

After DBC: Can Piracy Be Curbed Outside of the Court?

Adrian Dean takes a look at the landscape post Dallas Buyers Club.

INTRODUCTION

After much publicity, expense and speculation, the case of Dallas Buyers Club LLC v iiNet seems to have finally reached a conclusion.¹ Threats by Voltage Pictures - the owner of the rights to Dallas Buyers Club - to bring proceedings against those who have illegally downloaded the film will not likely bear fruit. Therefore, those who decide to illegally download films in Australia will possibly face only the lightest slap on the wrist. The case has once again brought to the fore the social and economic complexities of internet piracy. This essay examines the outcomes and ramifications of the recent Federal Court case. Further, it will explore actions that government and enterprise may take to minimize future piracy and encourage the development of a fair basis for creatives to protect their professional livelihoods.

DALLAS BUYERS CLUB LLC V IINET

The *Dallas Buyers Club* case was of particular interest as it dealt with the relatively unexplored areas of preliminary discovery and a rights holders' ability to take action against perpetrators by way of speculative invoicing. DBC sought the details of 4276 IP addresses from six Internet service providers (ISPs), alleging the account holders of these addresses had illegally downloaded and shared the film.² While all ISPs stated that they did not condone acts of piracy, they resolved to fight defiantly for the privacy of their customers.³

PRELIMINARY DISCOVERY

Preliminary discovery refers to a party discovering limited details (such as one's identity) before the commencement of substantive legal proceedings.⁴ DBC identified 4276 IP addresses that allegedly engaged in illegal file sharing. Without specific account holder details (which only ISPs would hold) the IP address details were effectively useless. Division 7.22 of the Federal Court Rules reads that, where a person may have grounds to obtain relief against a prospective respondent, but is unable to identify who that prospective respondent is and some third party is likely to know who the prospective respondent is, the court may order the third party to assist in identifying the prospective respondent.⁵ Perram J

found that these elements had been met and ordered the ISPs to handover details of account holders to DBC.⁶ It would appear that the courts are now willing to order ISPs to hand over the details of those who have allegedly engaged in illegal file sharing activities. However, in anticipation that DBC would engage in similar standover tactics to those commonly undertaken by content distributors in other jurisdictions, Perram J stayed the order, pending the approval of letters of demand.⁷

PENALIZING THE INDIVIDUAL: SPECULATIVE INVOICING

Submissions for damages made by DBC included two permissible demands. Perram J would allow damages equating to the cost of purchasing the movie for each copy downloaded, as well as costs associated with tracking down those who had allegedly downloaded the content.⁸ The permissible demands equate to what would likely be a relatively small monetary amount. The further two submissions for damages made by DBC were deemed impermissible. DBC argued that they should be able to claim damages for the cost of a licensing fee that each party would have paid to legally share the film. Perram J stated that such a submission was "so surreal that it should not be taken seriously."⁹ A further submission that punitive damages should be calculated based on how many other instances of piracy the infringer had previously engaged in was also dismissed. The Copyright Act does not permit calculation of damages by reference to other instances of the individual's breach of copyright.¹⁰

Speculative invoicing involves sending letters of demand for high monetary sums to those who have allegedly engaged in pirating activities. Commonly used in both the UK and the US, they often threaten further legal action should the demands of the rights holder not be met.¹¹ While *Dallas Buyers Club* did not deal with speculative invoicing per se, the case sets a precedent in respect of preliminary discovery and the legitimacy of obtaining relief against the prospective respondent. The Federal Court Rules state that preliminary discovery should be granted only on the grounds of obtaining relief.¹² As DBC sought to gain more than mere relief and arguably wanted to intimi-

1 *Dallas Buyers Club LLC v iiNet Limited* (No 5) [2015] FCA 1437.

2 *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317, 1.

3 *Ibid* 2.

4 *Federal Court Rules 2011* (Cth) div 7.21.

5 *Ibid* div 7.22.

6 *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317, 72.

7 *Ibid* 93.

8 *Dallas Buyers Club LLC v iiNet Limited* (No 4) [2015] FCA 838, 16.

9 *Ibid* 23.

10 *Ibid* 32.

11 Productivity Commission, *Intellectual Property Arrangements Productivity Commission Issues Paper* (2015) 20.

12 *Federal Court Rules 2011* (Cth) div 7.22(1)(a).

date infringers to settle claims (through speculative invoicing), Perram J denied preliminary discovery.¹³

WHERE DOES THIS LEAVE PIRATES AND RIGHTS HOLDERS?

The case is a 'win' for those who engage in downloading pirated films. The case demonstrates that should a rights holder wish to compel a third party ISP to identify account holders, they will be able to do so if the court is satisfied about the nature of the relief sought.

