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Copyright Developments in the Online Space

INTRODUCTION

Eli Fisher, lawyer and co-editor of the Communications Law Bulletin, moderates a discussion between two of the most prominent voices in the Australian debate about copyright policy in the online space. **Laurie Patton** CEO of Internet Australia, and **Jonathan Carter** President of the Copyright Society of Australia and General Counsel of the Australian songwriters and music publishers' collective, APRA AMCOS.

They discuss recent developments in connection with site-blocking, extended safe harbour provisions, the development of an industry code governing how ISPs deal with copyright infringement, the *Dallas Buyers Club* litigation, the Productivity Commission's Draft Report and geo-blocking.

Copyright policy has taken on enormous importance in recent years. The ALRC conducted in 2012-14 the most comprehensive review of the *Copyright Act 1968* since it came into effect almost a half century ago, and there have been numerous other inquiries since, including the inquiries into IT pricing and online copyright infringement. The Productivity Commission's review of Australia's IP arrangements is ongoing, and the Government continues to consider implementing a Fair Use regime in Australia. And with innovation being promoted as the centrepiece of Australia's economy going forward, copyright continues

to play a significant role in public policy and in commerce – particularly as content in Australia shifts to new digital platforms.

Some commentators have referred to debates on copyright policy between rights holders and consumers as "the copyright wars", and while discourse is somewhat polarised at times, it can only be valuable to consider reasonable arguments from both sides.



Laurie Patton is CEO of Internet Australia, the peak body representing Internet users and a chapter of the influential global Internet Society. An Internet evangelist, he believes in the need to build our economic and social future around a connected world where everyone has access to the Internet and has the skills required to use it. Laurie's career spans politics, journalism, senior management and non-executive directorships in media, IT and the events industry, much of which is detailed in his Wikipedia entry: <http://bit.ly/1nk9eqU>



Jonathan Carter is President of the Copyright Society of Australia and General Counsel of the Australian songwriters and music publishers' collective, APRA AMCOS. As a music lover, he believes that songs

CONTENTS

Copyright Developments
in the Online Space

Is Sports Clip Sharing Legal in
Australia? Applying the
UK Fanatix Decision

Copyright and Social Media

Summary note on the Productivity
Commission's Intellectual Property
Arrangements Draft Report

500 Versions of Software and the
Subsistence and Infringement
of Copyright - The Full Court's
Decision in *JR Consulting v
Cummings*

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

Profile: Nicholas Cole
Legal Practitioner Director of
Cole Media & Entertainment
Law and Producer at Talk Films

Editors
Victoria Wark &
Eli Fisher

Editorial Assistant
Imogen Yates

Printing & Distribution
BEE Printmail

play an integral role in shaping Australia's identity and culture. He is an advocate for an economic and social framework that support music creators and allow music to have value in the online marketplace. Jonathan's career has been dedicated to advancing the interests of music creators, firstly as a solicitor in private practice, then as a business affairs executive at major record labels, and now in his current role at APRA AMCOS.

The *Communications Law Bulletin* is grateful for their contributions.

If we want Australia's digital economy to continue to flourish, we need to ensure we have a regulatory framework which discourages free-riders and supports legitimate operators who can then compete on a fair playing field.

The Federal Government is focused on setting up the national economy so that it can thrive in the digital age. Where do you see copyright fitting into that, and what if anything needs to change so that the industries you each represent may take better advantage of what the future has in store for us?

JC: The Australian music industry is fully supportive of the Government's stated goal of creating a modern, dynamic, 21st century economy for Australia. As physical sales of music become obsolete, a strong and vibrant digital market is crucial to the sustainability of our industry. Innovation is obviously a buzzword right now and there is a lot of rhetoric in the media about how copyright hampers innovation. I genuinely don't see it that way. Innovation comes in lots of different shapes and sizes - the term should not be limited to notions of technical or scientific creativity. Cultural creativity (such as the art of song writing) is of course a form of innovation, and it is just as important to set a regulatory framework that encourages the creation of content as well as the creation of the technical means for distribut-

ing that content. Either way, copyright is a key framework by which that innovation (technical or cultural) is rewarded. In recent years the music industry has embraced innovation in the online market, and the music industry's contribution to the digital economy is significant - 62 percent of revenues from recorded music sales in 2015 were as a result of digital exploitation. If we want Australia's digital economy to continue to flourish, we need to ensure we have a regulatory framework which discourages free-riders and supports legitimate operators who can then compete on a fair playing field.

LP: Firstly, I think we need to differentiate between the music industry and film and television. I'm not sure that they are exactly the same in how they are being challenged by the advent of the Internet. Most of the more overt lobby-

ing in recent times has come from the film and television industry and, I'd argue, for reasons of self-interest that are not advantageous to Australian producers much less consumers. That said, recent US reports are showing that live streaming of music (paid for) is now taking off big time. This means that the Internet will be a critical platform for delivering music rather than current physical forms like CDs (although I note an interesting revival in vinyl is also occurring!)

As a former television producer I am fully supportive of copyright protections so long as they achieve the aims that Jonathan highlights. We also need to educate people about the purpose of copyright so that they understand the long-term downsides from copyright abuse. Unfortunately, largely at the behest of overseas (Hollywood) rights holders and their local representatives, our government seems determined to introduce regulations and processes that we know from international experience just don't work. A recent research report from Carnegie Mellon University found that a massive UK site-blocking exercise only saw a 22 percent reduction in unlawful downloading and a measly 10 percent increase in downloading from legitimate sites. Hardly a great outcome, especially given the costs involved for the ISPs required to implement the blocking (which will inevitably be passed on to consumers in increased Internet access fees).

Curiously, it has since emerged that Hollywood has provided Carnegie Mellon with millions of dollars to undertake their copyright research! Unfortunately, site-blocking does create a risk of damaging the efficient operations of the Internet. A while back, ASIC inadvertently put 250,000+ sites offline for several days in an effort to close down a few sites they alleged were committing consumer fraud. It is also worth noting that these "anti-piracy" moves are basically designed to assist overseas content producers, and not the local creative industry. For example, how many Australian feature films do you think are being downloaded via overseas "pirate" sites? Not many. It might be different for music as Jonathan suggests. If that's the case let's look for ways that help the Australian music industry as opposed to propping up the price-gouging activities of the overseas rights holders. Site-blocking is designed to help Hollywood, not Australian film and television producers.

JC: Laurie's correct that that music streaming sites are beginning to take off, not just in the US but also here in Australia. The Internet is already a critical platform for delivering music, but it's still early days for the subscription streaming services - by our calculations the number of Australian subscribers to legitimate music streaming sites will need to increase four-fold before the Australian music industry returns to the revenue levels it generated before unauthorised overseas websites decimated the recorded music market. However, I disagree with Laurie on his two other points.

First, I think legislative intervention does work, admittedly it's not a silver bullet but it's an important part of the overall framework for a legitimate market. The international data we've seen from the UK supports this proposition. There's the Carnegie Mellon study, which Laurie rightly points out was funded by rights holders. Of course, I'm sure tech companies would never fund academic studies to support their lobbying activities! But there's also a lot of music specific evidence we've

seen that supports our position, more on that later. Secondly, in the evidence that we've gathered for our upcoming "site-blocking" injunction, it's clear that there is plenty of Australian music available on unauthorised overseas websites - even a cursory search for your favourite Australian artist on any of those sites will confirm that point. In my view, any measure that disrupts access to "pirate" sites is intended for the benefit of local producers just as much as overseas ones.

The Government has been concerned about the effect of online piracy on the Australian marketplace for creative content. Do you share the Government's concerns? How are the industries you each represent involved in responding to the issue of online piracy?

LP: I'm just not sure that the Government has actually been all that concerned about the effects of unlawful downloading of content, so much as they have been subjected to a concerted lobbying campaign by a select group of high profile representatives of the overseas rights holders. Sadly, the claims from the rights holders that they are losing money through unlawful downloading of content have never been seriously questioned and they have provided no evidence of significant losses.

As I noted earlier, Australians have been 'price-gouged' on overseas content ever since the days of VCRs. Anyone who's been to the US in the last 20 years knows that DVDs are much cheaper there than here. And if you've been to the cinema in America you'll also know that we pay a good deal more than they do to go to the movies. Our Prime Minister, Mr Turnbull, back when he was Minister of Communications, summed up the situation pretty well when he stated that the best way to deal with unlawful downloading is for the rights holders to make their content more easily available and at reasonable prices. Internet Australia backs this viewpoint. In fact there is mounting evidence that unlawful downloading of video content is declining now that we have Netflix and the local streaming platforms, Presto and Stan, available. Internet Australia is concerned at the trend to blame the Internet and seek to solve the problem of unlawful downloading through methods that have the potential to damage the Internet and to see our Internet access fees rise to cover the costs of implementation.

