

Update: Recent Online Anti-Piracy Reform In Australia

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The battle against on-line piracy in Australia, a country labelled as one of the worst offenders,¹ is well and truly on. Along with the recent Federal Court's decision in *Dallas Buyers Club LLC v iiNet Limited*,² where the battle has been taken to the individual end users, the Australian rights holders' anti-piracy "armoury" now also consists of:

- (a) legislative reform, which recognises the difficulties rights holders previously faced in taking action against foreign entities providing infringing content; and
- (b) a proposed industry code, designed to reduce piracy rates by way of an escalating notice scheme to help change residential fixed internet users' copyright-infringing behaviour.

Legislative Reform

The *Copyright Amendment (Online Infringement) Bill 2015* was first introduced into the House of Representatives on 26 March 2015 and received Royal Assent on 26 June 2015. Broadly speaking, it amends the *Copyright Act 1968* ("CA") to give rights holders the ability to apply to the Federal Court to make orders to have foreign websites, hosted outside Australia, blocked in Australia without first having to establish the carriage service provider's ("CSP's") liability for copyright infringement or authorisation of copyright infringement.

Australian rights holders found themselves in a difficult position prior to this legislative change. If the website operator providing infringing copyright material to Australians was identifiable, the rights holder could take direct action against that website operator and, provided they were resident in Australia, tangible enforcement action to shut the website down could follow. However, where the website operator was located outside of Australia, any finding of infringement would be without any practical means of enforcement. Short of establishing "authorisation" by the internet service providers ("ISPs") providing the carriage services used by the end users to access the website, which the decision *Roadshow Films Pty Ltd & Ors v iiNet Limited*³ indicates is a difficult claim to make out, there was no procedure available to shut down or deny access to a website facilitating the infringing activity.

The new section 115A of the CA attempts to assist rights holders by providing that:

- (1) the Federal Court may, on application by a copyright owner, grant an injunction if the Court is satisfied that:
 - (a) a CSP provides access to an "online location"⁴ outside Australia; and
 - (a) the "online location" infringes, or facilitates an infringement of, the copyright; and
 - (b) the "primary purpose" of the "online location" is to "infringe, or to facilitate the infringement of, copyright (whether or not in Australia)".

For websites hosted and operated within Australia, it is expected that rights holders will take action directly against the website operator under the existing provisions set out in section 115 of the CA. According to the *Revised Explanatory Memorandum*⁵:

- (a) the "primary purpose" is set as an intentionally high threshold e.g. the Court would not grant an injunction to disable access to an art gallery website operated outside Australia that contains an unauthorised photograph. Websites such as www.youtube.com or www.blogger.com would also not prima facie satisfy the test as being an online location that infringes or facilitates infringement of copyright; and
 - (b) to "infringe, or to facilitate the infringement of, copyright" would include circumstances where a website provides torrent files that facilitate the download and upload of copyright material without the permission of the copyright owner. It would also include websites that provide links to, or host, infringing material, as well as online storage services that are used to store infringing material. The provision is intended to be technology neutral and capture both existing and future technologies used to facilitate copyright infringement.
- (2) The CSP must "take reasonable steps to disable access to the online location" if the Court grants an injunction.

- (3) The parties to the action are:
- (a) the owner of the copyright;
 - (b) the CSP; and
 - (c) the person who operates the “online location” if that person makes an application to be joined as a party to the proceedings.
- (4) The owner of the copyright must notify:
- (a) the CSP; and
 - (b) the person who operates the “online location”, of its “blocking” application. Having said that, the Court may dispense with the notice requirements if it is satisfied that the copyright owner is unable, despite reasonable efforts, to determine the identity or address of the person who operates the “online location”, or to send notices to that person.
- (5) In determining whether to grant the injunction, the Court may take various matters into account. These include:
- (a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement;
 - (b) whether the “online location” makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
 - (c) whether the owner or operator of the “online location” demonstrates a disregard for copyright generally;
 - (d) whether access to the “online location” has been disabled by orders from any court of another country or territory on the ground of, or related to, copyright infringement;
 - (e) whether disabling access to the “online location” is a proportionate response in the circumstances;
 - (f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;
 - (g) whether it is in the public interest to disable access to the “online location”;
 - (h) whether the owner of the copyright complied with its notification requirements;
 - (i) any other remedies available under the CA;
 - (j) any other matter prescribed by the regulations; and
 - (k) any other relevant matter.

