

Summer 2014

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## Recommended Citation

Pappalardo, Kylie (2014) "Duty and Control in Intermediary Copyright Liability: An Australian Perspective," *IP Theory*: Vol. 4: Iss. 1, Article 2.

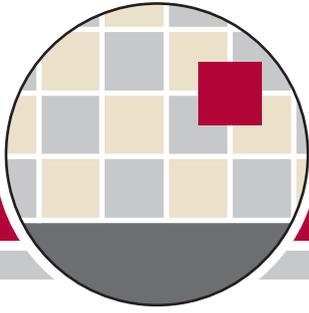
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## Duty and Control in Intermediary Copyright Liability: An Australian Perspective

Kylie Pappalardo\*

### I. Introduction

The question of whether technology intermediaries such as internet service providers (ISPs) and website hosts should be liable for acts of copyright infringement by their users has been at the forefront of copyright law for the last three decades. Yet despite a number of high-profile cases grappling with this question,<sup>1</sup> and repeated legislative and policy debates,<sup>2</sup> the law concerning intermediary copyright liability has not developed in a clear and predictable way. In Australia, we still do not have a reliable framework for determining *if* particular intermediaries should be liable for the infringement of third-party users, let alone *to what extent* they should be liable. This article considers the liability of so-called “passive” intermediaries, which are those intermediaries – like ISPs – that have not actively helped users to infringe copyright but which face liability because they have not acted to *stop* the infringement. It argues that principles of negligence under tort law, which consider whether the intermediary has a duty to act and whether that duty has been breached, may provide a more coherent framework for assessing the copyright liability of passive intermediaries in Aus-

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1. See *Metro-Goldwyn-Mayer Studios Inc., v. Grokster Ltd.* 545 U.S. 913 (2005); *In Re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7<sup>th</sup> Cir. 2003); *A&M Records, Inc. v. Napster Inc.* 239 F.3d 1004 (9<sup>th</sup> Cir. 2001); *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16; *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380; *Universal Music Australia v Sharman License Holdings Ltd* (2005) 220 ALR 1.

2. See, for example, the discussions surrounding amendments to the *Copyright Act 1968* following the Australia–United States Free Trade Agreement (AUSFTA), which included the addition of safe harbors for network providers: Matthew Rimmer, *Robbery under arms: Copyright law and the Australia-United States Free Trade Agreement*, FIRST MONDAY (Mar. 6, 2006), <http://firstmonday.org/ojs/index.php/fm/article/view/1316/1236#r4>; Robert Burrell and Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy* 2 U. ILL. J.L. TECH. & POL’Y 259 (2008). See also the debates surrounding the proposed Stop Online Piracy Act (SOPA), detailed in Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA and PIPA* 30 CARDOZO ARTS & ENT. L.J. 153 (2012).

tralia. In particular, the concept of control in tort law is far more robust than that currently found in Australian copyright law. This article uses the Australian High Court decision in *Roadshow Films Pty Ltd v iiNet Limited* [2012] as a case study to examine the creep of tort principles into copyright analysis and to demonstrate how the High Court used those principles to inform their understanding of an intermediary's control over the infringing actions of its users.

In Australia, intermediary liability is said to arise from the word “authorize” in sections 36(1) and 101(1) of the *Copyright Act 1968*, which provide that copyright is infringed by a person who does or authorizes the doing of one of the exclusive acts reserved to the copyright owner. “Authorize” has been held to mean: “sanction, approve, countenance,”<sup>3</sup> and it is on that definition that Australian intermediary liability doctrine is based. The High Court of Australia has recently criticized the fact that “authorize” has been defined by reference to its dictionary synonyms, especially since the words “sanction”, “approve” and “countenance” have no fixed legal meaning within copyright law.<sup>4</sup> “Countenance”, for example, has a number of meanings that are not co-extensive with the common understanding of “authorize”.<sup>5</sup> Intermediary copyright liability (or authorization liability, as it is known in Australia) therefore sits on rocky foundations. The doctrine has not developed in a principled manner, resulting in significant ambiguity about the scope of liability for intermediaries in Australia.<sup>6</sup>