JC: First, I'd like to clarify that it wasn't just "high profile representatives of overseas rights holders" that lobbied the Government to introduce (some reasonable and proportionate) measures to help tackle online piracy last year. APRA AMCOS was also there asking Government to make some changes and we represent over 86,000 local songwriters and music publishers from Australia and New Zealand. I can also recall seeing a number of highly paid lobbyists from the large ISPs and tech firms down in Canberra arguing against the Government's proposals, so it would be misleading to suggest that Government only consulted with rights holders on its proposed changes. If Laurie's after evidence of the impact of unlawful downloading of content on legitimate content sales, here's some: unauthorised download sites first became popular in Australia in around 2000. Since that time revenue from recorded music sales in Australia has halved. As for the price of DVDs in the US, well, debating comparative DVD pricing feels a bit last century to me. Suffice to say, the world's repertoire of music has been easily available at reasonable prices via

over 20 legitimate online services in Australia for a number years now. And every month thousands of Australians still download music from illegal sites for free. Go figure.

LP: I was at the parliamentary inquiry when the local rights holders put their argument in favour of Internet site-blocking. At the time I never doubted their sincerity. I only questioned whether they had actually considered the fact that site-blocking doesn't work. I also wondered if they had differentiated between the unlawful downloading of overseas versus local content. By the way, there was nothing "reasonable or proportionate" in what the "high profile representatives of overseas rights holders" had to say - just blunt force trauma. I'm not saying that the Government only consulted the rights holders. It's just that they ignored everyone else's advice. The fact that people started unlawfully downloading and sales started to fall is not sufficient evidence. There's no direct causal relationship that can be proved. People were copying music on tape recorders when I was at school. Perhaps price has something to do with this? I'm pretty certain more people would go to the movies if the price was lowered and it didn't cost ten bucks for a bucket of popcorn!

That said, it's time in this conversation that I reminded everyone that I support copyright protection. I just don't believe that we should muck around with something as technically fragile as the Internet by introducing requirements that we know don't work. There are more than 400 ISPs in this country. It is ludicrous to think that we can stop unlawful downloading by taking a handful of them to court.

Finally, for now, the relative price of content delivered online is certainly relevant in that the Internet is essentially a free delivery mechanism so it costs no more to have someone download or stream content here or in LA. Again, I repeat it is about educating people as much as anything.

Let's explore the site-blocking development that you have both raised a little further, particularly given your respective roles. Laurie, with you representing Internet users in Australia, and Jonathan, with you being involved in one of the first applications, your thoughts on this could not be more timely. By way of background, last year, the Copyright Act was amended to include a section 115A. The purpose of this new provision was to give rights holders a new mechanism for protecting their interests. In particular, it would allow a rights holder to apply to the court seeking an order that ISPs block their customers' access to an "online

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location" (such as a website) that is operated outside of Australia and which has the primary purpose of facilitating the infringement of copyright. What are your thoughts about this new right, and its prospects for reducing online infringement?

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JC: APRA AMCOS is very supportive of the new section 115A. By the time this article goes to print the music industry will have filed its first set of proceedings under the new provisions. I really don't think s115A is a particularly controversial amendment to the Act. Trying to disrupt access to overseas websites which do nothing but exploit the creativity of others while giving nothing back to the people whose music they exploit on their sites, as they make millions of dollars from the advertising which appears on them, can hardly be equated with censorship or "breaking the internet". I'm confident that the various actions brought under the new s115A will be effective in reducing online infringements.

My understanding is that the injunctions sought so far in the UK (under very similar provisions) are having a positive impact on the legitimate online content market over there. In any event, the Australian Government has indicated it will undertake a review of the impact of the provisions after 18 months, although I worry that may be too soon to form a conclusive view. I think we need to be realistic about the amendment's potential impact. While it will certainly be of great assistance to the content industries, s115A is no panacea. Disrupting access to illegal sites is not enough in and of itself to stem the flow of unauthorised digital content into Australia. Disruption will need to be combined with improved consumer education, a reduction buying advertising on unauthorised sites, and easy access to content at reasonable prices, if we are to achieve lasting and significant change in the online content market.

Lian Government has indicated it will undertake a review of the impact of the provisions after 18 months, although I worry that may be too soon to form a conclusive view. I think we need to be realistic about the amendment's potential impact. While it will certainly be of great assistance to the content industries, s115A is no panacea. Disrupting access to illegal sites is not enough in and of itself to stem the flow of unauthorised digital content into Australia. Disruption will need to be combined with improved consumer education, a reduction buying advertising on unauthorised sites, and easy access to content at reasonable prices, if we are to achieve lasting and significant change in the online content market.

LP: I can absolutely understand why APRA AMCOS would be keen to see something done to address this situation. It's their job to look after the interest of their members after all. I can only repeat that site-blocking doesn't work. The UK is in fact a good example of the problem we face in getting people to understand this fact. Yes, the UK legislation has seen countless sites blocked. On that basis you might think it was successful. However, what happens is the owners of the blocked "pirate" sites simply set up another one, and/or change the name. It is colloquially called "whack a mole".

As cited above, an academic report on the UK experience release recently clearly debunked the theory that site-blocking works. If "piracy"

has been marginally reduced it is probably because of the publicity that site-blocking cases have had more so than the actual intervention. As Graham Burke of Village Roadshow told Fairfax media last year, "The high profile case helped educate people about the threat that piracy imposes on the creative industry to those who didn't realise or understand the implications." This perhaps belies what could be their ultimate motive for heading to the courts. That and the embarrassment presumably caused to the Government in the rights holders not rushing to use a law for which they lobbied with such gusto (they took more than six months to mount a case).

Others have reported that pressure was brought to bear by the Government to finally see some action. So in the end are we going to take such problematic action in the hope the publicity works to stop people? For those of us at Internet Australia that's a pretty blunt instrument. Better to have a constructive education campaign. We'd happily support one.

JC: Firstly, as I alluded to earlier, the evidence that I have seen coming out of the UK relating to unauthorised music services paints a very different picture to the one Laurie describes. Once a critical mass of illegal websites had been blocked, the UK music industry saw a decline in unauthorised music downloads and an increase in subscriptions to legitimate music services. If this change was in part because of the publicity that the site-blocking cases have had then that's fine by me! There are a number of academic studies out there which support this analysis. One study stated the following: "Website blocking has proved effective where applied. While blocking an individual site does not have a significant impact on overall traffic to unlicensed services, once a number of leading sites are blocked then there is a major impact. In the three years since The Pirate Bay and numerous other sites were blocked in the UK, there has been a 45% decline (from 20.4m in April 2012 to 11.2m in April 2014) in visitors from the UK to all BitTorrent sites, whether blocked by ISPs or not. In Italy, where courts have ordered the blocking of 24 BitTorrent sites, there has been a decline of 25.6% in the number of overall BitTorrent downloads in the country in the two years from January 2013." (IFPI Digital Music Report 2015).

As for the "whack a mole" issue, it's true that the unauthorised websites sometimes pop again under a different URL. But the court orders are formulated in such a way that these reincarnations are able to be quickly blocked without too much trouble. As for the time it has taken rights holders to bring proceedings under the new section 115A here in Australia, I can assure Laurie we haven't been sitting on our hands the last 6 months. We've been negotiating with ISPs about to what extent the applications can be brought cooperatively, gathering evidence, satisfying the notice requirements to the infringing sites, all of these things take time and given it's a brand new provision in the Act we want to get it right first time around.

Finally, I agree with Laurie that constructive education campaigns are important and it's great to hear his organisation would support one. As I keep saying, addressing the issue of online copyright infringement is not about choosing between "legislative intervention" or "education", they are just two of many factors which need to be implemented to disrupt the illegitimate services.

CONTINUED ON PAGE EIGHT >

Is Sports Clip Sharing Legal in Australia? Applying the UK Fanatix Decision

Sally McCausland considers the implications of a UK copyright decision for Australian sports media.

On March 18, 2016 the England & Wales Cricket Board and its host broadcaster Sky UK Ltd won a legal action against the Fanatix sports fan clip sharing app (the "Fanatix app").

According to marketing documents tendered as evidence, the Fanatix app was intended to "disrupt the \$40 billion global sports media rights market" by creating "a single brand that users can access from any territory in the world". However, only a year after its launch, a UK court has found that the app infringes copyright. The case, *England & Wales Cricket Board Ltd v Tixdaq*¹, has important implications for the development of the global sports rights licensing market, and more generally for those seeking to rely on copyright exceptions to distribute copyright material on social media.

