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INDIFFERENCE AND SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT

Richard G. Kunkel[†]

Online infringements of copyright have been rampant for decades and shows no signs of abating. Owners of copyrighted films, music and books have attempted to hold infringers liable, but the expense of enforcing their rights against individual infringers is prohibitive. A more effective method of preventing infringement is to attempt to hold online intermediaries, such as Internet Service Providers (ISPs), secondarily liable for the primary infringements of their subscribers. Theories of contributory infringement, vicarious liability and inducement liability all rely on affirmative acts by intermediaries that facilitate infringement by others. In Roadshow Films Pty Limited v iiNet Limited, the Australian High Court considered whether an ISP's indifference to primary infringements by its subscribers would make the ISP secondarily liable for "authorising" the infringements under Australia's Copyright Act. The High Court unanimously ruled that the ISP was not secondarily liable for its indifference – despite knowing of specific acts of infringement and having ongoing control over its users' accounts. The decision has important legal and public policy implications for secondary liability for Internet intermediaries in Australia and worldwide. The High Court decision and its ramifications are discussed in this article.

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INTRODUCTION

The owners of valuable copyrights in digitized music, films, books and software have been battling the scourge of copyright infringement around the globe for over two decades.¹ A variety of legislative, judicial and policy initiatives have barely made an impact on the extent of copyright infringement occurring globally.² Internet intermediaries, such as Internet Service Providers (ISPs), peer-to-peer networks, user-generated content platforms and technology providers

1. See e.g., REBECCA GIBLIN, CODE WARS: 10 YEARS OF P2P SOFTWARE LITIGATION (2011) [hereinafter GIBLIN, CODE WARS]; Joe Karaganis, *Rethinking Piracy*, in MEDIA PIRACY IN EMERGING ECONOMIES, SOCIAL SCIENCE RESEARCH COUNCIL 1, 4-18 (Joe Karaganis, ed., 2011), <http://bit.do/MediaPiracy>.

2. See e.g., Ted Johnson, *Producers’ Coalition Says Copyright Alert System Has Failed to Stop Piracy*, in VARIETY (May 12, 2015); Rebecca Giblin, *Evaluating Graduated Response*, 37 COLUM. J. L. & THE ARTS 147 (2014) [hereinafter Giblin, *Graduated Response*]; *France Ends Three-Strikes Internet Piracy Ban Policy*, BRITISH BROADCASTING CORPORATION (July 10, 2014), <http://bit.do/FranceEndsBanPolicy>; David Price, *Sizing the Piracy Universe*, NETNAMES (Sept. 2013), <http://bit.do/NetNamesPiracy>.

enable copyright infringement on such a large scale that lawsuits against individuals for direct infringement is impracticable.³ Copyright owners' only practical alternative is to attempt to hold intermediaries liable under a theory of secondary liability.⁴ Secondary liability theories include contributory infringement,⁵ vicarious liability⁶ and inducement liability.⁷

ISPs could play an important role in preventing online piracy of digital copyright works. ISPs have the technological capability to control traffic flowing through their networks. They also have control over the terms of service that govern their ongoing relationship with their customers. It is economically efficient for ISPs to use these technical and contractual control measures to prevent, or at least impede, their subscribers' infringing conduct online.⁸ In recent years, copyright owners have sought to compel ISPs to engage in the battle against online copyright infringement by their subscribers.⁹ ISPs are attractive targets for secondary liability lawsuits because they are easily identifiable gatekeepers with deep pockets.¹⁰ ISPs and other intermediaries understandably wish to avoid the cost of, and potential liability for, detecting and deterring infringing conduct online. ISPs obviously prefer to have no affirmative legal duties to actively monitor their users' conduct to deter copyright infringement by subscribers.

Several countries, including France and the United Kingdom, have enacted legislation to impose on ISPs an affirmative duty to act against online copyright infringement through "graduated response"

3. Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L. J. 247, 254 (2008).

4. Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 25 (2006) (discussing *MGM v. Grokster*, 545 U.S. 913, 929-30 (2005). Professor Elkin-Koren has termed this an "enforcement failure," which leads to under-deterrence of copyright infringement.).

5. *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

6. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); see *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs.*, 907 F. Supp. 1361, 1376 (N.D. Cal. 1995).

7. *MGM v. Grokster*, 545 U.S. 913, 936-37 (2005).

8. Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 256-59 (2006); David Lindsay, *Liability of ISPs for End-User Copyright Infringements: The First Instance Decision in Roadshow Films Pty Ltd v iiNet* (No 3), 60(2) TELECOMM. J. OF AUSTL. 29.1, 29.17-18 (2010).

9. Annemarie Bridy, *Graduated Response American Style: 'Six Strikes' Measured Against Five Norms*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1, 10-16 (2012) (a global campaign to enlist ISPs to implement a program of warnings and sanctions against their infringing subscribers began as early as 2005).

10. Elkin-Koren, *supra* note 4, at 26.

schemes.¹¹ In general, when copyright owners detect copyright infringement online and send a notice to an ISP, these regimes require ISPs to warn their infringing subscribers to stop their illegal activity. If the subscriber continues to infringe, increasing levels of sanctions will typically be applied.¹² Other nations, such as Germany, have refused to enact graduated response legislation.¹³ In the United States, copyright owners marshaled sufficient political pressure and threats of litigation to persuade some major ISPs to “voluntarily” implement a graduated response program even without national legislation.¹⁴

In the absence of a new graduated response scheme, whether imposed by legislation or negotiated agreement, copyright owners have striven to establish secondary liability for ISPs through litigation under existing copyright laws. However, ISPs have not yet been held secondarily liable for their subscribers’ infringing acts if the ISP merely remains indifferent to infringement and fails to take action to stop it. In the absence of an affirmative legal duty, intermediaries could remain indifferent to infringement.

Indifference to rampant online copyright infringement was arguably justifiable when ISPs often had only general knowledge that their networks and services were used for a variety of illegal purposes along with legal and legitimate uses. Further, indifference may be defensible if an ISP lacks sufficient control over its subscribers’ use of its network. For example, in cases involving devices that facilitated reproductions of infringing copyright material, the device manufacturers had no control over the purchasers’ use of the device after the sale, whether for infringing or legitimate uses.¹⁵ Secondary

11. Giblin, *Graduated Response*, *supra* note 2, at 153-73. These countries include France, New Zealand, South Korea, Taiwan and the United Kingdom. *See, e.g.*, United Kingdom - *Digital Economy Act 2010* (UK); New Zealand - (*Copyright (Infringing File Sharing) Amendment Act 2011* (NZ)); France - (*Loi 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet* arts 6 and 7, 251 Journal Officiel de la République Française, 29 October 2009).

12. *See* Giblin, *Graduated Response*, *supra* note 2, at 153-73 (Some of these graduated response schemes initially included suspension or termination of Internet service as a sanction.).

13. Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1377 (2010) (Graduated response schemes were rejected by Germany, Hong Kong, Spain, and Sweden as well as in the European Parliament.).

14. Bridy, *supra* note 9, at 11-12; Memorandum of Understanding between content owner representatives, the participating ISPs, and the members of the Participating Content Owners Group (July 6, 2011), <http://bit.do/CopyrightMOU>.

15. *See e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417 (1984); *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 (UK); *Australian Tape Manufacturers Association Ltd and Others v The Commonwealth of Australia* (1993) 177 CLR 480.

liability based on indifference has not been imposed on third parties where this element of control is absent.

Changes in the online environment may be increasing the risk that ISPs will be held secondarily liable if they persist in their indifference to copyright infringement. Online infringing activity can be tracked and documented. In recent years copyright owners have undertaken their own monitoring and detection activities that enable them to provide ISPs with *specific* identifying information regarding the infringing acts of subscribers on specific ISP networks.¹⁶ Today, online intermediaries provide *services* that enable infringement rather than devices. These services are delivered pursuant to ongoing contractual relationships. ISPs can modify the contract terms from time to time to exert control over their users' online activities. Content owners argue that the combination of this *knowledge* of specific acts of infringement and the ISP's *control* over their service are sufficient to create an affirmative legal duty to take action to combat infringement. If this duty were to be legally recognized, ISPs would be secondarily liable if they were indifferent to copyright infringement and refused to act. Litigation in Australia sought to establish secondary liability for an ISP's indifference to widespread copyright infringement by its subscribers.

Piracy has been a persistent problem in Australia.¹⁷ Graduated response legislation has not yet been enacted there.¹⁸ Instead, copyright owners and ISPs have for years attempted to negotiate a voluntary industry code of practice similar to graduated response schemes implemented in other countries.¹⁹ In 2007, lengthy negotiations between major copyright owners and ISPs failed to produce an agreement for a voluntary graduated response scheme.²⁰

16. The Copyright Alert System in the United States hired a vendor, Mark Monitor, to monitor peer to peer (P2P) traffic to generate infringement notices. The system sent 1.3 million notices in its first year. CENTER FOR COPYRIGHT INFORMATION, THE COPYRIGHT ALERT SYSTEM PHASE ONE AND BEYOND 1, 6 (May 28, 2014), <http://bit.do/CopyrightAlertSystem>.

17. Marc C. Scott, *From Convicts to Pirates: Australia's Dubious Legacy of Illegal Downloading*, THE CONVERSATION (Apr. 10, 2015), <http://bit.do/ConvictsToPirates>.

