

**THE EFFECT OF THE DALLAS BUYERS CLUB  
RULING ON CYBER LAW IN AUSTRALIA**

**JASON KING  
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## I. INTRODUCTION

On Tuesday 7 April 2015, Perram J in the Federal Court of Australia handed down a decision that in time will possibly change the landscape of cyber law in Australia forever. The case *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 in theory is a straight forward discovery case where the applicant the Dallas Buyers Club LLC successfully sought for the use of information obtained from the 6 respondents in pursuing future damages in regards to their intellectual property.

The case identified 4,726 Australian Internet Protocol (IP) addresses that had allegedly downloaded the 2013 movie the Dallas Buyers Club through bit torrent software and as such breaching copyright of the movie. An IP address in this instance represents an individual internet user, using an Internet Service Provider owned by one of the respondents. The Dallas Buyers Club parent company Voltage Pictures in its statement of claim to the Federal Court of Australia is seeking damages to recover the costs of the illegal downloading of the movie and the names and addresses of the 4,726 Australian's who illegally downloaded the movie.

The ramifications of this decision are yet to be seen, but the mere fact that the applicant was successful could open a Pandora's Box and could have long lasting effects on internet users in Australia.

This paper will discuss the origins of cyber law from a position of infancy from where we have originated from through to the challenges of cases such as the Dallas Buyers Club. It will then focus on the present situation and position of cyber law in Australia, in particular the reaction of the Dallas Buyers Club ruling and then finally on where is cyber law heading and are government and law makers actually doing enough in this space.

## II. HISTORICAL ORIGINS OF CYBER LAW

Cyber law is an area of law that deals with the Internet's relationship to technological and electronic elements, including computers, software, hardware and information systems.<sup>1</sup> Cyber Law is also commonly known as Internet law.

The fundamental purpose of cyber law is to reduce or prevent cybercriminal activities by protecting information access, privacy, communications, intellectual property and the freedom of speech relating to the use of the Internet, websites, email, computers, mobile phones, software and hardware.<sup>2</sup>

Cyber law creates new legal challenges in a sense there are no physical jurisdictional boundaries and cyber laws differ from country to country and jurisdiction to jurisdiction, which makes enforcement of cyber law challenging at least.

To have a better understanding of cyber law an understanding of the internet is paramount. The best legal definition of the internet was seen in *Reno v. ACLU* (U.S. Supreme Court 1997) where it was stated that:

*“The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called ‘ARPANET,’ which was designed to enable computers operated by the military, defense contractors, and universities conducting defense related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war.”*<sup>3</sup>

The definition was further defined in 2001 in *Re Double Click Privacy Litigation* 154 F Sup 2d 497 at 501-2 which defined the internet as

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<sup>1</sup> Janssen, C TechoPedia Definition – ‘What does Cyberlaw mean’  
<<http://www.techopedia.com/definition/25600/cyberlaw>>.

<sup>2</sup> Janssen, C TechoPedia Definition – ‘Techopedia explains Cyberlaw’  
<<http://www.techopedia.com/definition/25600/cyberlaw>>.

<sup>3</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

*"The Internet is accurately described as a "network of networks. Computer networks are interconnected individual computers that share information. Anytime two or more computer networks connect, they form an "internet." The "Internet" is a shorthand name for the vast collection of interconnected computer networks that evolved from the Advanced Research Projects Agency Network ("ARPANet") developed by the United States Defense Department in the 1960's and 1970's. Today, the Internet spans the globe and connects hundreds of thousands of independent networks."*<sup>4</sup>

It is important to add although Australia is a common law country and follows common law precedents from countries such as England and Canada, many of the cyber law precedents are followed from the United States of America, this is a change to the traditional laws of Australia and it is one that the Australian legal fraternity is only now starting to understand and perhaps come to terms with.

One of the early hurdles to overcome in cyber law legal governance is that for many years, especially in its infancy the internet was seen as being self-governed. To an extent this is still the case today with a combination of private organisations<sup>5</sup> and now government organisations<sup>6</sup> starting to govern the internet or cyber law within its own jurisdictions. Internet regulation was defined in 2003 in *Bonnier Media Ltd v Smith* 2003 SC 364 a Scottish Intellectual Property case where the Court of Session held that a Mauritian company, and an American resident in Greece, could be interdicted in Scotland from using a domain name said to infringe a trademark in Scotland;<sup>7</sup>

It was the opinion of the court that

"[it] is not appropriate to regard the Internet for legal purposes as a mere static physical entity: nothing more than a group of computers containing information which are linked

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<sup>4</sup> *DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497; (2001) U.S. Dist. LEXIS 3498 at 501-2.

<sup>5</sup> Private organisations such as Internet Corporation for Assigned Names and Numbers (ICANN) and World Wide Web Consortium (W3C).

<sup>6</sup> Government Organisation's such as Australia's Department of Defence, US government organisations such as World Trade Organisation (WTO), World Intellectual Property Organisation (WIPO), working group on Internet governance and Internet Governance Forum (IGF).

<sup>7</sup> Jonathan Mitchell QC - Archived Site *'Defamation and intellectual property rights on the internet'* <<http://www.jonathanmitchell.info/old/internet.html>>.

physically to one another. The Internet should rather be viewed as a process of communication. It is, in essence, a system of communication that allows a verbal or graphic message to be set up on a computer, which may be situated anywhere in the world, and conveyed to another computer, which may likewise be situated anywhere in the world. What is peculiar about the Internet is that the message will not be conveyed unless the initiative is taken by the operator of the second, recipient, computer. Nevertheless, it is essential to bear in mind that there will be no message to be conveyed unless the operator of the sending computer first sets up the necessary website. Moreover, when a website is set up, it is self-evident that the intention is that other persons should be able to obtain access to it via the Internet. The person who creates the website is linking himself into a process of communication, with the obvious intention that communication should take place by way of that process".<sup>8</sup>

### III. JURISDICTION

Although this paper is an analysis of the Dallas Buyers Club ruling it is important to have an understanding of internet jurisdiction within the scope of this paper.

In any legal setting the topic of jurisdiction is paramount and whether the correct court or investigative body has jurisdiction in the matter. Generally in traditional terms jurisdiction evolved in relation to geographical territories, with each state asserting authority over persons and things within its boundaries.<sup>9</sup>

The internet has now raised certain challenges as people now with the help of the internet can communicate and conduct business transaction with foreign companies located abroad, which are not within their home jurisdiction of Australia or their state based jurisdiction.

A court must have both subject-matter jurisdiction (i.e. jurisdiction over the type of dispute concerned) and personal jurisdiction (i.e. jurisdiction over the parties involved in the dispute)<sup>10</sup>

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<sup>8</sup> *Bonnier Media Ltd v Smith* (2003) SC 364 at 18.

<sup>9</sup> Brian F Fitzgerald, *Internet and E-Commerce Law, Business and Policy* (Thomson Reuters, 2011) 57.

