

**COPYRIGHT INFRINGEMENT AND ISPs: ROADSHOW
FILMS PTY LIMITED V IINET LIMITED [2011] FCAFC
23**

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I. BACKGROUND

iiNet Limited (“iiNet”) is an internet service provider that provides an internet connection to thousands of computer users within Australia. In 2009, 34 major motion picture studios (“Copyright Owners”) brought an action against iiNet on the grounds that it had breached copyright by authorising the illegal downloading of movies by its users. The allegation was that iiNet customers used a ‘BitTorrent’ program (“BitTorrent”) in order to communicate copies of copyrighted films to the public over the internet, and that iiNet authorised these infringements.

BitTorrent is a file-sharing program that allows computer users seeking particular data to participate in the distribution of that data. BitTorrent breaks up large files into small pieces in order to transfer those large files efficiently between computers. Pieces are requested by users and reassembled into a whole file. It was through this program that iiNet users copied, and communicated copies, of films to the public. It was not in dispute in the case that iiNet knew that this form of file sharing was occurring.

From July 2008, the Australian Federation Against Copyright Theft¹ issued weekly notices (“AFACT Notices”) to iiNet alleging that infringements had occurred. The AFACT Notices contained details such as the date and time at which infringements took place, and the IP addresses of infringing users. These notices required iiNet to act to

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¹ The Australian Federation Against Copyright Theft (“AFACT”) was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims. AFACT members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

prevent its customers from continuing to infringe copyright. iiNet also received hundreds of automatically generated notices from the USA each week, which also alleged infringement (“Robot Notices”).

iiNet required each of its customers to enter into a customer relationship agreement. The conditions of this agreement included a clause that stated that any conduct infringing copyright was a breach of the agreement, and could result in the suspension or cancellation of the customer’s account. This was also stated on the iiNet website. However, it was alleged that when iiNet was notified of the infringements by the AFACT Notices, it did not take any action to terminate or suspend the accounts of users. It was on this basis that the copyright owners alleged authorisation.

II. THE LEGISLATIVE FRAMEWORK

Section 86 of the *Copyright Act 1968* (Cth) (“Copyright Act”) provides that copyright is the exclusive right to:

- make a copy of a film;
- cause the film to be seen in public; or
- communicate the film to the public

The term ‘communicate’ is defined in s. 10 of the Copyright Act to include:

- making a film available online; or
- electronically transmitting a film.

This is further qualified by s. 14 of the Copyright Act, which provides that “a reference to the doing of an act in relation to ... other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the ... other subject matter ...”.

Sections 101(1) and (1A) of the Copyright Act prescribe the conduct that will infringe copyright. These sections are in the following terms:

- (1) *Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.*

- (1A) *In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:*
- (a) *the extent (if any) of the person's power to prevent the doing of the act concerned;*
 - (b) *the nature of any relationship existing between the person and the person who did the act concerned;*
 - (c) *whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.*

...

Section 112E of the Copyright Act provides that a carriage service provider (defined in the *Telecommunications Act 1997* (Cth) in such a way as to include the services provided by an internet service provider such as iiNet) “is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.”

Division 2AA of Part V of the Copyright Act, which consists of sections 116AA to 116AJ (the “Safe Harbour Provisions”), imposes limitations on the remedies against carriage service providers for infringement of copyright. Section 116AC provides for the following:

A carriage service provider carries out a Category A activity by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.

Section 116AG(3) provides that where copyright is infringed in the course of carrying out a Category A activity, the relief that a Court may grant against a carriage service provider is limited to one or more of the following:

- (a) *an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia;*
- (b) *an order requiring the carriage service provider to terminate a specified account*

In deciding whether to make an order under s. 116AG(3), the Court must have regard to:

- (a) *the harm that has been caused to the owner or exclusive licensee of the copyright; and*
- (b) *the burden that the making of the order will place on the carriage service provider; and*
- (c) *the technical feasibility of complying with the order; and*
- (d) *the effectiveness of the order; and*
- (e) *whether some other comparably effective order would be less burdensome.*

The Court may also have regard to any other matters that it considers to be relevant.