18. AUSTRALIAN ATTORNEY GENERAL JOINT MEDIA RELEASE, COLLABORATION TO TACKLE ONLINE COPYRIGHT INFRINGEMENT (Dec. 10, 2014), <http://bit.do/CollabToTackle> (In the past year, the Australian Attorney General and Communications Minister pressured ISPs to reach agreement on an industry code of practice by threatening to impose one unilaterally if negotiations were unsuccessful. While a draft code was prepared, implementation has been delayed due to inability to agree on which parties will bear the costs of the system.); Allie Coyne, *Australia's Industry Piracy Code Still Stuck On Cost Debate*, ITNEWS (Jul. 22, 2015), <http://bit.do/AustlPiracyStuck>.

19. *Copyright Act 1968* (Cth) s 116AH(1) (Austl.). (Development of an industry code was provided for in the ISP safe harbour provisions of Australian Copyright Act.).

20. *See Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285 (Austl.) [hereinafter,

In response, a consortium of movie studios filed suit seeking to establish the secondary liability of ISPs for the direct infringement of their subscribers.

The Australian *Copyright Act 1968* provides for a statutory tort imposing secondary liability on those who “authorise” primary infringements by others.²¹ Case law precedents had broadly interpreted authorisation liability under the *Copyright Act*, making Australia a favorable jurisdiction for testing the limits of secondary liability for ISPs based on indifference.²² Under these precedents, indifference to known online infringement appeared to be sufficient to hold an ISP secondarily liable for copyright infringement. In 2009, a consortium of movie studios pursued litigation against iiNet, a large Australian ISP, as a means to either: 1) increase legal pressure upon ISPs to agree to a graduated response program via an industry code, or 2) to establish by judicial precedent that ISPs face authorisation liability if they are indifferent to copyright infringement on their networks.

Thousands of iiNet subscribers had committed primary infringements of the movie studios’ copyrights by downloading movies using the BitTorrent peer-to-peer software. The studios provided iiNet with detailed information regarding the infringing acts.²³ The studios’ lawsuit asserted that this knowledge of specific infringing downloads, along with iiNet’s technical and contractual control over its subscribers, created an affirmative legal duty to prevent these infringements. They argued that iiNet authorised these infringements not by action, but by indifference, and by failing to take action to prevent them. iiNet prevailed in both the Federal trial court,²⁴ and on appeal at the Full Federal Court.²⁵ In *Roadshow Films Pty Limited v iiNet Limited*,²⁶ the Australian High Court rejected the studios’ claims of secondary liability by indifference in a 5-0 unanimous decision. The court held that iiNet’s indifference had not

iiNET APPELLATE JUDGMENT], 348-49 (Jagot, J) for background on the industry code and these failed negotiations.

21. *Copyright Act 1968* (Cth) s 101(1) (Austl.). (This article will use the Australian spellings “authorise” and “authorisation” as used in the Copyright Act and in Australian case law. Citations to Australian cases and statutes also follow Australian citation formats.)

22. GIBLIN, CODE WARS, *supra* note 1, at 119-41.

23. *Roadshow Films Pty Ltd v iiNet Ltd* (2010) FCA 24 (Austl.) [hereinafter, iiNET TRIAL JUDGMENT] ¶96-104 (For fifty-nine weeks in 2008 and 2009, extensive spreadsheets detailing the infringing downloads were sent to iiNet.)

24. *Id.* at ¶635.

25. iiNET APPELLATE JUDGMENT, *supra* note 20.

26. *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42 (Austl.) [hereinafter, iiNET HIGH COURT JUDGMENT].

authorised its subscribers' illegal downloading activities and that iiNet was not secondarily liable.²⁷

In *iiNet*, the High Court refused to impose a broad duty upon ISPs requiring them to act affirmatively to deter infringements by their subscribers. The High Court disapproved of established precedents that had used a broad test for authorisation: that one "authorises" a primary infringement by another person if they "sanction, approve or countenance" the infringement.²⁸ Instead, the court revived an older and narrower construction of "authorisation." Under the High Court's ruling in *iiNet*, an authoriser's actions must demonstrate an intention to "grant or purport to grant" a third person the right to do the infringing act.²⁹ The High Court's ruling makes it very difficult to establish a case of authorisation liability based on an ISP's indifference alone. Affirmative conduct in relation to the primary infringements is required. In addition, the High Court directed the copyright owners to Parliament to seek legislation creating expanded duties for ISPs.³⁰

This article will consider the High Court decision in *iiNet* and its implications for secondary liability in Australia and worldwide. The *iiNet* decision likely will have an impact internationally as other countries consider graduated response schemes that would require Internet intermediaries to monitor, detect and sanction infringing acts by their subscribers. Part I reviews the factual and legal background of the *iiNet* case. Part II reviews the history and development of authorisation law principles in Australia. Part III analyzes the main principles and legal reasoning of the High Court judgment in the *iiNet* case. Part IV will discuss the impact of the *iiNet* decision on secondary liability in Australia, and the public policy decisions surrounding graduated response proposals.

I. THE FACTUAL AND LEGAL BACKGROUND OF *ROADSHOW FILMS PTY LIMITED V IINET LIMITED*

Thirty-four major motion picture studios located in Australia and the United States sued iiNet claiming that iiNet was secondarily liable for authorising the copyright infringement committed by its

27. *Id.*

28. *Id.* at 62-63; *Id.* at 85, 89 (discussing the holding in *University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1 (Austl.)).

29. IINET HIGH COURT JUDGMENT, *supra* note 26, at 61, 84-85 (discussing the holding in *Falcon v Famous Players Film Co.* (1982) 2 KB 474 (Atkin, LJ) (UK)).

30. *Id.* at 71 (French, J), and at 82 (Gummow, J).

subscribers.³¹ The studios had formed an industry association known as the Australian Federation Against Copyright Theft (AFACT).³² AFACT acted on behalf of its membership to investigate online copyright infringement and to engage in activities to discourage infringements.

At the time, iiNet Limited was the third-largest Internet service provider in Australia. Like many technology startups, iiNet commenced operations in a garage in 1993. iiNet was listed on the Australian Stock Exchange in 1999, when it had fewer than 20,000 subscribers.³³ iiNet enjoyed rapid and sustained growth, and grew to become the second largest DSL broadband supplier in Australia. It provided a broad range of Internet and technology services, and grew to have more than 2500 employees³⁴ and a market value in excess of A\$1.5 billion.³⁵

Online piracy of copyrighted material is an especially significant problem in Australia for a variety of reasons.³⁶ These include delayed release of content already legally available overseas,³⁷ differential pricing charging Australians higher prices for legal digital content available for less in other countries,³⁸ and, until recently, lack of available legal access to the most current and desirable content.³⁹

31. iiNET TRIAL JUDGMENT, *supra* note 23, at ¶2.

32. *Id.* at ¶80-82 (AFACT was working closely with the Motion Picture Association of America (MPAA) in pursuing the litigation.); See Myles Peterson, *Australia: U.S. Copyright Colony, or Just a Good Friend* (January 21, 2012) <http://bit.do/CopyrightColony> (The article includes supporting links to Wikileaks.org. <http://bit.do/PublicLibraryUSDiplomacy>. The AFACT group now calls itself the “Australian Screen Association”; <http://bit.do/AustlScreenAssoc>.)

33. A timeline of milestone events in iiNet’s history is available at <http://bit.do/iiNetHistory>.

34. iiNet Media Release, *iiNet Gains Further International Plaudits* (May 6, 2014), <http://bit.do/iiNetMediaRelease>.

35. David Ramli & Tess Ingram, *iiNet Shareholders Vote in Favour of TPG Telecom Merger*, SYDNEY MORNING HERALD (July 27, 2015), <http://bit.do/iiNetShareholderVote> (iiNet was sold to TPG Telecom for A\$1.56 billion in July, 2015).

36. Freya Noble & Heather McNab, *House of Thieves: How Australians Have Become the World’s Worst Internet Pirates... Ripping Off the Final Season of House of Cards Far More Than Any Other Country*, DAILY MAIL AUSTRALIA (Mar. 2, 2015), <http://bit.do/AustlWorstPirates>; Michael Idato, *House of Cards Season 3 Piracy Booms in Countries Without Netflix*, SYDNEY MORNING HERALD (March 2, 2015), <http://bit.do/HouseofCardsPiracy>; Bernard Zuel, *Australians World’s Worst for Illegal Music Downloads*, SYDNEY MORNING HERALD (Sept. 19, 2012), <http://bit.do/AustlWorstIllegalMusic>.

37. Nick Evershed, *Australian Film Industry Claims Delayed Release Is Rare but Data Shows Otherwise* (June 30, 2014), <http://bit.do/AustlDelayedRelease>.

38. HOUSE STANDING COMMITTEE ON INFRASTRUCTURE AND COMMUNICATIONS, AT WHAT COST? IT PRICING AND THE AUSTRALIA TAX (July 2013), <http://bit.do/HouseOfRepITPricing>.

39. Marc Moncrief, *Stan, Netflix, Presto: Is Streaming the End of Piracy?* SYDNEY

When the 2009 litigation began, the movie studios were aware of studies showing that 57% of all Internet traffic in Australia in 2007 was peer-to-peer file transfers, and 73% of that traffic involved the BitTorrent protocol.⁴⁰ More than half of the traffic on iiNet's network represented uploads and downloads using peer-to-peer software, primarily BitTorrent.⁴¹ It is widely understood that a substantial portion BitTorrent traffic infringes copyrighted materials.

