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Calculation of Damages for Copyright Infringement Arising from Peer to Peer Sharing

The term "peer-to-peer (abbreviated frequently to "P2P") file sharing" refers to the online reproduction and communication of digital content using P2P networking technology.

This technology allows users to access and share content files such as books, music, movies, and games using a P2P software program that searches for such content from other computers connected on the P2P network. The nodes (peers) of such networks are end-user computers and distribution servers, rather than one single provisionary source. P2P file sharing technology has evolved through several stages from the earlier iterations like Napster, to those currently popular, like BitTorrent.

When proprietary media content is sourced for and downloaded on a PC through a P2P network, theoretically, the downloader would have committed a few possible acts of copyright infringement simply from effecting a single download, including (without limitation) reproduction of the content without the consent of the copyright owner into the hard drive of his PC.

At the same time, because a downloader would automatically become a "source" node for other users of the network, he would, by virtue of the download, contemporaneously, also (most times unconsciously), become a provider of infringing material, giving rise to a further possible claim in damages against him, this time for communicating the work to the public and authorising further downloads downstream.

In line with the rise of P2P technology are technologies which now allow copyright owners to track not only the IP addresses of downloaders; but also (as is claimed) the number of times downloads by other users down the stream have been facilitated by the original downloader's download.

This has led to a perfect legal storm.

The proliferation of copyright infringements arising from the ease by which reproductions and communications to the public may be effected through P2P networks have led to lawsuits being brought against downloaders and massive awards for damages by courts in some jurisdictions.

These oversized awards have led to a backlash against copyright owners now seen to be punishing infringers claiming "innocence". Infringers clearly wish not to be paying monies even if they acknowledge that their actions are illegal.

In this regard, with reference to such a system, the Federal Court of Australia in the case of Dallas Buyers Club LLC v. iiNet Limited [2015] FCA 317, had in its judgement, at 30, held

"…I do not regard as fanciful the proposition that end-users sharing movies on-line using BitTorrent are infringing the copyright in these movies. Indeed, if there is anything fanciful about this, it is the proposition that they are not."

If liability on the part of a home infringer is accepted, what exactly would be the damages payable for such infringement?

Capitol Records, Inc. v. Thomas-Rasset was the first file-sharing copyright infringement lawsuit in the United States brought by major record labels to be tried before a jury.

The defendant, Jammie Thomas-Rasset, was found liable to the plaintiff record company for making 24 songs available to the public for free on the Kazaa file sharing service and ordered to pay $220,000.

Before filing suit, Capitol Records offered to settle for $5,000, but Thomas-Rasset declined. The ultimate damage order came after several trials and appeals in 2007-2013. ➔

Samuel Seow discusses the difficulty in the calcuation of P2P copyright infringement cases

The damage award at one stage reached $1,920,000.

The concept of compensation in the form of damages paid to copyright owners for infringements have long been a mainstay.

However, with the technological advancement of the globalising world, including the proliferation of P2P technologies, the calculation of such damages are also taking on the complexion and complexities of a globalisation effect.

This has led to damages awarded in such cases to be potentially massive, despite being based on clear statutory provisions enacted to address the issue, during a simpler time where P2P forms of reproduction and communication did not yet exist.

In Singapore, Section 119(2) of the Copyright Act (Cap. 63) provides for specific remedies regarding copyright infringement cases.

"Subject to the provisions of this Act, in an action for an infringement of copyright, the types of relief that the court may grant include the following:

(a) an injunction (subject to such terms, if any, as the court thinks fit);

(b) damages; or

(c) an account of profits;

(d) where the plaintiff has elected for an award of statutory damages in lieu of damages or an account of profits, statutory damages of —

(i) not more than $10,000 for each work or subject-matter in respect of which the copyright has been infringed; but

(ii) not more than $200,000 in the aggregate, unless the plaintiff proves that his actual loss from such infringement exceeds $200,000."

The Section thus presents to the copyright owner two mutually exclusive broad categories of damages; damages/account of profits based on losses; or pre-determined statutory damages. Nonetheless, one would note that, as stated on the Intellectual Property Office of Singapore's website:

"In determining the amount of statutory damages, the Court is to consider these factors:

- nature and purpose of the infringing act, including whether the infringing act was of a commercial nature or otherwise;
- flagrancy of infringement;
- if the act was done in bad faith;
- any loss suffered or likely to be suffered by the copyright owner;
- any benefit shown to have accrued to the defendant;
- conduct of both parties before and during proceedings;
- the need to deter similar instances of infringement; and
- all other relevant matters."

