

# Intermediary Liability

## An Australian Perspective

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# Summary

- 1 Intermediaries are not homogeneous
- 2 Authorisation liability is fracturing
- 3 *iiNet* is about knowledge and control
- 4 Liability-limiting criteria are not clearly defined
- 5 Courts are starting to create *ex ante* enforcement codes by reference to authorisation
- 6 International harmonisation is just beginning
- 7 Site-blocking is not new, and not a panacea

(1) Intermediaries?

The Google logo is displayed in its characteristic multi-colored font. The letters are: 'G' in blue, 'o' in red, 'o' in yellow, 'g' in blue, 'l' in green, and 'e' in red. A small 'TM' trademark symbol is located to the upper right of the 'e'.

Google™

The Bing logo is shown in a blue, lowercase, sans-serif font. The letter 'i' has a small orange dot above it. A small 'TM' trademark symbol is positioned to the upper right of the 'g'.

bing™

(a) Search engines



(b) Hosts

**facebook**®

amazon.co.uk<sup>®</sup>



*PayPal*<sup>™</sup>



(d) Marketplaces and payment processors



(e) Internet service providers



(f) Software and protocol developers



(g) Website operators

Proximity to  
infringement

Website operators

Marketplaces

Search engines

Hosts and registrars

Protocol developers

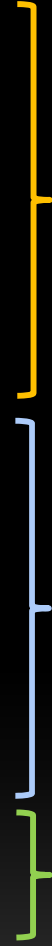
Internet service providers

Hardware suppliers

Application  
layer

Network  
layer

Physical  
layer



## (2) Authorisation

Why look at Australia?

# Similar principles?

“I was also referred by the parties to [two] ... decisions under the Australian *Copyright Act of 1968*. ... In my judgement these decisions are entirely consistent with the [UK] principles which I have summarised and which I believe I must apply.”

*Twentieth Century Fox Film Corp v Newzbin Ltd*  
[2010] FSR 21, 541–2 (Kitchin J)

# Antipodean origins

“The copyright in a book [&c] means the exclusive right **to do, or authorize another person to do**, all or any of the following things in respect of it: ...”

*Copyright Act 1905 (Cth) s 13(1)*

Qualified comparison

# Sources of Anglo–Australian divergence

- 1 The statutory language and context
- 2 The European copyright framework
- 3 Different tests for authorisation
- 4 Different intermediary safe-harbours
- 5 New *iiNet* criteria: “means” + “reasonable steps”
- 6 New notice requirements: “cogent and unequivocal”
- 7 Authorisation is highly fact-specific

# UK authorisation: early cases

“[the authorities] clearly indicate that ...  
[‘authorise’] is to be understood in its  
ordinary dictionary sense of ‘sanction,  
approve, and countenance.’”

*Falcon v Famous Players Film Company*  
[1926] 2 KB 474, 491 (Bankes LJ)

# UK authorisation: early cases II

“to ‘authorize’ means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor.”

*Falcon v Famous Players Film Company*  
[1926] 2 KB 474, 499 (Atkin LJ)

# Authorisation in Australia

“The word ‘authorize’ ... has been held judicially to have its **dictionary meaning** of ‘**sanction, approve, countenance**’: *Falcon* ... It can also mean ‘permit’. ... However, [it] connotes a **mental element** and it could not be inferred that a person had ... authorized something ... if he **neither knew nor had reason to suspect** that the act might be done.”

*The University of New South Wales v Moorhouse*  
(1975) 133 CLR 1, 12–13 (Gibbs J)

# UK authorisation: modern view

“Atkin LJ said that ... ‘authorise’ means to **grant or purport to grant** [&c] ... In my opinion, this comes **much nearer to** my understanding of **the meaning of the word ‘authorise’** than the synonyms approved by Bankes LJ and the High Court of Australia.”

*Amstrad Consumer Electronics plc v The British Phonographic Industry Ltd* [1986] FSR 159, 207 (Lawton LJ)  
(Glidewell LJ agreeing)

# UK authorisation: modern view

“I respectfully agree with Atkin LJ and with Lawton LJ in the present case that ... an authorisation means a grant or purported grant, which may be express or implied, of the right to do the act complained of.”