In addition, s. 116AG(1) provides that before the limitations set out in s. 116AG(3) apply, a carriage service provider must satisfy certain conditions. These are set out in section 116AH(1). The relevant provisions in respect of Category A activities include the following:

- 1) *The carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.*
- 2) *If there is a relevant industry code in force – the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material.*

Section 116AH(2) provides that nothing in those conditions requires a carriage service provider to monitor its service or to seek facts to indicate infringing activity, except to the extent required by an

industry code. It was common ground that there was no relevant industry code at the time of the alleged infringements.

III. DECISION AT FIRST INSTANCE

At first instance in the Federal Court before Cowdroy J, the Copyright Owners argued that iiNet users had communicated films to the public by making copies available online, and by transmitting them electronically via the Internet.² The Copyright Owners alleged that iiNet had authorised such conduct in contravention of s. 101(1) of the Copyright Act.

The Copyright Owners submitted that each time a user who made a copy of a film available online turned on his or her computer, he or she made that copy available, thus committing another infringement. However, the primary judge found that each user who had infringed copyright by making a film available online had breached copyright only once. His Honour stated that to find that a new infringement occurred each time a computer was turned on would result in an “entirely arbitrary and random result, in respect of the number of copyright infringements.”³

Cowdroy J also found that iiNet users had breached copyright in electronically transmitting substantial portions of the films. Although each film was transmitted in thousands of insubstantial fragments (and would therefore not form the whole of the film, or potentially even a ‘substantial part’ of the film), his Honour found that the thousands of fragments “would comprise a substantial part in the abstract”, and that it would be unusual for someone to transmit less than a substantial portion of a film.⁴

In determining whether iiNet infringed copyright by authorising those primary infringements, Cowdroy J relied on the test for authorisation established in *Moorhouse & Angus and Robertson (Publishers) Pty Ltd v University of New South Wales*⁵ (“*Moorhouse*”). That is, that the alleged authoriser is the party that “provided the true ‘means’ of infringement”.⁶ The question therefore was whether iiNet provided the ‘means of infringement’. His Honour found that while iiNet

² *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 (4 February 2010).

³ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [292] per Cowdroy J.

⁴ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [304], [310] – [312] per Cowdroy J.

⁵ (1974) 3 ALR 1

⁶ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [381] per Cowdroy J.

provided an internet connection, and that such an internet connection was a necessary precondition to infringement, it was not the means of infringement. As such, iiNet could not have authorised the infringements.

His Honour then went on to consider s 101(1A) of the Copyright Act, which (outlined in Section II above) sets out various factors that a Court must consider in determining whether authorisation took place. Section 101(1A) was inserted into the Copyright Act after the decision in *Moorehouse*. Cowdroy J stated that the section “was meant to elucidate, not vary, the pre-existing law of authorisation”.⁷ However, His Honour noted that the section “is phrased as considerations that ‘must’ be considered” and therefore that “the Court is compelled to go into further consideration of the issue of authorisation pursuant to the considerations in [the section]”.⁸

In considering these factors, Cowdroy J held that iiNet did have the power to cancel or suspend the accounts of users, but that it would not have been reasonable for iiNet to have acted on the AFACT Notices. His Honour based this conclusion on the fact that the AFACT Notices did not provide enough information or evidence for iiNet to be certain that infringement had occurred, or by whom. His Honour found that the information was ‘at such a level of abstraction’ to make it difficult to act upon.⁹

Cowdroy J also found that it was not reasonable for iiNet to suspend or terminate internet services on the basis of infringement, as there was no way to know whether the person who infringed copyright was the customer or some other user. His Honour was concerned that the customer would be penalised for the action of a different user.¹⁰

On this basis, Cowdroy J concluded that while there was infringement by iiNet’s users, iiNet itself did not authorise this infringement. This is because iiNet did not provide the means of infringement, nor was it reasonable for iiNet to have prevented infringement by suspending or cancelling the accounts of infringing users.