<sup>10</sup> Dan Jerker B. Svantesson. (2004) "An introduction to jurisdictional issues in cyberspace".  
[http://epublications.bond.edu.au/law\\_pubs/26](http://epublications.bond.edu.au/law_pubs/26) 56.

which in essence means that a plaintiff could not go to the Federal court to have a state criminal matter heard.

In contract law a court might query where the disputed contract was formed, where the contract was broken or where the contract was performed.<sup>11</sup> In tort law it is rather similar where a court might examine where the tort was committed or where the damages were suffered.<sup>12</sup> However in cyber law the addition of where a server was located or where the defendant resided may be additional aspects to consider.

The first Australian case to really challenge "internet jurisdiction" was seen in *Dow Jones & Company Inc. v Gutnick, Joseph*.<sup>13</sup> A defamation case where the plaintiff Joseph Gutnick sued the defendant Dow Jones for defamation regarding an article that was titled Unholy Gains, by William Alpert, published in Barron's on October 30, 2000. The actual article queried Mr Gutnick's business dealings and in particular who Mr Gutnick allegedly associated with. Mr Gutnick did not read the article that was published in print; however he read the article on the website of the publisher. Mr Gutnick read the article in Melbourne and the tort of defamation as such then occurred in Melbourne. However the server that held the publication on it was located in the USA state of New Jersey.

This matter went all the way to the High Court of Australia where in a unanimous decision all seven High Court justices decided that Gutnick had the right to sue for defamation as his primary residence and the place he was best known.<sup>14</sup> It was held that Victoria was the location or jurisdiction that the damage to his reputation occurred and that the defamation did not occur at the time of publishing, but as soon as a third party read the publication and thought less of the individual who was defamed.<sup>15</sup>

With the ever increasing popularity of cloud servers and even web based email servers such as Microsoft's Hotmail, the possibility of obtaining data through legal process from a server located in a foreign jurisdiction is more prevalent today than it ever has been.

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> [2002] HCA 56, 210 CLR 575

<sup>14</sup> *Dow Jones & Company Inc. v Gutnick, Joseph* [2002] HCA 56, 210 CLR 57.

<sup>15</sup> Ibid.

*In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, \_\_\_ F. Supp. 2d. \_\_\_, 2014 WL 1661004 (S.D.N.Y. 25 April 2014)). A search warrant was issued in December 2013, by a United States Magistrates against the Microsoft Corporation seeking information from a US citizen's MSN email account. The email server that the held the information was located in Dublin, Ireland, outside the physical jurisdiction of the United States. Microsoft challenged the validity of the search warrant stating

*“The US government doesn’t have the power to search a home in another country, nor should it have the power to search the content of email stored overseas”*<sup>16</sup>

The search warrant was seeking information relating to the content of all emails stored in the targeted account and records or other identifying information for the targeted account, including the full name of the account holder, physical address, telephone numbers, and other identifiers.<sup>17</sup> Information that is similarly being sought by the applicant in the Dallas Buyers Club case.

Microsoft initially co-operated with the search warrant and provided information of non-content that was located on its American servers, but Judge Francis denied the motion by Microsoft to quash the search warrant<sup>18</sup> and therefore requiring the presentation of the content located on the server in Ireland.

In reasoning for the decision being upheld Judge Francis noted that the *Stored Communications Act*, 18 U.S.C. sections 2701-2712 did authorise the government to seek information – including content of an email – by way of subpoena, court order, or warrant.<sup>19</sup>

Microsoft stance was it was a jurisdictional matter as that the information was stored on overseas servers violated United States laws against extraterritorial searches and seizures.<sup>20</sup> It was noted as this was a search order for production in essence of a client’s data it was not a traditional search warrant, where a premises entry would need to be undertaken, so in this instance Judge

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<sup>16</sup> ComputerWeekly, *US Judge Orders Microsoft To Hand over Email Data Held in Dublin* (2015) <<http://www.computerweekly.com/news/2240219656/Cloud-privacy-fears-loom-as-US-judge-asks-Microsoft-to-hand-over-data-held-in-Dublin>>.

<sup>17</sup> Lexology.com, *Microsoft Appeals Decision Requiring It to Provide E-Mail Content Stored Overseas in Response to Search Warrant* / Lexology (2015) <<http://www.lexology.com/library/detail.aspx?g=a99e3a4b-3b69-4185-b3e8-335436ca0541>>.

<sup>18</sup> Ibid.

<sup>19</sup> above n 16.

<sup>20</sup> above n 17.



Francis concluded that although it is in essence a search warrant, it is also a subpoena requesting production of documents and should be treated similarly to a subpoena.

For Judge Francis to treat the search warrant as a subpoena, it was noted by Judge Francis that it had

*"long been the law that a subpoena requires the recipient to produce information in its possession, custody or control regardless of the location of that information,"*<sup>21</sup>

As a result Judge Francis observed that the physical location of the server being based in Ireland did not have any bearing on the search warrant and Microsoft were required to produce the documents as per the search warrant.

The implications of this decision can be far reaching, not only with privacy concerns and political ramifications, but it sets a dangerous precedent for dot com companies that have data storage facilities located abroad. In Australia similar requests are generally undertaken through the Commonwealth Attorney Generals Department through Mutual Assistance Requests.<sup>22</sup>

#### IV. BIT TORRENT AND COPYRIGHT

Australia has long had an appetite for downloading (at times) illegal torrent files, which contain unauthorised and copyright movie and music material through bit torrent sites such as kickasstorrents, torrentz, extratorrent, the pirate bay and yts.<sup>23</sup> Australia is ranked 6th behind the USA, UK, Italy, Canada and Brazil<sup>24</sup> on the world scale for the number of torrent users in the world.

A torrent file is a small sized (usually less than 100 kilobytes) metafile which contains

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<sup>21</sup> Joseph Falcone, *Microsoft / Microsoft Decision* (2015) Herbertsmithfreehills.com  
<<http://www.herbertysmithfreehills.com/-/media/Files/ebulletins/2014/20140805%20-%20ny%20e-bulletin%20microsoft%20decision.htm>>.

<sup>22</sup> Ag.gov.au, *Mutual Assistance / Attorney-General's Department* (2015)  
<<https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx>>.

<sup>23</sup> List of top 5 torrent sites - <https://torrentfreak.com/top-popular-torrent-sites-2015-150104/>.

<sup>24</sup> TorrentFreak, *Top Bittorrent Countries in the World, Top Torrent Towns in the UK - Torrentfreak* (2012)  
<<https://torrentfreak.com/top-bittorrent-countries-in-the-world-top-torrent-towns-in-the-uk-120917/>>.

information about all files which can be downloaded as well as addresses of trackers that enables communication among peers.<sup>25</sup> A torrent user will connect to many computers around the world to download fragments of the file to eventually download the completed file. This method of downloading illegal material at times can be difficult to prosecute or even take civil action against the downloader as a number of factors such as where did the original downloader obtain the file from (usually stored on a server overseas) and to what jurisdiction does the downloader belong to.