*CBS Songs Ltd v Amstrad Consumer Electronics plc*  
[1988] 1 AC 1013, 1054 (Lord Templeman)

# A simplified comparison

	United Kingdom	Australia
<b>Orthodox test</b>	“Grant or purport to grant the right to do” the act complained of	“Countenance, sanction or approve” the act; or permit it to occur
<b>Codified?</b>	No, subject to EU interpretative provisos	Partially: three s 101(1A) mandatory factors
<b>Knowledge?</b>	Actual or constructive (including wilful blindness)	
<b>Control?</b>	Need direct control at the time infringing acts occur	Technical or contractual capability is enough
<b>Reasonableness?</b>	Not considered directly, but test is an objective one	Accepted limiting criterion (FCAFC in <i>iiNet</i> )

iiinet



50%

of iiNet's customer traffic  
consisted of BitTorrent

5000  
notices

received by iiNet each  
weekday alleging  
infringement

86  
films

infringed by electronic  
communication

20

repeat infringer  
accounts identified

“And the position from iiNet, ... was it not, [was] that it didn't matter what AFACT said, or what information it provided, iiNet was not going to act upon those [infringement] notices ...; correct?”



**Tony Bannon SC**  
Counsel for  
Applicants

That's correct.

**Mike Malone**  
iiNet CEO



No matter what answer AFACT had given to any question, that position was not going to alter, iiNet was not going to act on them in the way AFACT was suggesting; correct?”



Yes, that's correct.



# Authorisation at trial

“one has to have under one’s control the ‘means’ of infringement before knowledge ... becomes a relevant consideration. Consequently, it is of fundamental importance to decide, in the particular circumstances of each case, whether the person alleged to have authorised actually provided the ‘means’ of infringement.”

*Village Roadshow Ltd v iiNet Ltd* [2010] FCA 24, [382] (Cowdroy J)  
(‘iiNet’)

# Authorisation on appeal (Nicholas J)

“The question [of authorisation] depends upon a consideration of various factors including those to which the court must have regard to pursuant to s 101(1A) [of the *Copyright Act*]. ... [Cowdroy J] did not address those factors ... He treated the question [of means] as a threshold one which, if answered in the negative, was conclusive on the issue of authorisation. In the result, his Honour’s consideration of the factors referred to in s 101(1A) ... was a somewhat pointless exercise. In my view, his Honour erred in approaching the issue of authorisation in this way.”

*iiNet* [2011] FCAFC 23, [695] (Nicholas J)

# Authorisation on appeal (Emmett J)

“The structure of the reasons of the primary judge ... may be thought to be **unconventional**. ... A person will authorise an act of infringement if the person sanctions, approves or countenances the act. Those words should be understood **disjunctively** not conjunctively. Countenancing does not mean the same thing as approving and **includes turning a blind eye and tolerating or permitting**. The question is whether iiNet tolerated and permitted acts of infringement to continue.”

*iiNet* [2011] FCAFC 23, [126], [173] (Emmett J)

(4) Limits?

# Knowledge

“In my opinion the AFACT notices were not sufficient to provide [iiNet] with knowledge that its network was being utilized by users of particular accounts to infringe the appellants’ copyright in the identified films. I accept that they must have given [iiNet] reason to suspect that such infringements had occurred. However, knowing ... and merely suspecting that [infringements] have occurred are quite different things.”

*iiNet* [2011] FCAFC 23, [763] (Nicholas J)

# Wilful blindness

“The appellants also submitted that [iiNet] was ‘wilfully blind’ to the matters disclosed in the AFACT notices. ... In the present case the explanation behind [iiNet’s] failure to make inquiry is much less sinister. Rightly or wrongly, it was the respondent’s view that it was not obliged to go to the effort and expense of making any inquiries in response to the AFACT notices.”

*iiNet* [2011] FCAFC 23, [766]–[767] (Nicholas J)

# Reasonableness (Nicholas J)

“I accept that a refusal by an ISP to act on infringement allegations ... may be evidence from which authorisation might be inferred. But that will only be so if the refusal is unreasonable. ... My conclusion is that [iiNet’s] failure to take steps to issue warning notices or to terminate or suspend subscribers’ accounts in response to the allegations ... was **not unreasonable** given the lack of information in the AFACT notices ...”

