

A Pyrrhic Victory For “Doing Squat”: A Short Critique Of The Full Court’s Decision In *Roadshow Films v iiNet*

Wen Hui Wu¹ reviews the Full Court of the Federal Court’s decision in *Roadshow Films v iiNet* and considers the interplay between copyright authorisation and the “safe harbour” provisions.

On 24 February 2011, the Full Court of the Federal Court handed down its keenly-anticipated decision in *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 (*iiNet*). A majority of the Full Court dismissed the film companies’ appeal from the trial judge’s decision that the internet service provider (*ISP*) iiNet was not liable for “authorising” copyright infringement by its users via the BitTorrent peer-to-peer network. However, as the conclusion to Justice Emmett’s reasons makes clear, the Full Court’s decision does not bring to an end the dispute between content owners and ISPs over online copyright infringement.²

This article will review and critique the Full Court’s decision in *iiNet*. First, it is necessary to review, briefly, the doctrine of authorisation in copyright infringement. Second, this article will survey their Honours’ reasons in *iiNet*. Third, this article will show that there is a confused interplay between the doctrine of authorisation and the “safe harbour” provisions for carriage service providers in Part V, Division 2AA of the *Copyright Act*. Lastly, the significance of the *iiNet* decision to online copyright infringement will be considered.

The doctrine of authorisation

The Australian doctrine of authorisation has been criticised as being “a litany of competing and contrasting considerations”,³ “built on shaky foundations”,⁴ “uncertain”⁵ and “shift[ing] the balance in copyright too far in favour of the owner’s rights”.⁶ Detailed studies of its “tortuous”⁷ development have been undertaken by Birchall, Naphthali, Giblin and Brennan.⁸

Section 13(2) of the *Copyright Act 1968* (Cth) (**Copyright Act**) confers upon a copyright owner the exclusive right to authorise another person to exercise the acts comprised in the copyright. A person infringes copyright if, not being the copyright owner and without the licence of the owner, that person does in Australia, or authorises the doing in Australia of, any act comprised in the copyright (see Sections 36(1) and 101(1)). Thus there are two types of copyright infringement: the doing of an infringing act (‘primary infringement’) and the authorising of the doing of a primary infringing act (‘authorisation’). It has been established that the two types of liability are distinct, actionable torts.⁹

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The High Court in *UNSW v Moorhouse* (1975) 133 CLR 1 (**Moorhouse**) adopted the definition of “authorise” in the *Oxford English Dictionary* – to “sanction, approve, countenance”.¹⁰ Liability may be found by omission – indifference may reach a degree from which authorisation may be inferred.¹¹ Two different approaches were posited in *Moorhouse*: Jacobs J’s approach, where there has been an express or implied invitation by the alleged authoriser to infringe, and Gibbs J’s approach, where the alleged authoriser con-

1 The author gives thanks to Michael Handler of UNSW Law School and Nic Suzor of QUT Law School. All errors and omissions are, of course, the author’s own.

2 *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 (*iiNet*), [274] (Emmett J).

3 *Roadshow v iiNet (No 3)* [2010] FCA 24, [358] (Cowdroy J).

4 Sydney Birchall, ‘A doctrine under pressure: The need for rationalisation of the doctrine of authorisation of infringement of copyright in Australia’ (2004) 15 *AIPJ* 227, 236.

5 Rebecca Giblin, ‘The uncertainties, baby: Hidden perils of Australia’s authorisation law’ (2009) 20 *AIPJ* 148.

6 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, [41] (Supreme Court of Canada).

7 *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, 285 (Gummow J) (*‘Hanimex’*).

8 Sydney Birchall, above n 4; Michael Naphthali, ‘Unauthorised: Some thoughts upon the doctrine of authorisation of copyright infringement in the peer-to-peer age’ (2005) 16 *AIPJ* 5; Rebecca Giblin, n 5; and David Brennan, ‘ISP Liability for Copyright Authorisation: The Trial Decision in *Roadshow Films v iiNet* Part One’ (2010) 28(4) *CLB* 1.

9 *Hanimex*, 284 (Gummow J), approved in *APRA v Jain* (1990) 26 FCR 53, 57 (Sheppard, Foster and Hill JJ). As a result, “authorises the doing of an act” in ss 36(1) and 101(1) is wider than “the exclusive right to authorise” in s 13(2), a controversy first recognised by Gummow J in *Hanimex*, 286, but, in light of the High Court’s decision in *UNSW v Moorhouse* (1975) 133 CLR 1 (**Moorhouse**), never satisfactorily resolved.

