

In April this year, Justice Perram of the Federal Court held that iiNet and five other Internet Service Providers (**ISPs**) would be required to disclose to Dallas Buyers Club LLC and Voltage Pictures LLC (**DBC**) the names and addresses of customers whose IP addresses were used to download the film Dallas Buyers Club.

The next month, Justice Perram made orders that would compel the ISPs to give DBC the details by way of preliminary discovery, but placed a stay on the orders, such that DBC were not able to access the details of the account holders until they had produced to the Court a copy of the correspondence it proposed to send to them.

In a decision delivered on 14 August 2015, Justice Perram rejected an application by DBC to lift the stay on his order for preliminary discovery because he determined that the proposed correspondence that DBC had provided to the Court included claims for damages that DBC would be highly unlikely to be entitled to if and when the matter eventually proceeded to a full hearing.

DBC's proposed letter to the prospective respondents included four heads of damages:

1. A claim for the cost of the actual purchase of a single copy of the film for each copy of the film downloaded.
2. A claim for an amount relating to the infringers' uploading activities which equated to the price of a "one-off licence fee" from each uploader.
3. A claim for punitive damages under s.115(4) of the *Copyright Act 1968* (Cth).
4. A claim for damages arising from the amount of money it cost DBC to obtain each infringer's name.

Justice Perram accepted that the claims for the first and fourth heads of damage were arguable (and so not "hopeless") and as such could be included in any letter sent to the account holders. However, his Honour held that the claim for the second head of damage was hopeless, and likely to be dismissed summarily, and that in relation to the third head of damage, DBC had not provided a sufficient explanation of the quantum of damages they would be seeking.

Justice Perram held that while DBC met the jurisdictional requirements to obtain preliminary discovery under the Federal Court Rules, his Honour had a discretion as to whether to make the order, and that the court would not exercise that discretion to "facilitate court cases or negotiating positions lacking legal substance". Justice Perram also said that he would only lift the stay on the order for preliminary discovery if DBC gave a written undertaking that once it received the details of account holders, DBC would only send the account holders correspondence regarding the first and fourth heads of damage. As DBC had no presence in Australia, Justice Perram required that an undertaking by DBC be secured by AU\$600,000.

This decision is important for several reasons:

1. It shows that a party can obtain discovery from a third party to both identify a wrongdoer to sue them as well as to negotiate with them.
2. A party seeking preliminary discovery must establish they will only use the discovery for a purpose countenanced by the Federal Court rules and the court will take steps to ensure that this is the case.
3. It suggests that in considering claims of copyright infringement through peer-to-peer sharing, the court will likely take a practical approach to assessing damages, where the claimant may only be entitled to the amount that the film's producer or distributor lost from the sale of copies of the film, along with the cost of the enforcement proceedings.

Contacts

Graeme Slattery

Partner
T +61 8 9429 7576
E graeme.slattery@squirepb.com

Richard Horton

Partner
T +61 2 8248 7806
E richard.horton@squirepb.com

Richard Pascoe

Of Counsel
T +61 2 8248 7803
E richard.pascoe@squirepb.com

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