*iiNet* [2011] FCAFC 23, [782]–[783] (Nicholas J)

# Non-infringing uses (Emmett J)

“The fact that the service provided by iiNet may be used for purposes that do not involve acts of infringement is really of no relevance. [Such a] finding ... **does not preclude a finding of authorisation of infringing acts using that service.** The question of substantial non-infringing use arises only where ... the alleged authoriser **does not have control over the [acts]**. Where the alleged authoriser has such power to prevent, ... it does not matter that some other use might not infringe.”

*iiNet* [2011] FCAFC 23, [191] (Emmett J)

# Reasonable steps (Emmett J)

“[B]efore it would be reasonable for iiNet ... to suspend or terminate a customer’s account, **at least the following circumstances** should exist:”

- (1) Effective notice
- (2) Subscriber warning
- (3) Unequivocal and cogent evidence
- (4) Indemnity and costs

*iiNet* [2011] FCAFC 23, [210] (Emmett J)

## (i) Notice

“in writing of particulars of **specific** primary acts of infringement of copyright of the Copyright Owners, by use of **particular IP Addresses** of iiNet customers.”

## (ii) Warnings

that “inform its customer of the ... allegations [;] request the customer either to refute the allegations or to give appropriate assurances ... [;] warn the customer that if there are continued acts of infringement ... the service will be terminated.”

### (iii) Evidence

“unequivocal and cogent evidence of the alleged primary acts of infringement ... Mere assertion by an entity such as AFACT ... would not, of itself, constitute unequivocal and cogent evidence ... Information ... that was adequate to enable iiNet to **verify the accuracy** of the allegations, may suffice.”

## (iv) Indemnity

- “The Copyright Owners have undertaken:
- to reimburse iiNet for the reasonable cost of verifying the [infringement] and of establishing and maintaining a regime to monitor [further infringements], and
  - to indemnify iiNet in respect of any liability reasonably incurred [by] mistakenly suspending or terminating a service”

# Dissenting judgment (Jagot J)

“the fundamental obligation is to apply the statute. ... The unavoidable inference is that the trial judge considered the matters specified by s 101(1A) ... by reference to the conclusion already reached (that iiNet had not authorised the infringements ...) and as a result of applying a test not specified by the statute (the means of infringement test).”

*iiNet* [2011] FCAFC 23, [369]–[370] (Jagot J) (dissenting)

# Dissenting judgment (Jagot J)

“the AFACT notices rose well above the status of mere unsubstantiated or unreliable allegations of copyright infringement. ... iiNet had ... both the technical capacity and the contractual right to [prevent the infringements]. ... iiNet at least countenanced the primary infringements. It tolerated, indeed permitted, [them]. More than that, by its conduct in all of the circumstances identified, it moved beyond mere indifference to at least tacit approval of those primary infringements.”

*iiNet* [2011] FCAFC 23, [402], [426], [477] (Jagot J) (dissenting)

# iiNet: summary of findings

	Cowdroy J	Emmett J	Jagot J	Nicholas J
<b>Means of infringement</b>	The BitTorrent system	The iiNet-supplied internet connection (among other additional means)		
<b>Power to prevent?</b>	Yes (but unreasonable)	Yes	Yes	Yes
<b>Relationship with infringers?</b>	Contractual	Technical + contractual	Commercial benefit to iiNet	Technical + contractual
<b>Reasonable steps taken?</b>	Yes	Yes (in the circumstances)	No	Yes
<b>Knowledge?</b>	Yes	No	Yes	No
<b>Pre-conditions for preventative action</b>	N/A (iiNet did not provide 'means' of infringement)	Unequivocal and cogent evidence + cost indemnity	None; notices were <i>prima facie</i> evidence of infringement	More specific notices of infringement
<b>Authorisation?</b>	x	x	✓	x

“Despite the lead role of AFACT and the inclusion of Australian companies ..., this is an MPAA/American studios production. ... MPAA prefers that its leading role not be made public. AFACT and MPAA worked hard to get Village Roadshow and the Seven Network to agree to be the public Australian faces on the case to make it clear there are Australian equities at stake, and this isn't just Hollywood 'bullying some poor little Australian ISP.'”