It also raises the question, considered below, of how an Australian court might rule on a sports video sharing app.

A KILLER APP

The Fanatix app was advertised on the UK Apple App Store as:

"Capture, Caption. Share!

Create 8 second sports news snippets. Caption with Attitude. Share sports video with millions of fans".

The Fanatix app works by letting fans "point their mobiles at their TV screens, and capture the moment that matters most to them, adding their own comments as they do". The clips can then be replayed in near live time by other fans worldwide for free.

The app makers acknowledged it would "[push] legal boundaries" as the clips it distributed were unlicensed. Instead, its business model relied on the "reporting current events" free exception under s 30 of the UK Copyright, Designs and Patents Act (the UK Act).² (It also relied on a safe harbour intermediary host defence not discussed here).

To fit within the exception, the conditions of use required that fans add commentary to their clips, which it appears most did, and attribute the broadcaster by capturing its logo. Further restrictions were added in later versions, such as expiry of clips after 24 hours, and a limit on how much video a user could see or upload within certain periods.

The first version of the app launched in February 2015. By June 2015 when the applicants became aware of it, the app had over 50,000 active monthly users. By early

2016 these figures had more than doubled. Revenue figures from advertising or other sources were not detailed in the judgment.

SUBSTANTIAL REPRODUCTION - PROTECTING THE INVESTMENT OF SPORTS BODIES AND BROADCASTERS

The court found that the taking of 8 second clips of highlights from broadcasts and films of sports events was a "substantial" reproduction and therefore an exercise of copyright.

HIGHLIGHTS MARKET

As UK courts are now bound by EU law, Arnold J interpreted the UK Act "as far as possible" in the light of wording and objectives of relevant EU Directives and of relevant international agreements directly adopted by the EU. These included TRIPS³ and the EU Information Society Directive.⁴ Arnold J cautioned against reliance on UK case law decided before these instruments applied.

Justice Arnold acknowledged that the Information Society Directive rationale for copyright protection of broadcasts and films is to protect the investment of the producer and broadcaster. In his Honour's view, a key investment made in a sports broadcast or film was the skilled, multiple angle capture and editing of highlights such as wickets.

His honour applied a qualitative as well as quantitative test to the question of what was a substantial reproduction of such moments. Arnold J defined the "highlights market" for sports clips as separate to the market for continuous live television coverage of sports events. This meant that some parts of a match would be commercially more valuable than other parts. Applying this test, Arnold J found that 8 second excerpts showing key match moments shared on the app were substantial reproductions of the broadcast or film from which they were taken.

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¹ *England and Wales Cricket Board Limited & anor v Tixdaq Limited & anor* [2016] EWHC 575 (Ch).

² *Copyright, Designs and Patents Act* (1988) (c 48, UK).

³ *Agreement on Trade Related Aspects of Intellectual Property Rights* 1869 UNTS; 33 ILM 1197 (1994).

⁴ *Directive 2001/29/EC*.

FAIR DEALING EXCEPTION UNDER S 30 UK ACT

The most interesting issue in the case was whether the app fits within the fair dealing purpose of “reporting current events” in section 30(2) of the UK Act. The key requirements of this exception are:

- Purpose of the use of copyright material is for “reporting current events”;
- Only a “fair” amount may be used; and
- Requirement to attribute the copyright owner.

MEANING OF “REPORTING CURRENT EVENTS”

Justice Arnold was prepared to give a relatively wide interpretation to the term “reporting current events”, and both parties conceded that reporting could include “citizen journalism” and not merely reporting by traditional media outlets.

Unfortunately for the defendants, Arnold J considered that the primary purpose of the app was not “reporting current events” but sharing of highlights from sports events. While noting that the commercial nature of the venture was not of itself determinative, his Honour found that the defendant’s objective was “purely commercial rather than genuinely informative”.

“FAIR” AMOUNT

While finding that the app was not for the purpose of current event reporting in s30(2), Arnold J made some obiter comments about the issue of fairness. The fairness issue is a notoriously difficult issue to litigate, as it is not simply a matter of measuring quantity via seconds or minutes used, but takes into account how the use impacts the rights of the copyright owner.

A key determining factor in fair dealing cases therefore, is the court’s conception of the market that the copyright owner should legitimately control, and how far that protected market extends into new areas of licensing which the owner is not yet exploiting.

In a precedential decision, Arnold J decided to directly apply Article 5(5) of TRIPS, known as the “three step test”. His Honour acknowledged that the question of whether the three step test should apply to UK courts, or was directed only at the UK legislature when framing national laws, had not been previously resolved. However, as defence counsel agreed with the applicant’s counsel that it should apply, his Honour proceeded on this basis.

The three step test consists of the following elements:

- (1) Exceptions should be confined to “certain special cases”;

- (2) which do not conflict with a normal exploitation of the copyright material; and

- (3) which do “not unreasonably prejudice the legitimate interests of the rights holders”.

Arnold J accepted evidence that the high volume of near live clips offered free on the Fanatix app were affecting sales of the host broadcaster’s licensed TV subscription packages. More significantly, he found that future rights deals were being threatened by the “possibility the defendants might be able to offer clips via the App for free”. He did not consider relevant the fact that existing industry practice, reflected in the local industry code between broadcasters, enabled free news access to footage by non-rightsholders in “linear” news services. Nor did he consider relevant that the applicants were not offering any standalone clip service to the public. Despite evidence that the applicants’ clips constituted only a small portion of what was shared, he considered the potential audience of “millions” of fans to be excessive.

Accordingly, he found that the use of the clips was not fair.

ATTRIBUTION

His honour held that in accordance with settled law, the attribution requirement was satisfied by the inclusion of the broadcaster logo. However, it was noted that in some cases the broadcasters’ logo was not included in the screen capture, and those were infringing uses.

ARE THESE KINDS OF APPS LEGAL IN AUSTRALIA?

The following is a brief review of the potential outcome were a similar case to be brought under Australian copyright law.

SUBSTANTIAL REPRODUCTION - SAME RESULT

The determination of what is substantial reproduction of a broadcast or film in the *Fanatix* decision is probably reasonably consistent with current Australian law. Arnold J cited the dual qualitative and quantitative test used by the Australian Full Federal Court in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)*⁵ (the “Panel case No 2”). In that case, a majority of the Full Federal Court found that the respondent had taken a substantial amount of the applicant’s broadcasts in instances where the excerpts were between 8 and 26 seconds of “highlights” or “memorable moments” taken from broadcast segments of up to 42 minutes.

THE FAIR DEALING EXCEPTION FOR NEWS REPORTING

The general equivalent to the UK “reporting current events” exception under Australian copyright law is the fair dealing exception for “reporting the news” in section 103B of the Copyright Act.⁶

While there are some minor wording differences between the Australian and UK sections, the relatively broad construction of “reporting current events” in the *Fanatix* case is also generally consistent with Australian

⁵ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53.

⁶ *Copyright Act 1968* (Cth).

courts' interpretation of "news reporting", as applied in the first Panel case before the Full Federal Court⁷ and in *Telstra v Premier Media Group*,⁸ discussed below.

"FAIRNESS" AND MARKET IMPACT - A DIVERGENT APPROACH?

While UK decisions remain persuasive in Australian courts, the directive impact of EU law on UK decisions means that Australian and UK copyright law is diverging. This divergence may be apparent in Arnold J's comments on the issue of fairness in the *Fanatix* case, and in his construction of the purpose of the app.

In *Telstra v Premier Media Group*, the only reported Australian case on fair dealing and digital sports rights, Telstra sought an interlocutory injunction to prevent the first respondent from supplying video clips of up to two minutes, with accompanying voiceover commentary, of NRL match highlights compilations to online services. It was acknowledged that Telstra had paid premium sums for digital highlights rights to NRL broadcasts. Telstra claimed that these rights were being devalued by the respondents' activities. Telstra sought orders to limit the duration and availability of clips to what it considered a "fair" amount.

In rejecting Telstra's application, Allsop J referred to the fact that Telstra had factored news access by third parties into its calculations for buying the rights. He also referred to the "public interest" in sports news, and that the Australian public had "come to expect" sport news to be delivered to them. While *Telstra v Premier Media Group* was only an interlocutory hearing, the case since seems to have confirmed that there is scope for new forms of unlicensed services using sports clips under fair dealing in the Australian market, provided such usage is not excessive. There have been no reported cases on sports fair dealing disputes since this case in 2007.

In contrast, Arnold J's judgment in the *Fanatix* case does not acknowledge that in future, if not already, legitimate news reporting by third parties will encompass new forms of online distribution of sports news and that this would be a factor in any valuation of the "highlights market".

