

## Media Alert

# Summary of iiNet's Position Federal Court Case - Roadshow Films Pty Ltd & Ors v iiNet Ltd

3 February 2010

### Primary Infringement

#### Making available

The applicants have made extravagant claims such as that their evidence revealed "97,942 infringements". iiNet provided evidence showing that these figures are wildly inaccurate and exaggerated and were based on the number of electronic enquiries made by DtecNet, often relating to the same film remaining on a user's computer for an extended period. iiNet accepted that some of its users at some stage would have downloaded movies using their iiNet accounts, it also accepted that where the applicants' evidence showed that a user had 100% of an identified film available for download, the user was making the film available online to the public. iiNet did not accept, however, that there is a fresh "making available online" each time a user's Internet is disconnected and then reconnected. iiNet submitted to the Court that on a proper construction of the law, there was only one act of making available in relation to each film or episode on each account identified in the evidence.

#### Transmission

The applicants claimed that iiNet users had electronically transmitted copyright works. iiNet submitted that this had not been made out on the evidence; firstly because no "substantial part" of the films had been transmitted, secondly that any transmissions were as a one-on-one exchange and not "to the public"; and thirdly, the person making the transmission was not the iiNet user, instead the maker of the transmissions forming the evidence was DtecNet.

#### DVD copies

The applicants also claimed that iiNet users had made further copies of films and television episodes onto DVDs. The only evidence of this was copying onto DVDs by the applicants' investigators/agents who, on iiNet's evidence, were licensed to do so and were therefore not committing infringements at all. The applicants' studio witnesses themselves confirmed that the investigations conducted by their agents had been conducted within the law and that they were authorised to carry out the investigations in the way they did without infringing any rights.

### Authorisation

iiNet clearly and publicly promotes the distribution of licensed content and clearly prohibits users from infringing copyright via its facilities - iiNet does not "sanction, approve or countenance" infringing activity by Internet users.

The evidence presented by iiNet demonstrated that iiNet did not authorise any use of its service to do any of the exclusive acts comprised in the applicants' copyright, it neither provided express or implied authority to do the infringing acts. iiNet prohibited the infringing acts under its customer relationship agreement and on its website, it instead encouraged subscribers to obtain licensed content via its Freezone service. Further, iiNet discouraged excessive bandwidth use by shaping its subscribers accounts. The means of infringement by Internet users was Bittorrent client software, not the



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service provided by iiNet. iiNet provided evidence that it, unlike certain of the applicants, did not have any relationship with Bittorrent or any Bittorrent clients.

s276 of the Telco Act is also relevant to whether iiNet has authorised copyright infringement, as it provides that iiNet had no power to prevent the doing of the infringing acts as it could not use the information provided to it by the applicants. Even if the Telco Act is construed not to prevent iiNet from using the information provided to it, the failure by iiNet to notify and ultimately disconnect customer accounts, this would not amount to authorisation as the implementation of such a regime could not be considered “reasonable steps”.

### **s112E**

The clear purpose of s112E is to provide ISPs with a defence to authorisation where it has been found to have authorised infringement of copyright. The applicants’ construction of s112E results in it having no operation as a defence as soon as *any* factual element is present that bears upon the question of authorisation, such that if iiNet had not authorised it could rely on s112E but wouldn’t need to but if it had authorised it could not rely on s112E. iiNet submitted that the parliament could not have intended to enact a provision of no utility or substantial operation.

iiNet’s submitted that on its correct construction s112E must apply to protect carriage service providers from liability for authorising infringements of copyright simply by providing the facilities that some other person uses to infringe copyright, whatever the mental state of the carriage service provider (that is, whether or not the carriage service provider knew about the use, had reason to suspect the use, or did not know about the use). Neither having knowledge of the use of the services; or having a contractual relationship with its customers could have prevented iiNet from being able to rely on s112E.

The applicants asserted that iiNet positively encouraged the continue of acts of copyright infringement including by promoting its services. iiNet rejected that interpretation on the basis that s112E should not be interpreted to protect only carriage service providers who do not promote their services. Unlike the earlier *Cooper* case, iiNet did not enter into any agreement with any of its subscribers that provided it with a commercial advantage from the infringing activity that was over and above the standard payment for Internet access services. On the contrary, iiNet profits are higher where customers only use a moderate proportion of their bandwidth quota and Bittorrent traffic tends to use a large amount of bandwidth.

iiNet has invested in its Freezone service which promotes access to authorised content, it had also invested a significant amount of money in telecommunications infrastructure and online technology; this kind of investment is exactly what the parliament intended to promote and protect by introducing the Digital Agenda Act and s112E.

