

Introduction

In this case, the position of internet service providers (ISPs), might at first blush appear secure following the finding by the Full Court of the Federal Court of Australia, that *iiNet* was not responsible for the infringement of copyright by its users of cinematograph films. The decision is by no means a clearance of the role of ISPs generally.

Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23 (Emmett, Jagot and Nicholas JJ, 24 February 2011)

The decision

The full court of the Federal Court of Australia handed down its decision in this matter on 24 February 2011. By a majority decision, their Honours dismissed the appeal by the copyright stakeholders (Roadshow) against the internet service provider or ISP (*iiNet*).

Background to claims

Roadshow is a group of copyright owners and exclusive licensees of copyright, in relation to specified cinematograph films. It was common ground that by the use of the internet access provided by *iiNet*, that the copyright in the films had been infringed: [1]. Roadshow commenced the proceeding against *iiNet*, alleging that *iiNet* had authorised the infringements, which were done through the service it provided.

Under s 112E of the *Copyright Act*, a carriage service provider who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in, relevantly, a cinematograph film merely because another person uses the facilities so provided to do something the right to do which is included in the copyright. The word communication in s 112E has a meaning which corresponds with the definition of communicate in s 10 of the *Copyright Act*: [7].

Roadshow based its case on authorisation, upon notices it had provided to *iiNet*, advising them of infringements against their copyright. The infringement notices had been issued by the Australian Federation Against Copyright Theft (AFACT), an organisation set up for the purposes of assisting its members in relation to infringement of their copyrights.

The infringement notices included:

- The IP Address used by the identified *iiNet* customer at the time of each alleged infringement.

- The motion pictures and television shows in which copyright had allegedly been infringed;
- The names of the copyright owners controlling the rights in the relevant films.

The information was also sent to iiNet in an accompanying CD.

The safe harbour provisions

If the finding were that iiNet had authorised the infringements, the question arose whether the relief against iiNet, would be limited by the 'Safe Harbour Provisions'. The Safe Harbour Provisions were inserted into the *Copyright Act* by the *US Free Trade Agreement Implementation Act 2004* (Cth) and are found in ss 116AA to 116AJ.

Section 116AG(3) relevantly provides for a limitation to the relief a court may grant against an ISP, where the ISP is *inter alia*, providing services for transmitting, routing or providing connections for a film. The relief is 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.

Reasons for decision

Emmett and Nicholas JJ determined that iiNet had not authorised the infringements. Emmett J considered that iiNet had been provided with unequivocal and cogent evidence of the alleged primary acts of infringement by use of the iiNet service in question: [211]. His Honour had difficulty with two matters in Roadshow's case.

Firstly, the methods of AFACT's investigations, in obtaining the information contained in the infringement notices, were not disclosed to iiNet. Secondly, that Roadshow did not offer iiNet any reimbursement of any costs associated with complying with the infringement notices.

In relation to verification of the source of information, Emmett J considered it reasonable for iiNet to require some further information as to how AFACT obtained the results. His Honour noted at [204]:

iiNet says that AFACT was not entitled to keep its method of investigations secret if it expected a carriage service provider such as iiNet to be convinced of the reliability of the allegations of infringement and to act on such allegations. iiNet contends that it was not unreasonable for it to take the position that it wanted an independent third party to attest to the reliability and authenticity of the evidence provided by the Infringement Notices.

In this regard, his Honour considered that ‘the Infringement Notices are no more than assertions. No means of verification was furnished’: [211].

In relation to the costs for carrying out the investigations and the costs of implementing the actions required by the notices, Emmett J observed at [205]:

It was not reasonable to require iiNet to undertake the immense amount of work, cost and effort required in order to set out, review and analyse the allegations in the information provided with the Infringement Notices. iiNet did not have the guidance, which was subsequently afforded to it in the course of the proceeding, to enable it to carry out that task.

And at [211]:

More importantly, in relation to the fourth circumstance, the Copyright Owners have not offered to reimburse iiNet for any costs incurred in complying with the demands made by the Infringement Notices.

Nicholas J identified the problem in relation to authorisation arose from knowledge. His Honour raised a number of questions including the following at [794]:

If a person makes communication facilities available knowing that they are to be used for the purpose of infringing copyright, can it be said that he or she has done something more than merely make communication facilities available?

His Honour concluded at [795], that it could not be inferred that a person authorised copyright infringement merely because he or she provides another person with communication facilities used by the other person to infringe copyright.

Comment

Whilst the comment of Nicholas J might be the cause of some wider relief by ISPs, the conclusions of Emmett J ring with a warning, that the case should be understood to turn on its facts, rather than a statement of general principle:

Even though the Copyright Owners are not entitled to the relief claimed in this proceeding, it does not follow that that is an end of the matter. It is clear that the questions raised in the proceeding are ongoing. It 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 users of the services provided to its customers under its customer service agreements.

(His Honour’s reasons at [277])

In addition, the full court unanimously determined that if iiNet had authorised the infringements, then the policy they had in place at the relevant time, to deal with copyright infringing conduct, would not have entitled them to the limitations on relief set out in the safe harbour provisions: Emmett J at [272]; Jagot J at [524]; Nicholas J at [800].