

Landmark Copyright Case: ISP Liability for Copyright Infringement?

Anita Cade and Maya Port consider some of the issues raised in a recent Federal Court Action against ISP iiNet. And also review approaches taken to ISP responsibility for users' copyright infringement in certain other countries.

Copyright infringement in the digital age is a growing concern for copyright owners, Internet Service Providers (ISPs) and legislators alike. Copyright owners are facing increased availability and transmission of copyright material, particularly music and video files, between Internet users over peer-to-peer protocols. ISPs are developing policies and practices to help reduce such conduct over their networks and to distance themselves from all forms of illegal activity in which their customers engage. Legislators and industry bodies worldwide are assessing how to balance the interests of copyright owners with those of ISPs and users of modern technology. The current proceedings in the Federal Court of Australia brought by an alliance of film and television studios against iiNet is likely to be a test case for ISP liability for copyright infringement in Australia.

The studios v iiNet: ISP liability for copyright infringement?

Background

On 20 November 2008, an alliance of film and television studios commenced proceedings in the Federal Court of Australia for copyright infringement against one of Australia's largest ISPs, iiNet¹ (*Roadshow Films Pty Ltd & Ors v iiNet Ltd*).

The studios claim that:

- iiNet authorised its users' infringement of the copyright in their cinematograph films under section 101 of the *Copyright Act 1968* (Cth) (**Copyright Act**);² and
- iiNet directly infringed the copyright in their cinematograph films by making and dealing with infringing copies of the films.³

The case concerns iiNet users⁴ downloading and sharing television show episodes and films using the peer-to-peer protocol BitTorrent, and follows the music industry's successful action against Kazaa for illegal music file sharing.⁵

The studios are seeking various forms of relief:

- declarations that iiNet infringed the copyright in their films;

- permanent injunctions to restrain iiNet from future acts of copyright infringement;
- orders requiring iiNet to disable its customers' access to sites containing the copyright infringing material;
- orders requiring iiNet to terminate the accounts of certain customers who have engaged in infringing conduct;
- damages;⁶ and
- relief for iiNet's alleged conversion and/or detention of "infringing copies" of their films.⁷

The authorisation claim

The studios' claim

Each applicant has particularised films and/or television episodes in its catalogue in which copyright subsists and for which it owns copyright (by way of exclusive licence)⁸ – facts that iiNet does not dispute.⁹

The essence of the authorisation claim is that iiNet authorised its users' conduct of downloading and sharing the applicants' copyright material without their permission or licence. The key issue is whether iiNet *authorised* its users' conduct pursuant to section 101(1) of the Copyright Act, not what that conduct entails.

However, at the time of writing, the parties are engaged in a preliminary dispute as to the exact underlying conduct of the iiNet users.¹⁰ Pursuant to section 86 of the Copyright Act, copyright in each of the studios' films comprises the exclusive rights to make a copy of the film, cause the film to be seen and heard in public, and communicate the film to the public. The studios claim that iiNet users made copies of the films with each download, made the films available online to fellow users of BitTorrent, and electronically transmitted the films to fellow users.¹¹ The

studios claim that the iiNet users therefore reproduced, copied and communicated copies of, or substantial parts of, the applicants' films and that iiNet authorised that conduct. On the other hand, iiNet claims that BitTorrent is a legitimate software tool that is primarily used for non-infringing conduct, including open-sourced file sharing.¹² The proceedings may therefore raise interesting questions as to how Internet usage aligns with the rights comprised in copyright, such as what "communicate to the public" means in the context of increasing traffic over peer-to-peer networks.

Authorisation liability

"Authorise" in the context of copyright infringement means to "sanction, approve [or] countenance".¹³ The question of authorisation is based on legislative and other factors developed in recent case law:

- the extent of the respondent's power to prevent the primary infringing conduct;¹⁴
- the nature of any relationship between the respondent and the primary infringer;¹⁵
- whether the respondent took any reasonable steps to prevent the infringing conduct, including whether the respondent complied with any relevant industry codes of practice;¹⁶
- the respondent's knowledge, or lack of knowledge, of the infringing conduct;¹⁷
- the respondent's inactivity or indifference, whether exhibited by acts of omission or commission, toward the infringing conduct;¹⁸ and
- where applicable, the respondent's level of control over the operation of its facilities or services that are used to commit the infringing conduct.¹⁹