A recent decision of the High Court of Australia has subtly shifted the discourse away from these vague definitions in copyright law towards better-established principles in tort. In *Roadshow Films Pty Ltd v iiNet Limited* [2012] the High Court unanimously held that iiNet, Australia's second largest ISP, was not liable for the acts of its subscribers who had communicated copyrighted films to other users over BitTorrent. The Court found that iiNet lacked the power to prevent the infringing uploads except by terminating its contractual relationships with its subscribers (in effect, terminating the subscribers' internet access). Members of the High Court used a notion of control influenced by tort law to hold that a power to prevent infringement at an abstract level (by terminating internet access) did not amount to effective control over infringing users and so did not give rise to a duty to act to

3. *Univ. of N.S.W. v Moorhouse* (1975) 6 ALR 193.

4. *iiNet* [2012] HCA 16 at [68], [117].

5. The Oxford English Dictionary includes the following definitions of ‘countenance’: (noun) support or approval; (verb) admit as acceptable or possible. It defines ‘authorize’ as “(verb) give official permission for or approval to (an undertaking or agent)”. See also *iiNet* [2012] HCA 16 at [68] (French CJ, Crennan and Kiefel JJ); *id* at [125] (Gummow and Hayne JJ).

6. See, for example, Rebecca Giblin, *The uncertainties, baby: Hidden perils of Australia's authorization law* 20 AUSTL. INTELL. PROP. J. 148 (2009); Jane Ginsburg and Sam Ricketson, *Inducers and Authorisers: A Comparison of the US Supreme Court's Grokster Decision and the Australian Federal Court's KaZaa Ruling* 11 MEDIA & ARTS L. REV. 1 (2006).

prevent the infringements. This was an unusual development, because principles of tort law have never featured prominently in Australian copyright discourse.<sup>7</sup>

This article will critically evaluate the tort law principles relied upon by members of the High Court in the *iiNet* case. The article addresses, primarily, the issue of liability for omissions to act, and argues that in tort law there is a strong onus on the plaintiff to show that the defendant had a duty to act. Whether a duty exists will often depend on whether the defendant was able to exercise effective control over the actions of the wrongdoing third-party. The ability to hinder the third party in some way is not enough to establish a duty to act in the absence of effective control. This article argues that an inquiry grounded in control as defined in tort law would provide a more principled framework for assessing the liability of passive intermediaries in copyright. In particular, it would set a higher, more stable benchmark for determining the copyright liability of passive intermediaries, based on the degree of real and actual control that the intermediary can exercise over the infringing actions of its users. This approach would provide greater clarity and consistency than has existed to date in this area of copyright law.

## II. The law (in brief)

In the United States, intermediary copyright liability developed from common law principles originating in tort. Intermediary liability for copyright infringement has traditionally been grounded in legal concepts of vicarious liability, which has its origin in agency,<sup>8</sup> and contributory infringement, which is based upon principles of joint tortfeasorship.<sup>9</sup> By contrast, authorization liability in Australia derives from statute, as interpreted by the courts. In fact, courts have traditionally denied the relevance of common law tort principles, stating that authorization liability in Australia is distinct from liability for the acts of agents or employees and liability as a joint tortfeasor.<sup>10</sup>

In Australia, intermediary liability is said to arise from the word “authorize” in sections 36(1) and 101(1) of the *Copyright Act 1968*, which provide that copyright “is infringed by a person who, not being the owner of copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.”<sup>11</sup> “Authorize” was defined in the leading case of *University of New South*

7. See discussion associated with footnote 10.

8. The *respondeat superior* doctrine in agency law holds that a principal may, in certain circumstances, be liable for the acts of his or her agent.

9. Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji, and Maureen A. O’Rourke, *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY*, 3<sup>rd</sup> Edition, 476 (Aspen Publishers, 2010).

