

Ex 2

**FEDERAL COURT OF AUSTRALIA**

**EXHIBIT/MF No. 2**

Judge: **Perram J** Date: 18/6/15

DBC v. iiNet

File No. 1501051 of 2014

Return to:

(party/non-party, if produced on subpoena)  
Associate: *[Signature]*

[insert account holder's details]

Dear [insert name of account holder]

XX

We act for Dallas Buyers Club, LLC (**DBC**) and Voltage Pictures LLC (**Voltage**).

DBC is the copyright owner of the film Dallas Buyers Club (**Film**). Voltage is the exclusive licensee and sales agent of the Film.

**Piracy**

Piracy is a term used to refer to the illegal and unauthorised copying, distribution and selling of another's works in copyright. A common example of piracy is the use of the BitTorrent Network to upload and download copyrighted films without the copyright owners' consent. This is because the uploading and downloading of these films necessarily involves the illegal copying and distribution of such films.

There are substantial costs of producing films which are incurred from the outset of production and are not recuperated until such time as a film is exploited and made available to the public. The film industry, including DBC and Voltage, rely heavily on consumer sales derived from the box office, DVD/Blu-rays, TV, Video on demand, legal downloads and streaming to recoup costs which have been incurred in producing a film, including the payment of its staff and other service providers.

Independent film makers and producers, such as DBC and Voltage, rely particularly heavily on consumer sales from DVD/Blu-rays, TV, Video on demand and legal downloads, as they do not recoup the same amount of costs from the box office as larger film producers.

Piracy of the Film in Australia is significant and widespread. As a result of this piracy of the Film, DBC and Voltage have experienced a significant reduction in consumer sales and have suffered significant loss and damage.

DBC and Voltage consider the level of piracy of the Film to be egregious and, taking into account the profound impact of piracy on them, intend to take legal proceedings against any person who has engaged in piracy of the Film.

We are writing to you because an IP address linked to your internet account with [insert] was used to illegally upload the Film.

**Investigations**

DBC and Voltage instructed Maverik Eye UG (**Maverik Eye**), which operates a software program that conducts investigations into the unauthorised uploading of copyrighted works both in Australia and overseas, including monitoring of the BitTorrent file distribution network (**BitTorrent Network**).

These investigations have occurred over the past year or so.

Maverik Eye conducts these investigations by using software which downloads the Film from users who make the Film illegally available over the BitTorrent Network.

As a result of these investigations, Maverik Eye has identified a number of Internet Protocol addresses (IP Addresses) that have been used to illegally upload the Film for other users of the BitTorrent Network to illegally download. Maverik Eye has identified the IP Addresses from where pirates are illegally uploading the Film.

An IP Address is a unique number sequence that can identify the 'address' of an account holder who has access to the internet via, and an account with, an internet service provider (ISP).

### **The BitTorrent Network**

The BitTorrent Network is a sophisticated peer-to-peer file sharing network which is often used by people to distribute movies and music across the internet without payment to the copyright owner for the relevant work. The BitTorrent Network cannot be 'accidentally' accessed and operated. A person using the BitTorrent Network must actively download software and take active steps to become a pirate on the BitTorrent Network.

A pirate using the BitTorrent Network:

- (a) downloads specialised software;
- (b) installs the software on his or her computer;
- (c) runs the software;
- (d) searches for movies or music;
- (e) downloads the movie or music; and
- (f) in some cases makes available movies and music on his or her own computer for downloading by others on the BitTorrent Network (i.e. uploading).

A pirate is aware of the steps involved in obtaining movies and music over the BitTorrent Network and is aware that copyright owners have not authorised those steps.

DBC and Voltage consider that the accessing and use of the BitTorrent Network is a planned and calculated means by which people knowingly obtain movies and music illegally.

Legal means of obtaining movie and music content is available from many sources, including in cinemas, television, on-line (such as on iTunes) and in retail stores.

### **Maverik Eye's evidence**

Maverik Eye has identified people who have uploaded the Film on the BitTorrent Network. Maverik Eye has identified that the [IP Address/IP Addresses] which [was/were] allocated to you by [insert ISP] [was/were] used by a pirate to breach the copyright in the Film across the BitTorrent Network.

Maverik Eye has detected that on the following date(s) and times the following IP [Address/es] was/were used to upload the Film.