The movie studios hired DTecNet, an Internet-surveillance firm, to monitor public peer-to-peer networks for infringing activity. DTecNet used a thorough process to identify the IP addresses of iiNet users who committed primary infringements of the studios' films by sharing or downloading the films using BitTorrent.⁴² DTecNet compiled this identifying information into spreadsheets cataloging and summarizing the infringing conduct of iiNet users and forwarded it to AFACT. Acting on behalf of the studios, AFACT supplied iiNet with messages entitled "Notice of Infringement of Copyright" each week for fifty-nine weeks in 2008 and 2009 (the "AFACT Notices").⁴³ The AFACT Notices identified the IP addresses of those iiNet users who were shown by DTecNet data to be "repeat infringers," i.e. those who had made multiple infringing downloads. The letters "required" that iiNet take unspecified actions to prevent further infringements.⁴⁴ The implication was that iiNet should undertake an unspecified type of graduated response program. Importantly, the AFACT notices contained no information regarding the methods used to obtain the identifying information or to confirm that the files contained copyrighted films.⁴⁵

MORNING HERALD (Sept. 4, 2015), <http://bit.do/StreamingEndtoPrivacy>.

40. *Internet Study 2007*, IPOQUE (2007), <http://bit.do/Ipoque2007>.

41. See IINET APPELLATE JUDGMENT, *supra* note 20, at 379, 383 (Jagot, J) (The full Federal Court referred to this fact several times).

42. See IINET TRIAL JUDGMENT, *supra* note 23, at ¶113. (DTecNet used a customized version of BitTorrent client software to identify the digital files of copyrighted films being shared online. DTecNet downloaded one copy of each suspected file, viewed the file to confirm that it was a film under the studios' copyright, and identified the IP addresses of the BitTorrent users sharing the file containing film. Next, DTecNet used a filter to identify only those users who had IP addresses issued by iiNet's service. Finally, DTecNet created a detailed daily log of information about the files exchanged by iiNet users containing the studios' copyrighted works, the relevant IP addresses of iiNet users and other detailed identifying information. This investigation produced an extremely detailed inventory of the alleged primary infringements by iiNet users.)

43. *Id.* at ¶96-104.

44. *Id.* at ¶98 (The trial judge, Cowdroy J, concluded from other evidence that AFACT wanted iiNet to initiate a graduated response scheme to warn, suspend or terminate users, which AFACT had been negotiating with the Internet Industry Association.); *Id.* at ¶440.

45. *Id.* *supra* note 23, at ¶79-154, ¶468-69.

In response, iiNet did nothing to identify the accounts of infringing subscribers or to take measures against them. The process of identifying individual subscribers from the IP address data was complex and expensive, and iiNet was unwilling to incur the costs based on unverified allegations of infringement.⁴⁶ iiNet also determined that it could not make the complex legal determination necessary to determine whether copyright infringement had actually occurred, even though the identifying information was quite detailed. iiNet did not learn the details of the DTecNet surveillance methods until the court proceedings began. Only then did Michael Malone, iiNet's founder and managing director, concede at trial that the DTecNet evidence was "compelling."⁴⁷ Even so, he maintained that claims of infringement had to be evaluated by an independent third party before moving from allegation to punishment.⁴⁸ iiNet chose to take no action until AFACT's claims of primary infringement were tested and proven in court.

When iiNet failed to implement a form of graduated response against its subscribers as AFACT had sought, the movie studios sued. The studios claimed that iiNet subscribers had engaged in primary copyright infringement under the Copyright Act by making copies of the studios' films, by making the films available online and by electronically transmitting the films using the BitTorrent peer-to-peer software protocol.⁴⁹ Most importantly, the studios also claimed that iiNet had authorised the subscribers' primary infringements by indifference based on two factors. They argued that iiNet had a legal duty to act because: 1) the AFACT notices established that iiNet knew specific infringements were occurring and were likely to continue and 2) iiNet took no action against the primary infringers (such as suspending or terminating their accounts) even though it had the right to do so under the company's Customer Relationship Agreement ("CRA") and had the technical ability to do so. The studios sought monetary damages and injunctive relief.⁵⁰

iiNet contended that its action—or rather, its indifference and lack of action—did not amount to authorisation of its subscribers' infringements. Although a large portion of its traffic used BitTorrent, such traffic could include either infringing or non-infringing content. Thus, iiNet claimed that the AFACT notices were "mere allegations"

46. *Id.* at ¶27.

47. IINET TRIAL JUDGMENT, *supra* note 23, at ¶172-80.

48. *Id.* at ¶179.

49. *Copyright Act 1968* (Cth) s 10 and s 86(c) (Austl.); IINET TRIAL JUDGMENT, *supra* note 23, at ¶266-69.

50. IINET TRIAL JUDGMENT, *supra* note 23, at ¶12-16.

of infringement.⁵¹ iiNet lacked sufficient information to verify whether the allegations were true or whether the contents truly were infringing. iiNet asserted that it was not obligated to incur the significant expenses necessary to take action against its subscribers under the CRA until the studios' claims of primary infringement were proven in court. iiNet also argued that it had no control over the BitTorrent protocol or the manner in which iiNet subscribers chose to use it. Thus, it had no power to prevent the infringing acts.⁵²

II. SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT BY AUTHORISATION IN AUSTRALIA

Australian law has recognized secondary liability for "authorising" copyright infringement for more than 100 years.⁵³ The current language of the *Copyright Act 1968*, Section 101(1) is:

Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, *or authorises the doing in Australia of*, any act comprised in the copyright.⁵⁴

A century of legal interpretation regarding authorisation liability has produced a body of law fraught with uncertainty and confusion. Professor Giblin has observed: "Eminent commentators have variously described it as 'unclear,' 'hard to reconcile,' 'enshrouded' in confusion, 'incoherent,' and 'unnecessarily complex and uncertain.'"⁵⁵ The *iiNet* case is emblematic of this confusion: it produced six separate judgments, each varying from the others in the analysis and reasoning applied.⁵⁶ This creates a very uncertain legal environment for ISPs and other Internet intermediaries.

51. *Id.* at ¶27.

52. *Id.* at ¶17-31.

53. *Copyright Act 1905* (Cth) s 13, s 14 and s 34 (Austl.). (*Copyright Act 1912* (Cth) (Austl.) adopted the *Copyright Act 1911* (UK) into Australian law.)

54. *Copyright Act 1968* (Cth) s 101(1) and s 13(2) (Austl.) (emphasis added).

55. Rebecca Giblin, *The Uncertainties, Baby: Hidden Perils of Australia's Authorisation Law*, 20 AUSTL. INTELL. PROP. J. 148, 149 (2009) [hereinafter Giblin, *Uncertainties*]; (citing 6 Laddie H et al., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* (3rd ed., Butterworths, London, 2000) 1772 at 39.14); Jennifer E. Stuckey, *Liability for Authorizing Infringement of Copyright*, 7 UNSWLJ 77, 78 (1984); David Lindsay, *Internet Intermediary Liability: A Comparative Analysis In The Context Of The Digital Agenda Reforms*, 1 & 2 COPYRIGHT REPORTER 70, 77 (2006).

56. The six judgments are: the judgment of Cowdroy, J, at the trial court; the separate judgments of Emmett, Jagot and Nicholas, JJ, at the Full Federal Court; and the judgments of French CJ, Crennan and Keifel, JJ; and Gummow and Hayne, JJ, respectively, at the High Court.

The complexity and uncertainty arise from a number of factors. First, case precedents have not been careful to distinguish between liability for “authorising” infringement from a separate form of liability for “permitting” public performances of works.⁵⁷ Second, an imprecisely-drafted statutory provision intending to partially codify the law was added to the *Copyright Act* in 2001.⁵⁸ While intended to clarify the law and provided greater certainty to intermediaries, it has had the opposite effect.⁵⁹ Third, copyright infringement arises in a host of contexts that necessarily involve case-specific issues of fact that often involve matters of degree. This is particularly true when authorization must be inferred from a failure to act or indifference to the primary infringements. Consequently, case precedents often are not easily applied to other cases and contexts.⁶⁰

A. *A Splintered and Confused History*

In 1912, Australia adopted the U.K.’s Copyright Act 1911 (the “Imperial Act”), which provided liability both for *authorising* infringing copyright activities,⁶¹ as well as liability for *permitting* an entertainment venue to be used for infringing public performances.⁶² Courts in both the U.K. and Australia very quickly began to commingle these two separate forms of secondary liability.

An early English case, *Performing Right Society v. Cyril Syndicate*⁶³ construed the Imperial Act’s provisions for authorising an infringement and for permitting a performance, based on the defendant’s indifference and failure to act to prevent the infringements. Professor Lindsay notes that the *Cyril* court conflated the reasoning regarding authorisation liability and the reasoning regarding permitting a performance.⁶⁴ In *iiNet* the High Court observed that in *Cyril* the judgment of Bankes, LJ, treated these two

57. See *infra* section II.A.

58. *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (Austl.).

59. Giblin, *Uncertainties*, *supra* note 55, at 155-61; David Lindsay, *ISP Liability for End-User Copyright Infringements: The High Court Decision in Roadshow Films v. iiNet*, 62 TELECOMM. J. OF AUSTL. 53.1, 53.9-53.10 (2012).

60. *University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1, 12 (Austl.) [hereinafter, *Moorhouse*] (Gibbs, J, observes: “The question whether one person authorizes another to commit an infringement depends upon all the facts of the case so that a decision on a particular set of circumstances may be of no assistance in other cases.”).