The studios argue that iiNet's conduct satisfies each of these criteria.²⁰ The studios engaged an investigator from the Australian Federal Against Copyright Theft (AFACT) to set up an iiNet account and connect to other iiNet users to download and share copies of the films using BitTorrent.²¹ Then, over the course of months, the studios sent

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iiNet spreadsheets detailing each instance of alleged infringement, the copyright material affected and the customers involved.²² The studios argue that iiNet therefore knew of, or reasonably suspected, its users' infringing conduct but did not act on the infringement notices, and therefore not only failed to take any action to prevent ongoing infringements but positively encouraged continuing infringements.²³ The studios also argue that iiNet failed to enforce its own terms and conditions of use that prohibit illegal file sharing.²⁴

On the other hand, iiNet argues that its actions do not constitute authorisation liability because:

- it did not have any power to prevent its users' alleged infringing conduct;²⁵
- its relationship with its subscribers is contractual;²⁶
- its relationship with iiNet users who are not subscribers is neither direct nor commercial;²⁷ and
- it took reasonable steps to prevent or avoid the alleged infringing conduct, including by implementing internal training, policies and procedures for dealing with infringement notices, the terms of its Customer Relationship Agreement, and operating a "Freezone Service" for its subscribers to legitimately download or stream copyright material.²⁸

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Possible defence – providing facilities only

iiNet argues that it is merely a conduit that provides the "pipes only"²⁹ for users' online conduct. In defence of the authorisation claim, iiNet seeks to rely on section 112E of the Copyright Act, arguing that it is a carriage service provider that is merely providing facilities which its customers have allegedly used to infringe copyright.³⁰ However, the Federal Court in the Kazaa proceedings made it clear that section 112E does not confer a general immunity to authorisation liability.³¹ The owners and operators of the Kazaa file sharing system were found to be more than messengers – they knew that Kazaa was predominantly used for sharing copyright-infringing material, they were capable of curtailing infringing conduct by using filters, and they had a financial interest in maintaining the system. iiNet argues that it derives no commercial advantage from its customers using its services to deal with copyright material over and above payment of their subscription fees.³² In fact, iiNet argues that increased sharing of large music and video files reduces bandwidth and probably the speed of service iiNet can offer its

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customers. Similarly, the respondent in *Cooper v Universal Music*³³ could not rely on section 112E in a more overt case of authorisation liability, where the Court found that the respondent actively invited use of his site in a way that would infringe copyright in music files (by downloading mp3s for free).

Possible assistance – safe harbour provisions

iiNet also seeks to rely on the "safe harbour" provisions in Division 2AA of the Copyright Act,³⁴ which limit the remedies available against carriage service providers for copyright infringement regarding online activities. iiNet argues that its alleged authorising conduct falls within the Category A activity for which safe harbour is granted³⁵ to a carriage service provider that provides facilities or services for transmitting, routing or providing connections for copyright material where the carriage service provider complies with the prescribed conditions set out in section 116AH(1) of the Copyright Act. iiNet claims that it satisfies the prescribed conditions because: it did not initiate the transmission of copyright material over its network; it did not substantively modify the copyright material; it implements a policy for terminating the accounts of repeat infringers; and there is no relevant industry code of practice.³⁶ iiNet may also point to the quali-

ties of their copyright.³⁹ In addition, the studios claim that these copies of the films constitute "infringing copies"⁴⁰ for which iiNet is liable in conversion or detention pursuant to section 116 of the Copyright Act.⁴¹ If this novel claim is made out, iiNet would not be able to rely on either section 112E or the safe harbour provisions, as each of those protections apply to authorisation liability only. It may be possible for iiNet to claim that it is an "innocent infringer" pursuant to section 115(3) of the Copyright Act. However, it would need to establish that it was not aware, and had no reasonable grounds for suspecting, that its conduct constituted copyright infringement. iiNet may contest that the applicants' infringement notices referred to the conduct of its users only,⁴² and did not put iiNet on notice that it was potentially liable for direct infringement.⁴³

Implications

The overarching context of the question of ISP liability is the balancing of the interests of copyright owners, ISPs and users of technology. On a practical level, which party should bear the burden of policing online copyright infringement?

On the one hand, copyright owners are frustrated by the frequency of online infringement of their works and for some, their resulting loss of royalties. Industry bodies and representative groups of copyright owners, such as the applicants in the iiNet proceedings, are increasingly turning this frustration toward ISPs and their alleged indifference toward their customers' infringing conduct. The studios argue that iiNet could have taken a variety of actions to prevent or cease its users' alleged infringing conduct: send a warning notice, limit their bandwidth so they are unable to easily download large film and music files or terminate the accounts of repeat infringers. Copyright owners argue that these steps would merely be a cost of doing business – but a cost that would ultimately be passed on to consumers.