There are a number of software applications now currently available to identify internet users for downloading copyright material. One of the main software applications and in fact the one used by the Dallas Buyers Club organisation to identify breaches is a German product Maverickeye.

Maverickeye boasts on its website that

*"Maverickeye UG Makes It Possible to detect and retrace Copyright Infringements with highly sophisticated software technology."*<sup>26</sup>

In essence without preparing a technology paper Maverickeye compares the original md5sum of the original movie to illegal copied movies that are available online. If an md5sum matches, it is basically a clone of the original source. The software then produces a report of the IP addresses that downloaded the original material.

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<sup>25</sup> Penna Sparrow, *Which Country Downloads Most From Torrents? ~ I Answer 4 U* (2015) ianswer4u.com <<http://www.ianswer4u.com/2012/05/which-country-downloads-most-from.html#axzz3kBAbYUMF>>.

<sup>26</sup> Maverickeye.de, *Maverick Eye / Detect and Retrace Copyright Infringements* (2015) <<http://www.maverickeye.de/>>.

## V. DALLAS BUYERS CLUB, LLC V IINET LIMITED (NO 1) [2014] FCA 1232

### A Background

In October 2014, the Dallas Buyers Club filed an application in the Federal Court in Sydney against Internet Service Providers, iiNet Limited, Adam Internet Pty Ltd, Amnet Broadband Pty Ltd, Dodo Services Pty Ltd, Internode Pty Ltd and Wideband Networks Pty Ltd.

The application was in regards to a preliminary discovery under Federal Court Rule 7.22 which is used to identify a person or company that an applicant wants to take legal action against.

Federal Court Rule 7.22 (1) –

Order for discovery to ascertain description of respondent states

*(1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant satisfies the Court that:*

*(a) there may be a right for the prospective applicant to obtain relief against a prospective respondent; and*

*(b) the prospective applicant is unable to ascertain the description of the prospective respondent; and*

*(c) another person (the other person):*

*(i) knows or is likely to know the prospective respondent's description; or*

*(ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent's description.<sup>27</sup>*

The Dallas Buyers Club in their application believe that the respondents (ISP's) have the information available such as usernames and personal particulars of the holders of the IP addresses that were identified as an illegal downloader responsible for downloading the Dallas Buyers Club movie. In essence it is true that the ISP would in fact have the information available as in 7.22(1)(b) and in (c)(i) and (c)(ii).

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<sup>27</sup> Federal Court Rules 2011 (Cth).

iiNet released on their internet blog that they were to oppose the discovery application<sup>28</sup> and believe in treating people fairly and certainly don't monitor [users] activities.<sup>29</sup> In the iiNet blog iiNet informed its customers that "although it did not condone copyright infringement, but had serious concerns about Dallas Buyers Club's intentions and that iiNet customers will be unfairly targeted to settle any claims out of court using a practice called "speculative invoicing."<sup>30</sup>

Speculative invoicing is when copyright owners send letters to internet users demanding payment for allegedly infringing copyright by downloading content like films or music without permission. The letters threaten expensive lawsuits if consumers don't pay up.<sup>31</sup>

## B Issues with the discovery application, Privacy and other legislation

On 1 August 2011 the Federal Court of Australia adopted *the Federal Court Rules 2011* (Cth) and its revised regime for discovery.<sup>32</sup> The main issue with the discovery of the documentation and in particular with the respondents production of the documents is in regards to privacy and the dealing with international law, as both the plaintiff and defendants are in essence from 2 jurisdictions. This is one of the key issues that the respondents argued in the case. Any release of a customer's details would involve the disclosure of an individual's personal information; considerations under the recently amended *Privacy Act 1988* (Cth) would come into play.<sup>33</sup>

Part 13, Division 2 of the *Telecommunications Act 1997* (Cth), makes elaborate provision for the privacy protection of individuals' telecommunications activity.<sup>34</sup> Under section 276 of the

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<sup>28</sup> Steve Dalby, *Not Our Kind Of Club / The Iinet Blog* (2015) Blog.iinet.net.au <<http://blog.iinet.net.au/not-our-kind-of-club/>>.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Suzy Wood, *Speculative Invoices - What They Are, What to Do If You Get One* (2015) Choice <<https://www.choice.com.au/electronics-and-technology/internet/using-online-services/articles/speculative-invoicing>>.

<sup>32</sup> Michael Legg and Jonathan Slater, *New Federal Court of Australia Discovery Rules Get Their First Analysis* / Clayton Utz (2015) Clayton Utz <[http://www.claytonutz.com/publications/edition/26\\_april\\_2012/20120426/new\\_federal\\_court\\_of\\_australia\\_discovery\\_rules\\_get\\_their\\_first\\_analysis.page](http://www.claytonutz.com/publications/edition/26_april_2012/20120426/new_federal_court_of_australia_discovery_rules_get_their_first_analysis.page)>.

<sup>33</sup> Hayden Delaney and Sheree O'Dwyer, *Iinet in New Copyright Infringement Battle over Customers Pirating Dallas Buyers Club Film* (2015) Findlaw.com.au <<http://www.findlaw.com.au/articles/5631/iinet-in-new-copyright-infringement-battle-over-cu.aspx>>.

<sup>34</sup> Alana Williamson, *Dallas Buyers Copyright Infringement Case* (2015) Insider <<http://blog.thomsonreuters.com.au/2015/04/dallas-buyers-federal-court-ruling-warning-film-pirates/>>.

*Telecommunications Act 1997* (Cth) it prohibits a carriage service provider such as the 6 respondents from disclosure or use of any information or document that relates to the contents or substance of a communication that has been carried by that provider, in this case the six respondents,<sup>35</sup> however the applicant could argue that section 280 of the *Telecommunications Act 1997* (Cth) provides an exception to this if the disclosure or use is required or authorised by or under law.<sup>36</sup>

The *Privacy Act 1988* (Cth) also allows protection for Australian Privacy Principles, Perram J agreed with the respondent's argument that the privacy of account holders was a significant value that warranted protection,<sup>37</sup> but also stated that the rights of copyright owners were also of significant value

*“In situations where different rights clash it is usual for courts to try and accommodate both rights as best they can. Here that can be done by requiring the information to be provided but by imposing, by way of conditions, safeguards to ensure that the private information remains private”*<sup>38</sup>

The respondents in their submission to the court that strict conditions should be applied to the discovery application if successful by the applicant that would protect the privacy of account holders, to prevent speculative invoicing.

A key issue in the discovery process that was argued by the respondent was that the discovery would not ascertain a prospective respondent, since it would only identify the account holders, not the person who had, in fact, shared the film.<sup>39</sup> All the account details would indicate would be the account holder or the person who was responsible for the account. It would not indicate who the actual infringer could be. The applicant even went to the extent of comparing the account holders to that of two “parking garage” cases.