61. *Copyright Act of 1911* (Imp) s 1(2) (UK).

62. *Copyright Act of 1911* (Imp) s 2(3) (UK).

63. *Performing Right Society v Cyril Syndicate* [1924] 1 KB 1 (UK).

64. Lindsay, *supra* note 59, at 53.6 (2012).

separate claims as synonymous.⁶⁵ The *Cyril* case is important for establishing the principle that indifference may reach a degree from which *either* authorisation *or* permission may be inferred.⁶⁶

Soon, another English case, *Falcon v Famous Players Film Co.*,⁶⁷ considered a situation in which some producers had imported a film to England, where they contracted with a movie theatre owner for the purpose of screening the film to the public. While the case involved authorisation (not permission), it was based on the affirmative acts of the producers, rather than on inaction or indifference. Unfortunately, *Falcon* produced two formulations for determining authorisation liability under the Imperial Act. The narrower interpretation by Atkin, LJ, held that “to ‘authorise’ 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.”⁶⁸ Since the producers obviously acted in a way that purported to grant the movie theatre the right to screen the film, Atkin, LJ, held them liable for authorising the infringement under this narrower test. Bankes, LJ, adopted a broader view of authorisation based on synonyms in the Oxford dictionary definition of “authorise”: “*to sanction, approve, countenance.*”⁶⁹ Under this broader test, Bankes, LJ, also held that the producers’ affirmative acts had authorised infringement.

The Australian High Court embraced the “sanction, approve and countenance” standard in *Adelaide Corporation v Australasian Performing Rights Association*.⁷⁰ The case involved permitting a performance and was based on the indifference of the owner of a performance hall. The owner of a hall leased it to a third party to be used for the purpose of vocal concerts by a singer. The hall owner failed to stop the performances despite being notified of the likelihood that the concert would involve public performance of songs infringing copyright. The hall owner’s indifference was obvious: it

65. IINET HIGH COURT JUDGMENT, *supra* note 26, at 78 (Gummow, J).

66. *Performing Right Society v Cyril Syndicate* [1924] 1 KB 1 (UK), 10; *See also The Corporation of the City of Adelaide v The Australasian Performing Right Association Limited* (1928) 40 CLR 481, 504 [hereinafter, ADELAIDE CORPORATION].

67. *Falcon v. Famous Players Film Co.*, [1926] 2 KB 474 (UK).

68. *Id.* at 499 (Atkin, LJ).

69. *Id.* at 491 (Bankes, LJ) (Even this formulation was later disputed. The original expression of this definition is from *Evans v E Hulton and Co Ltd* [1924] 131 LT 534, 535 (UK) (citing the Oxford Dictionary definition “to give formal approval to; sanction, approve, countenance”). Some contend the definition is conjunctive (sanction, approve *and* countenance) relying on Bankes LJ, in *Falcon*.) Others contend the definition is disjunctive (sanction, approve *or* countenance) (relying on ADELAIDE CORPORATION, *supra* note 66, at 504 (Higgins, J)).

70. ADELAIDE CORPORATION, *supra* note 66.

knew the offending songs were to be performed, and it ignored all warnings of the impending infringement from rights holders.

As a permission case, the narrower test for determining authorisation of *Atkin LJ*—grant or purport to grant—is not even mentioned. Even so, *Adelaide Corporation* often has been cited in subsequent authorisation cases for the holding by Higgins J, that liability by indifference could not arise in the absence of a direct power to prevent the specific infringing act, i.e. the singing of the song.⁷¹ The court held that the hall owner did not permit the infringing concert because it had no direct control or power over the infringing vocal performance itself, but only an indirect power to prevent it by terminating the entire lease.⁷²

In *The University of New South Wales v Moorhouse*,⁷³ the Australian High Court considered an authorisation case imposing liability for facilitating infringements by indifference or failure to act. The case involved a new reproduction technology—the photocopier—that threatened to make copyright infringement of books easy and inexpensive. The Australian Copyright Council instigated a test case concerning the placement of coin-operated photocopy machines in university libraries. A person selected a book of short stories from the open shelves of a university library and made two copies of a short story using the photocopiers provided by the library. The case was designed to test whether the library authorised the primary infringement by providing both the copyrighted books and the photocopiers in public areas of the library.⁷⁴

Unfortunately, *Moorhouse* again split the law by introducing two competing formulations, each of which was based on the broader “sanction, approve, countenance” standard used in *Falcon* and *Adelaide Corporation*. The majority decision of Jacobs, J, and McTiernan, ACJ, described authorisation as an express or implied “permission or invitation to do the acts comprised in the copyright.”⁷⁵ Jacobs, J, reasoned that the circumstances of the case—providing the photocopiers along with open access to books in the library’s collection—created the inference of an implied invitation to use the photocopiers “as they saw fit,” which included infringing copying. The university had not provided any copyright notices that limited use of the copiers only for non-infringing purposes, so the invitation was

71. *Id.* at 499.

72. *Id.* See also, IINET HIGH COURT JUDGMENT, *supra* note 26, at 48 (French, J).

73. *Moorhouse*, *supra* note 60.

74. *Id.* at 1.

75. *Id.* at 21 (Jacobs J, and McTiernan ACJ, agreeing).

unqualified. Further, because the circumstances created the inference, the degree of the university's knowledge about any actual infringing acts was irrelevant. Professor Lindsay contends that this judgment apparently assimilates the earlier precedents on authorisation and permission.⁷⁶

The minority opinion by Gibbs J, applied the same "sanction, approve, countenance" standard to reach a broader interpretation that would impose authorisation liability for inactivity or indifference in certain circumstances. First, he found that a person cannot authorise an infringement of copyright unless he has some power to prevent it.⁷⁷ Next, he observed that express or formal permission or active conduct indicating approval is not essential. "Inactivity or indifference, exhibited by acts of commission *or* omission, may reach a degree from which an authorisation *or* permission may be inferred."⁷⁸ Gibbs, J, reasoned that if: 1) a person has control over the means of infringement, 2) makes it available to others, 3) and knows or has reason to suspect the infringing conduct, then a failure to act (by taking reasonable steps to limit its use to legitimate purposes) will result in authorisation.⁷⁹ Professors Burrell and Weatherall note that the Gibbs judgment may be read to have significantly broadened authorisation liability to include cases in which the defendant merely permitted the infringements provided some elements of knowledge and control were present.⁸⁰ The *Moorhouse* decision has been criticized for being overly broad and introducing considerable uncertainty into authorisation liability.⁸¹

The Gibbs judgment's broad interpretation of secondary liability is a dangerous precedent for the many Internet intermediaries who make available facilities, services or platforms that can be used to facilitate copyright infringement. Like iiNet, these intermediaries have ongoing relationships with their users. They exert contractual control over their users in the terms of service governing the use of their service. These terms can be updated as needed to respond to new forms of infringing behavior. Under such a broad interpretation, the

76. Lindsay, *supra* note 59, at 53.7.

77. *Moorhouse*, *supra* note 60, at 12 (citing ADELAIDE CORPORATION, *supra* note 66, at 503).

78. *Moorhouse*, *supra* note 60, at 12 (citing ADELAIDE CORPORATION, *supra* note 66, at 504).

79. *Moorhouse*, *supra* note 60, at 13.

80. Robert Burrell & Kimberlee Weatherall, *Providing Services to Copyright Infringers: Roadshow Films Pty Ltd v iiNet Ltd*, 33 SYDNEY L. REV. 723, 732 (2011).

81. See Giblin, *Uncertainties*, *supra* note 55, at 157; Burrell & Weatherall, *supra* note 80, at 730-32; (The *Moorhouse* standard was rejected by the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 (Can.)).

only remaining factor required for a finding of authorisation liability is knowledge. Intermediaries would typically have general knowledge of the likelihood of infringing activities by users. In the past, this knowledge alone likely was insufficient to create an affirmative duty for ISPs to act to prevent particular infringing acts. However, today copyright owners are able to supply intermediaries with specific knowledge of particular infringing acts by identifiable subscribers, as occurred in *iiNet*. Just one message from an aggrieved rights holder identifying specific infringements would create an affirmative duty for intermediaries to actively monitor the behavior of subscribers and others using the service. Under the broad interpretation of the Gibbs judgment, intermediary indifference would trigger liability.

Moorhouse, and particularly the judgment of Gibbs, J, interpreting the “sanction, approve, countenance” test, became the leading Australian authorisation case. When digital entertainment media became commonplace, copying technologies proliferated and the emergence of the Internet enabled widespread infringements. Australian courts applied *Moorhouse*, and particularly the Gibbs judgment, in a wide range of authorisation cases.⁸²

B. *An Enigmatic Statutory Intervention*

Another source of confusion in Australian authorisation liability is the partial codification of the case law that took effect in 2001. The *Copyright Amendment (Digital Agenda) Act 2000*, amended Section 101(1) by adding the following subsection:

(1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that *must be taken into account* include the following:

- (a) the extent (if any) of the person’s power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;

82. See, e.g., *Australasian Performing Right Association Limited v Jain* (1990) 26 FCR 53; *Australian Tape Manufacturers Association Ltd and Others v The Commonwealth of Australia* (1993) 177 CLR 480; *Australasian Performing Right Association Ltd v Metro on George Pty Ltd and Others* (2004) 61 IPR 575; *Universal Music Australia Pty Ltd and Others v Cooper and Others* (2005) 150 FCR 1; *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* (2005) 65 IPR 289; *Cooper v Universal Music Australia Pty Ltd and Others* (2006) 156 FCR 380; *E-Talk Communications Pty Ltd & Anor v Universal Music Pty Ltd & Ors* [2007] HCA Trans 313 (Austl.).