On the other hand, ISPs argue that the practicalities and costs involved in "policing" copyright infringement on their networks are unworkable. First, ISPs argue that they should not be responsible for determining whether particular conduct constitutes copyright infringement and in effect enforcing

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the copyright owners' rights on their behalf. Second, ISPs argue that illegal downloading and sharing of copyright material is only one way in which consumers use the Internet – suspending or terminating a customer's account for copyright infringement would also remove their ability to utilise legitimate Internet facilities. iiNet argues that only a portion of the Internet traffic exchanged via its facilities was via BitTorrent and only a portion of that was the alleged infringing conduct.⁴⁴ iiNet also argues that BitTorrent is a legitimate program that has "many non-infringing uses and facilities" and "is elegantly designed for the delivery of large files like TV program and films", many of which contain legitimate content.⁴⁵ ISPs argue that to reduce bandwidth, or suspend or terminate customers' accounts, are disproportionate and costly responses to alleged infringing conduct in the majority of cases. This raises a broader question as to why other forms of online illegal activity are not subject to the same degree of scrutiny as copyright infringement.⁴⁶ Third, ISPs distinguish their position from that of the respondents in the Kazaa and Cooper proceedings, who the courts found were intimately involved in, and directly benefited from, users' infringing conduct. General ISPs argue that they provide a range of Internet services and do not receive any financial benefit from infringing customers over and above their usual subscription fees. In fact, some ISPs are also content providers that generate licence fees for customers' purchase of legitimate content – a revenue stream that is undercut by illegal file sharing.

The underlying question is where the risks and costs should lie. On the one hand, the copyright industry argues that ISPs are in the best position to control and monitor online infringement. On the other hand, taking into account the time, labour, technology and administration involved, ISPs argue that the costs involved are significant and should not be passed on to their customers as the price of enforcing third parties' rights.

Overseas development

Not surprisingly, it is a topic that is also occupying the minds of similar industries and players overseas.

Eircom agreed to implement a "three strikes" policy against its customers – inform customers that they are infringing copyright, warn customers that Eircom may terminate their accounts, and ultimately disconnect customers who fail to cease their infringing conduct.

New Zealand

Across the Tasman, the New Zealand government has taken a legislative approach to the problem of online copyright infringement. The *Copyright Amendment (New Technologies Act) 2008 (NZ)* (the **NZ Amending Act**) amends the *Copyright Act 1994 (NZ)* (the **NZ Copyright Act**) and aims to update copyright law to align with advances in digital technology.⁴⁷ The new section 92B of the NZ Copyright Act introduces a similar defence to those in sections 39B and 112E of the Australian Copyright Act – that an ISP is not liable for copyright infringement (either direct or authorisation liability) "merely because" a person uses the ISP's Internet service to infringe copyright in a work.

Of greater significance is the new section 92A of the NZ Copyright Act, which requires ISPs to "adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account... of a repeat infringer". A "repeat infringer" is a person "who repeatedly infringes the copyright in a work by using 1 or more of the Internet services of the Internet service provider to do

Ireland

In Ireland, four major recording companies have settled proceedings commenced in the High Court against the Irish ISP, Eircom, regarding its users' copyright infringement.⁵¹ Warner Music (Ireland), Sony BMG Music Entertainment (Ireland), EMI Records (Ireland) and Universal Music (Ireland) sought court orders compelling Eircom to install filtering software to prevent the sharing of music files over its network. Under the terms of the settlement, the recording companies agreed to collect data regarding users who allegedly infringe their copyright and pass that information on to Eircom. Eircom agreed to implement a "three strikes" policy against its customers – inform customers that they are infringing copyright, warn customers that Eircom may terminate their accounts, and ultimately disconnect customers who fail to cease their infringing conduct. Eircom also stated that the record companies agreed to take all necessary steps to put similar agreements in place with all other Irish ISPs.⁵²