In those cases, parking garages had sought discovery of the registered owners of vehicles that had breached parking regulations. The Road Traffic Authority (RTA) resisted discovery on the

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<sup>35</sup> above n 33.

<sup>36</sup> above n 33.

<sup>37</sup> *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 at 85.

<sup>38</sup> Ibid 86.

<sup>39</sup> above n 32.

basis that the owner was not necessarily the driver of the vehicle at the time of the parking breach. In both cases, the New South Wales Court of Appeal found in favour of the parking garage: “The possibility that additional evidence may be required to ... [identify] the driver does not mean that the information in the register lacks utility or forensic worth<sup>40</sup> ... preliminary discovery is not restricted to applicants seeking the last piece of a jigsaw”.<sup>41</sup>

As the Federal Court Rules in their present form are rather new and was only enacted in 2011, the respondent argued that the parking garage cases could be distinguished from the current proceedings,<sup>42</sup> as those NSW cases had applied a different discovery rule, that of rule 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW) and it is expressed in slightly broader language than Federal Court Rules 7.22.<sup>43</sup>

The respondents argued that the court should use its discretion in the granting of the discovery order and refuse the application by the Dallas Buyers Club on the grounds that only a portion of the film had ever been shared, and that it was in the respondents opinion that it was unlikely that any real case would be brought against the infringers.

The respondents argued that the preconditions for making a preliminary discovery order under Federal Court Rule 7.22 had not been met as the applicant through the German software company Maverickeye identifying the IP addresses was unreliable. Expert witness testimony was submitted by Maverik Monitors software explaining the use of the software but the respondents challenged the witness evidence of the individual who had used the software to locate the IP addresses.<sup>44</sup> The respondents challenged the creditability of the witness and his understanding of the software and the process of obtaining the IP addresses relating to the discovery application and the mere fact that the individual did not prepare his affidavit.

Of concern and a key issue was the fact that the applicant with the use of the Maverik Monitors evidence that the IP addresses identified had only shared a “very small sliver” of the film. The

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<sup>40</sup> *Roads and Traffic Authority (NSW) v Australian National Car Parks Pty Ltd* [2007] NSWCA 114; (2007) MVR 502 (CA) at [27].

<sup>41</sup> *Roads and Traffic Authority (NSW) v Care Park Pty Ltd* [2012] NSWCA.

<sup>42</sup> above n 33.

<sup>43</sup> above n 33.

<sup>44</sup> above n 32.

respondents argued that this was not substantial copying and therefore could not establish copyright infringement.<sup>45</sup>

Of grave concern and one of the most serious points argued by the respondents was that there was a high risk that the applicants would engage in speculative invoicing. “Speculative invoicing” is the practice of writing to a huge number of account holders demanding a large sum of money, and offering to settle for a smaller sum which still much exceeded what might actually be recovered. Also known as “copyright trolling”, the letters are often intimidating, and are sent with the purpose of profiting, and with no real intention to pursue proceedings. In the US, the practice has been particularly effective where pornographic films have been downloaded, since people are prompted to settle quickly in order to avoid embarrassment.<sup>46</sup>

## C Ruling

On 7 April, 2015, Perram J handed down the initial ruling in the Federal Court of the Dallas Buyers Club case. The verdict was handed down in favour of the applicant and as such the defendants would be required to hand over customer details of over 4726 IP addresses. Perram J ordered that the applicant was required to submit a draft letter that was proposed to be sent to the consumer for the courts prior approval. This however was not generally the case in Australia and Perram J followed previous international case law of the UK case of *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 , and the Canadian case of *Voltage Pictures LLC v John Doe* [2014] FC 161b.<sup>47</sup>

The reasoning behind the courts prior approval was seen in protecting the account holders' potential vulnerability to "abusive practices" such as speculative invoicing which could amount to misleading and deceptive conduct or unconscionable conduct in Australia.<sup>48</sup> The applicant was also ordered to pay the respondent's costs for the court proceedings.

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<sup>45</sup> above n 32.

<sup>46</sup> above n 32.

<sup>47</sup> *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 at 83.

<sup>48</sup> Financial Review, *Iinet Ordered To Hand Over Customer Details* (2015)

<<http://www.afr.com/business/legal/dallas-buyers-club-wins-first-round-in-iinet-case-20150407-1mfqi1#ixzz3mQbbdiUq>>.

The matter of speculative invoicing was referred to by Perram J and in particular the "*very aggressive letters*"<sup>49</sup> a tactic of the applicant in the past had to be considered in the best interests of the consumer.

The other key facts that were addressed by Perram J included, the two parking case scenario. Perram J rejected the argument on the grounds because it would mean that the scope of Federal Court Rule 7.22 was limited to

*"circumstances in which the discovery process would result in the identification of actual wrongdoers as opposed to persons who may be able to assist in identifying a wrongdoer"*<sup>50</sup>

which is inconsistent of the purpose of preliminary discovery and secondly the history surrounding Federal Court Rule 7.22 was not intended to have a different meaning to the words in the Uniform Civil Procedure Rules.<sup>51</sup>

In relation to the copyright offences committed by the alleged downloaders it was unlikely that any real case would be brought against the downloaders. Perram J noted that this application by the applicant was "*a procedure to identify putative respondents*"<sup>52</sup> and was "*not a procedure for working out how good those claims are, other than in the sense of eliminating plainly frivolous exercises*"<sup>53</sup> and that it was "*far from apparent*"<sup>54</sup> that the current exercise was frivolous.

Perram J found that a suit against individual BitTorrent users would be "*economically pointless*"<sup>55</sup> and in regards to multiple downloaders that damages could be available under section 115(4) of the *Copyright Act 1968* (Cth).<sup>56</sup>

On the point of deterrence to prevent other internet users from downloading copyrighted material, Perram J noted that

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<sup>49</sup> *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 at 81.

<sup>50</sup> Ibid 66.

<sup>51</sup> above n 34.

<sup>52</sup> above n 50 at 76.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 77.

<sup>56</sup> Ibid.



*"It is not beyond the realm of possibilities that damages of a sufficient size might be awarded under this provision in an appropriately serious case in a bid to deter people from the file sharing of films"*<sup>57</sup>,

however Perram J did not speculate on the value of the damages.

In a submission to the Federal Court on 15 July, 2015, the applicant lodged a draft letter<sup>58</sup> seeking out the demands from the respondent's customers. However the demands "did not make any demand for a sum of money. Instead, it encouraged recipients to make a telephone call to discuss the matter or to engage in email correspondence with an unidentified representative of DBC."<sup>59</sup> Perram J was unsatisfied with the applicant process and stated "I was not going to approve anything unless I was shown what it was that Dallas Buyers Club was proposing to demand monetarily or, as I put it at the time, the methodology underlying its approach to the amounts it was going to claim."<sup>60</sup>

A submission was made to the court seeking the monetary value that the applicants were seeking. This total was made private under direction of Perram J.<sup>61</sup> On the copyright offences committed by the respondent customers Perram J, found that "it seems to me that each act of sharing with a different user probably constituted a separate act of infringement "<sup>62</sup> and described in essence downloading and the meaning of BitTorrent, which in a legal sense is extremely important as it now has at least a case law meaning that can be set by a recent precedent.<sup>63</sup> However Perram J did make it clear that the Dallas Buyers Club was a case regarding the damages the applicant had received, rather than the prosecution of the respondent's customers for copyright offences. The remedies being sought by the applicant are monetary relief in the way of damages.