(c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.⁸³

Section 101(1A) was intended to “elucidate, not vary” the existing law on authorisation.⁸⁴ It was meant to “provide a degree of legislative certainty about liability for authorising infringements.”⁸⁵ Unfortunately, it had the opposite effect by introducing further uncertainty to the already-muddled law on authorisation liability.⁸⁶

The statute lists three factors to inform a court when determining whether an inference may be drawn that a defendant has authorised an infringement by a third party. However, the statute fails to clarify the legal threshold that must be attained to justify the inference of authorisation. Section 101(1A) does not mention any of the important legal thresholds for imposing authorisation liability from prior case law, such as “grant or purport to grant the right,” or to “sanction, approve, and/or countenance.” The statute’s factors are clearly correlated to the analysis of the minority judgment of Gibbs, J, in *Moorhouse*. However the statute does not account for the very different reasoning of the majority judgment of Jacobs, J, and McTiernan, ACJ, in *Moorhouse* based on permission and invitation. This created a dilemma for courts attempting to reconcile the case law with Section 101(1)(A).⁸⁷

Second, the statute’s three factors are neither exclusive, nor required.⁸⁸ The non-exclusivity allows courts the freedom to consider unique factual circumstances that could not be anticipated in advance when drafting the statute.⁸⁹ Other matters, such as those considered in cases prior to the amendments in 2001 may still be taken into account.⁹⁰ For example, the degree of knowledge of the alleged authoriser might be considered. While this is necessary for flexibility

83. *Copyright Act 1968* (Cth) s 101(1A) (Austl.); *see also*, s 36(1A) (regarding other types of works) (emphasis added).

84. IINET TRIAL JUDGMENT, *supra* note 23, at ¶415 (citing *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* (2005) 65 IPR 289, 402).

85. *Copyright Amendment (Digital Agenda) Bill 1999* (Cth) (Austl.), Explanatory Memorandum at 54 <http://bit.do/CopyrightAmendment>.

86. Lindsay, *supra* note 59, at 53.22 (Professor Lindsay asserts that the partial codification “conspicuously failed” to clarify the law.); *see also* Giblin, *Uncertainties*, *supra* note 55, at 156.

87. Lindsay, *supra* note 59, at 53.10.

88. Burrell & Weatherall, *supra* note 80, at 733-34.

89. *Id.* at 742.

90. *See* Giblin, *Uncertainties*, *supra* note 55, at 156 (citing *Cooper v Universal Music Australia Pty Ltd and Others* (2006) 156 FCR 380).

to respond to new types of authorising conduct, it comes at the cost of certainty and predictability.

The lower court judgments in *iiNet* embody the confusion regarding the interplay between the case law and Section 101(1)(A). The trial judge, Cowdroy J, performed an exhaustive analysis of *Moorhouse* and subsequent authorisation case precedents to conclude that iiNet had not authorised the infringements.⁹¹ Only after already reaching this conclusion against authorisation did Cowdroy, J, consider the statutory factors. The trial judge apparently believed the mandatory consideration of the three statutory criteria did little to vary the case law.⁹² This after-the-fact consideration of Section 101(1)(A) was rejected in all three judgments of the Full Federal Court.⁹³ In contrast, on appeal Emmett, J, gave minimal consideration to the case law and cited no case precedents for his conclusion on authorisation liability. Emmett, J, focused his analysis almost entirely on Section 101(1)(A).⁹⁴

Third, the three factors are not requirements for a finding of authorisation, but only matters that must be considered. Thus, authorisation liability arguably may attach even in the absence of one of the factors.⁹⁵ In this regard, the statute is significantly at odds with the case law regarding the requisite “power to prevent” infringements. The statutory language is “(a) the extent (if any) of the person’s power to prevent the doing of the act concerned.”⁹⁶ Commentators have suggested that the phrase “if any” indicates the liability could attach even in the absence of any power to prevent the infringing acts.⁹⁷ This is contrary to the case law holding that a power to prevent (and perhaps even a *direct* power to prevent) is a *prima facie* element of an authorisation claim based on indifference.⁹⁸

Finally, authorisation liability cases necessarily involve issues of fact, whether one is applying the case precedents or the statutory factors. Each of the mandatory factors involves matters of degree, particularly the question of the “reasonable steps” an alleged

91. II NET TRIAL JUDGMENT, *supra* note 23, at ¶¶357-415.

92. *Id.* at ¶¶415-16.

93. II NET APPELLATE JUDGMENT, *supra* note 20, at 315 (Emmett, J); 374-80 (Jagot, J); 442 (Nicholas, J).

94. *Id.* at 325-34 (Emmett, J).

95. Burrell & Weatherall, *supra* note 80, at 734.

96. *Copyright Act 1968* (Cth) s. 101(1A) (Austl.).

97. Burrell & Weatherall, *supra* note 80, at 734; Giblin, *Uncertainties*, *supra* note 55, at 158.

98. *Moorhouse*, *supra* note 60, at 12 (citing *ADELAIDE CORPORATION*, *supra* note 66, at 497-98, 503.)

authoriser might take. Thus, proper application of the statute requires a balancing and weighing of the respective factors that may vary considerably on the particular facts of each case.

C. Disharmony in the Trial and Appellate Court in iiNet

Given the splintered nature of authorisation case precedents and the unsettled interpretations regarding the partial codification in Section 101(1)(A), it is perhaps unsurprising that *iiNet* the case produced four conflicting judgments at the trial court and on appeal. Each of these judgments applied its own distinctive analysis and reasoning for the decision reached, leaving a wide range of issues for the High Court to resolve.

In the trial court, Cowdroy, J, applied the reasoning of Gibbs, J, in *Moorhouse*. The trial judge concluded that having control over the true “means of infringement” was the “fundamental and foundational element” for establishing authorisation liability.⁹⁹ Since iiNet had no control over the BitTorrent software or the infringing acts that iiNet subscribers committed using BitTorrent, iiNet had not authorised the infringements. Cowdroy, J, only considered the factors mandated in Section 101(1A) after making a finding that iiNet had not authorised the infringement.¹⁰⁰ This approach was rejected by all three judgments in the Full Federal Court.¹⁰¹

The Full Federal Court dismissed the movie studios’ appeal in a 2-1 decision.¹⁰² Emmett, J, considered that iiNet’s inaction was “capable of constituting at least tacit approval.”¹⁰³ However, he held that implementing a graduated response program was not a reasonable step due to deficiencies in the AFACT Notices, the costs involved, and the liability risks to iiNet if it wrongfully terminated a subscriber.¹⁰⁴ The Emmett judgment is most notable for its speculative attempt to describe the contours of a graduated response program that hypothetically could be considered a “reasonable step” under Section 101(1)(A). Emmett, J, ruled that ISP action would only be required when the ISP had received unequivocal and cogent evidence of the primary infringements, reimbursement of the ISPs costs to identify and warn subscribers, and indemnification of the

99. iiNET TRIAL JUDGMENT, *supra* note 23, at ¶382.

100. *Id.* at ¶416.

101. *See supra* note 93.

102. iiNET APPELLATE JUDGMENT, *supra* note 20.

103. *Id.* at 326 (Emmett, J).

104. *Id.* at 331-34.

ISP's potential liabilities.¹⁰⁵ Nicholas, J, also held that iiNet had not authorised the primary infringements principally because it was reasonable for iiNet to not take action against its subscribers given defects in the AFACT notices, the implementation costs for ISPs and the liability risks involved.¹⁰⁶

In contrast, Jagot, J, held that iiNet had authorised the infringements by its indifference and inaction. The AFACT notices were sufficiently detailed and credible to require iiNet to exercise its technical and contractual power to control the ongoing relationship with its subscribers.¹⁰⁷ In adopting an attitude that it had no obligation to act upon the AFACT notices, iiNet went beyond mere indifference to tacit approval of the infringements of its subscribers.¹⁰⁸

III. THE HIGH COURT'S DECISION IN *iiNET*

The *iiNet* case was the first authorisation liability case to reach the High Court since *Moorhouse* in 1975.¹⁰⁹ Moreover, *iiNet* was the first case to be considered by the highest-level court in a national legal system in which an ISP faced secondary liability for the primary copyright infringements of its subscribers.¹¹⁰ When the Australian High Court decided *Moorhouse*, it could not have imagined the high-speed personal computers and massive digital storage devices that today make it possible to reproduce exact copies of copyrighted works easily, instantly, and cheaply. Nor could they have envisioned the fast broadband networks and peer-to-peer software that allows immediate, global distribution of infringing works. The *iiNet* case gave the High Court the opportunity to review *Moorhouse* in light of the impressive digital advances of the intervening thirty-seven years. In addition, the High Court had its first opportunity to interpret the provisions of Section 101(1A) since they were added to the *Copyright Act* in 2001.

All five members of the High Court ruled that iiNet's indifference did not constitute authorisation of the primary infringements. The High Court issued two judgments. The majority judgment of French CJ, Crennan and Kiefel, JJ (hereinafter, the "French judgment") applied the "grant or purport to grant" standard

105. *Id.* at 333, 343.

