

## iiNet: A Victory for “business as usual”

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In a decision certain to send the internet all-a-twitter, Justice Cowdroy of the Federal Court today gave his decision in the much anticipated “iiNet Case” (Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24). The result was a comprehensive finding in favour of iiNet.

Much breathless commentary is likely to appear in coming days about the impact of Justice Cowdroy’s decision on the content and entertainment industries. However, the actual outcome can likely be summarised in three words: “business as usual”.

The iiNet decision confirms that internet service providers may continue to go about their business of providing their customers with access to the internet, while copyright owners can create copyright material and seek to protect it in whatever lawful manner they see fit.

Important findings of Justice Cowdroy include:

1. Although iiNet knew that copyright infringement was occurring on its networks, and although iiNet did not do anything to stop those infringements, this was not an “authorisation” of copyright infringement.
2. Earlier court decisions which had found an “authorisation” of copyright infringement, including the *Cooper* and *Kazaa* decisions, involved the provision by the defendants of a “means” of infringement. The mere supplying of an internet service was not a “means” of infringement.
3. The “means” of infringement in the iiNet litigation was the BitTorrent data sharing system. Justice Cowdroy found “iiNet has no control over the BitTorrent System and is not responsible for the operation of the BitTorrent system”. By contrast, the evidence in *Cooper* and *Kazaa* showed that those parties “...intended copyright infringements to occur, and in circumstances where the website and software... were deliberately structured to achieve this result”.
4. “A scheme for notification, suspension and termination of customer accounts is not, in this [iiNet case] instance, a relevant power to prevent copyright infringement pursuant to s.101(1A)(a) of the *Copyright Act*, nor in the circumstances of this case is it a reasonable step pursuant to s. 101(1A)(c) of the *Copyright Act*.” Section 101(1A) specifies certain matters that should be taken into account in determining whether a person has authorised the infringement of copyright.
5. The *Telecommunications Act* would not have prevented iiNet from acting on notices of infringement supplied to iiNet, but this matter was considered irrelevant in any event.
6. Section 112E of the *Copyright Act* would not have prevented a finding of authorisation against iiNet, but this matter was considered irrelevant in any event. Section 112E states that merely making a facility for communication available to another person does not imply authorisation of any infringement of copyright in an audio-visual item by that other person.
7. iiNet could have relied upon the “safe harbour” provisions in Division 2AA of Part V of the *Copyright Act* if it had needed to do so, but it did not need to do so.

In his summary, Justice Cowdroy observed that despite evidence that copyright infringement in films was occurring on a large scale “...such fact does not necessitate or compel, and can never necessitate or compel, a finding of authorisation, merely because it is felt that ‘something must be done’ to stop the infringements”, and that “iiNet is not responsible if an iiNet user chooses to make use of that system [BitTorrent] to bring about copyright infringement.”

The decision confirms that copyright is fundamentally a statutory civil right, granted for the benefit of creators and owners of certain material, and that the person responsible for enforcing those rights is the same person who enjoys the benefit of them – namely, the copyright owner. ISPs do not have an obligation to enforce any third party’s copyright.

At least for the time being, it’s business as usual.

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