The breakdown of damages is a difficult position for Perram J, as although he is privileged to the monetary amount of damages the applicant is seeking, it is also hard to ascertain each time the

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<sup>57</sup> Ibid 78.

<sup>58</sup> *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838 at 14.

<sup>59</sup> Ibid 11.

<sup>60</sup> Ibid 13.

<sup>61</sup> *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838 at 14 Perram J noted "*At DBC's instigation I made a confidentiality order in relation to that submission (which was lodged on 2 July 2015) because it disclosed DBC's bottom-line negotiating position which would destroy, or at least seriously impact upon, its ability to negotiate*".

<sup>62</sup> Ibid 20.

<sup>63</sup> Ibid.

respondent's customer may have infringed. The problem the court found and being unique to internet law and the use of technology in breaching copyright with BitTorrent software was, although the courts position was to make the applicant "whole again" and place the applicant "back into a position as if the infringements had never occurred."

The use of the BitTorrent software and a user's computer habits also came into play with Perram J, trying to ascertain the value of the damages that may be awarded to the applicant.

Perram J noted that

*"But there are many different ways in which the infringements might not have occurred. One counterfactual is that the infringer might not have used BitTorrent at all but instead rented the Film legitimately from another source. Another is that the infringer might have foregone watching the Film altogether. Yet another is that the infringer might have seen the Film at the cinema."*<sup>64</sup>

All of these concerns although addressed in this case, at this stage allows for challenges in other matters regarding cyber law, IP law or copyrighted offences containing to a computer and an illegal downloader that may take place in the future.

In the final orders made on August 14, 2015 Perram J directed that "the power in rule 7.22 of the Federal Court Rules 2011 (Cth) can be used"<sup>65</sup> and that the customers or the illegal downloaders of the respondent's information could be shared with the applicant. Furthermore Perram J order on the reason that the applicant was a USA based company and did not have any presence in Australia and therefore the court was "*unable to punish it for contempt if it fails to honour that undertaking*"<sup>67</sup> required that the applicant pay a bond of \$600,000<sup>68</sup> before the applicant could start any legal process regarding the recovery of monies from the illegal downloaders.

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<sup>64</sup> Ibid 21.

<sup>65</sup> Ibid 33.

<sup>66</sup> *Federal Court Rules 2011* (Cth) rule 7.22 Order for discovery to ascertain description of respondent.

<sup>67</sup> Ibid 35.

<sup>68</sup> Ibid.

## VI. WHAT IF A CHILD DOWNLOADED A MOVIE WOULD THEY BE PROSECUTED?

To put the Dallas Buyers Club ruling into perspective and to understand how it would affect the family, what implications would the Dallas Buyers Club ruling have if a teenage child downloaded a movie, using the family home internet connection.

### A Criminal Responsibility

Although the Dallas Buyers Club ruling is to ascertain the subscriber and account details of the internet account used to download the movie file. Children in the 21st century are considered by many to be the digital generation.<sup>69</sup> Many of today's children have never known life without a computer or the internet.<sup>70</sup> In Australia of all households with children aged less than 15 years, 86% have home internet access.<sup>71</sup> So it is to be considered that all of the customers information that the Dallas Buyers Club have successfully sought to be provided is the account holders details, and it is quite possible that although the account holders are in fact the owner of the account it is plausible that the account holder did not in fact download the material, but a family member (a child) could have been responsible.

In all Australian jurisdictions the statutory minimum age of criminal responsibility is now 10 years. Between the ages of 10 and 14 years, a further rebuttable presumption (known in common law as *doli incapax*) operates to deem a child between the ages of 10 and 14 incapable of committing a criminal act.<sup>72</sup> However this presumption can be rebutted by showing that the accused child was able at the relevant time adequately to distinguish between right and wrong, can a contested trial result in conviction.<sup>73</sup>

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<sup>69</sup> Abs.gov.au, *Australian Social Trends June 2011 - Children of the Digital Revolution* (2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features60Jun+2011>>.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid. - Statistics taken from the Australian Bureau of Statistics website in the article - *Australian Social Trends June 2011 - Children of the digital revolution*.

<sup>72</sup> Gregor Urbas, 'The Age of Criminal Responsibility' (2000) 181 *Australian Institute of Criminology*.

<sup>73</sup> Ibid.

But what if that child is in his middle teens at an age of 15, where criminal responsibility is not an issue. These young offenders may be still held fully responsible for their criminal acts but are subject to a different range of criminal sanctions than adults committing the same offences.<sup>74</sup>

Although the Dallas Buyers Club initially is a discovery matter to ascertain account details, and then in turn the Dallas Buyers Club is seeking some sort of restitution, that may only be the first step in this process, it is plausible that the Dallas Buyers Club or other rights holders of movies, may seek offenders prosecuted.

In the USA it is normal practice for an illegal downloader to be fined for downloading a movie, such in the same way that the Dallas Buyers Club is attempting in Australia through civil action, however the thought is not far-fetched that Australian adolescent teens could in fact in theory be convicted of copyright offences and in turn have a criminal record before the age of 18.

## B Swedish Case Study

In 2011 in Sweden, the Swedish authorities prosecuted a 15 year old male for downloading and sharing 30 movies online.<sup>75</sup>

Sweden has in the past been lenient or gentle with infringers but since the rise and fall of The Pirate Bay,<sup>76</sup> they have since succumbed to international movie companies. Ever since that, Sweden now punishes more file-sharers than any other country in Europe which can range from fines up to imprisonment for up to 2 years.<sup>77</sup>

How this crime was uncovered could be the same in any school in Australia.

*“The piracy came to light when a technician at a Gothenberg school traced the introduction of a virus on the school network back to the boy’s computer. On scanning*

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<sup>74</sup> Kate Warner, *Sentencing Juvenile Offenders* (Longman, 1997).

<sup>75</sup> TekGoblin, *15 Year Old Boy Faces Charges for File Sharing* (2011) <<http://www.tekgoblin.com/2011/07/20/15-year-old-boy-faces-charges-for-file-sharing/>>.

<sup>76</sup> In January 2008, Swedish prosecutors filed charges against four men for facilitating and promoting copyright infringement through their website The Pirate Bay. The charges were heard following a raid on 12 different premises where The Pirate Bay was hosted, in which 186 servers were confiscated. - Chris Connolly, 'Cyberlaw' [2009] *Hot Topics - Legal Issues in plain language*.