After arduous litigation, it seems that the court will only grant a fraction of what the rights holders had originally submitted. Given the hassle, cost and the little reward associated with such an outcome, it is highly unlikely that further legal action will be pursued. Critics will no doubt question the decision. The outcome lacks any hard notion of deterrence. It seems the Federal Court believes that such an issue is one best left to Parliament.

THE THREAT TO RIGHTS HOLDERS IS REAL

While those who use illegal downloading services can sleep easy at night, there is little joy flowing from the decision for producers and creatives, individuals whose intellectual and physical efforts are scarcely rewarded at the best of times. Add piracy to the mix, and the impact on their rightful earnings, as well as broader economic consequences for the industry, point to a significant issue that requires action from lawmakers and industry alike. Legitimate movie sales since the introduction of BitTorrent have seen a worldwide decrease of 27%.¹⁴ Take one of Australia's most successful films, *The Sapphires*, as a case in point. The film won the unenvied position of 46th on the '100 Most Illegally Downloaded Movies of 2013' list. While the film did make an impressive \$14.5 million at the Australian box office, it has been suggested that producers lost over \$1 million of potential revenue due to piracy. While this figure pales in comparison to US blockbusters, it is a stark reminder that the actions of the armchair thief, whose misguided belief that piracy does not equate to stealing, in fact, having greater economic consequences closer to home than one may imagine.¹⁵

ACTIONS: GOVERNMENT

The introduction of the *Copyright Amendment (Online Infringement) Bill 2015* (the Bill) by then Communications Minister Malcolm Turnbull wisely targets providers of pirated content as opposed to individuals who download or use the content. At best, the new legislation can be described as a genuine attempt at protecting content owners by disabling access to pirated materials. At worst, the Bill can be portrayed as, an ineffective mechanism used for political point scoring.

The Bill allows content owners to seek from the Federal Court an order for ISPs to block websites whose primary purpose is facilitating copyright infringement.¹⁶ However, such an approach is intrinsically flawed. The then Minister of Communications made clear in his second reading speech that no action would be taken on websites that can still be accessed by way of a Virtual Private Network (VPN).¹⁷ Therefore, while the blocking of illegal content providers may deter some casual downloaders, the reality is that the Bill will likely have minimal impact on dedicated downloaders. Critics of the Bill argue that a further substantive flaw lies in the independent manner in which ISPs are allowed to carry out orders to block a website, with no third party supervision over the process. Some argue that where ISPs have full control of the blocking process, file sharing websites such as Dropbox, whose primary function does not include an intent to host infringing material, could be inadvertently blocked.¹⁸

Clearly, the Bill has flaws. However, it is an attempt at providing some form of initial legislative position after many years of government inaction on an issue that has a wide impact on Australia's creative industries. The then minister made clear in his second reading speech that this is a piece of legislation that is up for constant review and amendment.¹⁹ Statute in this fast moving technical arena does require constant tinkering; there is also an inherent element of trial and error.

As discussed, critics believe that the Bill may lead to the potential blocking of websites with little to no illegal copyright sharing intent. However, the Bill's explanatory memorandum does give specific guidance as to factors to be considered by the court in applying the Bill. These factors include the flagrancy of the infringement or its facilitation, whether the owner or operator of the online location demonstrates a disregard for copyright generally, whether blocking access is a proportionate response, and the public interest.²⁰ We can reasonably surmise that the consideration of such factors would effectively assist in the prevention of blocking websites with little to no copyright sharing intent.

THE UK'S ANTI-PIRACY MEASURES: A STORY OF MILD SUCCESS

So far, the best litmus test as to the success of comparable legislation is the UK's 2012 anti-piracy measures. Similar to the Australian measures, the UK laws allow orders for ISPs to block websites whose primary function is to facilitate illegal file sharing.²¹ The legislation has had mixed results. The UK's banning of the world's largest file-sharing website, the Pirate Bay, resulted in little success. Predictably, once ISPs blocked the page,

13 *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838, 6.

14 Alejandro Zenter 'Measuring the Impact of File Sharing on the Movie Industry: An Empirical Analysis Using a Panel of Countries' (22 March 2010) University of Texas at Dallas < <http://ssrn.com/abstract=1792615>>.

15 Twila Wingrove et al, 'Why were millions of people not obeying the law? Motivational influences on non-compliance with the law in the case of music piracy' (2009) 14(3) *The Journal of Psychology, Crime & Law* 261.

16 *Copyright Act 1968* (Cth) s115A.

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6416 (Malcolm Turnbull).

18 Tim Biggs, 'Anti piracy site-blocking laws: what you need to know' *The Age* (Melbourne) 23 June 2015.

19 Turnbull, above n 17, 6416.

20 Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth).

21 *Digital Economy Act 2010* (UK), c24, s17.

there was a sharp increase in the site being accessed with the help of VPNs and mirrored websites, meaning little to no drop in traffic to the site.²² However, this particular example aside, the culmination of blocking 19 of the most popular file sharing portals has, in fact, led to a sizeable decline in total piracy and a resulting correlation of an increased usage of paid, legal services such as Netflix.

