

Form 59
Rule 29.02(1)

Affidavit

No. NSD474 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

ESAFETY COMMISSIONER

Applicant

X CORP.

Respondent

AFFIDAVIT OF CORYNNE MCSHERRY

Address: 815 Eddy Street, San Francisco, CA 94109
Occupation: Legal Director
Date: 9 May 2024
Prepared by: Johnson Winter Slattery
Level 14, 50 Bridge Street
Sydney NSW 2000

I, Corynne McSherry of San Francisco, California, United States of America, affirm that:

1. I am the Legal Director of Electronic Frontier Foundation (**EFF**).
2. I am authorised to make this affidavit in support of EFF's application to intervene or for it to be appointed *amicus curiae*.
3. Now produced and shown to me and market "**CM-1**" is a paginated bundle of documents referred to in this affidavit (**Exhibit Bundle**). Where in this affidavit I refer to a page number of Exhibit CM-1, I am referring to a page number of this bundle.
4. I make this affidavit based on my own knowledge and belief, except where otherwise indicated, in which case I state the source of my knowledge. I believe the contents of this affidavit to be true.

Background

5. I have more than twenty years of litigation and policy experience, with a focus on defending online fair use, political expression, and the public domain. As a litigator, I have represented the [Internet Archive](#), [Professor Lawrence Lessig](#), [Public.Resource.Org](#), [the Yes Men](#), and a [dancing baby](#), among others. I was named one of California's Top Entertainment Lawyers and AmLaw's "Litigator of the Week." My policy work focuses on copyright, generative AI, and [best practices](#) for online expression.
6. I have [testified](#) before the United States Congress about the Digital Millennium Copyright Act and Section 230 of the Communications Act of 1934, 47 U.S.C. § 230 ("Section 230").
7. In addition to public commentary at conferences such as RightsCon, FIFAfrica , I comment regularly in the media on digital rights issues. I have quoted in a variety of outlets, including NPR, CBS News, Fox News, the New York Times, Billboard, the Wall Street Journal, and Rolling Stone. Prior to joining EFF, I was a litigator at the law firm of Bingham McCutchen, LLP. I hold a B.A. from the University of California at Santa Cruz, a Ph.D from the University of California at San Diego, and a J.D. from Stanford Law School. While in law school, I published *Who Owns Academic Work?: Battling for Control of Intellectual Property* (Harvard University Press, 2001). In my role as Legal Director for EFF, I have also coordinated numerous interventions in non-U.S. courts, including in France, Canada, Indonesia, Colombia, and other countries. I have also coordinated amicus curiae briefs submitted to international courts, such as the Economic Community of West African States (ECOWAS) Court and the European Court of Human Rights (ECtHR)."
8. EFF is a member-supported, non-profit civil liberties organisation dedicated to protecting digital rights. For more than 30 years, EFF has worked to ensure that internet policy, legislation, and technological measures appropriately balance the rights of all internet users. EFF regularly advocates in courts on behalf of users and creators of technology in support of free expression, privacy, and innovation online. EFF has significantly assisted national and international courts as amicus in numerous cases, including those involving the granting of mandatory injunctions affecting non-parties in foreign jurisdictions, with a particular focus on the impact on freedom of expression and access to information rights. EFF has also commented on relevant cases, crafted comprehensive policy recommendations for lawmakers with respect to injunctions, and articulated civil liberties considerations within a broader political context.
9. EFF's cases are too numerous to list here, but a representative sample of takedown-related matters includes:

- (a) *Woodhull Freedom Foundation v. United States*, 72 F.4th 1286 (D.C. Cir. 2023) (constitutional challenge to U.S. law on grounds that it silences online speech by muzzling Internet users and forcing online platforms to censor their users). A copy of an article written and published by EFF on this topic is available at pages 1-3 of Exhibit CM-1.
- (b) *Equustek Solutions Inc. v. Jack*, 2015 BCCA 2653 & *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.4 (amicus intervention explaining concerns about how a global takedown order would conflict with U.S. law and the rights of U.S.-based persons). A copy of an article written and published by EFF on this topic is available at page 4 of Exhibit CM-1.
- (c) *Lenz v. Universal Music Group*, 815 F.3d 1145 (9th Cir. 2016) (challenge to improper use of copyright law to cause YouTube to take down lawful fair use). A copy of an article written and published by EFF on this topic is available at pages 5-6 of Exhibit CM-1.
- (d) *Ashcroft v. FSC*, 122 S.Ct. 1389 (2002) (constitutional challenge to U.S. law that would have established criminal penalties for any "commercial" distribution of material deemed "harmful to minors".) A copy of an article written and published by EFF on this topic is available at page 7 of Exhibit CM-1.
- (e) *Disney v Hotfile*, 2013 WL 6336286 (S.D. Fl 2013) (amicus intervention urging federal judge to hold entertainment company accountable for sending thousands of improper takedown demands). A copy of an article written and published by EFF on this topic is available at page 8 of Exhibit CM-1.
- (f) *Garcia v Google*, 786 F.3d 733 (9th 2015) (amicus intervention urging federal appeals court to overturn court order requiring Google to remove copies of the notorious "Innocence of Muslims" film from YouTube based on improper copyright claim). A copy of an article written and published by EFF on this topic is available at pages 9-10 of Exhibit CM-1.
- (g) *Lessig v Liberation Music* D. Case No. 1:13-cv-12028 (D. Mass., Aug. 22, 2013) (challenge to improper use of copyright law to cause takedown of academic lecture that included music clips). A copy of an article written and published by EFF on this topic is available at pages 11-12 of Exhibit CM-1.
- (h) *SERAP v Federal Republic of Nigeria*, Application No. EWCS/CCJ/APP/23/21 (amicus intervention before the ECOWAS Court to challenge the legality of a broad and arbitrary shutdown of a social media platform). A copy of an article written and published by EFF on this topic is available at pages 13 to 18 of Exhibit CM-1.