<sup>77</sup> above n 75.

*the drive he located 24 movies including The Mechanic, The Social Network, and The Fighter. He proceeded to report the finding to the head teacher.”*<sup>78</sup>

During the trial of this matter the defendant admitted to downloading the material but was unaware that he was actually also uploading<sup>79</sup> or seeding the material and hence distributing the files. It was determined by two of the judges that the defendant had been negligent but not grossly so, the requirement for a conviction<sup>80</sup> in Sweden. As a result the defendant was acquitted.

Although this case ended with the defendant being acquitted, it now shows the changing of society expectations and that of enforcement of this illegal activity, from countries in the past, that had been very lenient once before.

### C Australia’s love of Internet Piracy

In a survey on the news.com.au website in 2010 5902 respondents advised the top three reasons why Australians choose to download illegal movies. Of the respondents 72.7 per cent said they did so regularly.<sup>81</sup> The top three reasons recorded for the responses was that going to the cinema is too expensive (43.5 per cent),<sup>82</sup> downloading of movies were convenient (42.4 per cent),<sup>83</sup> and the respondents wanted to be able to watch the movie whenever they wanted (42.4 per cent).<sup>84</sup>

Of interest in this survey and of great interest to the Dallas Buyers Club case seeking restitution for the illegal downloads, the respondents in the survey were asked how much they would pay for a convenient legal option. The number one response was \$2 per episode (45.6 per cent),<sup>85</sup> this is yet to be discussed in court the value of restitution that the Dallas Buyers Club is seeking, but the matter is set down for the 2nd of November, 2015 for a further directions hearing.

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<sup>78</sup> Matthew Humphries, *15-Year-Old Facing Jail Time for Downloading 24 Movies* | News | Geek.Com (2011) @geekdotcom <<http://www.geek.com/news/15-year-old-facing-jail-time-for-downloading-24-movies-1415467>>.

<sup>79</sup> Torrent Freak, *COURT ACQUITS 15-YEAR-OLD SCHOOLBOY FILE-SHARER* (2011) <<https://torrentfreak.com/court-acquits-15-year-old-schoolboy-file-sharer-110830>>.

<sup>80</sup> Ibid.

<sup>81</sup> Andrew Ramadge, *Top Three Reasons We Choose Illegal Downloads* (2010) NewsComAu <<http://www.news.com.au/technology/why-do-australians-choose-illegal-downloads/story-e6frfo0-1225863649562>>.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

Considering the response of the survey in regards to this question and considering the current cost of the Dallas Buyers Club to purchase online through iTunes of \$17.99,<sup>86</sup> it could create an interesting precedent. It is however more likely that the conservative approach of the cost of the movie on iTunes will be closer to the mark that the Dallas Buyers Club would be seeking. That amount will only net around \$85,000 however the restitution for damages that the Dallas Buyers Club have lost with the file/s being shared throughout the torrent network is still undecided.

#### D Nintendo Co Ltd v James Burt

There has already been cases heard in Australia where an applicant is seeking restitution, damages and costs for illegal downloaders downloading their intellectual property. In November 2009 in the Federal Court of Australia in Melbourne,<sup>87</sup> a claim was made by the video game company Nintendo Co Ltd (Nintendo) against an Australian individual for illegally copying and uploading to the Internet its new Super Mario Bros Wii game.<sup>88</sup> The defendant James Burt was a 24 year old from Brisbane,

Although in this particular case was an online game the process is almost identical in producing and making available a torrent or download just as in the Dallas Buyers Club with a movie, the process is the same and there is no difference whether it is a game or a movie, they are both digital files that are made available to download.

In the facts of the case, the defendant had received an early copy of Nintendo's New Super Mario Bros Wii (apparently after having it sold to him early by mistake) and made it available for illegal download on 6 November 2009, one week before the game's official Australian release.<sup>89</sup>

It was discovered through forensic investigations that the game that the defendant had uploaded

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<sup>86</sup> iTunes, *Dallas Buyers Club On iTunes* (2015) <<https://itunes.apple.com/au/movie/dallas-buyers-club/id804306187>>.

<sup>87</sup> *Nintendo Co Ltd v James Burt* - Federal Court of Australia, Victoria Registry File Number: VID839/2009.

<sup>88</sup> Karen Hayne, *Copyright Infringement – Australia – Nintendo Settlement Gives Warning to Individual Copyright Infringers and Pirates* (2010) Addisons Lawyers <[http://www.addisonslawyers.com.au/knowledge/Copyright\\_Infringement\\_%E2%80%93\\_Australia\\_%E2%80%93\\_Nintendo\\_settlement\\_gives\\_warning\\_to\\_individual\\_copyright\\_infringers\\_and\\_pirates220.aspx](http://www.addisonslawyers.com.au/knowledge/Copyright_Infringement_%E2%80%93_Australia_%E2%80%93_Nintendo_settlement_gives_warning_to_individual_copyright_infringers_and_pirates220.aspx)>.

<sup>89</sup> Ibid.

to the Internet was downloaded 50,000 times over a five day period.<sup>90</sup>

In the decision in this case it was ordered that the defendant to pay \$1.5 million Australian Dollars to the plaintiff for the loss of sales revenue caused by his actions.<sup>91</sup> The defendant was also ordered to pay the plaintiffs \$100,000 legal costs.<sup>92</sup>

## VII. IS CYBER LAW KEEPING PACE WITH TECHNOLOGY

To understand if cyber law is keeping pace with technology, it is important to understand cyber law and intellectual property law and understand the origins of Australian copyright law.

Copyright law in Australia is no different to other laws as it has its first origins from the United Kingdom. Australian copyright law originates in British copyright law which was established by the British parliament through the *Australian Courts Act 1828*.<sup>93</sup> Australia's *Copyright Act 1912* (Cth) simply adopted the *Copyright Act 1911* (UK).<sup>94</sup> The *Copyright Act 1912* (Cth) abolished common law copyright.<sup>95</sup>

### A The Past

#### 1. *Copyright Act 1968* (Cth)

On 1 May 1969 the *Copyright Act 1968* (Cth) was enacted after the Australian Attorney-General in 1958 appointed the Spicer Committee to review the 1912 Act to see what changes were necessary for Australia to ratify the Brussels Act of the Berne Convention.<sup>96</sup> The *Copyright Act 1968* (Cth) since its enactment in 1969 has been amended on occasions to deal with the emergence of society trends and the relevance of the time. The Whitlam government in 1974 undertook the first major review appointing the Copyright Law Committee, to examine the

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Mark J Davison, Ann Louise Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 2008) 180.

<sup>94</sup> Ibid 16.

<sup>95</sup> Ibid 182.