### **Telco Act**

s276 of the *Telecommunications Act* provides that it is a criminal offence for a carriage service provider (such as iiNet) or its employees to use or disclose certain types of information. Under s276 of the *Telecommunications Act*, carriage service providers must protect the confidentiality of information that relates to the contents of communications carried by them, the carriage services supplied by them and the affairs and personal particulars of other persons. iiNet contended that this prohibition is directly relevant to whether it has authorised copyright infringement, and would likely result in iiNet or its employees committing a criminal offence if they were to use or disclose either the information contained within the AFACT notifications or the information held by iiNet about the affairs or personal particulars of other persons, and about the carriage services supplied to those persons.



In particular, iiNet contended that it could not be found to have the power to prevent an infringement by an iiNet user if the exercise of the power to take the suggested or hypothetical steps (such as notifying the customer, suspending or disconnecting their service, etc) would constitute a criminal offence. Further, it would not be reasonable for iiNet to take the suggested or hypothetical steps because to do so would, or would likely, constitute a criminal offence on the part of iiNet or its employees.

Although there are certain exceptions in relation to the offence of use or disclosure of information, none of the exceptions would apply in the circumstances: there has been no consent to such use by the customer, nor would the customer have been reasonably likely to have been actually aware or made aware that the information of the relevant kind is usually disclosed, or used, as the case requires, in the circumstances concerned. No provisions contained within iiNet's customer relationship agreement alter this position.

### **Safe Harbour**

Part V, Division 2AA of the *Copyright Act* sets out a statutory regime, commonly known as the "safe harbour regime", that limits the remedies available against carriage service providers for infringement of copyright provided that the carriage service provider complies with relevant conditions.

According to the safe harbour regime, there are four separate categories of activities undertaken by carriage service providers. This case related to Category A activity - 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. In order to rely on the limitation of liability provided by the safe harbours, in the case of category A activities, certain conditions must be met by the carriage service provider, including the adoption and reasonable implementation of a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers; and complying with any relevant industry code (no such code exists). There is no duty on the carriage service provider to monitor its service or to seek facts to indicate infringing activity (unless set out in an industry code - which does not exist). iiNet considers that it has met this condition by adopting and reasonably implementing a policy, although not contained wholly within a document, and so should have the protection of the safe harbours. iiNet has provided evidence of a number of different steps it has taken since 2005 to effect its safe harbour compliance policies.

As a result of satisfying the conditions relating to Category A, iiNet considered that the Court must not grant relief against it that consists of damages or an account of profits, additional damages, or other monetary relief. The orders available to the Court are instead limited to an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia, and an order requiring the carriage service provider to terminate a specified account, have regard to a number of factors including the harm caused to the copyright owner, the burden the making of such order would have on the provider, the technical feasibility of complying, the effectiveness, etc.

### **Credit**

The applicants unjustifiably attacked the credibility of both Mr Malone and Mr Dalby's evidence. iiNet rejected these claims and asserted that Mr Malone and Mr Dalby gave honest evidence on the topics about which they were examined by the applicants. The applicants were also critical about "the absence of appropriate witnesses" in case. iiNet read affidavits by its managing director, chief regulatory officer and chief financial officer and a comprehensive documentary record of the company's communications were placed before the court.

Contrary to the applicants harsh commentary and overstated criticism, it was clear that Mr Malone readily answered questions in an efficient, direct and straightforward manner. He regularly accepted propositions put to him, including



about matters obviously regarded by the applicants as adverse to iiNet's case. The applicants suggested that Mr Malone was not a sufficiently informed or knowledgeable witness, when in fact he is the founder of iiNet and has been its managing director for 16 years with a background of relevant tertiary qualifications and experience as a computer programmer including writing iiNet's original billing system and maintaining it for more than 10 years. Similarly, after attacking Mr Dalby's credibility, the applicants acknowledged that they rely on much of his evidence, this fact strongly suggests Mr Dalby gave straightforward and honest answers. In particular, the applicants allege significant omissions in Mr Dalby's evidence, however the substance of everything alleged to be a significant omission was in fact in Mr Dalby's affidavit or its attachments showing that Mr Dalby's affidavit is complete and accurate in all material respects.

**- ENDS -**

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**About iiNet**

iiNet was established in 1993 and listed on the ASX in 1999, growing from a small Perth business into the third largest Internet Service Provider in Australia. The company now supports over 750,000 broadband, telephony and dialup services nationwide, with revenues of over \$400m, and proudly employs around 1300 people in Perth, Sydney, Auckland and Cape Town.

iiNet's goal is to lead the market with the best internet access products and then differentiate with genuine, plain speaking customer service. The company has its own high speed ADSL2+ network reaching around 4million households across Australia, the largest Voice over IP network in the country, and is delighted to have led yet again with Naked DSL, recognised by PC User Magazine as the 2007 Product of the Year.