[insert date, time, film and IP addresses] (Infringing IP [Address/es]).

### **Why are we writing to you?**

DBC and Voltage wrote to [insert ISP] seeking information which would identify the personal details of the account holder in respect of the Infringing IP [Address/es]. [insert ISP] refused to provide this information unless it was required to do so by a Court order.

On 6 May 2015, DBC and Voltage obtained an order from the Federal Court of Australia that [insert ISP] provide the name and address of the account holder in respect of the IP Address/es [insert IP Address/es]. The Orders made by the Court are enclosed with this letter.

[insert ISP] identified you as the account holder of the Infringing IP [Address/es].

The Court's order for [insert ISP] to disclose your contact information does not mean that the Court has considered any claims by DBC and Voltage in respect of Copyright Infringement (as defined below) or that there has been any determination by the Court in respect of your potential liability for Copyright Infringement.

You can obtain a copy of the Court's judgment by going to the Court's website located at [www.fedcourt.gov.au](http://www.fedcourt.gov.au) and clicking on "Find a Judgment" under the heading "Quick Links", typing "Dallas Buyers Club" into the "Case Name" cell and clicking on the judgment dated 7 April 2015 in the search results.

### **Relevant law and damages**

Pursuant to sections 86 and 101 of the *Copyright Act 1968* (Cth), copyright is infringed if a person who is not the owner of the copyright and without the licence of the owner of the copyright does an act including:

- (a) making copies of the whole or a substantial part of copyrighted works;
- (b) making copyrighted works available online to other persons for viewing or copying; and/or
- (c) electronically transmitting copyrighted works to other persons

(together **Copyright Infringement**).

Copyright owners and exclusive licensees are entitled to commence court proceedings in respect of Copyright Infringement. If Copyright Infringement is established, the Court can order that the person or persons responsible for the Copyright Infringement pay such damages to the copyright owners and/or their exclusive licensees as it considers appropriate in the circumstances, including additional damages.

We set out below the classes of damages that DBC and Voltage intend to pursue.

Damages for uploading and downloading the Film

DBC and Voltage allege that the uploading of the Film amounts to Copyright Infringement for which DBC and Voltage are entitled to seek the payment of damages (Piracy).

Piracy includes the unauthorised distribution of the Film. Voltage has entered into exclusive distribution agreements in respect of the Film both in Australia and overseas. Piracy negatively affects the value of those agreements and any future agreements which DBC and/or Voltage may enter into in respect of the Film and/or future productions. As such, DBC and Voltage are entitled to seek the payment of damages for Piracy.

It can also be inferred from Piracy that the Film was downloaded without consent from DBC before being subsequently made available for uploading. The unauthorised downloading of the Film also constitutes Copyright Infringement for which DBC and Voltage are entitled to damages.

Additional damages

DBC and Voltage are also entitled to seek additional damages against a pirate pursuant to section 115(4) of the Copyright Act.

The circumstances that a Court may have regard to in assessing additional damages include:

- (a) the flagrancy of the infringement;
- (b) the need to deter similar infringements of copyright;
- (c) the conduct of the person who infringed copyright after the act constituting the infringement or, if relevant, after that person was informed that the person had allegedly infringed copyright; and
- (d) any benefit shown to have accrued to the person by reason of the infringement.

Out of pocket expenses

DBC and Voltage are out of pocket for legal costs which they incurred in obtaining your name and address from [insert ISP]. These costs form part of the damage suffered by DBC and Voltage to which they are also entitled to claim from any pirate.

### **What does this mean?**

We have reason to believe that you are, as the account holder in respect of the Infringing IP [Address/es], or another person with access to the IP [Address/es] allocated to you is, responsible for engaging in Piracy.

DBC and Voltage have the right to commence proceedings in the Federal Court of Australia against any party that it alleges has engaged in Piracy.

Prior to commencing proceedings, DBC and Voltage are obliged to take genuine steps to attempt to resolve a dispute. This obligation is set out in the *Civil Dispute Resolution Act 2011* (Cth).

Such steps can involve notifying the other person of the issues that are or may be in dispute, offering to discuss them and providing relevant information and documents to help them understand the issues involved and how the dispute might be resolved.

As such, if there is anything in this letter that you do not understand, or you require further information about Piracy referred to in this letter, please let us know. Alternatively, we suggest that you obtain independent legal advice in respect of this letter.