<sup>96</sup> Ibid.

impact of reprographic reproduction on copyright law in Australia.<sup>97</sup> The committee was also required to consider and recommend "any alterations to the Australian copyright law to effect a proper balance of interest between owners of copyright and the users of copyright material in respect of reprographic reproduction."<sup>98</sup>

The review found that Australian should be careful to not adopt too radical solutions<sup>99</sup> but adopt a statutory licensing scheme.<sup>100</sup> The review in 1974 found that the purpose of the copyright act 1968 was

*"...to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered."*<sup>101</sup>

A number of reviews were conducted in the 1980s and 1990s by the now disbanded<sup>102</sup> Copyright Law Review Committee. The Copyright Law Review Committee prepared a number of reports and the main census of the reports were for a more simplistic approach to copyright law in Australia.<sup>103</sup>

## 2. Copyright Amendment Act 2006 (Cth)

With the evolution of technology and a rapid increase of the internet, the copyright amendment act was enacted in 2006 and came into effect on 11 December 2006. The legislation strengthened anti-circumvention laws<sup>104</sup> between Australia and the United States as per the US-Australia Free

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<sup>97</sup> Ibid 182-183.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid 183.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Copyright Law Review Committee was disbanded in 2005 by the Australian Commonwealth Government.

<sup>103</sup> above n 93183.

<sup>104</sup> Anti-circumvention laws give copyright owners the legal power to create closed technology platforms which exclude competitors from interoperating with them. Dale Clapperton and Stephen Corones, 'Locking In Customers,



Trade Agreement. There were many changes and a series of new exceptions to copyright law which included:

- private copying of sound recordings;
- copyright enforcement;
- technological protection measures;
- special exceptions for non-commercial activities by libraries and educational institutions;
- fair dealing for parody and satire; and
- the jurisdiction of the Copyright Tribunal.<sup>105</sup>

This allowed for people to record most television or radio program at home<sup>106</sup> and watch at another time. The new laws also allowed for people to make copies of their music onto other media such as CD's for their personal use.<sup>107</sup> The *Copyright Amendment Act 2006* (Cth) allowed for the exception for institutions such as universities, schools and other non-commercial public sector organisations to broadcast material, without fear of copyright breaches.

However the most obvious change was the Copyright Amendment Act 2006 (Cth) introduced strict liability offences for some copyright infringements<sup>108</sup> in a bid to make the enforcement of copyright offences easier.<sup>109</sup>

## B Legislative Change

### 1. *Copyright Amendment (Online Infringement) Bill 2015* (Cth)

One of the major changes to cyber law in Australian cyber law's short history has only become

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Locking Out Competitors: Anti-Circumvention Laws In Australia And Their Potential Effects On Competition In High Technology Market' (2006) 30 *Melbourne University Law Review*. 661.

<sup>105</sup> Aria.com.au, *Key Changes - Copyright Amendment Act 2006* (2015) <<http://www.aria.com.au/pages/keychanges-CopyrightAmendmentAct2006.htm>>.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> above n 93183.

law at the time of writing this paper. In July 2014, the Commonwealth government released an Online Copyright Infringement Discussion Paper. The paper proposed amendments to the *Copyright Act 1968* (Cth). The focus of the discussion paper was to improve the existing legal framework so that rights-holders, carriage service providers (CSPs) (also known as internet service providers (ISPs)) and consumer representatives could develop effective methods to reduce online copyright infringement.<sup>110</sup>

The new legislation is to provide an “*effective new tool that rights holders use can then use to respond to commercial scale widespread copyright infringement on websites operated outside Australia.*”<sup>111</sup>

The bill was presented to parliament in June 2015 and was enacted on 13 October, 2015.

The bill consists of a new section 115A. This section has the ability for copyright owners (such as the applicants in the Dallas Buyers Club case) to apply to the Federal Court for a court order for an injunction, which would require the Internet Service Provider to block access to an overseas website if that website has the primary purpose of infringing copyright, or facilitating the infringement of copyright.<sup>112</sup>

The material that is covered by the new legislation is predominately in regards to movies and television. Music and software is also included within this definition. It is expected in theory that the new legislation will be designed to block torrent sites as listed in paragraph IV on page 8 of this paper.

The new legislation does raise some possible issues. The first is that the legislation requires that the Internet Service Providers use "reasonable steps" to disable access to the infringing online

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<sup>110</sup> Karen Hayne and Ashleigh Fehrenbach, *The New Copyright Amendment (Online Infringement) Bill 2015 Has Passed – Is This A Win For Copyright Owners?* (Addison Lawyers, 2015).

<sup>111</sup> Second Reading of the Bill by the then Communications Minister Malcolm Turnbull as published on the website of Malcolm Turnbull <<http://www.malcolmturnbull.com.au/media/second-reading-copyright-amendment-online-infringement-bill-2015>> dated 27th March 2015.

<sup>112</sup> above n 110.

location<sup>113</sup> but it does not include what steps the ISP should undertake and in turn what is reasonable. However the biggest concern with the legislation is that there are numerous ways of blocking access to websites, and using the wrong method could result in a number of genuine websites being inadvertently blocked.<sup>114</sup>

It is too early to say if this legislation will be effective, however in the Dallas Buyers Club scenario, it would have been a positive step forward where the applicant could have applied to the Federal Court for an injunction for the ISP to block certain infringed websites. However, although the legislation is being "heralded as a win for Australian copyright owners"<sup>115</sup> there is still workable ways around the blocking of the website by a computer user.

The main method in avoiding the ISP website block is the use of VPNs (virtual private networks), which in lay man's terms tricks the computer and internet connection in believing that it is located in another country, hence making the website available and not blocked.

However from the applicant or owner of the copyright material, the legislation still requires that the applicant apply for an injunction to the Federal Court which could be costly. If the copyright material was to appear on another website, the applicant would need to apply for another injunction to also stop the new website, so the circle could just continue and become very expensive and futile.

The new legislation does raise internet censorship concerns, in theory under court order the Federal Court is censoring websites to disallow citizens to view. Only time will tell if this new legislation will be effective, however it is the authors opinion that it is a step forward in trying at least to curb copyright offences and protecting the intellectual property of the owner.

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

## 2. *The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth)

On 30 October 2014, one of the major current government legislative changes of the current government was introduced into Commonwealth parliament. The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth). The act passed the Commonwealth Parliament on 26 March 2015 and received Royal Assent on 13 April 2015.

The primary purpose of the legislation is to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Telecommunications Act 1997* (Cth) and it would require telecommunication providers such as Internet Service Providers to retain prescribed telecommunications data.<sup>116</sup>

Although the legislation is primarily to retain metadata,<sup>117</sup> but not content, details such as the identity of the internet subscriber, any source of communication, the data, time and type of that communication and the location of the equipment used.<sup>118</sup>

In relation to internet communications, metadata may include an IP address which may have been detected to have been engaged in unlawful activity. In relation to email communications, metadata may include information such as the sender, recipient, time and date of an email. It will not reveal the content of the email.<sup>119</sup>

Although at first glance, it appears that this legislation would be used by law enforcement bodies for matters to protect national security such as counter terrorism and espionage, it is not clear if it is only those types of offences will be prosecuted using the metadata obtained under the new

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<sup>116</sup> Karen Anne Hayne and Ashleigh Fehrenbach, *Proposed New Data Retention Laws In Australia – Essential Change Or A Step Too Far?* (Addisons Lawyers, 2015).