A key difference in the approaches taken in these cases may lie in the direct import of the TRIPS three step test by Arnold J. The judicial application of the three step test is controversial. While evidence of the market impact of the defendant's use has always been relevant, the three step test is about protecting the interests of rights holders. As a directive to legislatures considering how to frame a copyright exception in the public interest, it is appropriate. However, used in court it may invite the court too readily to quarantine "future" markets for the applicant, leaving little room for new uses by third parties. Although Arnold J proclaimed that the use of the three step test did not substantially change the fairness analysis, he seems to have emphasized the question of whether the use "conflicts with normal exploitation of the work". While the *Fanatix* case turned on purpose rather than fairness, the import of the three step test may be felt in

future UK cases if not overturned on appeal. Such an approach could make it more difficult for UK copyright users to avoid a "future market impact" argument by the copyright owner.

To date Australian courts have not imported the TRIPS three step test into their fairness analysis of copyright exceptions.

Another difference which may emerge is the Australian "expectation" of free access to sport given judicial notice in *Telstra v Premier Media Group*. While the UK court in *Fanatix* considered that highlights which were "of interest" to fans were not sufficiently newsworthy to permit fair dealing, it's hard to overestimate how important sport news is to Australians. It would be interesting to see how an Australian court would weigh the arguments by a sports rights holder if a video sharing app case were run here.

But at first glance it seems that a carefully designed video sharing app may fare better here than in the UK.

IMPACT OF THIS CASE INTERNATIONALLY

The UK decision is not binding on Australian courts, but is likely to be influential. It is one of the first international cases to comprehensively review fair dealing in the context of social media.

The UK is a key territory in the global sports rights market. The *Fanatix* decision may impact international contractual sports and other event rights negotiations, where provision is made for news access to non-rights holders, and fair dealing laws are factored into pricing.

WHAT NEXT?

While at first blush the *Fanatix* decision looks like a clear win for rights holders seeking to protect their interest in emerging digital licensing markets, the decision still leaves quite a lot of scope for those who may wish to design a "genuinely informative" unlicensed sports video sharing service. If such an app were to be tested in court here, the outcome is uncertain. Arguably, there were factors in the *Fanatix* case, such as the high volume of the videos shared and the distribution of clips worldwide, which would have been just as problematic in an Australian court. But at first glance it seems that a carefully designed video sharing app may fare better here than in the UK.

SALLY MCCAUSLAND has worked as a media lawyer for over twenty years and is the principal of McCausland Media Law. An earlier version of this article first appeared at medialaw.net.au.

7 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146.

8 *Telstra Corporation v Premier Media Group Pty Limited* [2007] FCA 568.

CONTINUED FROM PAGE FOUR

The section 115A amendment allows rights holders to try to minimise copyright infringement by trying, at the ISP level, to block access to websites that infringe copyright. But what about pursuing individual infringers themselves? I'm interested to hear your thoughts about the recent case brought by the production company of *Dallas Buyers Club*. There, the production company, based in the USA, sought personal details of the Australian customers of various ISPs, so that it could then pursue infringement cases against them (or at least look to settle each matter upon payment of an amount of money). Is pursuing individual Internet account holders a viable option?

LP: First, it's worth noting that in the DBC case we are talking about less than 5000 alleged unlawful downloads. Thankfully, the court realised what was going on and set a bar so high that the rights holders eventually gave up and went away. On the available evidence it appears there was an attempt to introduce what's called "speculative invoicing", where rights holders send letters to alleged infringers threatening legal action unless they agree to pay large sums of money, often in the thousands of dollars. Hapless consumers knowing no better have been known to hand over money when they didn't actually need to. Or at least far more than any court would logically order them to pay.

JC: I think it's fair to say that APRA AMCOS would have approached this matter somewhat differently from the manner in which the producers of *Dallas Buyers Club* appear to have done. My personal view is that bringing legal proceedings against individual account holders is never going to be a viable option when it comes to discouraging online copyright infringement. What I will say is that Perram J's reasons for judgment in these proceedings are well worth a read, if only for his Honour's highly entertaining turn of phrase. It's good stuff!

LP: Perram J certainly had some fun at the expense of the DBC mob. And good on him. I agree with Jonathan that singling out individual consumers is the wrong way to go. However, that's exactly what the rights holders convinced the Government we should do by proposing the "three strikes" warning notice system.

The Exposure Draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016 was released earlier this year by Government. One of the most controversial items in the Exposure Draft

of the Bill, and something that has been taken up in the Draft Report of the Productivity Commission, is the proposed extension of the Safe Harbour provisions. Currently an ISP would receive certain protections against an infringement action, provided it complies with the requirements of the scheme. The proposal is to extend those protections to a broader range of service providers. What are your thoughts?

JC: APRA AMCOS is strongly opposed to expanding the protections offered by the Australian Safe Harbour provisions to a broader range of online service providers. The intended beneficiaries of our Safe Harbour provisions were always persons who provide facilities for online services, not those who themselves provide online services. In our view there is a clear distinction between an entity that does no more than provide the facilities for a communication over the Internet and someone who is in the business of providing or aggregating content on a website. Entities such as cloud music services, social networking and video sharing sites exercise a different level of control over the material on their site or network and should not be protected by the Safe Harbour Scheme - they should obtain a licence from the relevant rights holders. It's worth noting that the Government's proposal to extend the Australian Safe Harbour scheme purports to mirror the relevant provisions of the United States' safe harbor scheme under their DMCA. But the United States' safe harbor scheme is at this very moment the subject of a formal review by the US Copyright Office as a result of claims it is 20 year old law that is no longer fit for purpose. So why on earth would we want to amend our Act now, to mirror the existing US provisions, and not wait to see the outcomes of that review first?

LP: I am still thinking through the implications of a "safe harbour" provision and other associated changes to the copyright law as they would affect the Internet. I'm nominally in favour of a provision that allows fair use and I have many well-versed colleagues who are strong proponents of safe harbours. On the other hand, I'm never in favour of slavishly following other jurisdictions, especially the US. We have a unique market structure and so we always need to tailor solutions to match our circumstances not copy others.

JC: I'll only add that there is some great material currently circulating in the US at the moment describing how their existing safe harbor scheme has been abused by content services in order to pay rights holders below market rates for the content that drives their advertising revenue. Do a search for the recent "Open Letter to YouTube" from the legendary artist manager Irving Azoff; it's a good read.

Connected to the Safe Harbour scheme is the idea of an industry code. Could you give a little background into that, and explain where industry is up to in the development of that Code?

LP: Representatives of the ISPs worked with a rights holder group on a code only to find the rights holders walk out on the process because they didn't want to pay for it. One has to wonder if they are facing real identifiable financial losses of any magnitude if they couldn't see the value in a system designed to stop people unlawfully downloading because it wasn't worth the cost to them! By the way, they have such a scheme in New Zealand and it is hardly ever used.

JC: I was closely involved in the negotiation of the code that was submitted to the ACMA for registration last year (it has not yet been registered). It was a great process to be involved with and we achieved a lot in five months of discussions. For APRA AMCOS, the code was not about "three strikes" leading to "potential legal action" as Laurie suggests. It was about asking ISPs to take reasonable steps to help rights holders notify and educate those consumers who were repeatedly downloading illegal content over the ISPs' networks. Rights holders were more than happy to pay for the majority of costs involved in implementing the code. But we felt strongly that if ISPs were genuine in their stated desire to help reduce online piracy and if compliance with the code meant ISPs were going to be protected from liability for copyright infringements on their networks, then they also needed to at least make a meaningful contribution towards the costs of the code. And that is where the negotiations stalled. It's true that Village Roadshow ultimately pulled out of the negotiations (without prior notice to the ISPs or its fellow rights holder negotiating partners!) and that was unfortunate. But the code has not been abandoned by rights holders and I hope not by the ISPs. Rather, ISPs and rights holders have agreed to put their negotiations over the code's costs on hold until such time as we have reviewed the impact of upcoming s115A actions. During that time, the ISPs may also have improved their automated notice sending capabilities, which may dramatically reduce the cost of the code for all involved.

LP: I beg to differ with Jonathan. I was also involved in the formulation of the "three strikes" code. Perhaps APRA AMCOS was happy to pay, but in the end the agents of Hollywood walked away. Village Roadshow unilaterally pulled out of the negotiations via an announcement at a news conference. I can personally corroborate reports that ISP representatives only became aware of this from reading newspapers the next day. On the matter of ISPs paying for the notice scheme, I can't speak for the big telcos but I think that the majority of ISPs were always of the view that if the rights holders wanted a scheme like this they should pay for it. No ISP I've spoken to thinks that they should be responsible for what people download any more than tollway operators should be responsible for the driving habits of motorists. The notion that somehow 400+ ISPs are about to improve their automated notice sending capabilities so they can send out threatening letters to their customers on behalf of rights holders is somewhat fanciful in my opinion. *[Editors' note: after this piece had been completed, it was reported that the negotiation of the*

Code has been parked for a year by all stakeholders.]

