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## Intellectual Property Law update

# iiNet copyright decision fails to follow Hollywood's script

*Roadshow Films Pty Ltd v iiNet Limited (No. 3) (Federal Court of Australia, 4 February 2010)*

### Background

In a landmark copyright decision handed down earlier this month, the Federal Court of Australia dismissed an application by a group of 34 major film studios against Australian internet service provider iiNet Limited for infringement of copyright in a large number of cinematograph films.

The case is understood to have been the first trial in the world which looked at the issue of whether an internet service provider ("ISP") is liable for the copyright infringement of its subscribers and therefore attracted significant global interest.

### The decision

In the case, the film studios alleged that a number of iiNet subscribers infringed copyright by sharing and downloading films and television programs using the online peer-to-peer file sharing network BitTorrent and that by failing to take any steps to prevent or stop the infringing conduct, iiNet authorised those infringements. Under the Copyright Act 1968, a person who authorises the infringement of copyright is treated as if they themselves infringed copyright directly.

Whilst the evidence in the case established that a number of iiNet subscribers had infringed copyright and that iiNet knew of the infringements, the Court held that iiNet did not authorise them. The Court drew a distinction between providing the "means" of infringement, which would amount to authorising the infringement, and merely providing a "precondition" to infringement occurring.

The Court found that the provision of an internet service by an ISP, like the provision of electricity by an energy company, is a precondition to infringement. In the same way that an energy company is not responsible for how its customers use the electricity, the Court held iiNet to not be responsible for how its subscribers used the internet. The direct means by which infringement of the film studio's copyright occurred was the subscribers' use of the BitTorrent system, not the use of the internet, and because of this iiNet was held not to have authorised the copyright infringements.

### Implications

Whilst the case is clearly a win for ISPs, it should also be seen a positive outcome for all Australian internet users, including those who engage in illegal file sharing and those who do not. If the Court had held that iiNet authorised infringement, ISPs would have been required to actively police and take steps to prevent its subscribers from engaging in infringing conduct. The costs involved in establishing and implementing such measures are significant and would inevitably have been passed on to the end user, resulting in an increase in the cost of internet access for all, including legitimate users of the internet.

In terms of the fight against internet piracy, the decision is obviously disappointing for the film studios particularly as the evidence in the case established that online copyright infringement is widespread and occurring on a large scale. If the film studios are unable to succeed on appeal, they, together with the music and other entertainment industries, will be left with no choice than to claim hollow victories in individual claims against individual copyright infringers or to lobby the Federal Government to introduce legislative reform imposing additional responsibilities on ISPs. Whereas the battle against online piracy is one thing, the introduction of additional legislation requiring ISPs to police what their subscribers do with their internet services, together with the Federal Government's controversial proposal to introduce a web filter to "censor" what Australians can view on the internet, would have unintended consequences for legitimate users of the internet and be a step in the wrong direction.

The film studios have until 25 February 2010 to lodge an appeal to the full court of the Federal Court of Australia.

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