10. *WEA International Inc. v Hanimex Corporation Ltd.* (1985) 77 ALR 456; see further *Ash v Hutchinson & Co (Publishers)* [1936] Ch. 489.

11. The US *Copyright Act 1976* also gives a copyright owner exclusive rights “to do and to authorize” certain

*Wales v Moorhouse* (1975) to mean: “sanction, approve, countenance.”<sup>12</sup> The *Moorhouse* case was brought as a test case to ascertain whether the University of New South Wales would be liable for making photocopy machines available in its library (where people could take books off the shelves and photocopy them from a small fee) without supervision or display of proper copyright notices. A majority of the High Court found the University liable. The most influential judgment was that of Justice Gibbs, who stated:

It seems to me . . . that a person who has under his control the means by which an infringement of copyright may be committed – such as a photocopying machine – and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use.<sup>13</sup>

This statement is widely considered to be the model for sections 36(1A) and 101(1A), which were inserted into the *Copyright Act 1968* in 2000.<sup>14</sup> They provide that in determining whether a person has authorized infringement, the court must take into account:

- (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;
- (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.

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acts: 17 USC § 106. Most debates in the US have focused on whether the words “to authorize” provide an independent right that can be directly infringed, or whether they merely refer to liability for contributory infringement. The prevailing position seems to be that the language “to authorize” provides “a statutory foundation for secondary liability”: *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1221 (D. Minn. 2008). See also *Venegas-Hernandez v. ACEMLA*, 424 F. 3d 50, 58 (1st Cir. 2005); *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1093 (9th Cir. 1994) (en banc); H.R. Rep. 94-1476 at 61 (1976) (“Use of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers”); Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 12.04 [A][3][a] at 12-85-88; cf. Phanesh Koneru, *The Right “To Authorize” in U.S. Copyright Law: Questions of Contributory Infringement and Extraterritoriality*, 37 IDEA 87 (1996).

12. *Univ. of N.S.W. v Moorhouse* (1975) 6 ALR 193.

13. *Id.* at 200-201.

14. See Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [54]-[56], [122]-[124]; *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [22], [52] (French CJ, Crennan and Kiefel JJ); *id.* at [133] (Gummow and Hayne JJ).

The power to prevent infringement, which loosely correlates to control, is the first factor to which judges must turn their minds. It is therefore an important feature of the authorization doctrine in Australia. In *Roadshow Films Pty Ltd v iiNet Limited* [2012], the High Court departed from established authority to examine this factor with reference to tort law. Two judges expressly referenced principles derived from tort cases in ascertaining the meaning of control where passive intermediaries have failed to act to stop infringement. The remaining three judges, while not referring to tort principles directly, read down the power to prevent factor in a way that accords with a tort-influenced approach. Part III describes, in brief, the facts of this case and the tort law references made by the court.

### III. *Roadshow Films v iiNet*

iiNet, Australia's second largest ISP, provides general internet access to subscribers under the terms of its Customer Relationship Agreement. The agreement states, in clause 4, that the subscriber must comply with all laws in using the internet service, and must not use or attempt to use the service to infringe another person's rights. It further provides, in clause 14, that iiNet may, without liability, immediately cancel, suspend or restrict the supply of the service if the subscriber breaches clause 4 or otherwise misuses the service.

In August 2007, the Australian Federation Against Copyright Theft (AFACT),<sup>15</sup> a body which represents the interests of copyright owners and exclusive licensees in films and TV programs in Australia, hired DtecNet Software, a software company, to gather evidence of apparent copyright infringement by Australian internet users. From July 2008 to August 2009, AFACT sent notices ("the AFACT notices") to iiNet on a weekly basis, alleging that iiNet subscribers (identified by IP addresses) were downloading and sharing movies via BitTorrent. In response, iiNet raised two issues: it could not understand AFACT's data, and that an IP address was insufficient to identify a particular internet user. iiNet stated that AFACT should refer its allegations to the appropriate authorities. iiNet did not suspend or terminate any subscriber account under the terms of its Customer Relationship Agreement in response to the AFACT notices, nor did it send warning notices to its subscribers.<sup>16</sup>