The Productivity Commission has just released its Draft Report in connection with its enquiry into Australia's IP arrangements. Broadly speaking, what have been the reactions of those in your professional circles, and what are your early thoughts?

JC: It won't come as any surprise to Laurie or your readers that rights holders were extremely disappointed by the Productivity Commission's recent draft report. Particularly frustrating was the Commission's characterisation of various rights holder submissions as "self-interested" while the submissions of large technology firms set to benefit from the proposed reforms were quoted and relied upon ad nauseam. Frankly, there are simply too many false assumptions and factual inaccuracies in the Commission's draft report to address in the space available here but please feel free to read APRA AMCOS' public submission in response to the draft report in early June where all of our arguments will be set out in full.

LP: All I'd say at this point is that the Productivity Commission has acknowledged what everyone has known for years, which is that historically Australians have paid an excessive price for overseas originated video and content and that this is the result of geo-blocking. It is extraordinary when you think about it that we have spent decades refining our consumer laws and our international trade agreements and yet this outrageous price-gouging has been allowed to continue. Once again, I'd ask that we differentiate between moves that would assist the local industry as opposed to those that are simply designed to help large overseas content rights holders.

JC: I think the issues around geo-blocking are more complex than simply equating it to the price-gouging of Australians by overseas content owners. The reality is that funding for Australian content depends on geo-blocking at least to some extent - local producers need the ability to sell exclusive rights in their content to different distributors in different territories in order to recoup their investment. Lots of companies price their goods and services differently in different countries based on any number of variables - cost of

No ISP I've spoken to thinks that they should be responsible for what people download any more than tollway operators should be responsible for the driving habits of motorists.

living, currency fluctuations, willingness to pay, competition in the local market, to name but a few. Plus, services are sometimes geo-blocked not just on pricing grounds but because the content or advertising is targeted to the local audience.

Finally, could you each provide some concluding remarks about moving forward - in particular, what are your concerns and hopes for copyright in a digital age?

LP: The protection of copyright is a fundamental element of our legal system and something that Internet Australia fully supports. We just do not believe that this justifies the imposition of costly processes that don't work, apart from perhaps having some PR value. We are also opposed to slavishly doing what overseas rights holders want us to do. The same rights holders that have used geo-blocking to price-gouge Australian content consumers for decades. I've met with APRA AMCOS previously and would welcome the opportunity to sit down with them and look at ways to deal with unlawful downloading that might actually work. One that would have the major benefit of looking after local rights holders. Thus far the schemes that have been proposed have been largely to the benefits of overseas interests. I spent six year as deputy-chair of the NSW Film and Television Office (now Screen NSW) and I am a former television producer. So I think my record of supporting the local content industry is such that I can argue against site-blocking without being seen to support so-called "pirates".

JC: Content is such an important part of Australians' digital experience and as more and more content is consumed online it is crucial from both an economic and cultural perspective that Australia gets its regulatory setting right in this area. Copyright is simply a framework by which creators (and those who invest in them) can be remunerated for their endeavours. I don't think it's such a bad thing for that framework to discourage consumers from using illegal services and encourage them to use legitimate ones instead. Laurie and I probably agree on that principle, where we diverge is over what are the most effective ways to achieve that end. I know Laurie's been in this game, having debates like this, a lot longer than I have so of course I'd be very happy to meet with him and learn about his ideas on alternative ways to address the issues that continue to undermine the Australian music industry, especially if they benefit Australian songwriters and music publishers. The coffee is on me Laurie!

Copyright and Social Media

Rebecca Dunn, Peter Pereira and David Krasovitsky¹ provide some high level observations about copyright subsistence and infringement in the social media environment.

The rise of social media has meant that individuals now produce and publish material to the public, a privilege that was previously held only by mass media publishers. The freedom to create and the opportunity to share those creations online is unprecedented and powerful. This article considers the role that copyright law plays in this new publishing environment. In particular, we address two questions: first, when does copyright subsist in a social media post and second, how is any such copyright infringed?

COPYRIGHT SUBSISTENCE ON SOCIAL MEDIA

The subsistence of copyright in social media posts will depend on the nature and content of the publication, and this will be informed to some extent by the social media platform being used. For example, Instagram enables users to publish photographs, and to incorporate their own editorial control over the appearance of the photographs via application of filters and other tools. It is very likely that copyright will subsist in most original photographs published on Instagram.

The situation is more complex in relation to the micro-publishing application Twitter, which allows users to tweet to their followers and the world at large. A tweet is capped at 140 characters, and in relation to copyright subsistence there is a live question as to whether a publication of such insubstantial length has sufficient originality to enable copyright to subsist.

In considering whether a tweet can be a literary work, guidance can be drawn from the headlines case of *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109 (**Reed**). In that case, copyright was found not to subsist in certain headlines of newspaper articles. Those headlines included the following:

- “Investors warned on super changes”
- “Blackout probe sheds little light”
- “Laser a ray of hope for eye problems”

As can be seen, these headlines were mostly descriptive in nature with little originality in their exposition. In finding that copyright did not subsist in the headlines in issue, Bennett J acknowledged that this did not exclude the possibility that copyright could subsist in a particular headline (at [50]). As with the subsistence of copyright generally, the question is whether the party asserting copyright can adduce sufficient evidence to show that the headline is an “original literary work” within the meaning of s 32 of the *Copyright Act 1968* (Cth). A finding of originality typically involves consideration of:

- a number of factors including: original skill, labour, judgment or ingenuity in the expression of the idea;

- whether there was sufficient effort of a literary nature being expended by one or more authors; and
- whether the form of expression is the result of particular mental effort which is not essentially dictated by the nature of the information conveyed.

As to original skill, it is not enough to demonstrate originality by the deployment of a literary device like a pun or double entendre. If the expression (in this case the headline) conveys no more than the fact or idea conveyed, it will not be protected by copyright. The challenge for all publishers is to do more than this. Ultimately, the issue of copyright subsistence is an evidentiary one.

Like headlines, a tweet with sufficient originality could also attract copyright protection. Consider the following tweets from the comedian Jimmy Fallon:



It is likely that these tweets from Jimmy Fallon would not attract copyright protection under Australian law because, as the court said in *Reed*, copyright does not protect facts or information or even ideas; it protects the original expression of ideas.

On the other hand, consider the following tweets from the same comedian:



Assuming these tweets have not been published elsewhere prior to Jimmy Fallon publishing them, they would appear to contain the requisite originality to attract protection.

¹ Rebecca Dunn and Peter Pereira are lawyers in Gilbert + Tobin’s Intellectual Property group and David Krasovitsky is a graduate in Gilbert + Tobin’s Intellectual Property group.

There is clearly some ingenuity and effort of a literary nature that went into their publication.

Given the millions of Twitter users the amount of potentially copyrightable material being generated on a daily basis is enormous. Tweets can also be 'commercialised'. For example, the Twitter handle 'The Grade Cricketer' expresses humorous tweets based on the experiences of a participant in and observer of the Sydney grade cricket competition. By way of example:

"Umpire warned me for running on the pitch. I warned him he was wasting his twilight years officiating meaningless grade cricket fixtures."

"Donald Trump bats 8 and doesn't bowl".

a tweet with sufficient originality could also attract copyright protection

The success of the Twitter account has now found expression in a book called "The Grade Cricketer", which essentially takes the many tweets published by the author and converts them into narrative form. This demonstrates the importance and value of copyright protection, which as Bennett J said in *Reed* "is concerned with rewarding authors of original literary works with commercial benefits having regard to

the fact that literary works in turn benefit the reading public".

INFRINGEMENT

Copyright is infringed when material in which copyright subsists is used without the permission of the owner of the material. A person who infringes copyright exposes themselves to legal action by the owner of the copyright. There are examples both in Australia and internationally of actions brought in relation to the infringement of copyright works published on social media.

In 2013, a jury in New York ordered two media companies to pay \$1.2 million to a freelance photojournalist, Daniel Morel, for their unauthorised use of photographs he posted to Twitter (*Agence France-Presse v. Morel, U.S. District Court for the Southern District of New York, No. 10-02730*). An editor at one of the media companies had discovered Morel's photos through another Twitter user's account and provided the photos to Getty who went on to distribute the photos widely, including to *The Washington Post*. The jury found that the media companies had wilfully infringed Morel's copyright, and ordered the maximum statutory penalty available. It did not matter, for example, that Morel's Twitter feed was publicly available. Since then, Morel has posted photos to Twitter with a large text box saying "(C) Daniel Morel".

