

Copyright Earthquakes or Minor Tremors? Site Blocking and Reverse Class Actions

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Site-blocking in Canadian copyright matters

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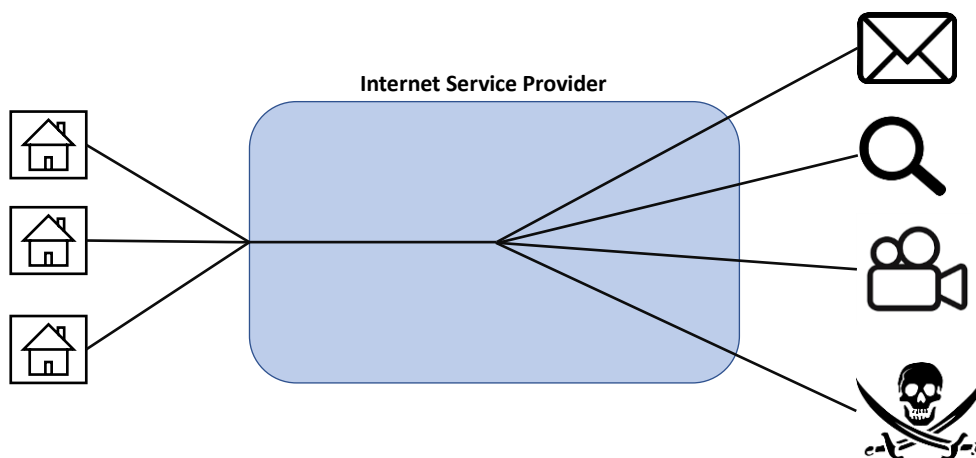
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Agenda

- What is site-blocking?
- Legal basis: the *GoldTV* decision
- When and why should rightsholders seek site-blocking?
- Questions

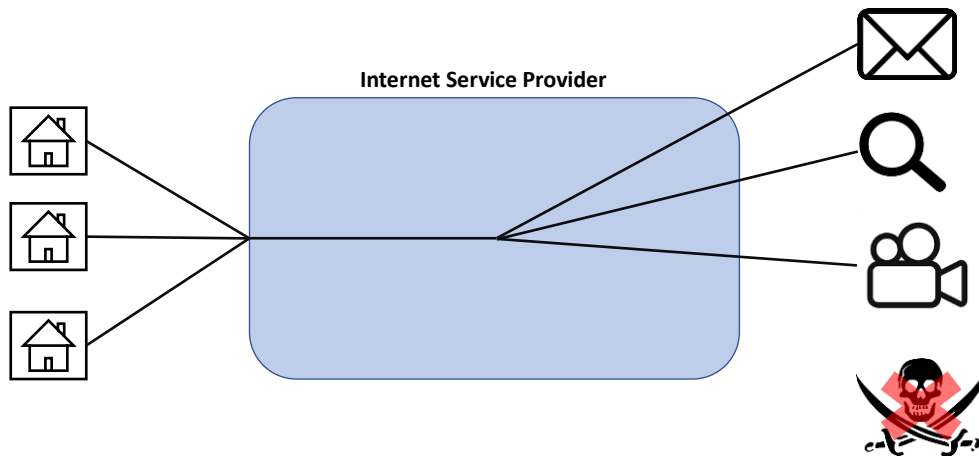
What is site-blocking?

The Internet



What is site-blocking?

The traditional injunction

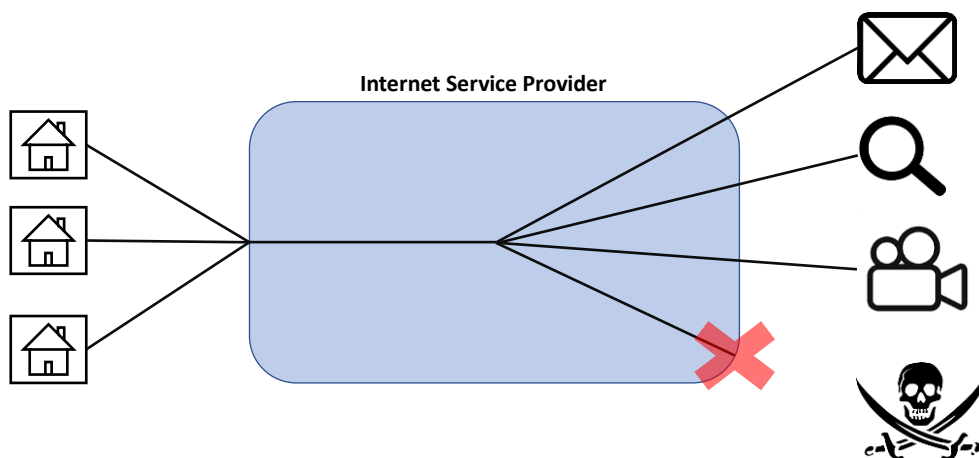


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What is site-blocking?

The site-blocking injunction



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Background: Pirate IPTV service



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Background: Injunctions against the Defendants

- Unidentifiable “John Doe” defendants
- Interim and interlocutory injunctions issued by the Federal Court
- Substituted service through e-mail, online forms, etc.
- IPTV service remains active despite injunctions

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Site-blocking injunction: legal basis

- Can an injunction be issued against innocent third parties (ISPs)?