10 *Moorhouse* (1975) 133 CLR 1, 12 (Gibbs J) and 20-21 (Jacobs J, with whom McTiernan J agreed), citing *Falcon v Famous Players* [1926] 2 KB 474, 471 (Banks LJ), which in turn cited *Evans v E Hulton & Co Ltd* [1924] All ER 224 (Tomlin J). It is remarkable that the doctrine of authorisation has come to be defined by this all-encompassing “catchphrase”, which seems to have been largely determined by lexicographical choice from a number of meanings of the verb “authorise”. For example, if their Honours in *Moorhouse* had adopted an alternative definition in the *Oxford English Dictionary* (“to give legal or formal warrant to (a person) to do something: to empower, permit authoritatively”) or the *Macquarie Dictionary* definition (“to give authority or legal power to: empower (to do something); formally sanction (an act or proceeding)”), the doctrine may be very different to what it is now.

11 *Moorhouse*, 12 (Gibbs J) and 21 (Jacobs J, with whom McTiernan J agreed).

trolled the means by which infringement was committed, knew or had reason to suspect those means were likely to be used for infringement, and had failed to take reasonable steps to limit their use to legitimate purposes.¹²

In 2001, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) amendments inserted three statutory factors into the doctrine, set out in ss 36(1A) and 101(1A). Those provisions state that, in determining liability for authorisation, the factors that must be taken into account include:

while the Moorhouse principles continue to be relevant, their application is subject to any inconsistency with the statutory factors in s 101(1A)

- The extent (if any) of the alleged authoriser's power to prevent the doing of the infringing act;
- The nature of the relationship between the alleged authoriser and the primary infringer; and
- Whether the alleged authoriser took any (other)¹³ reasonable steps to prevent or avoid the doing of the act, including compliance with any relevant industry codes of practice.

The Full Court's reasoning in *iiNet*

The trial judge's decision, *Roadshow Films v iiNet (No 3)* (2010) 263 ALR 215, has been reviewed by Brennan in an earlier issue of this publication.¹⁴ At trial, Cowdroy J held iiNet was not liable for authorisation because the internet service provided by iiNet was not the "means of infringement", and that the true "means" was the use of the BitTorrent system, over which iiNet had no control.¹⁵ The trial judge further held that a warning and termination scheme suggested by the film companies was neither a "relevant" power to prevent infringement (s 101(1A)(a)),¹⁶ nor a reasonable step to take in the circumstances (s 101(1A)(c)).¹⁷

On appeal, the Full Court was divided on the primary issue of whether iiNet had "authorised" the copyright infringements by its users via the BitTorrent peer-to-peer system. The majority, Justices Emmett and Nicholas, narrowly concluded that iiNet had not.¹⁸

Justice Jagot, dissenting, found that authorisation had been made out.¹⁹ Aside from matters of impression,²⁰ their Honours differed in their approach to the doctrine of authorisation and its application.

All three judges agreed that the pre-existing case law, including *Moorhouse*, continued to apply to the doctrine of authorisation. Justice Emmett found that it was important to have regard to the *Moorhouse* principles, although his Honour's reasons are largely structured around each of the statutory factors.²¹ Justice Nicholas agreed that *Moorhouse* assists with the interpretation of s 101(1A).²² Justice Jagot stated that while it is apparent that s 101(1A) is based on the concept of authorisation as developed in *Moorhouse*, the fundamental obligation is to apply the statutory factors.²³ Thus it appears from the Full Court decision that while the *Moorhouse* principles continue to be relevant, their application is subject to any inconsistency with the statutory factors in s 101(1A). On that basis, all three judges rejected the trial judge's threshold "means of infringement" test.²⁴

As to s 101(1A)(a) (the extent (if any) of the alleged authoriser's power to prevent the doing of the infringing act), Justice Emmett held that any power to prevent the doing of the act must be taken into account, and a qualification of "reasonableness" should not be read into this statutory factor.²⁵ Curiously, however, "reasonableness" features significantly in his Honour's assessment of iiNet's power to prevent infringement.²⁶ Justice Jagot, too, held that the extent of any power to prevent should be considered: from no power to an absolute power to prevent.²⁷ Her Honour remarked that, due to the presence of "reasonable steps" in s 101(1A)(c), the reasonableness of the exercise of any particular power to prevent (found to exist under s 101(1A)(a)) is a relevant consideration.²⁸ While Justice Nicholas also thought "reasonableness" was a gloss, his Honour expressed a view that, in cases founded on inactivity or indifference (as in *iiNet*), there must be *some* power to prevent before authorisation is found.²⁹ All three judges held that iiNet had the contractual and technical power (by way of warning, suspension and termination) to prevent copyright infringement by its users.³⁰

