

ROADSHOW FILMS PTY LIMITED & ORS v iiNET LIMITED

NSD 1802 of 2008

**ATTACHMENT TO CHAPTER 9 OF THE RESPONDENT'S OUTLINE OF FINAL
SUBMISSIONS**

**HOW iiNET SUBMITS THAT THE COURT SHOULD ANSWER ITS STATEMENT
OF ISSUES**

PRINCIPAL ISSUE #1

Acts of users of the Internet

Underlying infringements by Internet users

1. To what extent (if at all) have the applicants proved infringement of copyright in the Identified Films by Internet users doing any of the following acts:

- (a) making available online, and thus communicating, the whole or a substantial part of any Identified Film to the public;

This has been established, but not in anything like the quantities contended for by the applicants. For each appearance of an Identified Film in the DtectNet tables, in relation to the 20 nominated user accounts, someone accessing the Internet through that account has made the film available online once. In relation to accounts other than the 20 nominated accounts, the precise number of times that Identified Films have been made available online cannot be known, but is considerably less than the figure contended for by the applicants.

- (b) electronically transmitting, and thus communicating, the whole or a substantial part of any Identified Film to the public;

The applicants have not established this.

- (c) making a copy on a computer of the whole or a substantial part of any Identified Film;

There is a copy on each computer corresponding to each “making available online” of an Identified Film, on the footing that there is only one “making available online” as contended for by iiNet in issue 3 below.

- (d) making further copies of Identified Films in physical DVD format or on other physical storage media.

The applicants have not established this.

OTHER ISSUES RELATING TO PRINCIPAL ISSUE #1

Issues relating to “making available online”

2. Where, in tables that are in the applicants’ evidence, the column headed “% of file **shared**” shows a figure of less than 100%, is the amount identified a “substantial part” (within the meaning of s 14 of the *Copyright Act* 1968 (the “Act”)) of the cinematograph film concerned?

This question no longer arises. While iiNet has not conceded that any particular percentage amounts to a “substantial part”, iiNet says that there is no need for the Court to trouble itself with this issue.

3. Does an Internet user who makes an Identified Film available online do so once only as a single continuing act or as multiple acts? If the latter, when and in what circumstances does each separate act occur?

A Internet user makes such a film available online only once as a single continuing act.

Issues relating to “electronically transmit”

4. When a BitTorrent transmission occurs as a result of a person (for example, in the evidence, Mr Herps) seeking to download a film, who determines the content (within the meaning of s 22(6) of the Act) of a BitTorrent transmission? Is it the person on whose computer resides a copy that will be the source of part of the download (**Person A**) or is it the person (the “downloader”) who executed the command initiating the request for the film (such as, in the evidence, Mr Herps) (**Person B**)?

Person B determines the content of the transmission.

5. If the answer to issue 4 is “Person A”, does Person A electronically transmit the whole or a substantial part of an Identified Film, or a lesser part?

Given the answer to question 4, this does not arise. However, if the Court were to answer question 4 differently, the answer would be that in other instances in the evidence can the Court determine that a substantial part was electronically transmitted, and according to the applicants would fail this issue.

Issues relating to “electronic transmission to the public”

6. Were the electronic transmissions pleaded in paragraph 59(b) of the Further Amended Statement of Claim and identified in the evidence communications made “to the public” within the meaning of s 86(c) of the Act?

The communications are not made “to the public”.

Issues relating to making of copies by users

7. To what extent have the Applicants established that further copies of Identified Films in physical DVD format or on other physical storage media have been made by users as alleged in paragraph 60 of the Further Amended Statement of Claim?

The applicants have not established the matters raised by paragraph 60 of the Further Amended Statement of Claim.

Issues relating to absence of licence (s. 101) or statutory defences in relation to certain acts of users

8. Were the acts of Mr Herps, Mr Fraser, Mr Carson or DtecNet agents (**AFACT Agents**) that are said to constitute examples of primary infringements of copyright:

- (a) done without the licence of the relevant Applicant(s); and/or

The acts of Mr Herps and Mr Fraser were done with the licence of the relevant applicant(s). The question does not arise in relation to Mr Carson or the DtecNet agents.

- (b) done for the purpose of a judicial proceeding within the meaning of s 104 of the Act such that the acts done did not amount to an infringement of copyright?

Given the answer to 8(a), the question need not be answered. If it needs answering, the acts of Mr Herps and Mr Fraser were done for the purpose of this proceeding.

9. In relation to the making of copies alleged in paragraph 59(c) of the Further Amended Statement of Claim, to what extent have the Applicants established that copies were made in the course of accessing the Internet by means of iiNet's services?

As the copies have the BitTorrent tracker hash numbers, it follows that one copy has been made in relation to each account of each film identified on that account in the course of accessing the Internet. iiNet accepts that there will be sufficient copies for the Court not to have to consider the possibility that some might have been made by accessing a different ISP's services.

10. Who are the Internet users found to have engaged in the acts referred to in issues 1(a) to (d)?

They are people accessing the Internet through connections provided by iiNet. It is not possible to know, in any single instance other than Mr Herps and Mr Fraser, whether the person doing the act was, or was not, an iiNet customer.