According to the *Revised Explanatory Memorandum*, the factors that the Court may take into account are set at an intentionally high threshold. The purpose of the scheme is to allow a specific and targeted remedy to prevent those online

locations which flagrantly disregard the rights of copyright owners from facilitating access to infringing copyright content.⁶

Although the CSP is not liable for any costs in relation to the proceedings unless the CSP appears and takes part in the proceedings,⁷ it is not entirely clear how a CSP would be able to argue against and recover any costs it would incur, which may vary based on the blocking techniques required by the Court, without being actively involved in the proceedings.

Comparative Overseas Legislation

The amendments to the CA are modelled on European legislation. For example, similar provisions are set out under section 97A of the UK’s *Copyright, Designs and Patents Act 1988* (“**CDPA Act**”), a result of the implementation of Article 8(3) of the *European Parliament and Council Directive*⁸. Section 97A of the CDPA empowers the Court to grant an injunction against a “service provider” where the service provider has actual knowledge of another person using their service to infringe copyright. As the injunction is discretionary, rights holders must convince the Court that the granting of the injunction will be proportionate and the terms fairly balanced between the rights of the copyright owner and those of the ISP and its customers. Singapore also enacted similar legislation website blocking legislation in 2014.⁹

Despite section 97A of the CDPA being available to rights holders in the UK for many years, *Twentieth Century Fox Corp Ltd & Ors v British Telecommunications plc*¹⁰ was the first case to test the section. That decision followed an injunction granted in *Twentieth Century Fox Corp Ltd & Ors v Newzbin Ltd*¹¹, where the studios were successful in their claim that the owner and operator of a website called “Newzbin” was liable for authorising copyright infringement by its users and acting as a joint tortfeasor in procuring users to commit copyright infringement. Soon after the grant of that injunction, another website emerged at the same address under the name “Newzbin2”. It operated in a similar manner, however this time the operator’s identity was unknown. The claimants then sought an injunction against the ISP under section 97A of the CDPA, seeking an order to remove or disable access to the website. The Court ruled that the ISP’s users were using the ISP’s services as much as Newzbin2’s in their downloading activities. It was sufficient to show that the ISP had actual knowledge that one or more persons were using its service to infringe copyright (rather than actual knowledge of a specific infringement of a specific copyright work by a specific individual).

Following this successful claim, the record labels followed suit and obtained injunctions against certain ISPs in 2012 in *Dramatico Entertainment & Ors v British Sky Broadcasting Ltd*¹². In that case, the popular BitTorrent platform, the “Pirate Bay”, with billions of dollars in annual revenue from advertising, facilitated

illegitimate file sharing by the ISP's users on a peer-to-peer ("P2P") network (rather than downloading data from a hosting website). In order to download the relevant copyright protected works, users would obtain a "torrent file" or "seed" which contained information which enabled the P2P user to track and locate other P2P users sharing the wanted copyright work. Once the other P2P users were identified, the downloader could download the copyright work from those other P2P users. "Downloaders" of data simultaneously act as "uploaders" on a P2P network. The Pirate Bay website catalogued, indexed and arranged the torrent files for all types of content. Ultimately, the Court took the view that P2P users, acting as downloaders and uploaders, infringed the claimants' copyright by copying and making that copyright work available to other P2P users, and granted injunctions against the ISPs. The Court also concluded that the operators of the Pirate Bay website were liable for authorising copyright infringement and as joint tortfeasors for inducing, inciting or persuading its users to commit infringement of copyright. There have now been numerous cases in the UK where rights owners have successfully obtained injunctions under section 97A of the CDPA and blocked websites containing infringing music, films and TV programmes.¹³ This has recently been extended to websites containing infringing e-book titles.¹⁴

Copyright Notice Scheme Industry Code 2015

On 8 April 2015, the Communications Alliance submitted the *Copyright Notice Scheme Code 2015*¹⁵ ("Code") to the Australian Communications and Media Authority ("ACMA") for registration as a telecommunications industry code¹⁶. It was released for public comment earlier this year. ISPs worked on the Code together with representatives of both consumer groups and rights owners.

