

ROADSHOW FILMS PTY LTD & ORS v iiNET LIMITED (S288/2011)

Court appealed from: Full Court of the Federal Court of Australia
[2011] FCAFC 23

Date of judgment: 24 February 2011

Date of grant of special leave: 12 August 2011

The Appellants are Australian and American companies who are the owners and exclusive licencees of copyright in thousands of commercially released films and television programs. These are "cinematographic films" pursuant to the *Copyright Act 1968* (Cth) ("the Act") and the Appellants' ability to exploit them depends heavily upon the protections guaranteed by that Act.

The Respondent is an Internet Service Provider ("ISP"). It provides its customers with internet access pursuant to a standard Customer Relationship Agreement ("Agreement"). Amongst other things, that Agreement requires its customers not to use the internet to infringe anybody's copyright. It also entitles the Respondent to cancel, suspend or restrict its customers' access to the internet for any breach of those terms.

Many of the Respondent's customers downloaded (and exchanged) unauthorised copies of the Appellants' films using a "peer to peer" protocol called BitTorrent. (BitTorrent is also the dominant file sharing protocol used on the internet.) The Respondent was aware of BitTorrent and its use in the unauthorised sharing of files. It was also aware that approximately half of the internet traffic on its system was BitTorrent traffic, a substantial proportion of which involved copyright infringement.

In July 2008 the Australian Federation Against Copyright Theft ("AFACT") began sending the Respondent infringement notices. Those notices detailed the online infringement of the Appellants' copyright (using BitTorrent) detected on the Respondent's network. AFACT also requested that the Respondent take unspecified action to prevent any future infringement, a request that the Respondent effectively declined.

On 20 November 2008 the Appellants commenced Federal Court proceedings, alleging that the Respondent had authorised past, present and future infringements of the Appellants' copyright. Also on that date, the Respondent advised its affected customers that a judicial determination of infringement would be required before their accounts would be terminated.

On 4 February 2010 Justice Cowdroy held that the Respondent had not authorised the acts of infringement. This was despite the Respondent failing to take those legal and technical steps available to it to prevent the acts of infringement taking place. On 24 February 2011 the Full Federal Court (Emmett & Nicholas JJ, Jagot J dissenting) dismissed the Appellants' appeal. The majority held that the Respondent had not authorised the infringements of the Appellants' copyright.

Applications for intervention in this matter have been filed by the following interests: the Australian Recording Industry Association Limited; the Media, Entertainment & Arts Alliance and the Screen Actors Guild; the Australasian Performing Right Association Limited; the Australian Privacy Foundation; the Australian Digital Alliance Limited and the Communications Alliance Limited.

On 2 September 2011 the Respondent filed a notice of contention, the grounds of which include:

- The Full Court erroneously failed to decide that merely because other persons used facilities provided by iiNet for making, or facilitating the making of, a communication to engage in acts comprised in the Appellants' copyright, in the circumstances of this case iiNet is not taken to have authorised any infringement of copyright by reason of s 112E of the Act: Emmett J at [212]-[218], Jagot J at [452]-[465], Nicholas J at [784]-[797].

The grounds of appeal include:

- The Full Court erred (per Emmett & Nicholas JJ) in holding that the Respondent had not authorised the infringements of the Appellants' copyright by users of the Respondent's internet services (per Emmett J at [257]; Nicholas J at [798]; cf Jagot J at [477], [527(2)]).