PRINCIPAL ISSUE #2

Authorisation liability of iiNet

Section 101(1A)

11. Did iiNet "authorize", within the meaning of s 101(1) and (1A) of the Act, any of the following acts of Internet users (in so far as those acts were found to have been committed and to be an infringement of the Applicants' copyright):

- (a) making available online to the public of the whole or a substantial part of any Identified Film;

No.

- (b) electronic transmission to the public of the whole or a substantial part of any Identified Film;

No.

- (c) making a copy of the whole or a substantial part of any Identified Film; or

No.

- (d) making further copies of Identified Films in physical DVD format or on other physical storage media?

No.

OTHER ISSUES RELATING TO PRINCIPAL ISSUE #2

12. In considering issue 11:

- (a) did iiNet have the power to prevent the doing of any of the acts of Internet users identified under issue 10? If so, what was that power and what act(s) would have been prevented by its exercise?

iiNet did not have the power to prevent the doing of the acts as that power is properly understood in light of the authorities.

- (b) what was iiNet's relationship, if any, with the Internet users identified under issue 10?

iiNet's relationship with the internet users identified under Issue 10 is not known; it is not known whether any of them is an iiNet customer.

- (c) did iiNet take any "other reasonable steps to prevent or avoid" (within the meaning of s 101(1A) of the Act) the doing of any of the acts of Internet users identified under issue 10?

Yes.

Telecommunications Act 1997

13. Are the AFACT Notifications documents that relate to, or documents that contain information that relates to:

- (a) the content or substance of a communication that has been carried by iiNet;

Yes.

- (b) carriage services supplied, or intended to be supplied, to another person by iiNet; or

Yes.

- (c) the affairs or personal particulars of another person,

Yes.

within the meaning of s 276 of the *Telecommunications Act 1997* (the **Telco Act**)?

14. What other documents or information does iiNet have that relate to:

- (a) the contents or substance of communications that have been carried by iiNet;

The information in iiNet's records including in its databases.

- (b) carriage services supplied, or intended to be supplied, to another person by iiNet; or

The information in iiNet's records including in its databases.

- (c) the affairs or personal particulars of another person,

The information in iiNet's records including in its databases.

within the meaning of s 276 of the Telco Act?

15. Does s 276 of the Telco Act prohibit the use or disclosure of the documents or information referred to in any of issues 13 and 14 in:

- (a) taking the steps referred to in paragraphs 63(d) and 64(c) of the Further Amended Statement of Claim;

Yes.

- (b) taking the steps referred to in paragraphs 96 and 97 of the Applicants' particulars to the Further Amended Statement of Claim;

Yes.

(c) taking any other steps to investigate or act upon the document or information?

Yes.

16. If so, when determining whether or not iiNet has authorised the doing in Australia of any act comprised in copyright without the licence of the owner, are the steps referred to in issue 15 “*reasonable steps*” within the meaning of s 101(1A)(c) of the Act?

No.

17. What is the effect of the answers to issues 15 and 16 on the Applicants’ claim?

The resolution of these issues would alone be sufficient to defeat the applicants’ claim for authorisation infringement.

Section 112E (if authorisation liability otherwise established)

18. Does iiNet “provide facilities for making, or facilitating the making of a communication” within the meaning of s 112E of the Act?

Yes.

19. If so, does s 112E have the effect that iiNet is taken not to have authorized any infringement of the Applicants’ copyright that has occurred?

Yes.

PRINCIPAL ISSUE #3

Safe harbour (if infringement by iiNet is otherwise established)

20. Has iiNet satisfied the relevant within the meaning of s 116AG(1) of the Act so as to enliven the operation of s 116AG(3) of the Act in the present proceeding?

Yes.

OTHER ISSUES RELATING TO PRINCIPAL ISSUE #3

21. Does iiNet provide facilities or services for transmitting, routing or providing connections for copyright material within the meaning of s 116AC of the Act?

Yes.

22. Has iiNet satisfied the conditions set out in items 1 and 2 in the table to s 116AH(1) of the Act?

Yes.

ISSUES RELATING TO RELIEF

Relief (if infringement by iiNet established) (other than relief as to quantum)

If safe harbour applies

23. If the conditions in s 116AH(1) of the Act are satisfied, is there an online location outside Australia to which iiNet should disable access from iiNet accounts? If so, what location is it?

This question has been postponed, if it arises.

24. If the conditions in s 116AH(1) of the Act are satisfied, should iiNet terminate accounts and, if so, which accounts?

This question has been postponed, if it arises.

Generally

25. If the conditions in s 116AH(1) of the Act are not satisfied, should there be a grant of declaratory and/or injunctive relief and, if so, in what form?

This question has been postponed, if it arises.

26. Are the Applicants entitled to relief in respect of Catalogue Films which are not Identified Films?

This question has been postponed, if it arises.

27. Should damages be awarded to the applicants under s 115(4) of the Act?

This question has been postponed, if it arises.

28. Should the Court have regard to other likely infringements pursuant to s 115(6) of the Act for the purposes of granting relief?

This question has been postponed, if it arises.