- (i) *Contribution extérieure auprès du Conseil Constitutionnel sur la saine n 2020-801 DC* (amicus intervention before the French Conseil Constitutionnel on the constitutionality of French internet legislation for swift online content takedowns) Conseil Constitutionnel (2020). A copy of an article written and published by EFF on this topic is available at pages 19-24 of Exhibit CM-1.
 - (j) *Sanchez v. France*, [App No. 45581/15 \(ECtHR, 15.5.2023\)](#) (amicus intervention before the European Court of Human Rights, arguing that criminal liability of a user for hosting third-party comments violates freedom of expression rights). A copy of the Written Comments of the Third Party Interveners is available at pages 25-34 of Exhibit CM-1. A legal summary is available at pages 36-41 of Exhibit CM-1.
 - (k) *Telegram v Russia*, [App No. 13232/18 \(ECtHR, pending\)](#) (amicus intervention before the European Court of Human Rights, explaining why the blocking of an entire app unduly restricts freedom of expression rights of users). A copy of the Written Submissions of the Interveners is available at pages 42-51 of Exhibit CM-1. A copy of the Statement of Facts and Questions is available at pages 52-64 of Exhibit CM-1.
10. As a legal services organisation, EFF has also counselled individuals whose legitimate activities may be affected by takedown orders.
 11. In order to raise awareness of the effects of improper content-based takedowns, EFF also maintains a public list of particularly egregious examples, which it calls the "[Takedown Hall of Shame](#)". A copy of the "Takedown Hall of Shame" is available at pages 65-71 of Exhibit CM-1.
 12. When possible, EFF engages with policymakers to ensure that the Internet remains an open platform for free expression. We also support the efforts of organizations like [Tor](#) to empower Internet users residing in censored countries to protect their identities, circumvent firewalls, and access blocked content. Content blocking occurs in both autocratic and democratic countries. EFF seeks to amplify the voices of local grassroots organizations opposing censorship all over the world, and educate our members about those groups' concerns. We frequently join international campaigns against censorship, and provide updates on content blocking and other censorship incidents on the *Deeplinks* blog.
 13. EFF was one of the founding drafters and promulgators of the [Santa Clara Principles](#) on Transparency and Accountability, which established due process standards for moderating users' online speech. They have been endorsed by Apple, Github, Twitter, YouTube, and several other platforms. A copy of the Santa Clara Principles is available at pages 72-84 of Exhibit CM-1.
 14. As the above suggests, we have extensive experience dealing with content-based

takedowns and their potential impact on human rights.

15. EFF seeks to significantly assist the court by highlighting the public interests at stake in the matter, particularly for internet users not party to the case but who may be impacted if this Court makes a global takedown order. The court can ameliorate these concerns by applying a principled test, with specific requirements, as outlined below. The test will provide guidance for Australian courts that are considering the issuance of a mandatory worldwide takedown order affecting non-parties in foreign jurisdictions, particularly where such orders restrain free expression on the Internet. The proposed EFF test will provide consideration of foreign legal systems and citizens.

EFF Concerns

16. On Thursday May 2, 2024, I became aware of the terms of the order sought by the E Safety Commissioner (**Order**) through a conversation with Twitter's counsel. I was subsequently provided with a copy of the Order sought
17. I have read the Order sought and understand that its intended purpose, as interpreted by the E-Safety Commissioner, is to operate as a global takedown of content defined in the Notice.
18. Having read the terms of the Order, EFF has the following concerns:
 - (a) Such global enforcement of Australian domestic legislation creates conflicts of law. For example, contrary to protections granted under First Amendment to the United States Constitution, the Order impedes X Corp's right to share accurate information. Simultaneously, it restricts Internet users' ability to receive such information. The Order also runs counter to the protections provided by Section 230, which has been crucial for the growth of the Internet as a platform for speech.
 - (b) In addition, the extraterritorial application of injunctions undermines state sovereignty. Courts often rely on local standards and facts, neglecting the perspectives of other jurisdictions. Injunctions, except for narrow exceptions, should be limited to the issuing state's territory to avoid conflicts with comity and international coordination principles.
 - (c) If an Australian court makes a global takedown order, it may signal to other countries that they can reciprocally impose similar orders under their own laws for several reasons: A global takedown order establishes a precedent that courts of other jurisdictions can rely on to justify adopting the same measure. It is important to note that court decisions are not taken in isolation, but judges often use international precedents to develop consistency and make sure that their rulings are in line with