In Australia, in *Tylor v Sevin* [2014] FCCA 445 a landscape photographer from Hawaii sued an Australian travel agent who used a print from

his website to advertise a trip to Hawaii without the photographer's permission. The Federal Circuit Court ordered the travel agent to pay almost \$24,000 in damages. Almost 18 months after the order, the ABC reported that the travel agent had yet to pay a cent in damages.

READ THE TERMS OF USE!

Most if not all social media platforms have quite extensive terms and conditions regarding copyright. For Facebook, Twitter and Instagram the terms state that the author of the post retains full copyright. Contrary to the popular view that anything posted to a social media platform is owned by the platform, users actually retain rights in material they publish online and as such can, to an extent, control what happens with their material.

Allowing publishers of material to retain rights mitigates the risk of legal liability to the platform itself. If Facebook, Instagram or Twitter retained rights in everything posted on their platforms they could find themselves exposed to claims of infringement by third party rights holders. For example, if a user posts a video on Facebook that features audio belonging to a recording label, Facebook purports to avoid all liability by stating, under its terms of use, that it does not condone copyright infringement and that it has no rights in what is posted. Instead, the record label would need to approach the platform or the user directly to have the material removed. Facebook itself (and the other major platforms) have processes by which owners may request the removal of copyright infringing material.

From a user perspective, it is important to appreciate the consequences of posting material on social media platforms. While the benefits of owning the intellectual property rights in material are obvious, it is equally important to ensure the material posted does not infringe the copyright of other people, and in the event it does, to take measures to remedy this.

For publishers and media outlets, it is important to recognise the intellectual property rights that users may have in material which warrants publication. As the cases described above show, it can be an expensive exercise to fail to treat material posted on social media in the same way as traditional methods of producing content.

For lawyers, appreciating the terms on which material is posted to social media is the first step in working out where intellectual property rights lie. Whether copyright subsists in material depends on the same principles that apply to other content.

CONCLUSION

While the interaction between copyright and social media is evolving, the underlying legal principles remain the same. The challenge for publishers is to generate original content, no matter what medium the content is expressed through. The challenge for media platforms is to balance the need to allow users to express themselves freely while providing robust protection for those whose own material might be infringed in the process. And the challenge for lawyers is to deal with the fine lines in relation to the application of copyright law to subsistence and infringement in this new media landscape.

Summary note on the Productivity Commission's Intellectual Property Arrangements Draft Report

By Michael Williams and Xavier Fijac

BACKGROUND

The Productivity Commission (**PC**) has released its Intellectual Property Arrangements Draft Report on 29 April 2016 (**Draft Report**) (<http://www.pc.gov.au/inquiries/current/intellectual-property/draft>).

The Draft Report follows the PC Issues Paper dated October 2015.

KEY ISSUES

The PC has recommended sweeping changes to copyright law in Australia based on its adoption of the following positions:

- Copyright arrangements are “weighed too heavily in favour of copyright owners, to the detriment of the long term interests of both consumers and intermediate users”.¹
- Enforcement measures to encourage Internet service providers to cooperate with rights holders, and litigation, have only had a “modest impact in reducing infringement”, and further legislative change is unlikely to improve compliance with the law.²
- Infringement declines with better content availability and the timely release of content to Australian consumers.³
- Increased protection for rights holders will have limited impact on infringement.⁴

SUMMARY ADVICE

Topline PC recommendations:

Term

- Reduce copyright term from 70 year duration to 25 years, by seeking mutual amendment of terms in collaboration with other countries.⁵
- Reduce the term of protection for unpublished works from perpetuity to the current terms of copyright protection.¹⁰

Fair Use

- Replace Fair Dealing with a US-style Fair Use exception, with the acknowledgement that legal uncertainty and increased litigation will be the result.⁶ The fair use exception includes a new list of ‘fairness factors’:⁷
 - effect of the use on the market or value of the copyright protected work at the time of the use;
 - amount, substantiality or proportion of the work used, and the degree of transformation applied to the work;
 - existing commercial availability of the work;
 - purpose and character of the use, including whether the use is commercial or private.

There would also be a non-exhaustive list of “illustrative uses” which will constitute fair use.

- Extend fair use to cover the use of orphan works and commercially unavailable or out-of-commerce works.⁸

Parallel Importation

- Repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.⁹

Safe Harbour Scheme

- Expand the safe harbour scheme to cover the broader set of online service providers such as search engines.¹¹

Promoting global cooperation

- Australia should revive its role in supporting opportunities to promote global cooperation on intellectual property policy among intellectual property offices through the

1 Draft Report, p 16.

2 Draft Report, p 477.

3 Draft Report, p 477.

4 Draft Report, p 477.

5 Draft Finding 4.2; Draft Report, p 17.

6 Draft Report, p 18.

7 Draft Report, p 18.

8 Draft Report p 121.

9 Draft Recommendation 5.2, Draft Report p 30.

10 Draft Recommendation 4.1, Draft Report p 119.

11 Draft Recommendation 18.1, Draft Report p 37.

12 Draft Finding 17.1; Draft Recommendation, 17.1, Draft Report p 37.

WIPO and the WTO to avoid duplication and reduce transaction costs.¹²

Geo-blocking

- Legalise circumvention of geo-blocking as recommended by the 2013 House of Representatives Committee Report *At What Cost? IT Pricing and the Australia Tax (House Report)* to make it clear that Australian consumers may legally circumvent geo-blocking technology.¹³
- Avoid entering international treaties and trade agreements which impose obligations to prevent consumers using circumvention of geo-blocking technologies.¹⁴
- The geo-blocking recommendation was not present in the Issues Paper.
- There are more radical proposals on geo-blocking in the House Report which have the potential to impact commercial licensing arrangements. Other than legalising circumvention for consumers (explicitly referred to by the Draft Report), these recommendations include:
 1. A right of resale for digital content for consumers, business, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem;¹⁵
 2. enacting a ban on geo-blocking as an option of last resort, should persistent market failure exist in spite of the changes to the *Competition and Consumer Act* and the *Copyright Act* recommended in the report;¹⁶
 3. investigating the feasibility of amending the *Competition and Consumer Act* so that contracts or terms of service which seek to enforce geo-blocking are considered void.¹⁷

Competition Law

- The Draft Report reiterates the Harper Report¹⁸ recommendation that the Australian Government should repeal s. 51(3) of the *Competition and Consumer Act* which currently provides an exception or intellectual property transactions from prohibitions under competition law.¹⁹

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13 Draft Recommendation 5.1, Draft Report p 30; House Report, July 2013, Recommendation 5, p xiii.

14 Draft Recommendation 5.1, Draft Report p 30.

15 House Report, Recommendation 7, p xiii.

16 House Report, Recommendation 9, p xiii.

17 House Report, Recommendation 10, p xiii.

18 Competition Policy Review, Final Report, March 2015.

19 Draft Recommendation 14.1, Draft Report p 36; Recommendation 7, Competition Policy Review, Final Report, March 2015.

500 Versions of Software and the Subsistence and Infringement of Copyright – The Full Court’s Decision in *JR Consulting v Cummings*

Anna Spies, King & Wood Mallesons, takes a look at the recent Full Federal Court decision in *JR Consulting v Cummings* and navigates a path through the vexed issue of subsistence of copyright in software releases.

The Full Court of the Federal Court of Australia, in its recent decision in *JR Consulting & Drafting Pty Limited v Cummings* [2016] FCAFC 20, considered the difficult question of copyright subsistence and infringement in the context of multiple releases or versions of software.

The software developer in *JR Consulting v Cummings* had developed and released more than 500 versions or updates of the software in issue, some of which contained a relatively insubstantial update to the previous version. The Full Court ultimately found that copyright subsisted in each version of software. Each was original, taking into account the independent intellectual effort that was required to develop each version.

The Full Court’s decision is important for its analysis of the basic principles of originality, authorship and subsistence of copyright, as well as for its consideration of the relevance of originality in an infringement claim. In particular, the principles established are an important development on the discussion of independent intellectual effort and authorship from the High Court’s decision in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458. It is also an important case for legal representatives to consider in the context of pleading and preparing evidence on subsistence and infringement of copyright in circumstances where there are multiple similar versions of software, in particular on what inferences might be able to be drawn.

THE FACTS OF *JR CONSULTING V CUMMINGS*

The commercial dispute in the proceeding concerned the ownership and control of the “Quik Series Software” (**QSS**). The QSS was software used in the design and manufacture of cold form metal light gauge wall frames, trusses, flooring and roofing used in construction.