As to s 101(1A)(b) (nature of the relationship between the alleged authoriser and the primary infringer), all members of the Full Court emphasised the contractual power iiNet had under its customer relationship agreement.³¹ Under clause 14.2 of that agreement, iiNet users were prohibited from using the internet service to

12 *Moorhouse*, 21 (Jacobs J, with whom McTiernan J agreed) and 13 (Gibbs J)

13 The word "other" appears in s 101(1A)(c) and not in s 36(1A)(c). In *iiNet*, both Emmett J (at [179]) and Nicholas J (at [730]) reject the significance of the word "other". See also Sydney Birchall, "Authorisation of Copyright Infringement: Is the Word 'Other' an Impostor in Section 101(1A)(c)?" (2006) 66 *IP Forum* 34.

14 David Brennan, "ISP Liability for Copyright Authorisation: The Trial Decision in *Roadshow Films v iiNet* Part Two" (2010) 29(1) *CLB* 8.

15 *Roadshow Films v iiNet (No 3)* (2010) 263 ALR 215 (***iiNet (No 3)***), [400]-[407] (Cowdroy J).

16 *iiNet (No 3)*, [425]-[436], [438] and [444] (Cowdroy J).

17 *iiNet (No 3)*, [421]-[422], [436], [438] and [458] (Cowdroy J).

18 *iiNet*, [257] (Emmett J) and [798] (Nicholas J).

19 *iiNet*, [475] (Jagot J).

20 Compare, for example, their Honours' assessment of internal emails and an iiNet press release: *iiNet*, [448] (Jagot J), [770] (Nicholas J), [434] and [469] (Jagot J) and [753]-[754] (Nicholas J).

21 *iiNet*, [23], [25] to [27], [178]-[211] (Emmett J).

22 *iiNet*, [703] (Nicholas J). See also *iiNet*, [704]-[708] (Nicholas J).

23 *iiNet*, [369] (Jagot J).

24 *iiNet*, [126] (Emmett J), [371]-[372] (Jagot J) and [695]-[696] (Nicholas J).

25 *iiNet*, [179] (Emmett J).

26 *iiNet*, [188]-[189], [194] (Emmett J).

27 *iiNet*, [424] (Jagot J).

28 *iiNet*, [399] (Jagot J).

29 *iiNet*, [700], [719] (Nicholas J).

30 *iiNet*, [188]-[189], [194] (Emmett J), [426] (Jagot J) and [720] (Nicholas J).

31 *iiNet*, [192] (Emmett J), [428]-[430] (Jagot J) and [727]-[728] (Nicholas J). See also clause 14.2 of iiNet Customer Relationship Agreement, set out in *iiNet*, [380] (Jagot J).

infringe copyright, and iiNet could, without liability, immediately cancel, suspend or restrict the internet service if it reasonably suspected copyright infringement.

As to s 101(1A)(c) (whether the alleged authoriser took any reasonable steps to prevent or avoid the doing of the act), each of their Honours took a different approach:

- (a) Justice Emmett held that s 101(1A)(c) mandated an enquiry as to the steps actually taken by iiNet and a consideration of whether there were any reasonable steps not taken.³² His Honour thought that iiNet's contractual prohibition and its webpage were insufficient in the circumstances.³³ Although his Honour found that suspension and termination were relevant powers to prevent under s 101(1A)(a), Justice Emmett held that their exercise was unreasonable *unless*:
- (i) iiNet had been informed in writing of the particulars of the alleged infringement by iiNet users;
 - (ii) iiNet has been requested to take specific steps:
 - (A) to notify its customers of the alleged infringement;
 - (B) to invite those customers to indicate whether iiNet's service has been used for the alleged infringement;
 - (C) to request customers to refute the allegations or give assurances that there will be no repetition of infringement;
 - (D) to warn the customer that, if no satisfactory response is received within a reasonable time, the iiNet service will be suspended until a reasonable response is received;
 - (E) to warn the customer that, if there is continued infringement, the service will be terminated; and
 - (F) to terminate the service in the event of further infringements;
 - (iii) iiNet has been provided with unequivocal and cogent evidence of the alleged infringements, perhaps including adequate information on collection methodology so as to allow iiNet to verify the accuracy of the data, or verification on oath of the collection methodology; and
 - (iv) the copyright owners have undertaken to reimburse iiNet for the reasonable cost of verifying the allegations and monitoring its network, and to indemnify iiNet for any liability as a result of mistaken suspension or termination.³⁴