*Source: Wikileaks.org* (State Department cable, November 2008)



## (5) Enforcement

# A new judicial enforcement code

- 1 **Notice** of allegation particulars (all judges)
- 2 **Warnings** to subscribers (Emmett and Nicholas JJ)
- 3 **Right** to terminate (Jagot J) (“direct power”: Nicholas J)
- 4 **Evidence** of repeat infringement that is “unequivocal and cogent” (Emmett J) or “specific” and “sufficient to satisfy” iiNet (Nicholas J)
- 5 System of **penalties for repeat infringers** (ISPs should be given “considerable latitude”: Nicholas J)
  - a) Suspension or termination
  - b) Shaping
  - c) ‘Play-penning’
- 6 **Indemnity** for costs and liability (Emmett J)

Actual knowledge

Of specific infringements

To a verifiable standard

Copyright owners pay 100%

# The limits of authorisation

- 1 Authorisation does little to clarify the **practical duties** owed by ISPs and other intermediaries.
- 2 Fidelity to the statute may be fundamental, but what should judges do when the **statute provides such limited guidance** as to the meaning of 'authorise' in this context?
- 3 iiNet can partly be understood as an understandable attempt to give content to a **vacuous concept**.
- 4 This shows us that **authorisation (as presently understood) is not a capable toolkit** for solving problems of digital infringement.

# Appeal to the High Court of Australia

- 1 That the Full Court erred in holding that iiNet had not **authorised** the primary infringements;
- 2 That the Full Court erred in considering whether iiNet had **sufficient knowledge** of infringement; and
- 3 That Justice Emmett erred in holding that “**unequivocal and cogent evidence**” of infringement was required.

The appeal is due to be heard in early December.

The appellants' submissions can be [accessed here](#).

## (6) Harmonisation



# Trans-Pacific Partnership Agreement

## Intellectual Property Rights Chapter

(Leaked) Draft of 10 February 2011

# Draft TPPA art 16 — Intermediary liability

- 1 **Focus is on remedies**: to permit “effective action” against digital copyright infringement: art 16(1)
- 2 **“Legal incentives”**: for service providers to cooperate with copyright owners: art 16(3)(a)
- 3 **Search engine safe-harbours**: for “referring or linking users to an online location”: art 16(3)(b)(i)(D)
- 4 **Partial safe-harbours**: no damages and “reasonable restrictions on court-ordered relief”: art 16(3)(b)(i)
- 5 DMCA-style **notice-and-takedown**: art 16(3)(b)(ix)
- 6 Broad definition of intermediary: art 16(3)(xii)
- 7 Non-judicial *Norwich Pharmacal* orders: art 16(3)(xi)

# *Norwich Pharmacal-style orders*

“Each Party shall establish an **administrative or judicial procedure** enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.”

*Draft TPPA art 16.3(xi)*

## (7) Site-blocking

# Disabling access: conduits, ISPs

“For an infringement of copyright that occurs in the course of [transmission], the relief that a court may grant against a carriage service provider is limited to one or more of the following orders:

- a) an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia;

*Copyright Act 1968 (Cth) s 116AG(3)*

# Disabling access: hosts, indexers

“For an infringement of copyright that occurs in the course of [caching, storage or linking], the relief that a court may grant against a carriage service provider is limited to one or more of the following orders:

- a) an order requiring the carriage service provider to **remove or disable access** to infringing copyright material, or to a reference to infringing copyright material; ...
- c) some other less burdensome but **comparably effective non-monetary order**

*Copyright Act 1968 (Cth) s 116AG(4)*

# Enforcing the criminal law

“A carrier or carriage service provider must, in connection with:

(a) the operation ... of [its] telecommunications networks ...

give officers and authorities of the Commonwealth and of the States and Territories **such help as is reasonably necessary** for the following purposes: ...

(c) enforcing the criminal law ...”

*Telecommunications Act 1997 (Cth) s 313(3)*

# Other mechanisms

- 1 **Link-deletion notices:** ACMA can issue notices to Australian websites that link to prohibited content: *Broadcasting Services Act 1992* (Cth) sch 7 cl 62(1)
- 2 **Service-cessation notices:** service providers must cease making content available in Australia: sch 7, cl 56
- 3 **Access-prevention notices:** service providers must take all reasonable steps to prevent end-users from accessing content: sch 5, cl 40(1)(c)
- 4 **Online provider determinations:** can relate to any specified matter; compliance mandatory on penalty of prosecution: sch 5, cls 80, 82