A recent study on the effects of consumer behaviour and illegal file sharing confirms the above statistics. When file sharing websites are blocked, and where effective and cost competitive digital services are available, there is a sizable decrease in illegal downloads, especially amongst persistent offenders, with a decrease in illegal downloads around the vicinity of 25%.²³

The takeaway message is that anti-piracy measures can be successful, but require industry buy-in, an effective product, and timeliness in taking advantage of new laws.

FILM DISTRIBUTION IN AUSTRALIA: AN INDUSTRY THAT FELL ON ITS OWN SWORD?

There are two substantive drivers behind piracy in Australia: price and distribution. The inordinate delay of market entry by streaming services such as Netflix has, in part, caused the pricing of legal content in Australia to be out of step with that of other advanced economies. Netflix, the dominant player in streaming legal content, only entered the Australian market in early 2015, as did its main competitor, Stan. By contrast Netflix has been operating streaming services in the US since 2007.²⁴ Pre-Netflix, when Australians wished to purchase legal digital content, they had to utilize services such as iTunes. The prices offered by these services in Australia are not in line with the prices offered in other markets. For example, in 2011 when the Australian dollar was trading at \$1.05 USD, a digital download of a Beatles album on iTunes in the US was \$12.99.²⁵ Comparatively, Australian consumers were paying \$20.99. Presently, the price of Netflix ranges from \$9 to \$15 per month. Having access to digital content at an equitable price has, in a very short time, had a positive effect on piracy levels. Thirty three per cent of respondents in research conducted by IP Awareness Australia were pirating content at a significantly lower rate due to the common availability of legal streaming services.²⁶

Alongside pricing, poor distribution of content in Australia has traditionally been an equal contributor to piracy. Timeliness of distribution and a lack of available legal content in Australia is the driver behind 28% and

23% of illegal downloads respectively.²⁷ While the majority of Australians do try to first source a legal means of download, the historically tardy release dates of content into Australia does not gel with modern expectations.²⁸ For example popular television shows such as *Sherlock* (45 days delay), *Inside Amy Schumer* (62 days delay) and *Louie* (78 days delay).²⁹ When consumers are not be able to access content legally it is no surprise that some turn to file sharing websites.³⁰ While film distributors bemoan the plague of piracy in Australia and denounce the practice for eroding profits, should they not instead ask themselves some questions? Are we delivering the consumer what they want, when they want it, and for a competitive price? If the answer is no, it is not unreasonable that a consumer will find what they desire from another source. Instead of employing standover tactics by issuing speculative invoicing to occasional downloaders, surely resource allocation should be shifted to a proven method of piracy reduction: timely and widely available distribution.

The past few years in Australia have seen some clarity emerge as to the how piracy can be significantly reduced. While the war on piracy will likely never be won, the current climate provides an arena in which illegal downloads can be meaningfully reduced. The outcome of the *Dallas Buyers Club* decision is ultimately the right one. At present, it should not be the duty of the court to allow anything more than traditional damages when the film industry contributes to a number of circumstances that actively encourage piracy. The introduction of legal streaming services such as Netflix has already led to a reduction in piracy. Film distributors must take advantage of such distribution channels, ensuring that content is available in Australia in a comparable time frame with other countries. Improving infrastructure to further support legal streaming services, as well as blocking offending websites will also likely lead to an increase in the uptake of paid legal content. Only once film distributors have met the reasonable expectations of modern Australian consumers by providing consistent, timely and accessible content, should lawmakers allow distributors to pursue any form of relief or damages beyond that granted in *Dallas Buyers Club*.

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22 Brett Danaher et al, 'The Effect of Piracy Website Blocking on Consumer Behavior' (November 2015) Carnegie Mellon University Initiative for Digital Entertainment Analysis <<http://ssrn.com/abstract=2612063>>.

23 Ibid.

24 Netflix Media Centre, A brief history of the company that revolutionized watching of movies and TV shows (2014) Netflix <<https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10477>>.

25 Chris Griffith, 'Why Australians are paying higher prices for technology' *The Australian* (Sydney), June 14 2011.

26 'Australian Piracy Behaviors 2015' (2015) *IP Awareness Foundation Australia*.

27 The Australian Consumers Association, above n 25, 5.

28 Ibid.

29 Graham Spencer, *Watching TV in Australia: The Australian Delay Under The Microscope* (14 July 2014) Reckoner, <<http://reckoner.com.au/2014/07/watching-tv-in-australia-the-australian-delay-under-the-microscope/>>.

30 Ted O'Donoghue et al 'The Economics of Immediate Gratification' (2000) 13, *Journal of Behavioral Decision Making*, 233-250.