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ISP Not Liable for its Users' Copyright Infringement - landmark common sense decision

The decision in the much anticipated Roadshow *Films Pty Ltd v iiNet Limited (No 3)* [2010] FCA 24 was handed down on 4 February 2010 to much fanfare, with internet service providers (**ISPs**) and users applauding Justice Cowdroy's rational, coherent decision. The case concerned the potential liability of an ISP for the copyright infringement of its users, in particular whether iiNet had "authorised" the infringement. It was found that the ISP was not responsible for the copyright infringement of its users (occurring while the users were using the ISP's internet service), nor had it "authorised" the infringement.

Background

In November 2008, 34 major film studios and their Australian licensees instituted proceedings against iiNet, Australia's third largest ISP, seeking declarations that iiNet had infringed the copyright in films and television programs owned by the applicants by authorising their subscribed users to make copies of the films and communicate the films to the public, pursuant to s101 of the *Copyright Act 1968* (**Act**). The films included *I am Legend, Ocean's 13, Shooter, Atonement, Batman Begins* and *Blood Diamond*, to name a few. The Australian Federation Against Copyright Theft (**AFACT**) had conducted investigations into the alleged infringements and was, on behalf of the applicants, prominent in the conduct of the claim.

AFACT investigated the alleged infringements by means of the 'BitTorrent' protocol, a peer to peer file-sharing system employed by users to download and share materials over the internet. The BitTorrent system is a highly efficient and decentralised means of distributing data (both legitimate and that which infringes the copyright of others) across the internet. This engaging summary was used by Cowdroy J to describe the technology:

> *"To use the rather colourful imagery that internet piracy conjures up in a highly imperfect analogy, the file being shared in the swarm is the*

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treasure, the BitTorrent client is the ship, the torrent file is the treasure map, The Pirate Bay provides treasure maps free of charge and the tracker is the wise old man that needs to be consulted to understand the treasure map."

It is important to note that a film or program downloaded via the BitTorrent protocol is broken into various pieces that are downloaded together and, once they have all been downloaded, the whole film or program can be viewed.

During the course of its investigations, AFACT sent regular notices to iiNet setting out each instance of a user allegedly infringing the applicant's copyright via the BitTorrent system. AFACT demanded that iiNet take action to prevent the infringements from occurring by sending warnings to the alleged infringing subscribers. If the warning was not heeded, then AFACT expected iiNet to suspend the internet service of the user. iiNet did not take any action in relation to these notices.

Primary Infringement

Before it could be determined whether iiNet had authorised any copyright infringement, it first had to be found that iiNet's users had in fact infringed the copyright of the applicants (primary infringement). iiNet conceded that there had been infringement by its users, but the extent of the infringement needed to be ascertained, namely how many times each user had infringed. Cowdroy J noted:

> *"BitTorrent use is an ongoing process of communication for as long as one wishes to participate. Therefore, the term 'electronically transmit' cannot sensibly be seen in that context as anything other than a single ongoing process, even if the iiNet user transmits more than 100% of the film back to the swarm."*

Accordingly, it was found that each iiNet user "made available online" and "electronically transmitted" each film only once. The applicants were found to have proven primary infringement by iiNet's users.

Authorisation

The court considered a number of previous decisions on the authorisation of copyright, namely *Moorhouse*[1], *Kazaa*[2] and *Cooper*[3]. The court noted in *Moorhouse* that there were three issues to consider when investigating an alleged authorisation of infringement, namely the means, the knowledge of the infringement and the power to control. In *Moorhouse*, the University provided the means (books and copying machines in the library), had the knowledge of the infringement

(reasonable grounds to suspect that some infringements would be made if adequate precautions were not taken) and had the power to control both the use of the books and the use of the machines. In *Moorhouse*, it was important that both the books and the copier were necessary to the finding of authorisation – and that it was the provision of the copier in a library.

Justice Cowdroy stated that "context is all important in authorisation proceedings" and distinguished the present case from that of Cooper:

> *"While the liability of Comcen for copyright infringement in Cooper suggests that it is possible for an ISP to authorise infringement, it is important to observe the very specific factual circumstances in which authorisation was found. Comcen has directly dealt with, and assisted in the creation of, the particular 'means' of infringement (the website), and had even entered into an agreement with its owner to provide for hosting of that website free of charge."*

Accordingly, Cowdroy J found:

> *"The Court finds that it is not [iiNet], but rather it is the use of the BitTorrent system as a whole which is the 'means' by which the applicants' copyright has been infringed. [iiNet's] internet service, by itself, did not result in copyright infringement. It is correct that, absent such a service, the infringements could not have taken place. But it is equally true that more was required to effect the infringements, being the BitTorrent system over which [iiNet] had no control...There is no evidence before this Court that [iiNet] has any connection whatsoever with any part of the BitTorrent system."*

Finally, Cowdroy J considered that warning users and terminating user

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1 *Moorhouse & Angus and Robertson (Publishers) Pty Ltd v University of New South Wales* (1974) 3 ALR 1

2 *Universal Music Australia Pty Ltd and Other* (2005) 150 FCR 1

3 *Cooper v Universal Music Australia Pty Ltd and Others* (2006) 156 FCR 380

accounts on the basis of AFACT warning notices was not a reasonable step for iiNet to take to prevent infringements occurring, and therefore it was not incumbent on iiNet to stop the infringements. In concluding the authorisation issue, the court said:

> *"The Court accepts [iiNet] had knowledge of the infringements occurring. The Court accepts that it would be possible for the respondent to stop the infringements occurring. However, the Court has found as a matter of fact that [iiNet] did not authorise the infringement committed by the iiNet users".*

Other issues

Given the court found that iiNet had not authorised copyright infringement, it did not need to determine various other aspects of the applicant's claim. It should be noted, however, that the court still considered the 'safe harbour' provisions of the Act and considered that, if the court had erred in its finding regarding authorisation, the court would find that iiNet had adopted and implemented a reasonable repeat infringer policy and had therefore satisfied the safe harbour provisions. Defences under the Telco Act were also considered, as was s112E of the Act.

Conclusion

Overall, the court found that iiNet did not authorise copyright infringement, as "the mere provision of access to the internet is not the 'means' of infringement". Cowdroy J recognised that the applicants would be disappointed, given the evidence established that copyright infringement of the applicants' films was occurring on a large scale. However, he went on to say that "... such fact does not necessitate or compel, and can never necessitate or compel, a finding of authorisation, merely because it is felt that 'something must be done' to stop the infringements...iiNet is not responsible if an iiNet user chooses to make use of that [BitTorrent] system to bring about copyright infringement. The law recognises no positive obligation on any person to protect the copyright of another". The applicant studios were ordered to pay iiNet's costs in the matter.

ISPs and users have lauded this decision, yet copyright owners have been left scratching their heads. Now that the authorisation of infringement route has failed in relation to ISPs like iiNet (at least until the decision is overturned or there is a change in legislation), effectively copyright owners are left to protect their copyright themselves.

The court has provided us with a clear, easy to read decision for now, but the copyright war is far from over – we must now take stock and wait for the next chapter. Particularly in light of the fact that the applicants lodged an appeal against Justice Cowdroy's decision on 25 February 2010.

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