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AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT

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FILM AND TELEVISION COMPANIES COMMENCE HIGH COURT APPEAL TO PREVENT ONLINE COPYRIGHT THEFT

The film and television industry companies that brought a case against iiNet for authorising the copyright infringements of its users will commence their appeal in the High Court of Australia tomorrow.

Although they were successful on many grounds before the Full Federal Court, the film companies will seek to overturn the ruling that iiNet did not authorise the acts of infringement by its users, arguing the ISP knew its users were infringing copyright on their network but failed to take *any* steps to prevent the infringements or to educate or warn its users about the infringements.

Speaking on behalf of the film companies, Australian Federation Against Copyright Theft Executive Director Neil Gane said it was clear that the law of authorisation of copyright infringement was intended to apply to ISPs, and in this case iiNet.

“The Full Federal Court unanimously recognised that ISPs could be found liable for authorising the infringements of their users,” he said.

“The Court also found that iiNet had the power to prevent the infringements by its users from occurring and that there were reasonable steps it could have taken, including issuing warnings. The majority of the court did not accept iiNet’s argument that establishing a system of warning and mitigation measures was either too difficult or costly.

“However two judges of the Full Court went on to find that iiNet had not authorised the infringements of its users and it is that conclusion that we are appealing,” Mr Gane said. “We say they applied a different and higher test for knowledge contrary to the principles in the seminal authority on authorisation, *Moorhouse*, which principles were codified in 2000 as part of the Digital Agenda Act.

iiNet has also appealed against the Full Court’s rejection of its defence, including its defence under the Telecommunications Act.

“In response to iiNet’s appeal, we will argue that the full bench of the Federal Court correctly found that iiNet could not rely on any of its defences,” stated Mr Gane.

“We are pleased to have the support of the Australian creative community with three interveners in the appeal, being ARIA, APRA and MEAA/SAG. We are confident of



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our case and look forward to the opportunity to present it over the next two days,” Mr Gane said.

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Background

Thirty-four entities from the film and television industry, filed a legal action against iiNet in November 2008.

The commencement of a legal action followed a 5 month investigation by AFACT with weekly notices sent to iiNet identifying the IP addresses of those customers who had infringed the companies' copyrights.

The hearing of the case commenced in the Federal Court on 6 October 2009. The decision was handed down on 4 February 2010. Despite finding in favour of the respondent the lower court found that iiNet had not acted to stop the infringements and had made it plain that it would be taking no action in response to the notices of infringement sent by AFACT.

The film and television companies appealed the decision to the Full Federal Court. The appeal was heard in August 2010 before three judges of the Full Federal Court (Emmett, Jagot, Nicholas JJ).

By a majority of 2:1, the full Federal Court dismissed the appeal on 24 February 2011.

On 12 August 2011, the High Court granted special leave to hear the companies' appeal. The appeal will be heard by the High Court judges over 3 days on 30 November - 2 December 2011.

About AFACT

AFACT works closely with the film and television community, government and enforcement agencies to address copyright theft and protect the interests of its members.

Piracy is a major cost to the Australian economy. In February 2011, IPSOS and Oxford Economics released a study on behalf of AFACT entitled “Economic Consequences of Movie Piracy in Australia”. The key findings, outlined below, indicated the scale of harm caused by movie theft to the Australian economy in the 12 months up to July 2010.

- \$1.37 billion in revenue was lost across the entire Australian economy.
- 6,100 jobs were forgone across the entire economy.
- Tax losses to movie theft amounted to \$193 million.



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- Direct consumer spending losses to the movie industry, ie. cinema owners, local distributors, producers and retailers amounted to \$575 millions