

Blocking access to illegal file-share websites won't stop illegal downloading

December 15 2016, by Paula Dootson, Kylie Pappalardo And Nicolas Suzor



The Grand Tour, starring Jeremy Clarkson, Richard Hammond and James May, available on Amazon's pay-to-view service is reportedly now the most illegally downloaded program. Credit: Amazon Prime

The Australian Federal Court [ruled today](#) that TPG, Optus, Telstra and other internet service providers (ISPs) must take "reasonable steps" to [stop customers accessing](#) file-sharing websites The Pirate Bay, IsoHunt, TorrentHound and Torrentz.

In total, Australian ISPs must block access to 61 domains registered to these four websites, or to the IP addresses specifically listed in the orders.

The court also ordered that addresses belonging to SolarMovie be blocked, even though it is no longer operational.

Importantly, the court refused a request that the ISPs be required to ban new domains or IP addresses as they pop up (the "[whack-a-mole](#)" problem). This is a win for due process, because it ensures that the court maintains control over the process.

But it also shows that this is largely a symbolic victory. The experience from overseas shows how easy it is for a site such as The Pirate Bay to change its address faster than courts can keep up.

Consumers can also easily use VPNs and proxies to access the sites through private and secure connections.

The court ordered ISPs to block access within 15 business days of its decision. After this time, any user trying to access one of the blocked domains will be redirected to a webpage established by copyright owners, which will inform them that the domain has been blocked because of copyright infringement.

The Federal Court's orders will be in effect for three years. During that time, if The Pirate Bay or any of the other websites operates from a different domain name, IP address or URL than those listed in the order, copyrights owners may apply to have the order extended to the site's new location.

First use of new powers to block websites

This case is the first use of a new law, introduced in 2015, that allows copyright owners to apply to the Federal Court for an order requiring ISPs to block access to foreign-hosted websites.

Under the new provision, [section 115A](#), copyright owners must show that the foreign-hosted website has the primary purpose of facilitating copyright infringement.

If a court order is granted, the ISP must take reasonable steps to disable access to the online location. The Federal Court has further powers make orders about the technical means by which the ISP must disable access.

These laws are becoming more common around the world, as major copyright owners try to find legal solutions to copyright infringement.

An important concern about the Australian law is that it is potentially very broad in scope. Section 115A empowers the Federal Court to require an ISP to block access to a foreign website whose "primary purpose" is to "facilitate" copyright infringement. But these words are not defined in the Act or in existing case law.

This uncertainty creates a risk that section 115A may be applied sweepingly, with potentially serious consequences for internet users.

One of the wins for consumers in today's decision is that the Court has signalled that it will keep a close watch on future applications to extend these orders.

Requiring ISPs to be copyright police

Australian ISPs have been under a lot of pressure over the past few years to help copyright owners police their rights.

In the iiNet trial, the High Court found that iiNet had no obligation to terminate the internet access of subscribers suspected of using BitTorrent to download and share copyrighted files.

After iiNet, the failed "three-strikes" agreement would have seen ISPs pass on allegations of infringement to their users. But in the end, nobody could agree about who would pay for the scheme.

iiNet was again before the courts last year in the Dallas Buyers Club case, in which it successfully fought off "surreal" demands to hand over the contact details of its subscribers who were alleged to have downloaded the film over BitTorrent.

Now that iiNet has been [bought by TPG](#), there are fewer Australian ISPs with the money and political will to stand up for their users' interests. The ISPs in this case, as with the three strikes agreement, seemed mostly concerned about who should bear the costs of the blocking scheme.

Because this is a case between large copyright owners and ISPs, the interests of consumers have not been well represented.

Will this stop illegal downloading?

This ruling will likely have limited impact on copyright infringement in Australia.

Consumer research shows that [illegal downloading](#) occurs because consumers [lack cheap, easy, accessible channels](#) to access content legitimately.

The most recent example is the release of The Grand Tour series exclusively on Amazon's pay-to-view service.

The program was illegally downloaded en masse beating even HBO's Game of Thrones to become the most pirated show, [reports the Daily Mail](#). Consumers blame rights-holders for failing to meet market demand, and this encourages a social norm that infringing copyright, while illegal, is not morally wrong.

Some of our preliminary research indicates that exclusive licensing strategies (like Kanye West's initial release of Life of Pablo [only on Tidal](#)) are also likely to increase the [willingness of consumers to infringe copyright](#).

The problem is that constraining access to illegal content through site-blocking does nothing to address the core motivations for infringement.

Most Australians want to do the right thing – and generally, they are willing to pay for the content they want. This is evident from the large numbers of [Australians who circumvent geo-blocking](#) in order to access the US versions of paid services such as Netflix and iTunes.

But without legitimate means of access, consumers feel they have no choice but to download the content illegally.

What is the solution?

Site-blocking is not the solution to illegal downloading. In the 17 years since Napster, one of the first file-sharing services, punitive legal responses are yet to be proven effective at reducing rates of infringement.

This experience suggests that stricter copyright laws are not the most effective way to address [copyright infringement](#).

Instead of investing resources into legal proceedings, we suggest that

rights-holders should invest in innovative platforms that provide consumers with [greater access to content in a timely manner at a fair price](#).

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