In the circumstances, because paragraphs (iii) and (iv) above had not been fulfilled in the present case, his Honour did not consider that iiNet had failed to take reasonable steps to prevent the infringing acts.³⁵

- (b) Justice Jagot held that iiNet should have adopted and implemented a general policy or specific response, which could have included the type of information required before action would be taken, warnings to customers, bandwidth shaping, suspension and termination.³⁶ As to iiNet's specific responses, her Honour thought they carried little weight in light of iiNet's (internal) attitude to the film companies' allegations.³⁷
- (c) Justice Nicholas also found that "it was open" to iiNet to adopt a system providing for warnings, suspension and termination of accounts and the failure of iiNet to implement any system was a relevant matter under s 101(1A)(c).³⁸ In the absence of regulations or industry codes, ISPs should be given latitude to work out the details of such a system.³⁹

***iiNet could, without liability,
immediately cancel, suspend or restrict
the internet service if it reasonably
suspected copyright infringement.***

From the above it can be seen that two judges (Justices Jagot and Nicholas) took the view that iiNet had not taken the reasonable step of implementing a "warning, suspension and termination" scheme.

Despite their concurrence on s 101(1A)(c), Justice Nicholas did not form a majority with Justice Jagot because his Honour characterised iiNet's knowledge of infringement differently. For Justice Nicholas, the notices sent by the film companies were insufficient to provide iiNet with the requisite level of knowledge about specific acts of infringement.⁴⁰ The notices did not contain any verification of the accuracy of the collected data or explanation of the collection methodology.⁴¹ Nor was it incumbent upon iiNet to seek out this information when the film companies had not provided it.⁴² Justice Emmett appeared to adopt similar reasoning in discussing whether suspension and termination were reasonable steps.⁴³ For Justice Jagot, the film companies' notices rose above mere or unreliable assertions and provided credible evidence of infringement.⁴⁴

With the above considerations in mind, the Full Court determined whether iiNet "sanctioned, approved or countenanced" the copyright infringements by its users. Justice Emmett did not expressly say so – his Honour's conclusion on authorisation seems premised on the absence of unequivocal and cogent evidence of infringement, cost reimbursement and indemnification.⁴⁵ Justice Nicholas recognised the breadth of the third aspect, "countenance", but qualified its scope by stating that "authorise" connotes a mental element of "consent or permission of some kind or a carelessness from which such consent or permission may be inferred."⁴⁶ iiNet did not ignore the film companies' rights, but did not believe it was

32 *iiNet*, [195] (Emmett J).

33 *Ibid.*

34 *iiNet*, [210] (Emmett J).

35 *iiNet*, [257] (Emmett J).

36 *iiNet*, [431] (Jagot J).

37 *iiNet*, [448] (Jagot J).

38 *iiNet*, [751] (Nicholas J).

39 *iiNet*, [750] (Nicholas J).

40 *iiNet*, [762]-[765] (Nicholas J).

41 *iiNet*, [762] (Nicholas J).

42 *iiNet*, [764] (Nicholas J).

43 See third and fourth dotpoints at *iiNet*, [210] (Emmett J).

44 *iiNet*, [402], [405] (Jagot J).

45 *iiNet*, [257] (Emmett J).

46 *iiNet*, [779] (Nicholas J).

required to act on allegations that required further investigation. The inference of consent or permission could not, in his Honour's view, be drawn.⁴⁷ Justice Jagot held that iiNet's responses, in sum, evidenced iiNet's countenance, tolerance or tacit approval of its users' copyright infringements.⁴⁸

iiNet had not taken the reasonable step of implementing a "warning, suspension and termination" scheme

Interplay between authorisation and the "safe harbour" provisions

In 2005, as a result of the Australia-US Free Trade Agreement, the "safe harbour" provisions were introduced in Part V, Division 2AA of the *Copyright Act*.⁴⁹ That Division, based on the US *Digital Millennium Copyright Act*, limited the remedies available against carriage service providers (including ISPs) for certain classes of carriage service provider activity, including, relevantly, the provision of facilities or services for the transmission, routing or providing connections for copyright material (Category A).⁵⁰ Provided that an ISP meets the conditions in s 116AH(1), under section 116AG(2) of the Copyright Act, the Court cannot award pecuniary remedies against that provider in respect of copyright infringement that has occurred in the course of that activity.