<sup>117</sup> The term metadata refers to information used to describe items and groups of items. It is data about data. It can be used to describe physical items as well as digital items (files, documents, images, datasets, etc.). A library catalogue, for example, is made up of metadata describing the books, journals and other items held by the library. The File Properties for a word processing document is a rudimentary (and imperfect) metadata record. - Ands.org.au, *Metadata* (2015) <<http://ands.org.au/guides/metadata-awareness.html>>.

<sup>118</sup> above n 116.

<sup>119</sup> Ibid.

legislation.

The then Prime Minister Tony Abbott<sup>120</sup> said in August 2014 on a channel nine television program when interviewed on the new legislation that the "*metadata could be used to fight general crimes and not just in terror cases*".<sup>121</sup> This is such a broad explanation on how the legislation could be used and the explanation of general crime is not known.

How this relates to intellectual property and cases like the Dallas Buyers Club case is not known, but it is plausible that the new legislation could be just a new tool in the arsenal of law enforcement to prosecute for digital copyright offences. The metadata could be valuable evidence in evidence gathering as the metadata would contain the lists to the torrent sites from where the material was downloaded. It could also contain information about remote computers that the offender may connect to, to distribute the infringed material.

## VIII. CONCLUSION

How will the Dallas Buyers Club effect cyber law in Australia? It is perhaps a little premature to tell if the ruling in this case will have a long lasting effect on cyber law. This matter is still being played out in court with a further directions hearing<sup>122</sup> set down for Monday 2 November, 2015. Of concern however is the privacy issues, of the user account details that the applicant has been able to successfully in theory obtain from the respondent.

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<sup>120</sup> Malcolm Turnbull replaced Tony Abbott as Prime Minister on Monday September 14, 2015.

<sup>121</sup> Latika Bourke and James Massola, 'Data Storage Could Be Used to Fight 'General Crime', Tony Abbott Says' *The Sydney Morning Herald*, 2014 <<http://www.smh.com.au/federal-politics/political-news/data-storage-could-be-used-to-fight-general-crime-tony-abbott-says-20140805-3d78h.html>>.

<sup>122</sup> Email dated 31 August, 2015 from Barrister Michael Bradley, Managing Partner, MARQUE Lawyers Pty Ltd (representing the applicant) to Honours Student stating "We anticipate bringing a further application shortly which will hopefully clarify the position and set a clearer course for future similar cases."

In email correspondence with the author, Michael Bradley, Managing Partner, Marque Lawyers representing the applicant, advised the author in regards in his opinion working closely with the Dallas Buyers Club case what impact the decision will have on cyber law in Australia stated:

*"It's hard to say just at the moment what the longer term impacts of the case will be, as the judge has issued a couple of decisions which are a bit hard to reconcile with each other".*<sup>123</sup>

A directions hearing is set down for Monday 2 November, 2015 and perhaps a clearer direction will be understood after this directions hearing. It is anticipated that the directions hearing will focus on the letters that the Dallas Buyers Club plan to issue to the 4,726 respondents customers.

Cyber law has come a long way from its infancy in Australia to present day. With 2 key pieces of legislation being enacted by the current government now in place. The *Telecommunications (Interception and Access) Amendment (Data Retention Bill) 2014* (Cth) (which came into effect on 13 April, 2015) and the *Copyright Amendment (Online Infringement) Bill 2015* (Cth), which was enacted on 13 October, 2015.

The effect the Dallas Buyers Club case does have on internet users and cyber law in Australia, does show that traditional jurisdictional boundaries are no longer in use and if computer users are downloading files from overseas servers, then the intellectual property owner can take both civil action as seen in the Dallas Buyers Club case and Australian courts have set precedents to show that there are no longer any jurisdictional issues in hearing these types of cases.

It appears with the Dallas Buyers Club case and the Commonwealth governments new *Copyright Amendment (Online Infringement) Bill 2015* (Cth) has had an impact on internet users in Australia, but to what extent is not yet known. The Dallas Buyers Club has been the lead case on the internet technology pages and each decision has been analysed by intellectual property lawyers who have provided running blogs on the case from its infancy. The new legislation has gone some way in kerbing Australia's love of piracy downloading, but the legislation is still in

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<sup>123</sup> Email dated 31 August, 2015 from Barrister Michael Bradley, Managing Partner, MARQUE Lawyers Pty Ltd (representing the applicant) to Honours Student.

its infancy and the full impact of this legislation may not be known for a number of years to come.

The main impact that is of concern however that is any of these 4,726 subscribers that the Dallas Buyers Club have successfully sought the account details of, could be just a normal Australian household, so the fear for many Australians downloading illegal material feel that, it could have been them. It is surprising however that the respondents were Internet Service Providers, but did not include the 2 major Internet Service Providers in Australia, that being Telstra and Optus. It is suggested within the legal fraternity that Dallas Buyers Club did not go after Telstra in the first instance as the plaintiff would have picked iiNet ahead of Telstra as the "best chance" of success.<sup>124</sup> On the other hand some legal opinion suggests that the 6 respondents in this matter were a test case to see if there could be any success and if successful would go after the major Internet Service Providers. This does appear to perhaps be a possibility with Marque Lawyers partner Nathan Mattock suggesting in May, 2015 that the Dallas Buyers Club will be "writing to the other ISPs in the next week seeking consent to similar court orders as those obtained against iiNet."<sup>125</sup>

As detailed earlier throughout this paper, this matter is still running its cause and it is possible that this case could go on for another 12 months before it is finally concluded.

The effect in the author's opinion that the Dallas Buyers Club ruling will have on cyber law in Australia is huge, it now shows that downloading illegal material a computer user may be sued to seek monetary relief by the intellectual property owner. It makes the crime of downloading illegal material not only a criminal offence (as it always has been) but makes it now a civil offence were an intellectual property owner can obtain the details of the downloader and seek relief in the form of damages, the only issue now for consumers is, it is not yet known what the value of those damages will be.

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<sup>124</sup> Lia Timson, 'Telstra, Optus Not worth Chasing in Dallas Buyers Club Piracy Crackdown' *The Sydney Morning Herald*, 2014 <<http://www.smh.com.au/digital-life/digital-life-news/telstra-optus-not-worth-chasing-in-dallas-buyers-club-piracy-crackdown-lawyers-20141023-11az39.html>>.

<sup>125</sup> David Swan, 'Telstra, Optus Users next To Face Dallas Buyers Club Wrath' *The Australian*, 2015 <<http://www.theaustralian.com.au/business/latest/telstra-optus-users-next-to-face-dallas-buyers-club-wrath/story-e6frg90f-1227362969092>>.

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