(all emphases in all quotations herein ours)

Extrapolating from the above, it is then important, for the purposes of investigations of infringing activity and for the determination of compensation, that the copyright owners in P2P infringement cases can determine with sufficient certainty the number of days a file has been uploaded by a particular user as well as the average numer of downloaders the user had made the work available to per day (on the average).

In fact, this proposition of infringement based on the end-users

sharing the infringing material online appear fairly consistently. Keeping in mind that this form of infringement ignores geographical borders and general physical restrictions (besides the Internet's limitation in the respective jurisdiction), its reach is almost limitless.

Accordingly, the damages flowing from such infringement should, in line with case law, take an escalating domino effect which is reflected, inter alia, in the following materials:

Halsbury's Laws of England vol 9 (Butterworths 4 Ed., at 612)

"In an action for infringement of copyright it is not necessary to give proof of actual damage; the damages are at large"

The learned author went on to elaborate that the damages assessed may include,

(a) the amount which would have been received by the plaintiff if he had himself been able to sell the copies sold by the defendant;

(b) a substantial sum for injury to trade by reason of the fact that the defendant's prices were lower than those usually charged by the plaintiff;

(c) the profit which the plaintiff would have made; and

(d) the licence fee that he would have charged.

Dootson Investment Corp v. Highway Video Pte Ltd [1997] SGHC 314

In this case, the learned High Court had approved of the foregoing stated in Halsbury's, and had further held the following:

"In cases where damages are in the nature of loss of profits it is necessary to plead and prove them and prove them; not so when they are at large. In the latter case one of the principal underlying purposes of damages is to send the message "tort does not pay". In copyright infringement cases the message therefore is "piracy does not pay".

and

"When a laserdisc is rented out many times on each occasion several persons can view it. Seen in this light there is a snowball effect on the damage done by pirated copies".

Based on the foregoing words of the learned G P Selvam J., it is clear that the snowball effect, when applied to the P2P sharing networks presently under consideration, would be much greater that that occasioned by a video rental store renting out pirated material. In that case, the Court had regard to the snowball effect multiplied by the "loss of profits" to the plaintiff.

In the article, Damages in Intellectual Property Rights, European Observatory on Counterfeiting & Piracy, the learned authors of the work had stated in some detail (at p. 2) the purpose of damage and

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While the authorities address the issue that copyright damages not only compensate for the rights infringed but should also impose additional punishment so as to deprive unjust enrichment, it fails to show how such damages are to be calculated in the circumstances where such damages have to mimic free-market transactions in an environment whereby such free-market have already been disrupted (or may not even be contemplated).

In short, the calculation of damages under the "profit lost per download" type of formula is the utopia which everyone appear to know but no one knows how to reach.

The calculation not only have to internalise the positive externalities, such as the "snowball effect", the royalties or fees correctly due or the far reaching damages into the industry, but also serve as a deterrence on infringement. These are all intangibles which values are often the subject of contention.

Indeed, the Intellectual Property Office of Singapore had stated in its Copyright Notice Number 1/2015 at page 4 thereof that "[t]o-date, no court cases in Singapore have considered how to calculate statutory damages in the context of downloading or sharing a movie via a peer-to-peer network".

It is submitted that this issue of dmamages accruing to the copyright holder requires clear and accurate pronouncement of the legislature.

Barring the complete removal of the concept of statutory damages, the alternatives to provide for a fixed or narrow-range of pre-established damages (or calculations) for specific types of infringement, such as playing music on a jukebox without paying the statutory license fees, or peer-to-peer filesharing of music, or movies, need to be seriously contemplated.

It would not defeat the purpose to require a plaintiff seeking more than the statutory minimum to pass a threshold level of proof to establish that actual economic losses, though difficult to quantify with precision, nevertheless qualify for a statutory damages claim.

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Information Technology & Communications

The growing interaction among smart devices (fixed and mobile), as well as their ability to operate and send information across multiple platforms and countries are impacting all business sectors. Digital convergence has redefined many innovation models and has resulted in new industries emerging and in the dramatic increase of productivity of human resources.

Baker & McKenzie understands these challenges as well as the rewards of keeping a profitable and innovative stance in times of rapid change. We were the first global law firm to offer services specific to the IT and communications industries and with over 580 lawyers in 47 countries, we continue operating the farthest reaching and most comprehensive IT and communications practice in the world. In Mexico, our solid team of IT and communications lawyers assist clients in a vast range of transactional, regulatory and commercial matters. By assisting in defining new ways to comply with laws and regulations and setting forth new contractual standards for these industries, we often inspire the creation of policies and laws that transform the Mexican legal system.

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