Notwithstanding its conclusion on authorisation, the Full Court reversed the trial judge's holding that iiNet could take advantage of the protection afforded under the "safe harbour" provisions. On the evidence, their Honours held that iiNet did not meet the Condition 1, Item 1 in s 116AH(1) because it did not reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.⁵¹

It is apparent from the Full Court's reasons that their Honours drew on various aspects of the "safe harbour" provisions in reaching their respective conclusions on authorisation. For example, in considering whether termination of internet access was a reasonable power to prevent copyright infringement, Justice Emmett reasoned:

Even where a service provider such as iiNet has the benefit of the Safe Harbour Provisions, the Court is specifically empowered, under s 116AG(3)(b), to order termination of a specified account. It can hardly be concluded, therefore, that termination was, per se, unreasonable. Rather, the

Copyright Act itself contemplates such a step. Accordingly, it must be regarded as a reasonable step, at least in some circumstances, including circumstances involving repeat infringements, to terminate or suspend an account of a customer.⁵²

Likewise, in rejecting iiNet's submission that a "warning, suspension and termination" scheme was complex, expensive and unreasonable, Justice Jagot remarked:

[T]here is no reason that a scheme of warnings and suspension or termination could not specify the minimum requirements for the provision of information about copyright infringement before action would be taken. In other words, working out these issues is part and parcel of the scheme itself. Moreover... the legislature contemplated a scheme for repeat infringers that would include termination "in appropriate circumstances" (s 116AH(1) of the *Copyright Act*).⁵³

Similarly, Justice Nicholas' observation that it was not incumbent to the ISP to seek independent verification of allegations⁵⁴ is reminiscent of the statutory qualification that the conditions to the "safe harbour" provisions are not to be taken as requiring an ISP to monitor its service or to seek facts to indicate infringing activity.⁵⁵ His Honour also draws on the prescribed "take down" notice in the "safe harbour" provisions⁵⁶ as a "useful illustration" of what an ISP might reasonably expect to receive from a copyright owner who asserts the provider's internet facilities are being used for copyright infringement.⁵⁷

Most worrying, however, is Justice Emmett's analysis of reasonable steps at [210] (see above), which reads like a thinly-veiled reference to his Honour's preferred form of "warning, suspension and termination" scheme.⁵⁸ Given that other jurisdictions like France, the United Kingdom and New Zealand, have adopted or are adopting legislative schemes to address online copyright infringement (and not without controversy), it is strongly open to question whether the common law doctrine of authorisation should be shaped to apply to ISPs in the prescriptive manner suggested by his Honour Justice Emmett.⁵⁹

Furthermore, with respect, there are three reasons why their Honours' drawing on the "safe harbour" provisions is inappropriate. First, as the trial judge observed, the relationship between the doctrine of authorisation and the "safe harbour" provisions is one-way:

47 *iiNet*, [780] (Nicholas J).

48 *iiNet*, [477] (Jagot J).

49 Part 11, Schedule 9, *US Free Trade Agreement Implementation Act 2004*.

50 Sections 116AC to 116AF, *Copyright Act*.

51 *iiNet*, [264]-[272] (Emmett J), [520]-[526] (Jagot J) and [803]-[806] (Nicholas J).

52 *iiNet*, [189] (Emmett J).

53 *iiNet*, [417] (Jagot J).

54 *iiNet*, [764] (Nicholas J).

55 Except to the extent required by a standard technical measure in a relevant industry code: s 116AH(2), *Copyright Act*.

56 Reg 20I and Schedule 10, Part 3, *Copyright Regulations 1969*.

57 *iiNet*, [760]-[761] (Nicholas J).

58 See Kim Weatherall, 'A few thoughts on iiNet FFC decision' (17 March 2011) *Fortnightly Review* at URL: <http://fortnightlyreview.info/2011/03/17/a-few-thoughts-on-iinet-ffc-decision/>.