The case against iiNet was brought by an alliance of movie studios and media companies, including Village Roadshow, Universal Pictures, Paramount Pictures, Warner Brothers Entertainment, Sony Pictures Entertainment, Twentieth Century Fox and Disney. The movie companies argued that by doing nothing in response to the AFACT notices, particularly by failing to enforce the terms of its Customer Relationship Agreement, iiNet had at least 'countenanced' the infringements. Therefore, by failing to take reasonable steps to prevent subscribers from downloading and sharing infringing copies of films, iiNet had

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15. Now called the Australian Screen Association: <http://www.screenassociation.com.au/>.

16. Description of facts derived from *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [28]-[35].

authorized the infringing acts of its subscribers.

The case came to the High Court on appeal from the Full Court of the Federal Court of Australia. The High Court was unanimous in finding that iiNet had not authorized the infringements. The High Court delivered two separate judgments. The first, a joint judgment by Chief Justice French and Justices Crennan and Kiefel, focused on the statutory language in s 101(1A) of the *Copyright Act 1968* to find that iiNet's power to prevent was limited: "It had no direct power to prevent the primary infringements and could only ensure that result indirectly by terminating the contractual relationship it had with its customers."<sup>17</sup> Additionally, the judges noted the inadequacy of the information in the AFACT notices, holding that the notices did not provide enough evidence to compel iiNet to act.<sup>18</sup> However, it is the second joint judgment by Justices Gummow and Hayne that is of greater interest for the purposes of this article. Their Honors drew principles from tort law in finding that iiNet did not have a duty to act to stop subscribers from infringing copyright owners' rights. This is an interesting development, given that Australian courts have seldom relied on tort law in framing authorization liability.

In their reasons, Justices Gummow and Hayne described the appellants' case by reference to the elements of negligence in tort:

[C]ounsel for the appellants appeared to accept that their case posited a duty upon iiNet to take steps so as not to facilitate the primary infringements and that this duty was broken because, in particular, iiNet did nothing in that regard.

So expressed, the appellants' case resembles one cast as a duty of care owed to them by iiNet, which has been broken by inactivity, causing damage to the appellants.<sup>19</sup>

Indeed, the appellants had placed significant weight on s. 101(1A)(c) of the *Copyright Act 1968* in arguing that because iiNet had not taken any reasonable steps to "prevent the continuation of the [infringing] acts" it had exhibited indifference about the infringements.<sup>20</sup> They asserted that indifference in the face of knowledge or suspicion of copyright infringement amounted to countenancing infringement. The appellants therefore argued that even though iiNet had not taken any steps to facilitate infringement, it should nonetheless be held liable because it had not acted to stop the infringement. They stated:

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17. *iiNet* [2012] HCA 16 at [69]-[70] (French CJ, Crennan and Kiefel JJ).

18. *Id.* at [74]-[75], [78]

19. *Id.* at [114]-[115] (Gummow and Hayne JJ).

20. Appellants' Submission in *Roadshow Films Pty Ltd v iiNet Ltd*, No S 288 of 2011, 9 September 2011, 3 [13].

At the least, such conduct amounted to countenancing the infringements of copyright for the purposes of authorization. Despite its denials of authorization, iiNet permitted the users of its internet service to infringe without interruption or consequence. It did so because it did not believe that it was required to act, because “it had no legal obligation to act”.<sup>21</sup>

The question of whether or not iiNet did have an obligation or duty to act was at the core of Justices Gummow and Hayne’s legal analysis. Their Honors referenced several tort law principles in examining the circumstances in which a duty to act to protect another will arise. First, they quoted the following passage from a 1914 article on the tort liability of public authorities:

