. Computer City Inc.*, [2000] O.J. No. 2823 (S.C.J.), and *Wiebe v. Bouchard et al.*, 2005 BCSC 47.
- ⁵³ *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063 at para 46.