

ALERT

23 APRIL 2012

Roadshow Films Pty Ltd v iiNet Limited - High Court decision handed down

A group of thirty four Australian and US film and television companies (Studios) alleged that an internet service provider (ISP), iiNet Limited (iiNet), authorised its customers' primary infringement of the Studios' copyright (with infringement occurring through the illegal downloading and sharing content via BitTorrent or peer-to-peer networks). The High Court held that the conduct of iiNet did not constitute authorisation of its customers' acts of infringement.

Case summary

The Studios claimed that iiNet had received credible information of customers' copyright infringement in the form of notices from the Australian Federation Against Copyright Theft (AFACT) and had failed to enforce the terms of its agreements with the customers through a system of warnings, suspensions and terminations. iiNet was therefore accused of having 'authorised' the infringing activity.

The High Court held that the information contained in notices received from AFACT did not provide iiNet with adequate information to enable iiNet to send warning notices to individual customers containing threats of suspension or termination of the service. As such, iiNet's inactivity or apparent 'indifference' following receipt of the AFACT notices was not unreasonable. The stretch from 'indifference' to 'authorisation' of an act of infringement of copyright was too great.

Even if it were possible to show that, as an ISP, iiNet had enabled infringement to occur, the court found that iiNet's technical ability to prevent infringement was limited. iiNet had no direct power to prevent its customers from using the BitTorrent system to infringe copyright in the Studios' films or to block access to the Studios' films which were made available online.



ALERT

Accordingly, iiNet did not 'authorise' infringement under the *Copyright Act 1968*. In reaching this conclusion, the High Court noted that the only practical course of action for iiNet would have been to terminate its contractual relationship with the customer (by ceasing to provide a connection to the internet). This would create several further issues, including the cost to the ISP of administering warnings and terminations, the lack of a genuine resolution of the infringement problem due to customers being able simply to engage alternative ISPs and wrongful termination exposing ISPs to liability.

How does the decision affect copyright owners?

Although the Studios failed on this occasion to show that the ISP had 'authorised' infringement, the decision leaves open

the possibility that, given different circumstances, the ISP could be liable.

Copyright owners will need to provide adequate information to ISPs about the allegedly infringing conduct. In the immediate future they will need to work with ISPs to pinpoint infringing activity with greater specificity. Such negotiations will need to involve agreements regarding who bears the cost of sending out warning letters and monitoring user conduct. The copyright owners will also need to indemnify the ISPs in case they get it wrong and terminate an account which has not actually been engaging in infringing conduct.

Copyright owners should also examine why some Australians resort to downloading films or TV series illegally. For example, the motivation may be to obtain access to overseas content that is not yet available here. Arguably, copyright owners could do more to embrace the online environment by modifying their business practices in favour of models that adopt file-sharing technologies to deliver content at competitive prices, accompanied by features that internet 'pirates' cannot offer.

How does the decision affect ISPs?

For now, ISPs are not 'authorising' infringement. However, in the future, technological advances may make it feasible for ISPs to monitor and control customers' activities and prevent internet users from making illegal downloads. If so, a failure to control activities could mean the ISP is deemed to have authorised the infringing conduct.

Also, if copyright owners improve the level of information contained in infringement notices, the courts may find that it is reasonable to expect the ISP to take action.

ISPs will need to be prepared in the future to collaborate with copyright holders to prevent infringing behaviour.

How does the decision affect Australian internet users?

For now, there is no immediate impact on the average internet user in Australia. The decision does serve as a reminder that the internet is not an entirely anonymous landscape, as many users presume it to be. In fact, as evidenced by the AFACT notices, illegal downloads may be monitored and IP addresses may be generally identifiable by copyright owners. These may then be passed on to the ISP, or indeed to the Australian Federal Police or the FBI depending on the scale of the problem. Internet users should not presume that they will always be able to get away with downloading content illegally.

What might happen in the future?

It will probably require a legislative change to compel ISPs to cooperate with copyright owners to prevent illegal downloads. If Australia's government moves in this direction, it will need to address a range of practical issues, such as:

- Is there technology available that can make it feasible for an ISP to monitor user activity and/or block access



to infringing content, without impinging on perfectly legal usage?

- Who will bear the cost of monitoring activity and sending out warning notices or terminating accounts?
- Will ISPs be indemnified against claims from customers who contest warning notices or termination?
- How will terminated customers be prevented from simply opening an account with a different ISP?
- Does the monitoring of customer activity and the sharing of information amount to a breach of privacy?

Authored by: **Tamsyn Hutchinson** and **David Moore**,
Cornwall Stodart

Want to republish any of this article?

If you would like to republish any part of this article in your staff newsletter or elsewhere please contact our Marketing team on
+61 3 9608 2168

Disclaimer

This Alert is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



For further information please contact:

David Moore, Special Counsel

Phone (direct) **+61 3 9608 2264**

Mobile **+61 488 310 103**

Email **d.moore@cornwalls.com.au**