

DALLAS BUYERS CLUB - AN INTERNATIONAL FIGHT

04 December 2015 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Rebekah Gay** and **Peter FitzPatrick**

Readers in Australia will be familiar with the ongoing efforts of Dallas Buyer Club (**DBC**) to obtain the names and addresses of the account holders whose internet connections were allegedly used to share the DBC movie online. The film makers have also brought action in the United States of America. This article looks at recent developments in both the US and Australia and the concerns expressed by Courts in both jurisdictions about DBC's conduct of the litigation.

BACKGROUND

The Federal Court of Australia has expressed concern about how DBC intends to use the contact details once obtained. It has imposed strict limitations on what DBC can demand from account holders in its pre-litigation correspondence, to avoid 'speculative invoicing'. Speculative invoicing is the name given to the practice of demanding alleged infringers pay an amount substantially higher than could reasonably be expected to be awarded in an action for copyright infringement, in exchange for a promise not to sue. The Court has refused to provide the account holder details to DBC until it receives appropriate undertakings from DBC and a surety of \$600,000 to ensure compliance.

A recent US District Court decision has revealed that the US court has similar concerns about DBC's approach to dealing with litigants there.¹

THE US LITIGATION

In Australia, the procedure to obtain the details of personal details of account holders is to seek preliminary discovery of the names and addresses from the ISP in a separate proceeding before bringing an action against the infringers identified. In the United States the procedural equivalent is to file 'John Doe' litigation. The US procedure allows litigation to be commenced against an unknown and unnamed defendant. After the litigation has been commenced the plaintiff can issue a subpoena to the relevant ISP to obtain the names and addresses of the account holders. Once identified the complaint is amended to replace the Joe Doe with a named defendant.

DBC has brought 13 cases with between 10 and 39 Joe Doe defendants in each. Having obtained the contact details of the account holders, DBC then proceeded to make contact with some of them to request assistance in identifying the actual infringer. The contact person associated with 16 of accounts either failed to respond or refused to cooperate. DBC sought leave to subpoena depositions from the 16 contacts.

The decision makes plain the Court's frustration with the failure of DBC to amend the Joe Doe complaint to name the account holders identified. DBC's reticence to proceed with further steps in the litigation has been interpreted as implying *'that Plaintiff is not actually interested in bringing these cases to conclusion on their merits and is instead trying to use these proceedings to leverage settlements out of unidentified Doe defendants through the threat of Court order'*.

Accordingly, the Court not only refused leave to issue the requested subpoenas but it made orders requiring DBC to file an amended complaint with only named defendants within 60 days and then to seek default judgment against any defaulting defendant within a further 60 days.

Reading between the lines, the Court appears to believe that DBC will be awarded a lower amount on default judgment than it hopes to obtain through pre-litigation demands to the alleged infringers. The Court appears anxious to ensure DBC cannot use the threat of litigation to extract more from the defendants than it could obtain through the litigation. This mirrors closely the concerns of the Judge in Australia.

THE AUSTRALIAN LITIGATION CONTINUES

Since we last reported, DBC has made a further attempt to gain access to account holder details in Australia. Rather than providing the full security of \$600,000, DBC has proposed that it give the undertakings² with a surety of \$60,000, in exchange for access to a portion³ of the account holders' details.

It remains to be seen if the Judge will be persuaded that a potential penalty of \$60,000 will be enough to ensure DBC adheres to the undertakings sought. It might well be thought that the figure of \$600,000 was picked so as to act as a serious deterrent and that the level of deterrence required is not necessarily proportional to the number of account holders identified. Media reports suggest that his Honour expressed some scepticism to DBC's proposal at the most recent directions hearing.⁴

DBC's application is set to be heard on 9 December 2015.

ENDNOTES

1. United States District Court for the Western District of Washington at Seattle, DBC v Does 1-28, order dated 29 October 2015.
2. The exact terms of the undertakings being offered are currently confidential.
3. The number of account holders to be identified is currently confidential, it is assumed they are seeking access to details of 10% of the subscribers.
4. <http://www.computerworld.com.au/article/587973/dallas-buyers-club-stoush-returns-court/>.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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