France

France has also adopted an adaptation of the "three strikes" approach. French authorities, ISPs and copyright owners' representative bodies agreed a memorandum of understanding in November 2007 (the "Olivennes Agreement") setting out a "three strikes" graduated approach to dealing with repeat

the NZ Copyright Act requires ISPs to adopt and reasonably implement a policy that provides for termination of the account of a repeat infringer

a restricted act without the consent of the copyright owner". The language of section 92A is very similar to that of section 116AH(1) of the Australian Copyright Act. Whilst the provisions operate in different ways,⁴⁸ the ultimate result may be the same in both jurisdictions – ISPs must actively combat copyright infringement in a way that directly affects their bottom line. Further, questions remain regarding the standard of proof and practical operation of section 92A. Various industry groups (including APRA) are currently developing a code of practice for ISPs to deal with alleged "repeat infringers".⁴⁹ Section 92A is due to come into effect on 27 March 2009; however, its implementation may be suspended if an industry code of practice is not agreed by that time.⁵⁰

infringers.⁵³ This approach provides: for a web user's first copyright infringement, he or she will be sent a warning email; for the second infringement within 6 months, he or she will be sent a second warning email and formal warning letter; and for the third infringement within one year, the government regulator may impose various sanctions. These sanctions include ordering the user's ISP to suspend the user's Internet access for a period ranging from three months to one year (the length of which may be reduced if the user provides written undertakings not to engage in copyright infringement), and imposing a fine of a maximum of €5,000. Significantly, the *regulator* sends the warnings and imposes the sanctions, not the ISPs. Further, the regulator's actions are coordinated with all ISPs so that repeat infringers are placed on a "blacklist" and cannot simply subscribe to an alternate ISP if their Internet access is suspended. ISPs must check this "blacklist" before entering new customer contracts. Whilst web users have a right of appeal against sanctions, the scheme has been criticised for lacking procedural fairness, as well as conflicting with data protection, privacy and competition laws. It remains to be seen how effective

(and costly) this novel scheme will be in practice to prevent and reduce online copyright infringement.

Conclusion

Overseas developments, together with the iiNet proceeding in Australia, indicate an increasing industry focus on ISPs as the gatekeepers of Internet users who participate in copyright-infringing conduct. Their underlying logic is that ISPs are in the best position to control their customers' conduct and therefore should be directly engaged to develop best practices to combat online infringement. Alternatively, New Zealand and French practices demonstrate the introduction of legislative schemes to deal with online copyright infringement. While legislative developments inevitably lag behind technological ones, some argue that they may nevertheless be useful in the copyright context to align statutory rights with the public's practices, and in a digital economy to balance the interests of copyright owners, ISPs and users of technology.

Anita Cade is a Senior Associate and Maya Port a Lawyer at Blake Dawson

(Endnotes)

1 iiNet is the third largest Australian ISP by number of customers, was listed on the Australian Stock Exchange in 1999 and supports approximately 700,000 services: "About iiNet", iiNet website, available at <http://www.iinet.net.au/about/>.

2 Applicants' Statement of Claim, paras 63-67, filed 20 November 2008.

3 Applicants' Amended Statement of Claim, paras 67A-67F, filed 19 February 2009.

4 The applicants claim that iiNet authorised the infringing conduct of all iiNet users, being iiNet's customers and other users of its Internet services: Applicants' Statement of Claim, para 59. iiNet, however, distinguishes between the acts of its subscribers and other persons who may use its services but with whom it has no direct relationship and whom it cannot identify: Respondent's Defence, para 63(t).

5 *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 220 ALR 1; (2005) 65 IPR 289.

6 At the second directions hearing held in the Federal Court of Australia on 6 February 2009, counsel for the Applicants submitted that the quantum of damages available (in the event the Applicants are successful) is currently in dispute. At the time of writing, the applicants are seeking an order that all issues of the quantum of any pecuniary relief be heard and determined separately from all other issues in the proceeding (Applicants' Notice of Motion, filed 23 February 2009).

7 Applicants' Amended Statement of Claim, paras 71-77.

8 Applicants' Statement of Claim, paras 15-56.

9 Respondent's Defence, paras 15-56.

10 Pursuant to the parties' submissions at the second directions hearing, Federal Court of Australia, 6 February 2009.

11 Applicants' Statement of Claim, para 59.

12 Respondent's Defence, para 63.

13 *University of New South Wales v Moorhouse* (1975) 133 CLR 1; 6 ALR 193 per Gibbs J.

14 Section 101(1A)(a) of the Copyright Act.

15 Section 101(1A)(b) of the Copyright Act.

16 Section 101(1A)(c) of the Copyright Act.

17 *Universal Music Australia v Sharman*, note 5.

18 *Universal Music Australia v Sharman*, note 5; *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244; (2004) 61 APR 575.

19 *Universal Music Australia v Sharman*, note 5.