[23] In *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 824 [*Equustek*], the Supreme Court of Canada considered whether an interlocutory injunction that would require Google to globally de-index the websites of a company in breach of several court orders was available. In considering the question, the Supreme Court addressed the availability of injunctive relief against someone who is not a party to the underlying litigation. **Justice Abella, writing for the majority, first noted that injunctions are equitable remedies and that the powers of a court with equitable jurisdiction are, subject to any relevant statutory limitation, unlimited, not restricted to any area of substantive law, and enforceable through a court's contempt power** (*Equustek* at para 23).

[24] Justice Abella then reviewed the jurisprudence in support of her conclusion that injunctive relief was available against Google, a non-party to the underlying litigation. She noted that ***Norwich*** orders can compel non-parties to disclose information and ***Mareva*** injunctions may require non-parties to assist in the preservation of assets subject to litigation. Such obligations are imposed where parties are not themselves engaged in any wrongdoing but are in a position to facilitate the harm. She noted that this rationale was applied by the England and Wales Court of Appeal [EWCA] in ***Cartier CA***, where a site-blocking order issued against five ISPs (*Equustek* at paras 31–33).

- Bell Media Inc. v. GoldTV.Biz, 2019 FC 1432, para 23-24 (Gleeson J.)

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Site-blocking injunction: legal basis

- But site-blocking is not explicitly provided in the *Copyright Act*?

[29] **Parliament's choice not to adopt a site-blocking regime does not equate to Parliament prohibiting this Court from exercising its equitable jurisdiction to issue a site-blocking order.** Furthermore, subsection 34(1) of the Copyright Act recognizes that, subject to that Act, a copyright owner is "entitled to all remedies by way of injunction [...] that are or may be conferred by law for the infringement of a right". This includes the right to seek relief against a non-party in circumstances where that non-party facilitates, albeit innocently, the harm being complained of (*Equustek* at para 31)

- Bell Media Inc. v. GoldTV.Biz, 2019 FC 1432, para 29 (Gleeson J.)

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Site-blocking injunction: test

- Standard test for interlocutory injunctions
- Additional factors for the balance of convenience analysis
 1. **Necessity** – a consideration of the extent to which the relief is necessary to protect the plaintiff's rights. The relief need not be indispensable but the court may consider whether alternative and less onerous measures are available;
 2. **Effectiveness** – a consideration of whether the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service;
 3. **Dissuasiveness** – a consideration of whether others not currently accessing the infringing service will be dissuaded from doing so;
 4. **Complexity and Cost** – a consideration of the complexity and cost of implementing the relief sought;

- Bell Media Inc. v. GoldTV.Biz, 2019 FC 1432, para 52-53 (Gleeson J.)

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Site-blocking injunction: test

- Additional factors for the balance of convenience analysis
 5. **Barriers to legitimate use or trade** – a consideration of whether the relief will create barriers to legitimate use by unduly affecting the ability of users of ISP services to access information lawfully;
 6. **Fairness** – a consideration of whether the relief strikes a fair balance between fundamental rights of the parties, the third parties and the general public;
 7. **Substitution** – a consideration of the extent to which blocked websites may be replaced or substituted and whether a blocked website may be substituted for another infringing website; and
 8. **Safeguards** – a consideration of whether the relief sought includes measures that safeguard against abuse.

- Bell Media Inc. v. GoldTV.Biz, 2019 FC 1432, para 52-53 (Gleeson J.)

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When and why?

- Recent remedy
- Flexible test: “I do not view the listed factors as exhaustive, nor do I view any one factor as being determinative of the balance of convenience prong of the test. Each of the factors will be considered but they will be addressed holistically in my assessment of the balance of convenience.” (*GoldTV*, para 54)
- Nature of the infringement
- Nature and identity of the Defendants

Questions

The Availability of Reverse Class Proceedings in the Canadian Copyright Context

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Outline

- 1) What is a reverse class proceeding?
- 2) The use of reverse class proceedings in the copyright context
- 3) *Voltage Pictures, LLC v. Salna*, 2019 FC 1412
- 4) Moving forward

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1) What is a reverse class proceeding?

- History of class proceedings
- The “modern” class action
- Class actions and access to justice
- Plaintiff class proceedings
- Reverse class proceedings

2) The use of reverse class proceedings in the copyright context

- Why some parties have turned to reverse class proceedings in the context of copyright
- Why these attempts have been resisted by others
- Comparative view

3) *Voltage Pictures, LLC v. Salna*, 2019 FC 1412

- Facts
- Related proceedings
- Motion for certification denied
 - The pleadings do not disclose a reasonable cause of action
 - Evidence not sufficient to show the existence of an identifiable class of two or more persons
 - Common issues limited to subsistence and ownership of copyright
 - A class proceeding is not the preferable procedure
 - There is no suitable representative respondent
- Notice of appeal filed by Voltage Pictures, LLC

4) Moving forward

- Is the door still open to reverse class proceedings in the context of copyright in Canada? Should it be?
 - Likelihood of success on appeal (*Voltage Pictures, LLC v. Salna*, 2019 FC 1412)?
 - Other considerations
 - Technological improvements?
 - Cost calculations?
 - Consistent with 2012 reforms to the *Copyright Act*?
 - Consistent with the idea of class proceedings as a means through which to facilitate access to justice, conserve judicial resources, and modify harmful behaviours?
 - Alternative approaches?
 - International context?

Questions

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Thank you!

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