The cases in which men are liable in tort for pure omissions are in truth rare... The common law of tort deals with causes which look backwards to some act of a defendant more or less proximate to the actual damage, and looks askance at the suggestion of a liability based not upon such a causing of injury but merely upon the omission to do something which would have prevented the mischief.<sup>22</sup>

Next, their Honors looked to the separate judgments of Chief Justice Gleeson, Justice Gaudron, Justice Hayne and Justice Callinan in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000), a personal injury case.<sup>23</sup> They stated that these judgments were “recent affirmations of the general rule of the common law that in the absence of a special relationship one person has no duty to control another person to prevent the doing of damage to a third.”<sup>24</sup>

Justices Gummow and Hayne dismissed the appeal, finding for iiNet. They held that only in a very attenuated sense did iiNet have the ability to ‘control’ the primary infringements, and that for this reason, iiNet could not be liable for failing to act to stop the infringements.<sup>25</sup> Their Honors concluded: “The progression urged by the appellants from the evidence, to ‘indifference’, to ‘countenancing’, and so to ‘authorisation’, is too long a

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21. *Id.* at 19 [72].

22. Harrison Moore, *Misfeasance and Non-feasance in the Liability of Public Authorities* 30 L.Q. REV. 276, 278 (1914), quoted by Gummow and Hayne JJ in *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [108]. This passage had also been cited by the High Court previously, in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 551.

23. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 264 (Gleeson CJ); *id.* at 270 (Gaudron J); *id.* at 292 (Hayne J); *id.* at 299-300 (Callinan J).

24. *iiNet* [2012] HCA 16 at [109] (Gummow and Hayne JJ).

25. *Id.* at [146] (Gummow and Hayne JJ).

march.”<sup>26</sup>

#### IV. Tort liability for omissions to act

The principle relied upon by Justices Gummow and Hayne that it is rare, in tort, to find liability for pure omissions, has existing High Court authority. In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000), Chief Justice Gleeson said, “[T]he general rule that there is no duty to prevent a third party from harming another is based in part upon a more fundamental principle, which is that the common law does not ordinarily impose liability for omissions.”<sup>27</sup>

For the law to impose liability for an omission to act, there must first be a duty to act.<sup>28</sup> The alleged duty should be specific and clearly articulated.<sup>29</sup> In *Roadshow Films v iiNet*, the appellants claimed that iiNet had a duty to do *something* to prevent the infringements, but they did not state to the satisfaction of the High Court what this something was or ought to be. This created a problem in determining the scope of the apparent duty that iiNet owed to the appellants. A similar problem arose in the *Modbury Triangle* case. There, the respondent worked in a video store in a shopping center owned by the appellant. The shopping center had a large outdoor car park, in which the respondent had parked his car. The car park was lit until 10pm. On the night in question, the respondent had closed and exited the video store around 10:15pm. He walked to his car in the dark, and was assaulted and badly injured by three unknown men. The respondent sued the appellant in tort for damages for personal injury, arguing that the appellant should have acted to protect employees by keeping the car park lights on at least until the last employee had left for the evening. A majority of the High Court found that this did not properly define the scope of the purported duty. It was relevant that the shopping center had ATMs which were accessible by members of the public all night. Chief Justice Gleeson stated, “If the appellant had a duty to prevent criminal harm to people in the position of the first respondent, at the least it would have had to leave the lights on all night; and its responsibilities would have extended beyond that.”<sup>30</sup> Justice Callinan said:

The respondents initially put their submission on the first issue in very broad terms indeed. They said that the scope of the duty of care owed by a land-

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26. *Id.* at [143].

27. *Modbury Triangle Shopping Centre Pty. Ltd. v Anzil* (2000) 205 CLR 254, 265 (Gleeson CJ).

28. “[I]t is not negligent to abstain from doing a thing unless there is some duty to do it.” *Sheppard v Glossop Corp* [1921] 3 KB 132, 145 (Scrutton LJ), quoted in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 621 (Hayne J).

29. See Harrison Moore, *Misfeasance and Non-feasance in the Liability of Public Authorities* 30 L.Q. REV. 276, 280 (1914).

