

A win for copyright owners – the Dallas Buyers Club

In what has been hailed as a landmark decision, the Federal Court has ruled that a number of Australian internet service providers (ISPs) must hand over details of over 4,000 customers alleged to have illegally shared the film, Dallas Buyers Club. It is expected that they will now receive letters from Dallas Buyers Club requesting a settlement payment for copyright infringement.

While this is certainly a win for the rights holders, it is just one step in a process. It may also be a case of the bark being worse than the bite for Australian infringers. Chief Executive of iinet, David Buckingham has described the decision as a 'positive outcome' which ensures that 'customers will be treated fairly'.

Justice Perram made it clear that no letters can be sent to alleged infringers without approval of the Court. This is designed to guard against 'speculative invoicing' – a practice well established in the USA and UK, where a rights holder sends a mass number of pro forma letters of demand with a 'pay up or else' approach to settlement, designed to play on the fears of the recipient. The parties will shortly return to court to discuss the appropriate letter to be sent.

If a recipient chooses the 'or else' option, Dallas Buyers Club would need to sue the recipient for copyright infringement. What their appetite is for issuing multiple court proceedings of this nature remains to be seen, especially when they have been ordered to pay the ISPs costs of this proceeding.

While nobody wants to go through the Court process, it is important to note that damages for copyright infringement in Australia are generally compensatory rather than punitive. This means that the correct calculation of damages would be based on the fee the copyright owner would have received if the infringing copy was in fact a legally obtained copy. For example, Dallas Buyers Club is currently available on iTunes for less than \$15.00. While additional damages are available under the Copyright Act, they are generally awarded where there is repeated or multiple infringements or where conduct is particularly flagrant. It would be unlikely that additional damages would be awarded against someone downloading one copy of a movie for private viewing, although Justice Perram stated that it is 'not beyond the realm of possibilities that damages of a sufficient size might be awarded in an appropriately serious case'.

There are two major developments in relation to online piracy in Australia which may lead copyright owners away from taking this type of action against individuals. First, an industry code on copyright infringement has been negotiated and agreed by ISPs and copyright owners and submitted to ACMA for approval. This provides a system for ISPs to issue an account holder three warnings for infringement before the copyright owner can seek a preliminary discovery order of the type granted to Dallas Buyers Club. The code aims at educating users rather than punishing them, and it is hoped that behaviour will change as users receive notices.

Secondly, the Federal Government has introduced legislation into Parliament which, if passed, will allow rights holders to apply for court orders forcing ISPs to block overseas file sharing websites. This bypasses the individual infringer in favour of the source of the piracy. Communications Minister Malcolm Turnbull has described it as part of a range of solutions and tools that will materially mitigate copyright infringement, while critics liken the scheme to online censorship. It remains to be seen whether the scheme becomes law.

With the introduction of reasonably priced and easily accessible services like Netflix and Stan in Australia, it is likely that piracy will become less of an issue. In the meantime, movie and television lovers should be aware of the increased options open to rights holders, and consider whether the risk is worth the price of a movie ticket.

If you have any queries about this case, or would like advice in relation to intellectual property, please contact:

Emma Mitchell

Senior Associate

Sladen Legal

03 9611 0140

emitchell@sladen.com.au

or

Daniel Smedley

Principal

Sladen Legal

03 9611 0105

dsmedley@sladen.com.au