The Code's key objectives are to create an industry-led scheme to deter the practice of online copyright infringement by educating consumers as to which online activities constitute copyright infringement and informing them about lawfully available alternatives. The Code aims to achieve these objectives by way of a notice scheme where ISPs accept notices (in a prescribed format) from rights holders (being copyright owners, exclusive licensees of a copyright work, or a person acting as agent for one or more copyright owners that meets the criteria specified in the Code). The notices will identify the internet protocol ("IP") addresses that a rights holder alleges have been used to infringe copyright (for example, by way of a download of a pirated film), and request that the ISP notify the account holder of the alleged infringement. ISPs must endeavour to match the IP addresses to the relevant account holders. Where an IP address is matched, the ISP will send the account holder an escalating series of notices informing them of the alleged infringement in order to change their behaviour and help steer them toward lawful sources of content.

If an account holder receives three notices, namely, an "education", "warning" and "final" notice, within a 12 month period, ISPs will, on the request of a rights holder, facilitate a "preliminary discovery process" to assist the rights holder to enforce its copyright¹⁷. The rights owner can file an application for preliminary discovery in the Federal Court (or Federal Circuit Court) seeking access to the account holder's details. ISPs must act reasonably to facilitate and assist in relation to the application. An account holder's details will only be provided by ISPs to rights holders as a result of a Court order. It remains a matter for the Court to decide whether preliminary discovery should be granted. Account holders who have received three notices within a 12 month period may seek a review to be conducted by an independent adjudication panel. The Code will commence upon registration by the ACMA as a telecommunications industry code and its scheme will commence on the earlier of 1 September 2015 or a date to be set by the "Copyright Information Panel" established under Part 4 of the Code.

The ACMA is currently considering the Code and if it is satisfied that the Code meets the relevant legislative requirements, it is obliged to include the Code on the register of industry codes¹⁸. The Code's effectiveness will be independently evaluated 18 months after its commencement.

It will be interesting to see how, if at all, the Code will affect the Court's application of the various rulings given in the *Dallas Buyers Club* litigation. For example, in the latest decision of Perram J, *Dallas Buyers Club LLC* ("DBC") has been ordered to lodge a \$600,000 bond before it can obtain the account holder details of the alleged infringers.¹⁹ The reason for the bond is the fear that, because DBC has no presence in Australia, it will not be able to be punished for failing to honour its undertakings not to engage in "speculative invoicing", (being the practice of overinflating a letter of demand for damages sent to the account holder).²⁰

Concluding Comments

Some argue the new anti-piracy legislation has been rushed through, with concerns that blocking a website's URL is a slippery slope towards online censorship.²¹ Others argue that, given that any blocking technique employed by an ISP can be overcome with a readily available virtual private network, these injunctions are not effective, particularly when the torrent sites themselves have been known to educate users on how to bypass the bans, and alternative mirror, tribute and proxy sites are abundant on the web.²² Having said that, research has shown that blocking the pirate sites has increased the usage of paid streaming services.²³ The recent introduction of the relatively cheap and accessible "video on demand" streaming services such as Stan, Quickflix, Netflix, Presto and the new Telstra TV offering²⁴ are beginning to have a major impact upon the Australian media market. The take-up of these services may therefore alter the Australian user's

copyright infringing habits and, together with the legislative change and education the proposed Code provides, further lower the incidence of on-line piracy in Australia. Only time will tell how these effective these new anti-piracy measures, together with the new on-line streaming service market, are on the incidence of on-line piracy in Australia.

¹ Scott M, "From convicts to pirates: Australia's dubious legacy of illegal downloading", *The Conversation* April 10 2015, available at <http://theconversation.com/from-convicts-to-pirates-australias-dubious-legacy-of-illegal-downloading-39912> accessed 13 August 2015.

² [2015] FCA 317 where the Federal Court made preliminary discovery orders (requiring the ISPs to disclose certain details of over 4700 Australian internet account holders whose IP addresses were alleged to have unlawfully shared the film "Dallas Buyers Club" online illegally) in order to send letters of demand or requests for payment.

³ [2012] HCA 16 where the studios were unsuccessful in their claim that an ISP, iiNet Limited, "authorised" the users of its service to infringe copyright by failing to terminate their accounts. The majority of the Court did not agree with the argument that "authorisation" should be interpreted in the same way as a "failure to prevent".

⁴ The *Revised Explanatory Memorandum* states that the term "online location" is intentionally broad and includes websites; available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81%22 accessed 12 August 2015.

⁵ Ibid.

⁶ Ibid.

⁷ Section 115A(2) CA.