30. *Modbury* 205 CLR 254, 266-267 (Gleeson CJ).

lord in control of commercial premises to employees of its tenants is to minimize the risk of injury to them by criminal acts of third parties, wherever it is reasonably foreseeable that criminal conduct may take place, and the cost of minimizing or eliminating that risk is reasonable.

The submission goes beyond any formulation of the duty to be found in any of the decided cases of this country.<sup>31</sup>

Justice Hayne, similarly, thought that the duty alleged by the respondent was not a duty to light the car park. “The failure to light the car park was no more than the particular step which the respondents alleged that reasonable care required the appellant to take.”<sup>32</sup> Justice Hayne emphasized the difference between a duty and reasonable steps taken in furtherance of a duty. This is a distinction that also applies in the context of authorization liability – It is the difference between “power to prevent” under s. 101(1A)(a) of the *Copyright Act 1968* and “reasonable steps [taken] to prevent or avoid [infringement]” under s. 101(1A)(c).

In the *iiNet* case, while the appellants declined to specify what exactly iiNet would be required to do to avoid authorizing infringement, they indicated that, at the very least, iiNet should have sent warning notices to the subscribers identified by AFACT as infringing copyright. This is akin to the *Modbury Triangle* respondents arguing that the appellant should have prevented the criminal assault at least by leaving the lights on. Like leaving the lights on, sending a warning notice might constitute a step taken in furtherance of a duty, but it is not the duty itself.

## V. The essential element: control

In the *iiNet* case, the primary acts of infringement were committed by third parties whose only relationship to iiNet was a contractual one to acquire internet access. It was not alleged that iiNet helped these third parties to infringe copyright by providing them with the software used to share the digital files or by telling them how to copy and share digital files.<sup>33</sup> iiNet had no connection with or control over the BitTorrent protocol used by the infringing subscribers. Rather, the claim was that iiNet had the power to prevent the infringements under s. 101(1A)(a) but did nothing to stop them. A traditional copyright assessment would look to iiNet’s contractual power to terminate or suspend infringing subscribers’ accounts under the terms of the Customer Relationship Agreement. This, arguably, constitutes a power to prevent the infringements under s. 101(1A)(a). The copyright-based approach

31. *Id.* at 296-297 (Callinan J.)

32. *Id.* at 291-292 (Hayne J.)

33. *Cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd.* (2005) 220 ALR 1.

is not particularly nuanced, and provides no means of distinguishing between a technical power to prevent infringement of the kind arguable in the iiNet case and the existence of real and actual control over the infringing acts. The concept of actual control has been more thoroughly explored in tort authorities.

Control was a central feature of the tort law cases referred to by Justices Gummow and Hayne in their reasons. In *Brodie v Singleton Shire Council*, a case dealing with the liability of highway authorities, the court focused on whether the highway authority had control “over the source of the risk of harm to those who suffer injury.”<sup>34</sup> In that case, the source of the risk was a faulty bridge that had not been repaired. The court ultimately found that the highway authority did have sufficient physical control over the bridge in question, and so was liable for the plaintiff’s injuries that had occurred when the bridge collapsed. Justices Gaudron, McHugh and Gummow stated, “[T]he factor of control is of fundamental importance.”<sup>35</sup>

In *Modbury*, the court emphasized that the defendant must have some (real) control over the actions of the third party who caused the harm before liability will follow. Chief Justice Gleeson stated that the appellant in that case “had no control over the behaviour of the men who attacked the first respondent, and no knowledge or forewarning of what they planned to do.”<sup>36</sup> Justice Hayne noted that the appellant’s ability to control the lighting of the car park was central to the respondent’s case. However, this misconstrued the issue of control, which was really about whether the appellant could control the men who assaulted the respondent. Justice Hayne found that the duty asserted by the respondent was a duty “to take reasonable steps to hinder or prevent criminal conduct of third persons which would injure persons lawfully on the appellant’s premises.”<sup>37</sup> He held that this amounted to a duty to take steps to affect the conduct of persons over whom the appellant had no control. He concluded, “No such duty has been or should be recognized.”<sup>38</sup>