The facts of the dispute and the relationship between the parties are complex, but in broad terms, Mr Cummings, the first respondent to the appeal, developed and was the author of the QSS. The other respondents, Tanmari and FIPL, were companies controlled by Mr Cummings. Between 1990 and November 2011, Mr Cummings developed and released more

than 500 versions and updates of the QSS.

The appellant parties were all associated with Mr Pacione. The appellant parties conducted a business that involved the supply of equipment to manufacture steel frame structures for residential and commercial construction and associated software. The system that was supplied was integrated with computer aided design software and computer aided manufacturing software.

In 2002, Mr Cummings and the first appellant (**JRC**) entered into an agreement for the transfer of a non-exclusive interest in respect of QSS (**the 2002 Agreement**). In February 2004, Mr Cummings’ company, Tanmari, granted the second appellant (**HSFS**) an exclusive licence to use and exploit QSS in Australia (**the Exclusivity Agreement**). In August 2004, Tanmari granted HSFS a perpetual non-exclusive licence in relation to QSS in the world (this excluded Australia, except if the Exclusivity Agreement was terminated or expired) (**the 2004 Agreement**).

The Cummings parties (**the respondents**) contended that copyright in the QSS was infringed by the appellants by the sublicensing by JRC of the QSS to SFSI (**the fourth appellant**) and by SFSI in turn sub-licensing the use of that software to a number of its customers pursuant to contracts between SFSI and those customers. The Appellants claimed that they derived an interest under the 2002 Agreement that entitled JRC to non-exclusively use the QSS and to sub-licence the QSS to others, including its customers.

The Full Court emphasised the need to take a commercial approach to the issue of construction by identifying the commercial purpose or object of the agreement by reference to the interests of both parties

THE CONSTRUCTION OF THE 2002 AGREEMENT

The question of whether the appellants had infringed copyright was dependent in part upon the construction and continued operation of the 2002 Agreement.

The key copyright question in the proceeding was whether copyright subsisted in each update or new version of QSS. The Full Court found that copyright subsisted in each version of the QSS that was created by Mr Cummings up to November 2011

The primary judge found that the 2002 Agreement did not effect an assignment of copyright. Rather, JRC was given a non-exclusive licence in relation to QSS which was limited to the version of software as at the date of that agreement. The primary judge found that it was improbable that the parties could have objectively intended that Mr Cummings would grant a licence to use all future versions of QSS without any time limitation and allow JRC to sublicense others without imposing significant controls on the use of that software. The agreement was directed to the software as it existed at a point in time.

The Full Court upheld this finding on appeal. The Full Court emphasised the need to take a commercial approach to the issue of construction by identifying the commercial purpose or object of the agreement by reference to the interests of both parties. The Full Court found that the 2002 Agreement was poorly drafted, and while there were matters that could be advanced in favour of the construction contended for by the appellant (that the agreement extended to new releases), they were outweighed

by the matters identified by the primary judge's commercial construction. The finding that the 2002 Agreement did not effect an assignment of copyright was not challenged on appeal.

The Full Court also upheld the primary judge's finding that the 2002 Agreement had been abandoned. Even though HSFS was not a party to the 2002 Agreement, the Full Court found that the inference was irresistible that by the date of the 2004 Agreement the parties considered that future licensing of the QSS would be governed by the Exclusivity Agreement and the 2004 Agreement.

SUBSISTENCE OF COPYRIGHT IN UPDATES AND NEW RELEASES

The key copyright question in the proceeding was whether copyright subsisted in each up-

date or new version of QSS. The Full Court found that copyright subsisted in each version of the QSS that was created by Mr Cummings up to November 2011.

The respondents to the appeal contended that each update or new release, being the whole or a substantial part of the previous version with additional material, was a "new literary work". In contrast, the appellants denied that each update or new release of QSS was a new literary work, as each update or new release was "not substantial enough" to be a new work. The deleted or amended material was "not original". In addition, the appellants argued as an evidentiary question that the respondents had failed to establish that Mr Cummings had contributed sufficient effort, skill, labour and judgement, as author, in order to establish that each version of the software was an original work of authorship.

At first instance, the primary judge found that the respondents had established that copyright subsisted only in three versions of the software, being the only versions in respect of which there had been evidence of the time and effort spent by Mr Cummings and a significant increase in the line count of the source code. The primary judge found that the evidence which had been led did not allow a finding that all updates were original in the relevant sense, even though it was likely that that many such updates were original.

The principles of originality explained

The Full Court set out an important analysis of the principles applicable to the subsistence of copyright in circumstances where an original work has been altered by a number of changes that are insubstantial in the context of the foundation work (at [244] to [385]). In particular:

- Authorship is central to the overall scheme of Part III of the *Copyright Act 1968* (Cth). There is a "correlative" relationship between authorship and originality. The requirement that a literary work be original requires that the literary work *originated* with the author and that it was not merely copied from another work. In this context, the Full Court extracted and considered the relevant principles set out by the High Court in *IceTV v Nine Network Australia* and in *Data Access Corporation v Powerflex Services Pty Ltd and others* (1999) 202 CLR 1.
- The Full Court stated that the "*contemporary question is simply this: Has the author deployed personal independent skill, labour, intellectual effort, judgement and discrimination in the production of the particular expression of the work?*" (at [264]; emphasis original).
- The reference to "effort of a literary nature" in the High Court's decision in *IceTV* was not likely intended to introduce any notion of literary "merit" or "creativity" into the statutory correlation of authorship and originality (at [260]). Neither literary merit nor novelty or inventiveness is required and although the law of copyright does not protect

function and extends only to the expression of a work, a work may serve utilitarian ends ([261]).

- The observations of the High Court in *IceTV* may have “raised the bar” on the threshold skill, labour and judgment required for originality. However, the Full Court noted that the High Court in *IceTV* also affirmed that “too much” has been made of the kind of skill and labour that must be expended: the requirement is that the work “originates” with the author from “some independent intellectual effort” (at [285]).
- In relation to database “compilations” of pre-existing data and information,¹ the Full Court stated that the “selection” and “arrangement” is likely to be the authorial or original contribution and noted that the degree of originality may require close examination for subsistence more broadly. The Full Court also noted that in such cases, it may be difficult to identify which author or group of authors undertook the selection and arrangement (at [282]).

The Full Court found that particular considerations arise in relation to the correlative relationship between the author and original work in the context of a work which requires regular revisions and updates, which may be insubstantial in the context of the foundation work. As an illustrative example, the Full Court considered a hypothetical legal text on equitable remedies which requires relatively regular changes to update the text, which may be individually insubstantial in the context of the foundation work. For example, only a number of paragraphs of the text may be altered to reflect one or more new decisions. The Full Court asked (at [275]):

Is the text as altered, as a whole, to be regarded as a new original work? Are the changes, when analysed, just too insubstantial to bring about a new work? Do the alterations themselves reflect original authorship? If there is no new work as a whole (that is, a revised, updated whole), what “work” is the true source of the rights of the copyright owner? What would be the “work” once the foundation text has been amended in, for example, 30 or 50 “insubstantial” ways? To identify “precisely” the “work” (and thus the source of the author’s rights) is it necessary to identify the state of the foundation text and then identify each and every change by addition and deletion to that text to show that at some point the “work in suit” emerged.

The Full Court considered the commentary of Professor Ricketson,² who noted that each successive draft needs to be considered in overall terms as the application of fresh authorial effort in revising, reviewing and “settling” what has gone before. Providing the work is not a mere slavish copy, it will constitute an original work in its own right if the author has ex-

pended sufficient independent skill and labour in bringing it into material form. Professor Ricketson stated that it may be assumed that the author has carefully reviewed and considered the preceding text as a whole. The Full Court stated that this “assumption” might be properly regarded as an inference from foundation facts.

The Full Court’s findings on the QSS

The Full Court found that the evidence was sufficient to prove that Mr Cummings was the author of all source code for the QSS and that Mr Cummings had applied enough skill and judgement to make each version an original work in its own right. The Full Court took into account the history of the development of QSS by Mr Cummings, his authorship of each sequential change to the code, the dedication of his time, effort and judgement to writing the code and his release of “entire package” of programs after making each set of changes or updates. The Full Court concluded (at [304]):

*To the extent that each sequential update ... reflects changes to the source code by addition or deletion (whether the rectification of errors or a new set of instructions to bring about a certain result) that might be regarded as, quantitatively at least, insubstantial, an **inference arises** from the circum-*

*stance of his authorship of the entire programs comprising QSS, over time, and his election to release, with each numerical version of QSS, the entire program as updated, to the following effect: that he has carefully considered the preceding state of the suite of programs and that the alterations, insertions or deletions are intended to be consistent with and enhancements of what has gone before. In other words, Mr Cummings has undertaken a **particular revision of the programs on each occasion as part of the whole of the work with the application of sufficient skill and judgement to make each version as updated and released an original work in its own right.***

(emphasis added).

particular revision of the programs on each occasion as part of the whole of the work with the application of sufficient skill and judgement to make each version as updated and released an original work in its own right

¹ The present proceeding did not concern database compilations and the database and compilation cases were mentioned by the Full Court for the principled approach to originality and subsistence (see [284]).