106. *iiNET APPELLATE JUDGMENT*, *supra* note 20, at 460-61 (Nicholas, J).

107. *Id.* at 385-87, 392 (Jagot, J).

108. *Id.* at 395-97.

109. Burrell & Weatherall, *supra* note 80, at 729.

110. Lindsay, *supra* note 59, at 53.1.

from Atkin, LJ, in *Falcon*.¹¹¹ The judgment focused on the statutory factors in Section 101(1A). It emphasized that iiNet's power to prevent infringing acts was limited and indirect. iiNet's Customer Relationship Agreement (CRA) had expressly restricted use of its services to legal uses. Consequently, the French judgment held that iiNet subscribers could not possibly infer from iiNet's indifference that iiNet had granted them the right to commit the primary infringements.¹¹² Further, the French judgment held that authorization could not be inferred from iiNet's indifference because it would not be a reasonable step for iiNet to implement the graduated response scheme sought by the studios. iiNet merely made an assessment of the costs, liability risks and effectiveness of the scheme in light of the deficient information in the AFACT notices and determined that it was unreasonable to do so.¹¹³

The full statutory analysis of the French judgment was only briefly addressed in the minority judgment of Gummow and Hayne, JJ (hereinafter, the "Gummow judgment"). The Gummow judgment confirmed the French judgment's analysis that applied the "grant or purport to grant" test, and confirmed the conclusion that iiNet had not authorised the infringements. First, however, the Gummow judgment explored other theories for secondary liability. The judgment reviewed general principles of tort law related to liability for omissions and failing to act.¹¹⁴ The Gummow judgment gave two reasons for refusing to impose a broad duty of care (which it compared to negligence) which would require ISPs to act affirmatively to prevent primary infringements by subscribers. First, such a duty would be so broad that it would create an uncertain legal standard for ISP operations.¹¹⁵ Second, it would provide copyright owners with a remedy that was not available to them if they had sued the primary infringers directly.¹¹⁶ The Gummow judgment found that the only practical course of action available to iiNet to prevent the acts of primary infringement was to terminate all further Internet uses by the subscriber. The Gummow judgment concluded that it was not unreasonable for iiNet to be indifferent to the incomplete allegations contained in the AFACT notices.¹¹⁷

111. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 61.

112. *Id.* at 70.

113. *Id.*

114. *Id.* at 79.

115. *Id.* at 81.

116. *Id.*

117. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 90.

A. *The “Sanction, Approve, Countenance” Standard Discredited*

The High Court’s ruling significantly reduced the uncertainty and the risk of authorisation liability for ISPs and other intermediaries. The Court turned back the clock to 1926 by applying the narrower definition of authorisation stated by Atkin, LJ, in *Falcon v Famous Players*: “authorise” means to “grant or purport to grant to a third person the right to do the act complained of.”¹¹⁸ This holding harmonizes Australian secondary liability law with the law in the United Kingdom and that in Canada, each of which had criticized the expansive reasoning in *Moorhouse*.¹¹⁹

Both judgments in the High Court rejected the use of the “sanction, approve, countenance” standard. In response to the contention that iiNet’s inaction amounted to “countenancing” of the infringements—and thus, authorisation—the French judgment stated:

“Countenance” is a long-established English word which, unsurprisingly, has numerous forms and a number of meanings which encompass expressing support, including moral support or encouragement. In both the United Kingdom and Canada, it has been observed that some of the meanings of “countenance” are not co-extensive with “authorise.” Such meanings are remote from the reality of authorisation which the statute contemplates. The argument highlights the danger in placing reliance on one of the synonyms for “authorise” to be found in a dictionary.¹²⁰

The Gummow judgment also criticized the “sanction, approve, countenance” approach. The judgment declared that it would be wrong to take the one element of the test—countenance—then seek the broadest definition of that element to expand the “core notion of ‘authorise.’”¹²¹ Rejecting the studios’ claim that iiNet’s indifference amounted to authorisation, the Gummow judgment declared: “The progression . . . from the evidence, to “indifference,” to “countenancing,” and so to “authorisation” is too long a march.”¹²²

The abandonment of *Moorhouse*’s application of the “sanction, approve, countenance” standard appears to have surprised some legal commentators who anticipated a close fact-based decision interpreting

118. *Falcon v Famous Players Film Co* (1926) 2 KB 474, 499 (UK) (Atkin, LJ).

119. See *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 at 109 (UK); *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1059-1060 (UK); *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 (Can.).

120. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 68.

121. *Id.* at 84.

122. *Id.* at 89.

Moorhouse in light of the statutory amendments in Section 101(1A).¹²³ The High Court’s “grant or purport to grant” standard makes it exceedingly difficult to infer authorisation merely from the indifference of an Internet intermediary in a continuing relationship with its users or subscribers. Except in unusual cases, the intermediary will need to engage some affirmative conduct, such as active promotion or encouragement from which the primary infringer could infer a grant of a right to infringe.¹²⁴ The Gummow judgment also noted the stark contrast between the “indifference” referenced in *Moorhouse* and the intentional “inducement and encouragement” required by the U.S. Supreme Court in *MGM v. Grokster*.¹²⁵

B. *The Primacy of Section 101(1)(A) Factors*

Under both High Court judgments the first obligation is to examine the statutory factors in Section 101(1A) to determine whether they support an inference of authorisation when applying the “grant or purport to grant” threshold. In rejecting the use of dictionary definitions for “authorisation,” the French judgment stated:

Whilst resort to such meanings may have been necessary in the past, attention is now directed in the first place to s 101(1A). That provision is intended to inform the drawing of an inference of authorisation by reference to the facts and circumstances there identified, and recourse must be had to it. That is an express requirement.¹²⁶

1. Technical and Contractual Power to Prevent Infringements

With regard to the first statutory factor—the power to prevent acts of infringement—both High Court judgments found iiNet’s powers to be limited and indirect. The French judgment emphasized the utter lack of technical control that iiNet had over any aspect of the BitTorrent system, protocol, or the BitTorrent client. Nor did iiNet have any control over the uses its subscribers would make of BitTorrent, and could not remove, filter, or block any infringing

123. Burrell & Weatherall, *supra* note 80, at 725-26. (Two leading commentators anticipated that the High Court would interpret *Moorhouse* and Section 101(1A) to require iiNet to merely forward warning notices as a reasonable step, but not to implement a graduate response program leading to suspension or termination of Internet service.)

124. Lindsay, *supra* note 59, at 53.14. (Inducement liability in the U.S. requires active steps taken to encourage direct infringement, and depends upon purposeful, culpable expression and conduct. *MGM v. Grokster*, 545 U.S. 913, 936-37 (2005).)

125. IINET HIGH COURT JUDGMENT, *supra* note 26, at 85; *MGM v. Grokster*, 545 U.S. 913, 936-37 (2005).

126. IINET HIGH COURT JUDGMENT, *supra* note 26, at 68.

content its subscribers chose to access or store. Despite iiNet's provision of technology to access the Internet, it had "no direct technical power at its disposal to prevent a customer from using the BitTorrent system to download appellants' films to that customer's computer" ¹²⁷ In this regard, the French judgment echoed the conclusions of Cowdroy, J, in the trial court. ¹²⁸

With regard to iiNet's contractual power over its subscribers, the High Court directly applied the narrower definition of authorisation: "to grant or purport to grant a right." By giving its customers access to the Internet, it had provided them with the *power* to use the Internet. However this power could be used for both infringing and non-infringing purposes. Under the terms of its CRA iiNet prohibited use of its service to "commit an offence or to infringe another person's rights; . . . for illegal purpose or practices; . . . or allow anybody else to do so." The High Court found that the CRA gave express, formal and positive disapproval of using the Internet for infringing purposes, negating any possibility that iiNet had granted its subscribers any *right* to infringe. ¹²⁹ This language echoed the U.K. decision in *CBS Songs Ltd v. Amstrad*, ¹³⁰ which held that by selling tape recording devices to consumers, the seller "conferred on the purchaser the power to copy but did not grant or purport to grant a right to copy." ¹³¹

The High Court's assessment of iiNet's power to prevent the infringing acts is starkly different from the judgments in the Full Federal Court. Each of the three appellate judgments had found that iiNet had both a technical power over its service and contractual power under the CRA that it could use to prevent the infringements. ¹³² The appellate judgments focused on iiNet's power over its *users*, by limiting the extent of their access to Internet. iiNet could use its technical power to slow, suspend or terminate a user's service. Further, in the CRA iiNet's users had granted iiNet contractual powers to do so if they had used the iiNet service to infringe.

In contrast, the High Court and the trial judge focused on the *uses* that subscribers made of iiNet's Internet service. Like the trial judge, the French judgment found iiNet had no technical power to

127. *Id.* at 68, 70 (French, J); *Id.* at 88 (Gummow, J).

128. IINET TRIAL JUDGMENT, *supra* note 23, at ¶407-09.

129. IINET HIGH COURT JUDGMENT, *supra* note 26, at 68.

130. *CBS Songs Ltd v Amstrad Consumer Electronics plc* (1988) AC 1013 (UK).

131. *Id.* at 1054.