Finally, Cowdroy J considered whether iiNet would have had the benefit of the Safe Harbour Provisions (if it has been held that iiNet had authorised the copyright infringement). As outlined in Section II

⁷ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [415] per Cowdroy J.

⁸ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [416] per Cowdroy J.

⁹ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [465] per Cowdroy J.

¹⁰ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [440] per Cowdroy J.

above, the Safe Harbour Provisions limit the remedies available against an internet service provider that is found to have authorised infringement. His Honour concluded that the requirement that the internet service provider have a policy to deal with repeat infringers of copyright was satisfied by iiNet. As such, if there had been authorisation, the Safe Harbour Provisions would have limited any remedies available against iiNet.

The Copyright Owners subsequently appealed to the Full Court of the Federal Court. There were three major areas on appeal. These were:

- The extent of primary infringements;
- Whether iiNet authorised the infringements; and
- The operation of the safe harbour provisions.

IV. PRIMARY INFRINGEMENT

ISSUE ONE: THE NUMBER OF INFRINGEMENTS

On appeal, the extent of the primary infringements was considered by all three judges (Emmett, Jagot and Nicholas JJ). The Copyright Owners argued that when an iiNet user made a film available online, it would remain available only as long as that user's computer remained connected to the internet. The Copyright Owners argued that every time a user connected to the internet, he or she made the film available online. By this interpretation, hundreds of infringements were committed by every infringing user. On the other hand, iiNet contended that each film was made available only once, and the fact that the films were unavailable when a user's computer was switched off did not mean that a new infringement occurred every time the computer was turned back on.

On appeal, it was found by each of Emmett, Jagot and Nicholas JJ that the meaning of 'make available online' should not be influenced by the nature of the computer program, and that each time the computer was switched on, a new infringement occurred. Emmett J found that:

[C]onnection to the internet is an essential element in 'making available online', in that communication cannot occur if there is no connection to the internet ... Every time that a modem is connected to the internet, and makes a Film available, there is a new making of

*the film available online. A separate act is engaged in each time a modem is connected to the internet and goes online.*¹¹

Similarly, Jagot J found that “the person makes the film available online each time he or she connects that computer to the Internet.”¹² Nicholas J also found that

*Copyright material is either available or it is not. When it is stored on a computer that is configured by its user so as to be accessible to others by means of an internet or other online connection then it will no longer be accessible if the user later terminates the connection. At that point it will not be available online. When the user takes steps to restore the connection, the copyright material will once again be available online.*¹³

On this basis, the Full Court held that each user potentially committed a number of copyright infringements in respect of each film because each time that user turned connected to the internet, that user made a film available online.

ISSUE TWO: ELECTRONIC TRANSMISSION

iiNet argued that there had been no ‘electronic transmission’ of the films, as there had been no transmission of a substantial portion of those films pursuant (referring to the definition of an ‘act’ as modified by s. 14 of the Copyright Act, outlined in Section II above). This was because the nature of the BitTorrent program meant that the films were transmitted in very small segments.

This issue was not considered by the Full Court because it was considered that it could not be determined without further evidence and analysis.¹⁴ Notwithstanding this, it was clear to the Court that there had been at least some infringement by iiNet users by making the whole of films available online, and communicating the whole of those films to members of the public. As such, it was not necessary to resolve the question of electronic transmission.

V. AUTHORISATION

¹¹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [152] per Emmett J.

¹² *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [329] per Jagot J.

¹³ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [666] per Nicholas J.

¹⁴ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [170], [353] and [681].

The main issue on appeal was whether iiNet had authorised these primary infringements. On appeal, all three judges focused directly on the criteria set out in s. 101(1A) of the Copyright Act, rather than relying on the *Moorhouse* test applied by Cowdroy J at first instance. Jagot J explained this course in the following terms:

... although it is apparent that s 101(1A) of the Copyright Act is based on the concept of "authorisation" developed by Gibbs J in Moorhouse, the fundamental obligation is to apply the statute. This is apparent from s 101(1A) itself which prescribes that in determining for the purposes of s 101(1) whether or not a person has authorised any act comprised in a copyright, the nominated matters must be taken into account. The difficulty with the trial judge's approach is that, having already determined that iiNet had not authorised the copyright infringements by reference to another test (the "means of infringement" test), the trial judge then considered the required factors under s 101(1A) (at [415]-[416]). The trial judge's answers to questions posed by the other "means of infringements" test, however, determined his conclusions about the s 101(1A) factors. This is apparent from the trial judge's finding that iiNet had no power to prevent the infringements because it did not control the means of infringement (at [424] and [436]).¹⁵

CONSIDERATION ONE: POWER TO PREVENT

The first consideration required by s. 101(1A) of the Copyright Act is the extent of iiNet's power to prevent the infringement occurring. Each of Emmett, Jagot and Nicholas JJ agreed with the trial judge that iiNet had both the contractual and technical power to warn users about infringement, and to cancel or suspend services on the basis of infringement.

This ability was summarised by Nicholas J as follows:

The respondent has the technical power to prevent copyright infringement by iiNet users by denying them access to the internet using the respondent's facilities. [The customer relationship agreement] provides that the respondent may, without liability, immediately cancel, suspend or restrict the services it provides to a subscriber if the respondent reasonably suspects "illegal conduct" by the subscriber or any other person in connection with such services .

¹⁵ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [369] per Jagot J. See also [171] per Emmett J and [695] per Nicholas J.

Thus, the respondent has a contractual power to cancel, suspend or restrict its services to a subscriber if it reasonably suspects that they are being used by any person (not merely the subscriber) to infringe copyright. This gives the respondent a wide legal power with which to justify the use of its technical power to terminate or suspend a subscriber's internet access in appropriate cases. It is the combination of these technical and legal powers which comprise the power of the respondent to prevent iiNet users from making the appellants' films available online.¹⁶

CONSIDERATION TWO: NATURE OF THE RELATIONSHIP

The second consideration under 101(1A) of the Copyright Act is the nature of the relationship between the infringing users and iiNet itself.

None of Emmett, Jagot or Nicholas JJ accepted the distinction made by the trial judge between customers and users of the services.¹⁷ This was because the customer relationship agreement provided that iiNet's customers could not use or allow anyone else to use iiNet's service to infringe another person's rights. There was therefore a relationship between iiNet and any person who used the service. As such, none of the appellate judges had any difficulty finding a relationship between iiNet and any users of its services, whether they were customers or not.

CONSIDERATION THREE: REASONABLE STEPS

The final consideration in assessing authorisation under s. 101(1A) is an analysis of any 'other reasonable steps' taken to prevent infringements.

On appeal, each of Emmett, Jagot and Nicholas JJ interpreted this to mean that there would only be authorisation if steps could have been taken to prevent further infringement, and that it was reasonable for those steps to have been taken.

There was no doubt that some steps were taken by iiNet to prevent or avoid copyright infringement by its users. The customer service agreement included terms that copyright infringement was prohibited, and iiNet had a warning to that effect on its website. However, as Nicholas J found, these were:

¹⁶ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [720] per Nicholas J. See also [183] per Emmett J and [400] per Jagot J.

¹⁷ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [192], [390], and [728].

[R]easonable steps to take to prevent or avoid copyright infringements ... but, of course, it does not follow that the steps ... were adequate for that purpose or that there were no other reasonable steps that it was also open to the respondent to take.¹⁸

The appeal therefore turned ultimately on whether it would have been reasonable for iiNet to act on the AFACT Notices by warning infringing users, or suspending or terminating their accounts.