### **What if you deny the Infringing Conduct?**

If you deny engaging in Piracy, then please let us know the basis on which you deny it by providing a written response to this letter. In this response, you should include the details of the person whom you believe engaged in Piracy, including their full name, address, phone number and email address. We request that you provide a copy of this letter to that person.

If the person whom you believe to have engaged in Piracy is under 18 years of age, then please:

1. provide us with the full name and address of that person;
2. confirm that that person is under 18 years of age;
3. confirm whether you are the parent or guardian of that person; and
4. whether you are authorised to engage with us on behalf of that person in respect of the matters set out in this letter.

If you deny engaging in Piracy and do not provide details of another person who you suspect did, then DBC and Voltage may compel this information from you by commencing Court proceedings against you for preliminary discovery by seeking an order that you attend Court to answer questions about Piracy and deliver up your computer for analysis to verify any denials you make.

[When the letter is addressed to a company] You should be aware that there are provisions in the *Privacy Act 1988* (Cth) (*Privacy Act*) which prohibit the disclosure of personal information in some circumstances. If you are concerned that disclosure by you of the details of the person whom you believe engaged in Piracy may infringe the Privacy Act, then we suggest you seek legal advice.

### **What if you agree that you engaged in Piracy?**

If you admit that you engaged in Piracy, DBC and Voltage are prepared to settle the dispute on the following basis.

1. You provide an undertaking not to engage in Piracy in respect of the Film, or permit or authorise others to do so, in the form set out in Annexure "A" to this letter.
2. You undertake to delete any copies of the Film from any hard drive or operating system and any copies saved to external storage devices, other than any copyrighted works owned by DBC and/or Voltage that you have obtained legitimately. We also suggest you stop making any other copyrighted works available online across the BitTorrent Network.
3. You contact us in writing at [insert email address] to negotiate a settlement with DBC and Voltage. Alternatively, if you would prefer to speak with someone directly, then you may call [insert telephone number] to negotiate a settlement with DBC and Voltage.

### **Next Steps**

If you admit that you engaged in Piracy and no settlement can be reached, then DBC and Voltage may commence proceedings against you for Copyright Infringement. If Court action is taken against you in respect of Piracy, then DBC and Voltage may be entitled to seek the following relief from the Court:

1. an injunction to restrain you from further engaging in Piracy;
2. a declaration that you have breached the *Copyright Act 1968* (Cth);
3. damages for both the uploading and downloading of the Film;
4. damages for the legal costs incurred by DBC and Voltage in obtaining your account holder information from [insert ISP] for which they are out of pocket;
5. additional damages; and
6. costs of taking action against you.

Unless you call the above telephone number to speak with someone directly about negotiating a settlement, then please respond to this letter, in writing, to [insert email address], **within 28 days from the date on the front page of this letter**. If you do not, then court action may be commenced against you without further notice.

Yours sincerely

**Annexure "A"**

**UNDERTAKING OF [insert] to DALLAS BUYERS CLUB, LLC AND VOLTAGE PICTURES LLC**

In consideration of the Dallas Buyers Club, LLC and Voltage Pictures LLC refraining from taking action against [~~"me" or name of company~~], [~~"I" or name of company~~], [~~insert name~~]/[~~insert name of company~~] agree[~~s~~] and undertake[~~s~~] to Dallas Buyers Club, LLC and Voltage Pictures LLC as follows.

1. ~~I/company~~ will immediately delete all copies of the film Dallas Buyers Club from ~~my/company's~~ hard drive and operating system and any copies saved to external storage devices, other than any copies of Dallas Buyers Club that ~~I/company~~ have/has obtained legitimately.
2. ~~I/company~~ will refrain from doing any act which amounts to copyright infringement in respect of the Dallas Buyers Club.

~~Or~~

3. [~~insert name of company~~], whether by itself, its directors, servants, agents, employees, will refrain from doing any act which amounts to copyright infringement in respect of the Dallas Buyers Club.

Date:

Signed by [insert name]

in the presence of:

.....

Signature of witness

.....

Signature of [insert name]

.....

Name of witness (print)

OR

Executed by [insert name of company] in  
accordance with s 127 of the  
*Corporations Act 2001* (Cth):

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Signature of director

.....

Signature of director/company secretary

.....

Name of director (print)

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Name of director/company secretary (print)