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# Caught on film – illegal access Down Under

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In a global poll of which countries are the worst online piracy offenders, Australia would probably be a long way down the list but the content producers are worried and taking action. **Barbara Bierach** reports from Sydney.

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## Know your audience

In a landmark case at the Federal Court of Australia in early April 2015, film production and distribution company Voltage Pictures won a case against six Australian internet service providers (ISPs), including iiNet, Dodo and Internode. Voltage obtained the names and addresses of more than 4,600 Internet users who allegedly shared its movie 'Dallas Buyers Club', using peer-to-peer file sharing software such as BitTorrent.



Michael Bradley, managing partner at Marque Lawyers, the Sydney law firm representing the film's owners, said after the verdict that the aim was "to send a much bigger message to consumers about the broader issue of unauthorised downloading and uploading of copyright material". In May last year, the ISPs were finally ordered to pay 75% of the studio's legal fees, which local lawyers estimate are up to AU\$100,000 (US\$79,000). The *Dallas Buyers Club* case is widely regarded as a tipping point in the balance of power in Australia – now shifting from ISPs and consumers back to the copyright holders.

The case came almost a year after Australia's Attorney-General George Brandis declared the country a hotspot for intellectual property (IP) theft. "Australia, I'm sorry to say, is the worst offender of any country in the world when it comes to online piracy, and I am very concerned that the legitimate rights and interests of rights holders and content creators are being compromised by that activity," he told a Senate hearing in Canberra, mid-June 2014.

## Commonplace crime

In surveys, almost a third of Australian adults admit to regularly using illegal downloading services to consume film and TV shows. More reliable (June 2014) figures from Australia's digital industry ratings agency Nielsen show an Australian audience for 'The Pirate Bay' and 'KickassTorrents' – the two largest illegal content download websites – of almost 2.8 million users. Nielsen estimates the total market of internet users in Australia at 17.3 million. Another study into movie theft, undertaken by market research firm Ipsos and Oxford Economics on behalf of the Australian Federation Against Copyright Theft (AFACT), estimates an AU\$1.37 billion (US\$1.08 billion) cost to the Australian economy from movie piracy and 6,100 lost jobs in the 12-month period to July 2010.

## Three strikes and you're offline

"We want to do something about that," said Brandis. He proposed blocking websites hosting pirated content and introducing "graduated warnings" that ISPs could issue to users on behalf of rights holders. The idea is an obvious nod towards the "three strikes" law in countries such as New Zealand, France, and the United States, where ISPs are required to issue offenders with two warnings before rights owners are able to obtain a user's personal data with a view to starting legal proceedings.

## Lack of deterrent

Since Wellington introduced the policy in September 2011, New Zealand's Copyright Tribunal has secured several verdicts on behalf of copyright holders, charging illegal downloaders an average of NZ\$500 (US\$367) per song stolen. However, across the Tasman Sea, even if the *Dallas Buyers Club* case was decided in favour of rights holders, Australia does not have statutory damages provisions prescribing a minimum amount of financial compensation, should consumers be targeted by legal action. Moreover, local courts may only order damages in the range of the cost of legally purchasing a song or film. In respect of the *Dallas Buyers Club* case, Mark Vincent, partner at Shelston IP Lawyers, estimates the likely damages that could be awarded to Voltage Pictures studios to be "very modest".

Under Australian law, internet users are not required to secure their internet connection. Users accused of fraudulent downloading could argue another individual downloaded the content, especially if more than one person lives in a household or if a Wi-Fi connection is not secured and may be accessed by anyone in the area.

Another concern is the use of speculative invoicing. In the US and UK, rights holders have been known to send out masses of template-style letters to suspected infringers, demanding thousands of dollars with the clear message: 'pay-up or else'. In response, Justice Nye Perram, at Australia's Federal Court has ordered that any letters sent out by the music and film industry be checked by the court first.