Justice Hayne in *Modbury* highlighted that the ability to control and the ability to hinder are two different things and should not be confused. To hold the appellant liable for failing to take small steps which might have reasonably hindered the offending behaviour would cast the net of tort liability too wide, by holding the appellant responsible for conduct it could not control and where its contribution to the harm was negligible.<sup>39</sup> Justice

34. *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 558-559 (Gaudron, McHugh and Gummow JJ).

35. *Id.*

36. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 263 (Gleeson CJ).

37. *Id.* at 291-292 (Hayne J).

38. *Id.* Justice Gaudron, in her reasons, agreed particularly with Justice Hayne emphasis on “the significance of control over third parties before the law imposes a duty of care to prevent foreseeable damage from their actions,” *id.* at 270.

39. *Id.* at 293 (Hayne J).

Hayne emphasized that the coherence of tort law depends upon “the notions of deterrence and individual responsibility.”<sup>40</sup> To hold the appellant liable in circumstances where it had not contributed to the wrong would do nothing to further the goal of promoting individual responsibility for one’s actions.

Chief Justice Gleeson made a similar point in his reasons. He said, “The respondents submitted that the appellant assumed responsibility for the illumination of the car park. That submission confuses two different meanings of responsibility: capacity and obligation.”<sup>41</sup> In other words, while the appellant owned the car park and decided when to turn the car park lights on and off (capacity), that did not mean that the appellant assumed an obligation to care for the security of people in the car park by keeping the lights on to protect them from attack by third parties.

The principle relied upon in both *Modbury* and *iiNet*, that there is no general duty to control a person to prevent them doing harm to another, is derived from a statement made by Justice Dixon in the 1945 case of *Smith v Leurs*. There, Justice Dixon said:

It is, however, exceptional to find in the law a duty to control another’s actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing of damage to a third.<sup>42</sup>

*Smith v Leurs* was a personal injury case in which a 13-year-old boy (Leurs) had used his toy slingshot to fire a stone at another boy (Smith), hitting him in the eye and seriously damaging his sight. Smith sued Leurs’s parents in negligence, for allowing Leurs to play with the slingshot and for failing to control him in his use of the slingshot. There was evidence that Leurs’s parents had warned their son of the dangers of playing with a slingshot and had forbidden him to use it outside the limits of their home. The court found that this order was a genuine one and reasonable in the circumstances. There was no evidence that the parents could have expected Leurs to disobey them by taking the slingshot outside his home to play with other boys.<sup>43</sup> As in *Modbury Triangle*, the court distinguished between capacity and obligation. Although the parents certainly had the capacity to deny Leurs the possession of a slingshot, the court held this was not a reasonable expectation. Chief Justice Latham noted that a slingshot “is a common object in boyhood life. Annoyance rather than an actual physical harm is the worst that is normally to be expected from its use.”<sup>44</sup>

40. *Id.* On this point, Justice Hayne cites Jane Stapleton, *Duty of Care: Peripheral parties and alternative opportunities for deterrence* 111 L.Q. REV. 301, 317 (1995). See also, Peter Cane, *THE ANATOMY OF TORT LAW* (Oxford Press: 1997) 3, 25.

41. *Modbury* (2000) 205 CLR 254, 264 (Gleeson CJ).

42. *Smith v Leurs* (1945) 70 CLR 256, 261-262 (Dixon J).

43. *Id.* at 259 (Latham CJ); *id.* at 265 (McTiernan J).

44. *Id.* at 259.