Emmett J found that AFACT Notices did not contain sufficient information upon which iiNet could rely. Significantly, His Honour outlined various circumstances in which it would have been reasonable for iiNet to take steps to suspend or terminate a customer's account. Emmett J stated that the AFACT Notices would have had to have contained "unequivocal and cogent evidence" of infringement. On the other hand:

[M]ere assertion by an entity ... with whatever particulars of the assertion that may be provided, would not of itself, constitute unequivocal and cogent evidence of the doing of acts of infringement.¹⁹

Emmett J found that the infringement notices disclosed no more than assertions and that no means of verification were furnished. In addition (and more importantly according to Emmett J), the Copyright Owners did not offer to reimburse iiNet for any costs incurred in complying with the demands made in the AFACT Notices. Accordingly, Emmett J held that it was no reasonable to require iiNet to undertake the work, cost and effort required in order to set out, review, and analyse the allegations contained in the AFACT Notices.²⁰

His Honour also stated that iiNet received so many infringement notices (both the AFACT and Robot Notices), that an automated system of warnings, suspension and termination would be required in order to deal with them. Such a system would have caused great expense to iiNet and Emmett J accepted the evidence that such a system could not be commercially justified.²¹

¹⁸ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [731] per Nicholas J.

¹⁹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [210] per Emmett J.

²⁰ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [205] per Emmett J.

²¹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [206] - [207] per Emmett J.

Like Emmett J, Nicholas J held that the AFACT Notices were not sufficient to provide iiNet with “knowledge that its network was being utilised by users of particular accounts to infringe [the Copyright Owners’] copyright in the identified films”, although His Honour noted that the AFACT Notices “must have given [iiNet] reason to suspect that such infringements had occurred”.²² Nicholas J also doubted the difficulty of establishing a system of warnings, termination and suspension of accounts.²³ Nevertheless, his Honour concluded that:

*I do not think [iiNet] could reasonably be expected to issue warnings, or to terminate or suspend particular accounts, in reliance upon any such notice in circumstances where it has been told nothing at all about the methods used to obtain the information which lead to the issue of the notice. Nor should it be up to [iiNet] to seek out this information from a copyright owner who chooses not to provide it in the first place.*²⁴

In contrast to Emmett and Nicholas JJ, Jagot J found that there was no problem with the quality of the notices provided. Her Honour held that the notices “provided prima facie credible evidence including precise details (such as date, time, IP address, copyright material and percentage of material downloaded) of extensive infringements of copyright by iiNet customers or people customers had allowed to use their iiNet service.”²⁵ According to Jagot J, iiNet could and should have relied on the information provided by the AFACT Notices and that by failing to do so, the infringement was authorised. Jagot J stated that:

*iiNet could have adopted and implemented a general policy or a specific response to the AFACT notices ... The policy could have included a series of reasonable responses by iiNet to credible allegations of copyright infringement including the type of information required before action would be taken, warnings on receipt of such information to customers, the recording of warnings, shaping the customer’s service as well as suspending the customer’s account.*²⁶

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²² *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [763] per Nicholas J.

²³ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [748] per Nicholas J.

²⁴ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [764] per Nicholas J.

²⁵ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [467] per Jagot J.

²⁶ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [431] per Jagot J.

It was argued by iiNet that it was not able to identify the infringing users from the AFACT Notices because it would have been unlawful to do so. The claim was based on the fact that Part 13 of the *Telecommunications Act* makes it an offence for a carriage service provider or its employees to disclose protected information.

This argument was not accepted by any of Emmett, Jagot, or Nicholas JJ. The Court held that exemptions within the *Telecommunications Act 1997* (Cth) allowed iiNet to use the information. Further, the Court found that the customers had consented to the disclosure of their information for the purposes of managing and administering their accounts.²⁷

VI. SAFE HARBOUR PROVISIONS

The Safe Harbour Provisions operate to limit the available remedies against internet service providers when their users infringe copyright.

In contrast to Cowdroy J at first instance, none of the appellate judges accepted that the safe harbour provisions could apply in this case. For Emmett and Nicholas JJ, the Safe Harbour Provisions were a secondary consideration, as they had found that iiNet had not authorised infringement. In contrast, the Safe Harbour Provisions were a primary consideration for Jagot J because her Honour found that there had been authorisation. In any event, all three judges agreed that any policy that iiNet may have had was not sufficient to attract the protection of the Safe Harbour Provisions.