132. IINET APPELLATE JUDGMENT, *supra* note 20, at 327, 329 (Emmett, J), at 381, 383 (Jagot, J), and at 449 (Nicholas, J).

prevent the infringing *acts*.¹³³ It could only prevent the infringing acts by an indirect and limited contractual power to terminate the service of the user in its entirety. The Gummow judgment observed that Section 101(1A) begins with identification of an act of primary infringement, and considers whether a defendant has authorised “that act” of primary infringement.¹³⁴ The Gummow judgment ruled that iiNet lacked any power over the *uses* that subscribers would make of iiNet facilities to access the BitTorrent software to make infringing copies of the studios’ films.

2. Direct vs. Indirect Power to Prevent

The French judgment further constrains authorisation liability by construing Section 101(1A)(a) to *require* that an alleged authoriser have a power to prevent primary infringements:

An alleged authoriser must have a power to prevent the primary infringements. *Australasian Performing Right Association Ltd v Jain, Tape Manufacturers, Kazaa and Cooper* all confirm that there must be such a power to prevent. So much had been recognised earlier, in any event, in *Adelaide Corporation* and *Moorhouse*.¹³⁵

Further, the French judgment drew a distinction between direct and indirect power to prevent infringement. Citing *Adelaide Corporation*, the French judgment required a direct power to prevent a specific act of infringement, and rather than an indirect power that could halt the infringements only by terminating an entire relationship.¹³⁶ With regard to BitTorrent use, iiNet was held to have no direct technical power over the uses its subscribers made of the iiNet service.¹³⁷

Regarding iiNet’s contractual power, the French judgment determined that iiNet had only an indirect power because it could prevent the primary infringements only by terminating the entire relationship.¹³⁸ In other words, iiNet’s only power was over the

133. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 67; iiNET TRIAL JUDGMENT, *supra* note 23, at ¶407-09.

134. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 87.

135. *Id.* at 69 (citing *Australasian Performing Right Association Limited v Jain* (1990) 26 FCR 53; *Australian Tape Manufacturers Association Ltd and Others v The Commonwealth of Australia* (1993) 177 CLR 480; *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* (2005) 65 IPR 289; *Cooper v Universal Music Australia Pty Ltd and Others* (2006) 156 FCR 380; *ADELAIDE CORPORATION*, *supra* note 66; *Moorhouse*, *supra* note 60.)

136. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 61.

137. *Id.* at 67.

138. *Id.* at 69. (The distinction between direct and indirect power is referenced throughout the French judgment at 61, 65, 66, 67, 69, and 71, respectively.)

users—by terminating *all* services—and not over the particular infringing *uses* subscribers would choose to make of any services that iiNet provided. The Gummow judgment does not discuss this distinction between direct and indirect power to prevent. However, the judgment noted that iiNet’s powers were limited to controlling the contractual relationship. Because iiNet had no control over its subscribers’ use of BitTorrent, the “only indisputably practical course of action” to prevent the infringements was to exercise a contractual power to terminate the service entirely.¹³⁹

Commentators have discussed whether the existence of an ongoing commercial relationship gives an alleged authoriser a continuing degree of control that enables the power to prevent infringement.¹⁴⁰ In past cases involving the sale of *devices* that have both infringing and non-infringing uses, the relationship ends upon completion of the sale. Thus, the manufacturer/seller has no ongoing control over either the user or the uses to which the purchaser deploys the device, and thus no power to prevent.¹⁴¹ But when the commercial transaction involves an ongoing contract to provide a *service* online—such as Internet access, or a social media platform—the service provider can continually tweak the features of the service and the contractual terms of the user relationship in response to infringing uses. Thus, iiNet could have modified the terms and conditions of its CRA to provide that in cases of confirmed infringement, it would implement a graduated response scheme by sending notices, slowing service, suspending service, and ultimately terminating service altogether. This form of control over the user, together with the specific knowledge of particular infringing acts by identified users, arguably might be considered a sufficient power to prevent infringements.

The High Court rejected this argument in *iiNet*. Two issues are critical in assessing the proper use of these indirect powers in a continuing relationship. The first is the ability to control *uses* of the service that can prevent infringing acts that fall short of terminating the service relationship in its entirety.¹⁴² Both High Court judgments found that iiNet was unable to do so, given its limited and indirect powers. The second issue is whether the indirect power to control

139. *Id.* at 88.

140. Giblin, *Uncertainties*, *supra* note 55, at 156-66; Burrell & Weatherall, *supra* note 80, at 731-44.

141. *Australian Tape Manufacturers Association Ltd and Others v The Commonwealth of Australia* (1993) 177 CLR 480; *CBS Songs Ltd v Amstrad Consumer Electronics plc* (1988) AC 1013 (UK).

142. Burrell & Weatherall, *supra* note 80, at 735.

users, by limiting or terminating service pursuant to contractual terms of service, can be exercised without affecting non-infringing uses.¹⁴³ The Gummow judgment expressed the concern that if iiNet exercised its indirect power to prevent infringements by terminating accounts, the subscribers would lose all beneficial non-infringing uses of the Internet.¹⁴⁴ The French judgment emphasized that termination would be ineffectual because subscribers would merely shift their infringing activities to other ISPs and/or to other computers.¹⁴⁵

3. Reasonable Steps to Prevent or Avoid Infringements

The High Court next analyzed the third statutory factor—whether iiNet, by failing to act upon the AFACT notices to commence a graduated response program—had failed to take reasonable steps to prevent or avoid the primary infringements. The High Court held that it would not be a reasonable step for iiNet to implement a graduated response program.¹⁴⁶ Both High Court judgments expressed concern about the effectiveness of warnings as a means of ending the primary infringements. The absence of any required industry protocol binding on all ISPs seriously undermines the efficacy of any step iiNet might take—even of the rather drastic step of terminating an account entirely.¹⁴⁷ If iiNet were to terminate an account, the subscriber could easily create an account with another ISP, or access the Internet by other means.¹⁴⁸ Thus, termination merely relocates the infringing activity from one technology provider to another. The Gummow judgment describes termination of user accounts as the only indisputably practical solution to prevent the infringing act.¹⁴⁹

The High Court also was troubled over the difficulty of implementing the graduated response scheme the movie studios sought. The French judgment observed that iiNet would need to continually update the investigative exercise that the studios had undertaken in providing the AFACT notices, yet they had not been

143. *Id.* at 736-37. *See also*, Sony Corp. of Am. v Universal City Studios, Inc., 464 U.S. 417 (1984).

144. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 88; *See also*, iiNET TRIAL JUDGMENT, *supra* note 23, at ¶438 (In the trial court Cowdroy, J, also found that terminating accounts would prevent any beneficial and non-infringing uses of the Internet as well as infringing uses.).

145. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 70.

146. *Id.* at 71, 90.

147. *Id.* at 69-70.

148. *Id.* at 70, 88.

149. *Id.* at 88.

provided with the details of the DTecNet technology or methods.¹⁵⁰ The AFACT notices “did not approximate the evidence which would be expected to be filed in civil proceedings alleging copyright infringement.”¹⁵¹ The High Court acknowledged the liability risk to iiNet should the AFACT allegations be proven false. Thus the Court held that it was not unreasonable for iiNet to refuse to take action based upon the limited information the movie studios had provided. The French judgment concluded:

However, the evidence showed that the inactivity was not the indifference of a company unconcerned with infringements of the appellants’ rights. Rather, the true inference to be drawn is that iiNet was unwilling to act because of its assessment of the risks of taking steps based only on the information in the AFACT notices. Moreover, iiNet’s customers could not possibly infer from iiNet’s inactivity (if they knew about it) . . . that iiNet was in a position to grant those customers rights to make the appellants’ films available online.¹⁵²

One curious aspect of the judgments is that, after stating that the three statutory factors in Section 101(1A) were mandatory and must be considered, both judgments failed to specifically discuss the nature of any relationship existing between iiNet and the primary infringers. Perhaps the High Court found that the analysis of the issue in the trial court was dispositive. At trial Cowdroy, J, had recognized the continuing commercial relationship between iiNet and its users, but found on the evidence that no sufficient nexus existed between the infringing acts and iiNet’s profitability or commercial interests.¹⁵³

C. Deference to Parliament For Graduated Response Legislation

Finally, the High Court declared its preference that future issues regarding graduated response schemes were best resolved by Parliament through legislation. The French judgment commented:

. . . the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system. The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere, in constitutional settings different

150. *Id.* at 70.

151. iiNET HIGH COURT JUDGMENT, *supra* note 26, at 70.

152. *Id.* at 70.

153. iiNET TRIAL JUDGMENT, *supra* note 23, at ¶452.

from our own, by specially targeted legislative schemes, some of which incorporate co-operative industry protocols, some of which require judicial involvement in the termination of internet accounts, and some of which provide for the sharing of enforcement costs between ISPs and copyright owners.¹⁵⁴

The Gummow judgment concurred:

The history of the Act since 1968 shows that the Parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those pressures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions.¹⁵⁵

Whether to implement a graduated response scheme is a complex national policy decision about which prominent countries have reached opposing conclusions.¹⁵⁶ Graduated response policies implicate issues of freedom of expression, privacy, due process, proportionality and transparency.¹⁵⁷ It concerns many public and private stakeholders whose interests were not represented by the litigants in the *iiNet* litigation. The judicial proceedings included no evidence that would influence the proper design and scope of a graduated response system, such as reimbursement of costs for ISPs, the number of notices or warnings to be sent, the scale of the sanctions to be applied, any appeal rights for sanctioned subscribers, and the degree and nature of any judicial oversight of a sanctions regime. It would have been wholly inappropriate for the High Court to attempt to design or implement a graduated response scheme.¹⁵⁸

Whereas legislation can be carefully limited and tailored to balance a myriad of competing interests, a High Court decision holding ISPs liable for indifference to specific acts of infringements on their networks is an extremely blunt instrument. Retaining or extending application of the highly uncertain “sanction, approve, countenance” standard from *Moorhouse* would have significantly increased the secondary liability risk for ISPs. If the High Court had held that an affirmative duty arose whenever specific knowledge of infringing acts was provided, intermediaries would need to continually monitor the activities of those who use their services. This

154. *iiNET HIGH COURT JUDGMENT*, *supra* note 26, at 71.