² Ricketson S and Cresswell C: *The Law of Intellectual Property: Copyright Designs and Confidential Information*, Thomson Reuters.

INFRINGEMENT OF COPYRIGHT

Since the Full Court found that copyright subsisted in *each* version of QSS, it necessarily followed that any version of the QSS reproduced by SFSI or communicated, to its customers, without licence, infringed copyright.

The appellants argued that the respondents failed to prove objective similarity between the software used and licensed by SFSI and a relevant work in suit. They argued that it was necessary to identify the version or update of the QSS relied upon and then demonstrate that the relevant work has been infringed. It was not permissible, the appellants argued, to use a "representative sample" of the work in suit to draw an inference of infringement about all elements of the work at all moments in time (including for new versions and updates).

The Full Court found that the evidence demonstrated that SFSI was supplying a version of QSS. In addition, there had been no contest of whether SFSI was supplying something to its customers other than a version of QSS. Accordingly, there was no probative or forensic need for the appellants to conduct an analysis of a version of QSS with the version used and licensed by SFSI in order to prove objective similarity. Accordingly, the Full Court upheld the finding of copyright infringement.

As part of its discussion of originality in the context of subsistence of copyright, the Full Court also (obiter) considered the question of originality in the context of infringement. The Full Court stated:

- The analysis of whether a substantial part has been reproduced necessarily engages a consideration of the *quality* of the part of the work alleged to have been reproduced. The fact that a part reproduced "originates" from the author does not of itself necessarily mean a substantial part has been taken, having regard to the

quality, because the part taken may be something that is itself largely unoriginal (at [267]).

- In determining whether the *quality* of what is taken *makes* it a substantial part of the copyright work in suit, as the source of the rights, it is important to enquire into the importance which the taken portion bears in relation to the work as a whole. Is it an essential or material part of the work in suit (at [268])?
- In the context of a computer program, it is therefore necessary to examine what was allegedly taken, the set of statements or instructions comprehended by what was taken and compare it with the original. A person will be unlikely to have reproduced a substantial part where they reproduce parts that are "data" or "related information" and which are not relevant to the statements or instructions to be used to bring about a certain result (at [269]-[271]).

CONCLUSION

The Full Court's decision constitutes an important development in principle on the question of originality and copyright subsistence. In deciding whether copyright subsists in a version of software, the question was not whether a particular change made in that version was substantial or insubstantial. The question was whether there has been some independent intellectual effort deployed in the context of making that small change that was sufficient to establish that each version was protected by copyright. This independent intellectual effort might include careful revision and consideration of the preceding version as a whole.

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

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

INTRODUCTION

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

DALLAS BUYERS CLUB LLC V IINET

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

PRELIMINARY DISCOVERY

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

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

PENALIZING THE INDIVIDUAL: SPECULATIVE INVOICING

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

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

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

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

3 *Ibid* 2.

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

5 *Ibid* div 7.22.

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

7 *Ibid* 93.

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

9 *Ibid* 23.

10 *Ibid* 32.

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

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

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

WHERE DOES THIS LEAVE PIRATES AND RIGHTS HOLDERS?

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

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

THE THREAT TO RIGHTS HOLDERS IS REAL

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

ACTIONS: GOVERNMENT

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

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

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

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

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

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

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

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

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

16 *Copyright Act 1968* (Cth) s115A.

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

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

19 Turnbull, above n 17, 6416.

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

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

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

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

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

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

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

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

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

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

ADRIAN DEAN is a third year Law Student at Deakin University, Melbourne. After working as an actor for several years, he decided that maybe law might be a more lucrative career. He aspires to work in the realm of media law - hopefully at the bar. He recently came second in the CAMLA essay competition.

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

23 Ibid.

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

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

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

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

28 Ibid.

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

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



Profile: Nicholas Cole

Legal Practitioner Director of Cole Media & Entertainment Law and Producer at Talk Films

CAMLA Young Lawyers representative, Betheli O'Carroll, recently spoke to Nicholas Cole about his roles at Cole Media & Entertainment Law and Talk Films, as well as his predictions for the media and entertainment industry.

Thanks so much for agreeing to share some of your insights, Nick. Firstly, where do you work and what are your roles?

I am the Legal Practitioner Director of Cole Media & Entertainment Law, which is a firm I established at the end of 2012. So to cut a long story short, I'm self-employed.

I think our readers would be very interested in Talk Films. Can you tell us a bit more about that company and your work there?

That's a company that I set up in 2001. It's the vehicle I use to develop and to produce films. My background is in production so it works well with my legal practice as I genuinely understand the needs of my clients and their businesses.

You've had a very interesting career, could you please tell us a bit more about yourself and your previous positions?

The day after my final law exam I went to work as a runner on a feature film. I always wanted to work in film, so I worked my way up through the business. I moved into editing, and then became second unit director on a show called *Big Sky*. I eventually ended up as a director on *Water Rats*.

It was when *Water Rats* was cancelled unexpectedly that I had to think hard about what would happen next. I decided it was better for my family and raising children if I were doing something that offered stability so that's when I made the switch to law. I managed to get a job as a paralegal with Lloyd Hart Lawyers. I went to College of Law part-time and after that I did my Masters of Law. I then moved to the Film Finance Corporation and performed

an in-house role. After a couple of years at the Film Finance Corporation, I went to work at DLA Phillips Fox as it was, and was made Special Counsel.

After a while the "big firm" wasn't working out and it seemed like a good idea to set up on my own. It just felt like it was the right time to back myself. So I left DLA Piper, worked very briefly with a boutique entertainment firm, then set up on my own and haven't looked back. I've been lucky and have managed to work on some great projects. One of the first projects I got involved with was *Marco Polo*. Then I went on to *The Water Diviner*. After that, I worked on *Truth*, which was the Cate Blanchett film and more recently I've been on *Hacksaw Ridge*, which is the Mel Gibson film that's currently filming in Australia. I've also been working on some interesting television projects and some small indigenous projects.

What do you consider to be some of the biggest legal challenges facing the media and entertainment industry?

In terms of legal challenges, there's quite often a level of tension between the law being behind where industry practice is at. For example, the *Copyright Act* doesn't always equate with where technology underpinning IP and content rights are at, so there can be a disconnect at a basic level. Also, on the financing side, the concepts underpinning the Producer Offset scheme which was set up in 2007, are already out-dated. So that's a challenge—trying to help clients work within the parameters of legal constraints that exist and devising ways to work around them. What clients are doing can be constrained by concepts and legislation that are redundant.

What opportunities do you think are available in the media and entertainment industry?

OK, this is going to sound tough, but it's the truth: "opportunities?" There are none. Film and media are tough businesses so no opportunity is going to be presented to you. The only opportunities that exist are the ones you create for yourself. I have a very simple philosophy. Keep doing something, anything. Always keep working. Take the project that's going, not the one that might be going. Every day, do and act. Don't procrastinate or wait. In my experience, it's quite rare for opportunities to be presented to you. I've had to create them for myself otherwise nothing would have happened.

Fast-forward 15 years, what do you think the media and entertainment industry will look like?

One side of the business will remain exactly the same because it's remained the same for 2,000 years, and that is the need for stories. Stories are a fundamental part of our community, our lives. People love to hear and tell stories.

The economics and distribution models for how we disseminate those stories will change. There's been profound structural change within the media industry over the last five to ten years and that structural change will continue. However within the last two years there's been greater clarity coming into the market in terms of what the future will look like. I'm not going to say I have all the answers but, in the short term, the big tent-pole project will con-

tinue to dominate and independent films will struggle, so it's unlikely that we're going to be seeing many small Australian films on screens. However, on a longer term basis, I think there will be a resurgence in independent film. Audience's interest in tent-pole projects will wane and I'm looking forward to there being niche opportunities for independent projects that can potentially reach out to a global market in a way that was never before possible.

If you could give one piece of advice to someone interested in working in a boutique environment, what would it be?

Back yourself. The value of being in a firm is the technical training that it can bring and exposure to big transactions, government work and stuff that you can't get in a boutique environment. But at a certain point, if you want to take a greater level of control over your destiny and do something that's close to your passion, back yourself. Just go and do it.



BETHELI O'CARROLL is a Research and Standards Officer at the Australian Press Council, and a member of the CAMLA Young Lawyers Committee.

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