## Legal remedy

The verdict came as Australia's government began cracking down on Internet piracy with a Copyright Amendment (Online Infringement) Bill 2015. It aims to protect Australia's creative industries, which employ 900,000 people and generate an economic value of more than AU\$90 billion (US\$71.2 billion), including AU\$7 billion (US\$5.5 billion) in exports, according to Malcolm Turnbull, minister for communications.

If approved, the bill would allow rights holders to apply to a judge for an injunction requiring ISPs to block access to "online locations" overseas that facilitate copyright infringement. It also includes a process for "facilitated discovery" to assist rights holders take direct copyright infringement action against a subscriber after a number of alleged infringement notices are sent. In parallel, the government said it expects ISPs and rights holders to come up with a code of conduct to enhance self-regulation.

## Delay equals temptation?

The Australian Copyright Council (ACC), representing professional artists and content creators working in Australia's creative industries and the country's major copyright collecting societies, welcomed the bill, but has concerns. The ACC contends that "exclusive licensees" should be given the power to apply for a site-blocking injunction. It also notes "we are concerned that limiting the jurisdiction to the Federal Court of Australia may prejudice the ability of individual creators to access this remedy and may otherwise affect the cost effectiveness of the scheme". Another issue is whether the term 'online location' in the bill is broad enough for an injunction to cover replicas of the same infringing website mushrooming at different domains. "It seems to us that this is crucial for the legislation to be effective", said the ACC.

Meanwhile, consumer groups argue that delayed Australian release dates for programmes like Game of Thrones – one of the most often illegally downloaded shows in the country – inflate prices and so-called geo-blocks on accessing overseas content create an incentive for Australian consumers to download content fraudulently – something Australian creative authorities fiercely reject. 'The Little Death', an independent Australian feature film, was illegally downloaded "500,000 times within five days", according to its maker, Jamie Hilton, although some other reports claim it was 160,000 times, substantial piracy nonetheless. In Australian daily *The Sydney Morning Herald*, he argued that rights infringers "are not Robin Hood". They don't steal from the rich, he says; rather, they are depriving "independent film makers, artists and technicians from hard-earned income".

Market entry by content providers such as Netflix, which make legal access to content affordable and easy, may have a positive impact. The experience of the music industry would suggest otherwise, however. Dan Rosen, CEO of the Australian Recording Industry Association (ARIA), commenting on the *Dallas Buyers Club* case, doubts that better access alone will dampen Australia's lust for stolen music or films: "Even though we have introduced all these legal services, we have not seen a material decrease in piracy in Australia".

## Legislation may not be the way

It not yet clear what laws can achieve, either. "Graduated response" schemes, such as the one the Australian government is contemplating, have had mixed results in other jurisdictions: according to AHEDA, Australia's Home Entertainment Distribution Association, France's HADOPI law, or Creation and Internet law, from 2009 managed to motivate 70% of former pirates to start buying content after they received their first warning notice about pirating. However, the French abolished the law in July 2014, in favour of blocking access to sites hosting pirated content. The French government found the scheme was financially unsustainable: €12 million (US\$13.4 million) were spent to prosecute 134 cases, which could attract a maximum penalty of €1,500 (US\$1,673.5) each.

Until the Australian Copyright Amendment (Online Infringement) Bill 2015 can be finalised, the code of conduct demanded by the government will have to do. On 8 April 2015, the telecommunications lobby group Communications Alliance submitted a Copyright Notice Scheme Code to the Australian Communications and Media Authority for approval. Under the code, ISPs will issue three warnings to customers. The first will be an educational one, delivering information on how to access copyrighted materials legitimately. The second will be more serious, warning of potential consequences that come with copyright infringements. The third will advise of potential court proceedings that may be brought against persistent infringers. If that does not prove successful, copyright owners could identify users for potential legal action through a court order. The code does not work retrospectively, though, and probably does not mean the end of internet piracy in Australia – but the message seems clear enough: Australian customers illegally downloading intellectual property can and should in future expect some level of punishment.

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