155. *Id.* at 82.

156. *See* discussion *supra* notes 11-13.

157. Bridy, *supra* note 9, at 37-65.

158. *But see*, *iiNET APPELLATE JUDGMENT*, *supra* note 20, at 333, 343 (Emmett, J) (proposing the contours of a judicially-mandated graduated response regime).

would be a stifling burden on intermediaries, and would impose substantial and unjustified costs on all legal users of the Internet.¹⁵⁹ Such a holding also would have dramatically increased the degree of leverage that copyright owners could assert against ISPs and other intermediaries in negotiations for a graduated response regime.

Parliament had previously stated a clear preference in the *Copyright Act* that copyright owners and intermediaries negotiate the contours of any affirmative duties for ISPs to educate, warn, suspend or terminate infringing users in an agreed industry code.¹⁶⁰ An expanded threat of litigation likely would have distorted the policy choices to be made when Australian ISPs and major copyright owners negotiated the contours of a private “voluntary” graduated response scheme through an industry code. In the absence of such pressures, ISPs are able to assert the interests of their customers and the public interest regarding freedom of expression, privacy, due process and other important values in the negotiations. If the movie studios had prevailed in *iiNet*, ISPs would have been under severe pressure to expediently avoid litigation at the lowest cost. Copyright owners’ private interests would have dominated the negotiations without regard to the important public policy issues at stake.

Fortunately, in *iiNet* the High Court unanimously rejected an expansive interpretation of Australia’s authorisation statutes that would have created an affirmative duty for ISPs. Under the High Court’s “grant or purport to grant” standard in *iiNet*, ISPs can clearly negate any inference that they are granting a right to infringe copyright in the contractual Terms of Service governing their relationship with their subscribers. ISPs presumably will be savvy enough to avoid any affirmative acts to induce, encourage or actively incite infringements. Now that *iiNet* has removed most of the uncertainty regarding potential authorisation liability grounded upon indifference, ISPs are free to negotiate for an industry code that will properly account for important issues such as payment of ISPs’ expenses, the number of notices, degree of sanctions, appeal rights for accused subscribers, and judicial oversight. Copyright owners will resist such efforts. Thus it seems likely that Parliament itself will have to consider the design any graduated response scheme and whether to enact it into law.¹⁶¹

159. For example, each month Google now receives more than ninety million requests to remove items from search results because they allegedly link to infringing copyright material. See, Google Transparency Report, GOOGLE, <http://bit.do/GoogleTransparencyReport>. ISPs would likely be subjected to a similar barrage of allegations.

160. *Copyright Act 1968* (Cth) s 116AH(1) (Austl.).

161. Corinne Reichert, *Three-strikes Piracy Code Should be Shelved for a Year: Comms*

IV. IMPLICATIONS OF *iiNet* IN AUSTRALIA AND INTERNATIONALLY

The Australian High Court's unanimous ruling in *iiNet* clearly rejects the argument that an ISP may be liable for mere indifference to copyright infringement online. In *iiNet* the High Court maintained the status quo by refusing to be the first court at the highest level of a national legal system to impose secondary liability on ISPs for mere indifference to specific acts of primary infringement known to be occurring on their networks. In this respect, the *iiNet* decision is perhaps most important for what it did *not* do.

Even so, the *iiNet* decision is quite important for what it *did* do for Australian law. The High Court provided a much more certain legal landscape for Australian ISPs and other intermediaries whose users may inevitably infringe copyright. By disapproving of the overly broad “sanction, approve, countenance” standard applied in *Moorhouse* the High Court removed a tremendous amount of uncertainty from Australian law governing authorisation liability. The High Court clarified the importance of Section 101(1)(A) as the principal determinant of authorisation liability. Moreover, the High Court established the legal threshold that the statutory factors must meet to justify an inference of authorisation—“to grant or purport to grant” a right to infringe. ISPs will expressly negate any inference that they are granting a right to infringe in their contractual terms of service. If ISPs also are careful to avoid affirmative acts that encourage, promote or condone the primary infringements they will avoid secondary liability. Finally, both High Court judgments require a power to prevent the acts of primary infringement, and further, that the power must be a direct power. Each of these facets of the *iiNet* decision reduces the uncertainty and secondary liability risk facing Australian ISPs.

The *iiNet* decision does not, however, resolve all of the outstanding questions regarding authorisation law in Australia. The decision relies heavily on the statutory factors in Section 101(1)(A), which were based on *Moorhouse* and which reflect the broad interpretation for “authorisation” of Gibbs J. The High Court did not repudiate *Moorhouse*, even though both judgments rejected the reasoning in the case. Instead the High Court distinguished

Alliance CEO, ZDNET (April 4, 2016), <http://bit.do/PiracyCodeShelvedForYear>; Claire Reilly, *Three Strikes Out: Anti-piracy Scheme Shelved Over 'prohibitive' Costs*, CNET (February 18, 2016), <http://bit.do/PiracyCodeShelvedProhibitedCosts> (Copyright owners and ISPs spent several months in 2015 attempting to negotiate an industry code at the behest of the Australia Government. The major sticking point was sharing of the costs of the scheme. Negotiations were abandoned in early 2016.).

Moorhouse on the facts, perhaps to minimize the appearance of the plain conflict between its reasoning and case law origins of the statute.¹⁶² In adopting the narrow interpretation of “authorisation” in its “grant or purport to grant” threshold, the High Court introduces further confusion over the applicability of *Moorhouse* and subsequent cases applying its reasoning.¹⁶³ Lower courts will need to reconcile these conflicts. Inconsistencies are likely to arise, meaning that the High Court may well consider these issues again in the foreseeable future. It is clear, however, that mere indifference to the acts of primary infringement will not lead to authorisation liability.

The *iiNet* decision will also have a strong impact internationally. Two trends in the online world have created the potential for a further broadening of secondary liability for ISPs. First, the number and variety of services delivered online by intermediaries is expanding rapidly. These services feature ongoing contractual relationships that allow the intermediary continuing control over Internet users through their terms of service. Second, an expanding range of Internet surveillance tools allow copyright owners to provide more detailed information about specific acts of copyright infringement online. Taken together, the increased control and specific knowledge might be interpreted broadly to establish an affirmative duty for ISPs to act to prevent primary infringements on their networks. Australia, with its embrace of the broad definition of “authorisation” from *Moorhouse*, was the ideal forum for such an expansion. The *iiNet* case thwarted the potential for this expanded form of secondary liability for ISPs. The case confirmed the legal boundary for the furthest reach of secondary liability based on indifference by adopting the “grant or purport to grant” standard.

With regard to public policy, the High Court’s deference to Parliament will signal that copyright owners will need to develop other strategies for engaging ISPs and other intermediaries in the battle against rampant copyright infringement online. Using the threat of litigation-based judicial recognition of expanded theories of secondary liability as a lever to procure negotiated graduated response schemes appears to have reached its outer limit. Instead, copyright owners will need to seek legislation establishing new graduated

162. *iiNET* HIGH COURT JUDGMENT, *supra* note 26, at 86; Lindsay, *supra* note 59, at 53.20.

163. See, e.g., *Universal Music Australia Pty Ltd and Others v Cooper and Others* (2005) 150 FCR 1; *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* (2005) 65 IPR 289; *Cooper v Universal Music Australia Pty Ltd and Others* (2006) 156 FCR 380; *E-Talk Communications Pty Ltd & Anor v Universal Music Pty Ltd & Ors* [2007] HCATrans 313 (Austl.).

response schemes. This will enable broad participation by Internet users, interest groups and intermediaries in the public debate. This transparency will ensure that any such regimes are properly limited and respect essential freedoms and rights as discussed above.

In addition, public scrutiny of any graduated response proposals during Parliamentary proceedings will allow a searching investigation of the efficacy of such schemes. A full review of the merits and deficiencies of graduated response is beyond the scope of this article. However, Rebecca Giblin's comprehensive review in 2014 of graduate responses programs in a number of countries concluded that graduated response schemes are not effective in achieving their objectives.¹⁶⁴ Consequently, the *iiNet* case played a large role in delaying the adoption of an industry code implementing a graduated response scheme—and perhaps preventing an expensive and ineffective program from ever being enacted in Australia.

CONCLUSION

In *iiNet*, Australia's High Court confirmed that an ISP may remain indifferent to copyright infringement occurring on its network. The decision helpfully clarified the law of authorisation liability in Australia and narrowed Australian law to be consistent with international norms. By reducing uncertainty and limiting an ISP's risk of secondary liability, the judgment also blunted the litigation pressure that copyright owners were able to exert against ISPs to agree to a privately negotiated industry code for a graduate response scheme. The High Court properly allowed the issue of an ISP's affirmative duties to assist in the battle against online copyright infringement to be decided by Parliament with input from all relevant stakeholders and the public.

164. Giblin, *Graduated Response*, *supra* note 2, at 208-10.