Emmett J found that iiNet's policy was no more than "a policy to obey the law" and that "iiNet did not establish any processes to facilitate the operation of the so-called policy, in that it did not inform its customers of the existence of the policy."²⁸ Similarly, Nicholas J found that the iiNet policy was not sufficient to attract the Safe Harbour Provisions, and that it only provided for the termination of an account when it was the subject of an admission or a finding in court.²⁹ Likewise, Jagot J held that simply advising customers that infringement would result in termination is not the same as having a policy in place, and is certainly not the same as acting on that policy.³⁰

²⁷ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [255], [515], and [799].

²⁸ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [264] per Emmett J.

²⁹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [806] per Nicholas J.

³⁰ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [523] per Jagot J.

VIII. A TEST FOR AUTHORISATION

Nicholas and Emmett JJ affirmed the finding of Cowdroy J at first instance that iiNet did not authorise the copyright infringements. Jagot J stood in the minority, finding that authorisation did occur.

As it was found that the *Telecommunications Act 1997* (Cth) did not prevent iiNet acting on the AFACT Notices, and that the Safe Harbour Provisions had no operation in this case, the appeal turned primarily on the question of whether it was unreasonable for iiNet to fail to terminate or suspend users' accounts on the basis of allegations of infringement.

Emmett J considered 4 factors to be necessary before it was reasonable for an internet service provider to terminate or suspend an account when it received a notification or infringements:

- The internet service provider has received in writing particulars of specific acts of infringement from copyright owners;
- The internet service provider has been requested to take steps in relation to the infringement, including warning the customers of the possibility of suspension or termination;
- The internet service provider has been provided with unequivocal and cogent evidence of the alleged acts of infringement; and
- The copyright owners have undertaken to:
 - a) reimburse the internet service provider for the cost of verifying the primary acts of infringements and maintaining a system to monitor infringements; and
 - b) indemnify the internet service provider against liability reasonably incurred as a consequence of mistakenly suspending or terminating on the basis of allegations made by a copyright owner.³¹

³¹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [210] per Emmett J.

Jagot and Nicholas JJ did not go so far as to require indemnification or costs to be paid by the copyright owners alleging infringement. However, all three judges agreed on the importance of three factors in determining whether an internet service provider that fails to act on allegations of copyright infringement of its users has authorised that infringement. These factors are as follows:

- whether the internet service provider has the technical ability to terminate or suspend an account;
- whether the allegation provided by the copyright owner can be relied upon or verified with reasonable ease and expense; and
- whether the allegation can be acted on with reasonable ease and expense.

IX. CONCLUSION

This appeal turned on whether it was reasonable for an ISP to not take steps to warn, suspend or terminate accounts when the ISP was notified that users had infringed copyright. Nicholas J observed that the finding of the primary judge “seem[ed] to imply that an ISP which provides internet connectivity will never be liable for authorisation of its subscribers’ acts of copyright infringement because it could never be said that an ISP had supplied the means of infringement.”³²

However, it is implicit in the reasoning of all three appellate judges that an internet service provider can be found liable for authorising copyright infringements under the right circumstances.

As Emmett J stated:

[I]t does not necessarily follow that there would never be authorisation within the meaning of s 101 of the Copyright Act by a carriage service provider, where a user of the services provided by the carriage service provider engages in acts of infringement such as those about which complaint is made in this proceeding. It does not necessarily follow from the failure of the present proceeding that circumstances could not exist whereby iiNet might in the future be held to have authorised primary acts of infringement on the part of

³² *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [694] per Nicholas J.

*users of the services provided to its customers under its customer service agreements.*³³

In a similar vein, Nicholas J noted the following:

*I accept that a refusal by an ISP to act on infringement allegations made by or on behalf of a copyright owner may be evidence from which authorisation might be inferred. But that will only be so if the refusal is unreasonable. Whether or not a refusal is unreasonable must depend upon the circumstances in which it occurs including the nature and quality of the information upon which the ISP is requested to act by the copyright owner.*³⁴

An internet service provider may be found liable for failing to act on allegations of infringement if that internet service provider has the technical ability to act on the allegations, the allegations can be relied upon or verified with reasonable ease and expense, and the internet service provider can act on these allegations with reasonable ease and expense.

³³ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [274] per Emmett J.

³⁴ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [781] per Nicholas J.