# Problems with blocking

- 1 Ease of circumvention
- 2 Scope creep
- 3 Lack of end-user transparency
- 4 Lack of independent oversight
- 5 No third party appeal procedure
- 6 Uncertainty
- 7 Compliance costs
- 8 Market distortion
- 9 The infringement “arms race”

# An alternative?

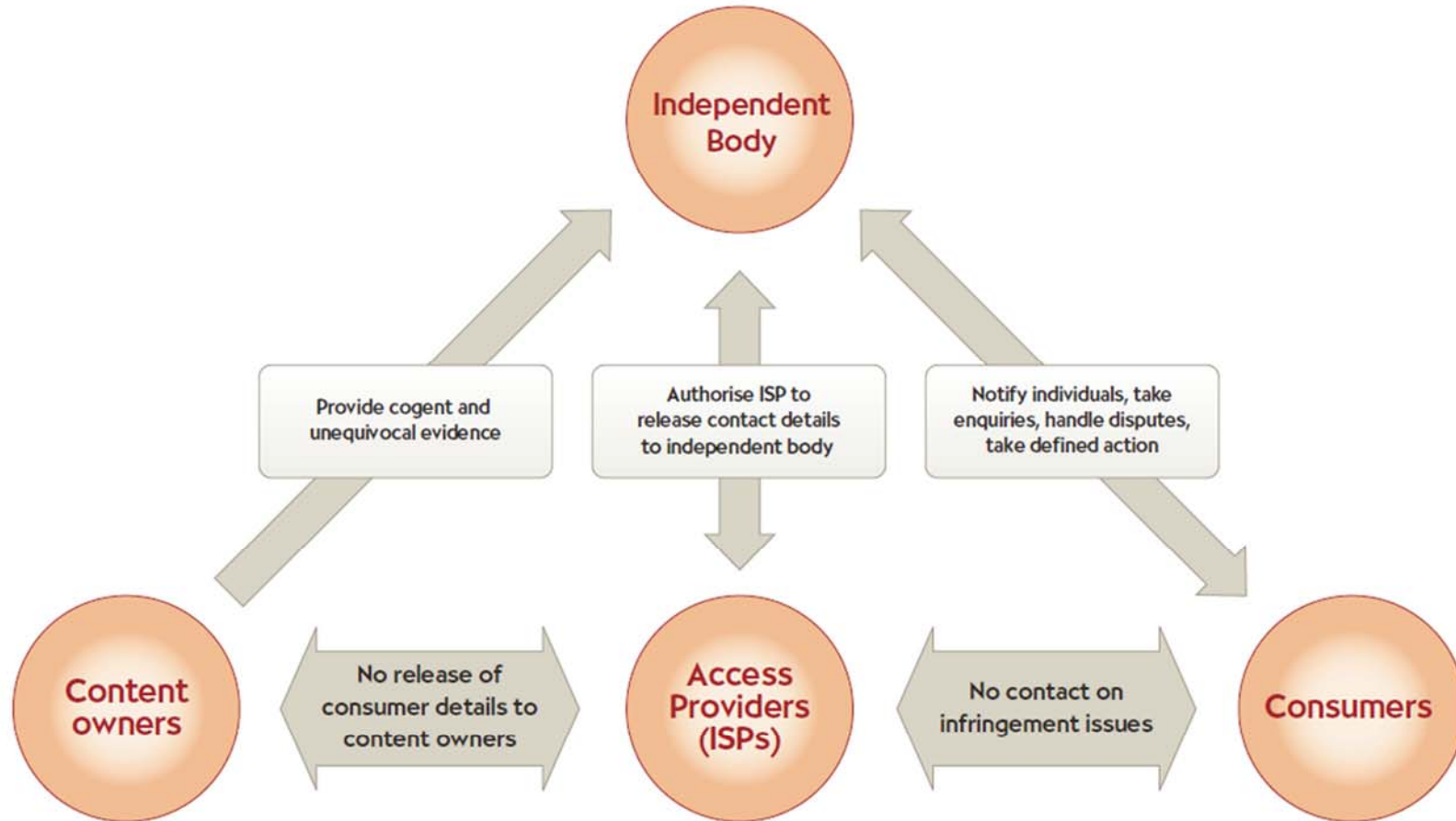


Figure 2: iiNet Model - overview

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