international standards. Courts may rely on international comparative analysis to inform their decisions, especially when addressing jurisdictional challenges of cases with a global dimension. Also, global enforcement cases involving injunctions, as in the present case, remain rare and often result in international protest. These reactions demonstrate the risks of normalizing jurisdictional overreach. Mutual respect for the public interest of other States is a pillar of international cooperation and disregarding the impact of national takedown orders in other countries will inevitably lead to friction and reciprocal approaches. Furthermore, there is a real risk that a practice of assigning global reach to injunctions leads to a fragmented and splintered internet, undermining freedom of expression and access to information worldwide. It could also encourage a “race to the bottom,” where the most restrictive rules of one jurisdiction dictate whether online content can be accessed. Finally, takedowns also set a dangerous precedent that could legitimise practices of authoritarian governments, which do not fully value the rights to freedom of speech and access to information.

- (d) The breadth of the Order violates the right to freedom of expression by unduly limiting access to information at a global scale without conducting a balancing test. International human rights law safeguards individuals’ right to free expression and their ability to receive information. Australia, as a party to the International Covenant on Civil and Political Rights (**ICCPR**), has recognised these standards. Article 19 of the ICCPR guarantees freedom of expression across borders, subject to strict conditions. Restrictions must be provided by law, necessary to protect a legitimate objective, and the least intrusive means. The “Manila Principles on Intermediary Liability” reinforce these principles, emphasising that content removal orders should be minimal and confined to the issuing jurisdiction.
- (e) The Order does not conform to recent international norms, such as the EU *Digital Services Act (DSA)* (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC). That Act addressed global takedown issues. In particular, Article 9 of the DSA provides that such orders must comply with several requirements. One of those requirements is that the territorial scope of a takedown order must be set out based on the applicable law of the territory, including the Charter of Fundamental Rights. Article 9 also specifies that court orders must be “limited to what is strictly necessary to achieve its objective” and, where relevant, “respect general principles of international law”. Recital 36 explains for cross-border situations that the effect of the order should in principle be limited to the territory of the issuing Member State and that a wider territorial scope must “take into account the interests of international comity.”

19. EFF further submits that an order to restrain expression with extraterritorial effect should be an order of last resort and issued only in the rarest of circumstances. It is not sufficient that a government agent has determined that the targeted content violates Australian law. Such a narrow focus ignores the impact on the rights and interests of other non-parties, including foreign states and individuals. Accordingly, the threshold question in the analysis of whether the Australian government should issue, and Australian courts should enforce, orders effectively restraining the rights of non-parties to receive expression, should be whether an order with extraterritorial effect may offend another state's core values or run contrary to the law of any jurisdiction whose citizens the order might affect.
20. Where there is a realistic possibility that an order with extraterritorial effects may offend another state's core values, or run afoul of its law, the order should not be made. In the instance of an order that seeks to restrict free expression on the Internet in foreign jurisdictions, such a threshold is exceedingly high and unlikely to be met. For example, in this case it appears that such an order runs contrary to U.S. policy and law, restricting the rights of Internet users to receive speech that may yet be shown to be lawful.
21. Where a plaintiff/applicant demonstrates that an injunction with extraterritorial effects does not offend another state's core values or law, then the plaintiff/applicant should be required to demonstrate the following in order to obtain its order seeking to restrain free expression:
 - (a) A strong prima facie case on the merits against the underlying defendant.
 - (b) The conduct of the defendant will cause substantial and irreparable harm to the interests of the plaintiff/applicant.
 - (c) Reasonable alternative measures, proven on a balance of probabilities, will not prevent the irreparable harm.
 - (d) The order is no broader than necessary to restrain the harm at issue - that is, it is minimally impairing.
 - (e) The order will be technically feasible and effective, including enforceability in the foreign jurisdiction(s) at issue.
 - (f) The salutary effects of the order outweigh the deleterious effects on the rights and interests of the enjoined party and the public, including the effects on the right to free expression.
22. EFF does not propose to delay resolution of this matter via its involvement. Accordingly, we propose to participate solely by way of affidavit and written submissions.

Affirmed by the deponent
at San Francisco
in California, U.S.A
on 9 May 2024

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A handwritten signature in blue ink, consisting of a stylized initial 'M' followed by a long horizontal line.

Signature of deponent

EXHIBIT CERTIFICATE

No. NSD474 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

ESAFETY COMMISSIONER

Applicant

X CORP.

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EXHIBIT "CM-1"

This is the exhibit marked "CM-1" referred to in the affidavit of Corynne McSherry affirmed on 9 May 2024