59 The *iiNet* case can be contrasted with the recent High Court of Ireland decision in *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377 (Charleton J) (*EMI v UPC*), which was decided on very similar facts. The case was not run on authorisation, but on s 40(4) of the Irish *Copyright and Related Rights Act 2000*. At [119]-[129], Charleton J considers the approaches adopted in other jurisdictions. In holding that s 40(4) of the Irish Act does not provide a proper basis for prescribing a "warning, suspension and termination" scheme, his Honour states (at [86]):

"For the Court to pursue the course of granting an injunction on the basis not of law but of economic abuse or moral turpitude would lead the Court beyond the threshold of the judicial arm of government and into legislation. It would undermine respect for the rule of law: for *no one would know quite what the rule of law might be if it depended on attitudes forged through legal argument in individual cases as to what was acceptable conduct.*" (emphasis added)

[Reasonable implementation of a repeat infringer policy] may be evidence in favour of a finding that the [carriage service provider] did not authorise the infringement of copyright... [But] the reverse is not true. That is, failure to comply with the requirements of the safe harbour provisions *cannot* be relevant and is not evidence that goes to a finding that a [carriage service provider] is liable for copyright infringement, since this would defeat the voluntary nature of the safe harbour provisions. Parliament has implemented a voluntary inducement, which, if not taken up, cannot, per se, be used as evidence that a [carriage service provider] has authorised infringement.⁶⁰

It does not follow, in the author's view, from a legislative intent to create a voluntary industry scheme, and the subsequent breakdown of industry negotiations,⁶¹ that Parliament therefore must have intended to amend the doctrine of authorisation for ISPs and to compel them to unilaterally assume a "warning, suspension and termination" scheme.

the Full Court reversed the trial judge's holding that iiNet could take advantage of the protection afforded under the "safe harbour" provisions.

Secondly, and as a corollary, if the doctrine's duty to take reasonable steps to prevent infringement compels an ISP to adopt and reasonably implement a "repeat infringer policy", there is no room left for the operation of the "safe harbour" provisions with respect to the provision of internet access. In other words, if the condition to limitations on remedies *becomes* the condition to non-liability, the limitations themselves become superfluous.

Thirdly, drawing on the "safe harbour" provisions led Justices Emmett and Nicholas to question the level of knowledge of infringement raised by the film companies' notices of alleged infringement. The majority took the view that the film companies' notices were deficient because they did not contain verification of the data and its collection methodology. However, as Justice Nicholas accepted, those notices must have given the ISP reason to suspect that such infringements had occurred.⁶² His Honour then appears to draw a distinction between knowledge and reason to suspect, a distinction which, with respect, was not drawn by Justice Gibbs in *Moorhouse* ("*...who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement...*").⁶³

Significance for online copyright infringement

Ultimately, the significance of the *iiNet* decision may lie in its power to compel copyright owners and the internet industry to resume their negotiations. *iiNet* may have won the case, but it is clear that

the film companies have gained significant leverage with which to negotiate. The film companies have since announced they have applied for special leave to appeal to the High Court.⁶⁴ Unsurprisingly, the Internet Industry Association announced shortly after the Full Court's decision that it was accelerating the development of an industry code.⁶⁵ *iiNet* has itself proposed the establishment of an independent body to investigate infringements, to issue warning notices and to seek fines and other remedies, similar to the HADOPI model in France.⁶⁶ The Attorney-General has also announced that the Government will be looking closely into the outcomes of any industry discussions.⁶⁷ Failing industry agreement, legislative intervention may be appropriate. In particular, as the above analysis shows, Parliament should give reconsideration to the confused interplay between authorisation and the "safe harbour" provisions.

Wen Hui Wu is a Lawyer in the Intellectual Property, Technology & Competition group at Corrs Chambers Westgarth.

60 *iiNet (No 3)*, [589] (Cowdroy J).

61 For the background to these failed negotiations, see *iiNet*, [277]-[284] (Jagot J).

62 *iiNet*, [763] (Nicholas J).

63 *Ibid.*; *Moorhouse*, 13 (Gibbs J) (emphasis added).

64 Australian Federation Against Copyright Theft Limited, press release (24 March 2011), at URL: <http://www.afact.org.au/pressreleases/pdf/2011/AFACT%20Media%20Release%2024.3.11.pdf>.

65 Internet Industry Association press release, 11 March 2011.

66 See *iiNet* position paper, 'Encouraging legitimate use of Online Content' (15 March 2011), 9 at URL: <http://www.iinet.net.au/press/releases/201103-encouraging-legitimate.pdf>. The HADOPI model ("*Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*") is discussed in *EMI v UPC*, above n 60, [122].

67 Attorney-General, Robert McClelland, Address to the Blue Sky Conference on future directions in Copyright law, 25 February 2011, at URL: http://www.attorneygeneral.gov.au/ministers/mcclelland.nsf/Page/Speeches_2011_FirstQuarter_25February2011-AddresstotheBlueSkyConferenceonfuturedirectionsinCopyrightlaw.