

DECEMBER 2007 / JANUARY 2008 Singapore: Controversy over ISP disclosure decisions

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Odex Pte Ltd, a local *anime* distributor in Singapore, filed separate suits against the local Internet Service Providers (ISPs) SingNet, Starhub and Pacific Internet, requiring them to reveal information on the identities of customers alleged to have illegally downloaded popular Japanese anime titles that Odex imported. Odex alleged that a substantial number of illegal downloads had been made in Singapore over the past 10 months, causing their sales to plunge dramatically.

Odex had initially succeeded in obtaining court orders to have both SingNet and Starhub disclose the identities of about more than one thousand subscribers to them, who allegedly downloaded such illegal content. However, in a surprising twist to the saga, Judge Ernest Lau recently threw out Odex's request to the third ISP, Pacific Internet, to divulge the names of their subscribers.

So the question was why Pacific Internet succeeded in resisting the court application, while SingNet and Starhub were unable to do so?

From a reading of the judgment by the Judge, it appears that there were several reasons. First, it is noted that different judges had ruled in all three cases, and although the arguments of the other two cases were not disclosed to the public, the Judge revealed that, in the case of SingNet, the company has consented to the request. Interestingly, and in the face of public queries, this consent has been later denied by SingNet. The Judge noted that the issues now raised by Pacific Internet were never fully argued by Starhub.

In his judgment, the Judge found that firstly, Odex had no clear legal standing to act against the alleged illegal downloaders because it was just a sub-licensee, and not the copyright owner or exclusive licensee for most of the *anime* titles it distributed in Singapore. Under the Singapore Copyright Act, only the copyright owners or an exclusive licensee can take legal action. Odex was found to be the exclusive licensee of only one *anime* video titled *Mobile Suit Gundam Seed*. Even in this case, the Judge found that Odex still failed to satisfy the legal requirement of showing an extremely strong case.

Interestingly, the Judge compared the request for an ISP's subscriber information to what is known as an Anton Piller order. An Anton Piller order is a court order that provides for the right to search premises, halt all activities, and seize all incriminating evidence found. The Judge also mentioned in his decision that because of its "draconian" nature, such an order is only granted when the plaintiff can prove it had an "extremely strong *prima facie* case of a civil cause of action". The Judge therefore required a similar threshold in this case to protect the public interests.

Further, the Judge noted that Odex's explanation of how it identified the downloaders fell short of what was required. Odex's claims of engaging a US company called BayTSP to obtain information on the illegal downloads were found to be not fully substantiated. Odex had provided no proof that it had engaged the services of BayTSP, and neither did BayTSP give evidence in favour of Odex.

However, the Judge did go on to say that the protection of intellectual property rights is of paramount importance to Singapore and that if a clear case of infringement is proven, copyright owners and their exclusive licensees can certainly expect pre-action assistance from the courts.

As expected, Odex has since filed an appeal against Judge Lau's decision. We therefore await the next decision of the Singapore Courts on this matter, to determine how this saga will end.



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