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No hooray for Hollywood

Movie studios and television networks will have to find an effective way of protecting their content online after a court threw out a landmark piracy case brought against Australian internet service provider iiNet.

In the first case of its type in the world, Federal Court judge Dennis Cowdroy found Perth-based iiNet could not be held responsible for its users illegally downloading movies and television programs.

The case has ramifications for global media and internet giants and involved the Australian Federation Against Copyright Theft accusing iiNet, on behalf of a conglomerate of Hollywood movie and television studios, of encouraging "rampant" copyright abuse for its own commercial gain.

Had Justice Cowdroy ruled in AFACT's favour, it could have led to an avalanche of similar cases around the world, with ISPs forced to tightly police the activities of customers.

A relieved Michael Malone, founder and managing director of iiNet, said the company had never authorised copyright infringement, and called for greater co-operation between content producers and service providers.

"The best way for us all to stop copyright violation, because it doesn't help iiNet either, is to make the material legitimately available for customers," Mr Malone said.

"The studios are facing a big problem because there are customers out there around the world, not just in Australia, that are downloading a lot of their material illegally. It's not unreasonable for them to seek ways to stop that. Our view has been that this isn't the best way to do it."

There had been fears that highly punitive damages in the case could have brought iiNet to its knees. Justice Cowdroy ruled that the provision of internet services did not amount to authorisation of copyright infringement, which was enabled through the use of BitTorrent file-sharing software over which iiNet had no control.

A media and entertainment partner at law firm Holding Redlich, Ian Robertson, said the case brought against iiNet went to the very heart of the business models of Hollywood studios and internet service providers globally. He said studios and other creators of films, television and music were deeply concerned about the threat to their business by widespread and ever-increasing piracy.

"It's easy to look at this as the economic interests of very large corporations but the livelihoods of a large number of individuals rest on this as well," Mr Robertson said.

He said if ISPs were made responsible for unlawful customer activity, their administrative costs would skyrocket and, ultimately, so would the cost of the services they provided. The case against iiNet was part of a broader international campaign to secure legislative intervention that would force ISPs to be accountable for activity on their networks.

Mr Robertson said AFACT would now probably lobby the government for a "three strikes" rule that forced ISPs into issuing a series of escalating warnings against customers that were infringing copyright. Under such a model, failure to stop infringement would eventually lead to the termination of internet accounts. Similar legislation is being considered in a number of other countries including the United Kingdom and France.

The concept has drawn fierce criticism from civil liberty groups, which argue that access to the internet is a basic human right in modern society, but Mr Robertson said it was likely to have a significant impact on illegal downloads because most people were inclined to comply with the law.

Ultimately, he said, the government would be forced to make a decision on how to address the problem.

"The advantage of this decision to AFACT and those that it represents is that it reinforces the point that the existing law is inadequate to achieve what they want. That is a good argument for legislative change," Mr Robertson said.

A spokesperson for Communications Minister Stephen Conroy said the government would examine the decision and consider the implications for the industry.

AFACT has not yet indicated if it will appeal against the decision but executive director Neil Gane expressed disappointment on behalf of the movie industry and the 50,000 people it employs in Australia. He said he believed the decision had been made based on a technical finding centred on the court's interpretation of how infringements occurred and the ISP's ability to control them. He said iiNet had accepted the evidence they provided as legitimate proof of copyright infringements on their net work.

"It is well recognised by government that this is a problem and we are confident that government policy will not support an outcome which allows for the continued rampant and unaddressed infringements that are occurring across the internet," Mr Gane said. In delivering a summary of his judgement yesterday, Federal Court judge Dennis Justice Cowdroy noted that the case had attracted widespread interest in Australia and around the world. He said this was the first court judgement in the world in a case where an ISP stood accused of authorising copyright infringement. Although evidence showed that copyright infringement was happening on a large scale, Justice Cowdroy said this did not necessitate making an example of iiNet.

While iiNet was aware that infringements were taking place, Justice Cowdroy said the critical issue was whether the ISP, by failing to take steps to stop conduct, infringed copyright. He ruled that the provision of internet services was not the cause of the crime. Rather, pirates used BitTorrent file-sharing software that iiNet had no control over.

Justice Cowdroy described Mr Malone as "an impressive witness" who remained consistent during "three days of gruelling and unnecessarily hostile cross-examination".

The studios have been ordered to pay iiNet's costs, which Mr Malone estimated at \$4 million. The court also found yesterday that iiNet had an acceptable policy for dealing with repeat copyright infringers and as a result would have been able to take advantage of so-called safe harbour provisions to limit damages liability had it lost.

Mr Malone warned iiNet customers who were illegally downloading content that the court's decision did not mean they were off the hook. He said the movie studios could still go after individual infringers.

Internet Industry Association chief executive Peter Coroneos said it would continue to push for a balance between the right of content producers and service providers, as well as for new commercial models that provided consumers with access to affordable, accessible and legal content.

Mr Malone set up iiNet in his parents' garage in 1993 and listed it on the Australian Stock Exchange six years later. It has more than 750,000 telecommunications customers, employs more than 1300 people and recorded annual revenue of \$418million last year. The shares climbed 11.1 per cent to close at \$2.20.

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