⁸ 2001/29/EC.

⁹ *Copyright (Amendment) Act 2014*; Zhang B, "Singapore's Amended Anti-Piracy Copyright Act Enables Streamlined Site-Blocking" *The Center for Internet and Society (Stanford Law School)*, 29 July 2014 available at <http://cyberlaw.stanford.edu/blog/2014/07/singapore%E2%80%99s-amended-anti-piracy-copyright-act-enables-streamlined-site-blocking> accessed 13 August 2015.

¹⁰ [2011] EWHC 1981 (Ch).

¹¹ [2010] EWHC 608 (Ch) ("*Newzbin2*").

¹² [2012] EWHC 268 (Ch) and [2012] EWHC 1152 (Ch).

¹³ For example, see *Football Association Premier League Ltd v British Sky Broadcasting Ltd and Ors* [2013] EWHC 2058 (Ch) where the Court ordered six major ISPs in the UK to block access to a website known as "FirstRow Sports" and *1967 Limited & Ors v British Sky Broadcasting Limited & Ors* [2014] EWHC 3444 (Ch) where the Court granted an injunction to a number of record companies requiring the five main ISPs to block access to 21 copyright infringing music websites.

¹⁴ "Publishers Win High Court Support in Fight Against Infringement", *Publishers Association*, 26 May 2015 available at <http://www.publishers.org.uk/policy-and-news/news-releases/2015/publishers-win-high-court-support-in-fight-against-infringement/> accessed 13 August 2015.

¹⁵ Communications Alliance, *Industry Code C653:2015 Copyright Notice Scheme*; available at http://www.commsalliance.com.au/data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf accessed 12 August 2015.

¹⁶ See section 136 of Part 6 *Telecommunications Act 1997* (Cth).

¹⁷ See Chapter 3 of the Code.

¹⁸ Available at <http://acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-codes> accessed 13 August 2015.

¹⁹ *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838

²⁰ Francis, H, "Dallas Buyers Club dealt major blow in Federal Court iiNet piracy case", *the Age*, 14 August 2015 available at <http://www.theage.com.au/digital-life/digital-life-news/dallas-buyers-club-dealt-major-blow-in-federal-court-ii-net-piracy-case-20150813-givyd7#ixzz3ikzOvcn0> accessed 14 August 2015.

²¹ Veen, B, "Pirate Bay's Peter Sunde says Australia's proposed website blocking scheme won't deter downloaders", *ABC News*, 20 June 2015 available at <http://www.abc.net.au/news/2015-06-19/pirate-bay-cofounder-mocks-proposed-website-blocking-legislation/6559288> accessed 13 August.

²² Cuthbertson, A, "UK piracy blacklist expansion proves ineffective as ExtraTorrent and Torrentz proxies emerge", *International Business Times*, 14 July 2015 available at <http://www.ibtimes.co.uk/uk-piracy-blacklist-expansion-proves-ineffective-extratortent-torrentz-proxies-emerge-1510755> accessed 13 August 2015; Stone, J "Pirate Bay Torrents Revived: Iso Hunt Tribute, Mirror Sites Celebrate Fallen Piracy Hub, But Be Careful What You Wish For", *International Business Times* 12 December 2014 available at <http://www.ibtimes.com/pirate-bay-torrents-revived-iso-hunt-tribute-mirror-sites-celebrate-fallen-piracy-hub-1752441> accessed 13 August 2015; Stone, J, "Pirate Bay Blockades Are Undercut By Torrent Mirror Sites, VPN Services: Study", *International Business Times* 9 June 2015 available at <http://www.ibtimes.com/pirate-bay-blockades-are-undercut-torrent-mirror-sites-vpn-services-study-1958992> accessed 13 August 2015.

²³ Danaher, B and Smith, M D. and Telang, R, "The Effect of Piracy Website Blocking on Consumer Behavior" May 29, 2015 available at <http://ssrn.com/abstract=2612063> or <http://dx.doi.org/10.2139/ssrn.2612063> accessed 13 August 2015.

²⁴ "Telstra announces partnership with Roku to launch Telstra TV streaming service", *Telstra Media Release*, 29 July 2015 available at <http://www.telstra.com.au/aboutus/media/media-releases/Telstra%20announces%20partnership%20with%20Roku%20to%20launch%20Telstra%20TV%20streaming%20service> accessed 14 August 2015.