20 Applicants' Statement of Claim, paras 63-64.

21 Applicants' Particulars to the Statement of Claim, paras 61, 63-65, 73.

22 Applicants' Particulars to the Statement of Claim, paras 69-77. The applicants used DtectNet Software to identify iiNet users who were making copies of the copyright material available online using BitTorrent, connect to those users and then transmit the films to a computer operated by DtecNet for download from those users.

23 Applicants' Statement of Claim, paras 63-67.

24 iiNet's Customer Relationship Agreement provides: a customer must not use iiNet Internet Services to infringe another person's rights, and iiNet can cancel or suspend a customer's Internet Services if iiNet suspects illegal conduct or is required to do so by law. There is also a notice on iiNet's website stating that the hosting or positing of illegal or copyright material using an iiNet service constitutes a breach of the Customer Relationship Agreement and may result in the suspension or termination of a customer's service without notice: Applicants' Particulars to the Statement of Claim, paras 66-68.

25 Respondent's Defence, para 63(r).

26 Respondent's Defence, para 63(s).

27 Respondent's Defence, para 63(t).

28 Respondent's Defence, para 63(u); Respondent's Particulars to Paragraph 63(u) of the Defence, filed 5 February 2009.

29 Pursuant to submissions of counsel for the Respondent at the second directions hearing, Federal Court of Australia, 6 February 2009.

30 Respondent's Defence, paras 57(g) and 75.

31 *Universal Music v Sharman*, note 5.

32 Respondent's Defence, para 58(d).

33 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187; (2006) 156 FCR 380; (2006) ALR 714; (2006) 71 IPR 1.

34 Respondent's Defence, paras 57(h); 76-85.

35 Section 116AC of the Copyright Act. Categories B-D activities are set out in sections 116AD-116AF respectively.

36 Respondent's Defence, paras 80-83.

37 *US Free Trade Agreement Implementation Act 2004* (Cth); *Copyright Legislation Amendment Act 2004* (Cth).

38 Applicants' Amended Statement of Claim, paras 67A-67D.

39 Applicants' Amended Statement of Claim, para 67F.

40 See definition of "infringing copy" of a cinematograph film in section 10(1) of the Copyright Act.

41 Applicants' Amended Statement of Claim,

paras 67E and 75.

42 Applicants' Particulars to the Statement of Claim, paras 70-77.

43 At the time of writing, the Respondent has not filed an amended Defence in response to the applicants' Amended Statement of Claim.

44 Respondent's Defence, paras 63 (b)-(c).

45 Respondent's Defence, paras 63(d)-(e).

46 ISPs may soon be more actively engaged in addressing online illegal content as part of the proposed mandatory content filtering scheme in Australia. The Federal Government has engaged ISPs to conduct live pilot tests of filtering software with the aim of introducing a two-tier scheme: the first tier being the mandatory filtering of content contained on a "blacklist" of URLs provided by the Australian Media and Communications Authority which contain "prohibited content" (as that term is defined in the *Broadcasting Services Act 1992* (Cth)); and the second tier being the optional filtering of other forms of inappropriate content (the details of which remain unclear). See the website of the Federal Department of Broadband, Communications and the Digital Economy for further details, available at <www.dbcde.gov.au>.

47 Except for the new section 92A, the NZ Amending Act came into effect on 31 October 2008: New Zealand Government, "Copyright (New Technologies) Amendment comes into force", 3 October 2008, available at <beehive.govt.nz>.

48 The New Zealand provision operates as a positive obligation on ISPs to adopt a policy dealing with repeat infringers, whereas the Australian provision is a condition for ISPs to rely on the safe harbour provisions in Division 2AA of the Australian Copyright Act.

49 Pilcher P, "Copyright law dust-up turns into a war of words", *New Zealand Herald*, 22 January 2009, available at <www.nzherald.co.nz>.

50 "Controversial internet law on hold – Key", *New Zealand Herald*, 23 February 2009, available at <www.nzherald.co.nz>.

51 Gergley A, "ISP cuts off illegal music downloader's", *Australian IT*, 8 February 2009, available at <www.australianit.news.com.au>; "Downloader's face disconnection following Eircom settlement", *Irish Times*, 28 January 2009, available at <www.irishtimes.com>

52 Ibid.

53 Baden-Powell E, "Three strikes and then what?", *Copyright World*, Issue no. 187, February 2009. The French Senate adopted the "Olivettes Bill" in October 2008, which is expected to be approved by the National Assembly to become law in early 2009.