Both *Smith v Leurs* and *Modbury Triangle* raise interesting points for consideration in the *iiNet* case. Did iiNet have real control over the actions of its infringing subscribers? iiNet had contracts with its subscribers that gave it the capacity to terminate subscriber accounts for breaches of the law. Additionally, the iiNet contracts warned subscribers against infringing copyright.<sup>45</sup> There was some debate as to whether this warning was a genuine one – the appellants argued that unless iiNet was willing to impose measures to deter or prevent infringement, then the warning was a toothless tiger; iiNet countered that it would be willing to take steps if directed by a court order, but it would not act as judge, jury and police on the matter.<sup>46</sup> Ultimately, the court held that in this case, capacity to terminate did not amount to obligation to terminate. The relevant factors were that iiNet’s control over its subscribers was indirect at best and its control over use of the BitTorrent protocol was non-existent,<sup>47</sup> and that there was a risk of liability for wrongful termination of subscriber contracts.<sup>48</sup>

A lingering issue is the distinction between control and the ability to hinder, and the point at which failure to act to hinder can attract liability. In *iiNet*, the appellants argued strongly that iiNet should have acted within its capacity to impede infringement, at the very least by sending warning notices to subscribers. As a finding of fact, Chief Justice French and Justices Crennan and Kiefel held, “[t]he information contained in the AFACT notices, as and when they were served, did not provide iiNet with a reasonable basis for sending warning notices to individual customers containing threats to suspend or terminate those customers’ accounts.”<sup>49</sup> The AFACT notices had failed to specify how the information contained in them had been gathered, and so the court found it reasonable that iiNet had considered the notices to be unreliable.<sup>50</sup> This leaves open the possibility that had the AFACT notices been more detailed or more transparently evidence-based, iiNet may have been compelled to act on them. It remains, unclear, however, what exactly iiNet would be expected to do. It is arguable that even if the AFACT notices had been more substantial, iiNet would not have been authorizing infringement by failing to pass them on. All judges of the High Court were extremely critical of the appellant’s reliance on the “countenance” aspect of the *Moorhouse* definition of authorization (“sanction, approve, countenance”).<sup>51</sup> It seems likely that the action (or inaction) of an ISP would need to rise to the level of at least “sanctioning” or “approving” infringement before liability would follow, though what exactly that involves is

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45. See *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [27] (French CJ, Crennan and Kiefel JJ (quoting from iiNet’s Customer Relationship Agreement, clauses 4.1, 4.2, 14.2, 14.3)); see also *id.* at [37], [66]-[67].

46. *Id.* at [36] (French CJ, Crennan and Kiefel JJ); *id.* at [96] (Gummow and Hayne JJ).

47. *Id.* at [69]-[70], [73], [77]-[78] (French CJ, Crennan and Kiefel JJ); *id.* at [112], [146] (Gummow and Hayne JJ).

48. *Id.* at [75]-[76] (French CJ, Crennan and Kiefel JJ).

49. *Id.* at [78].

50. *Id.* at [34].

51. *Id.* at [67]-[68]; *id.* at [125] (Gummow and Hayne JJ).

unsettled.

In determining whether iiNet had taken reasonable steps to prevent the infringements, Chief Justice French and Justices Crennan and Kiefel also placed some emphasis on the wording of s. 101(1A)(c), which includes consideration of “whether the person complied with any relevant industry codes of practice.” Their Honors noted “the absence of any industry code of practice adhered to by all ISPs.”<sup>52</sup> This suggests that had iiNet been a party to an industry code, their Honors may have read s. 101(1A)(c) to create a duty to adhere to that industry code. Failure to do so might therefore constitute a breach of that duty and provide strong evidence that iiNet failed to take reasonable steps to prevent the infringements, thereby giving rise to legal liability for authorization.<sup>53</sup>

Justices Gummow and Hayne were more definitive in their conclusion on warning notices. They held that the failure to pass on warning notices did not go to the heart of the matter; warning might or might not have had the effect of forestalling further infringements.<sup>54</sup> iiNet did not have control over how users behaved and there was no evidence as to how users were likely to behave in response to warning notices. “In truth, the only indisputably practical course of action would be an exercise of contractual power to switch off and terminate further activity on suspect accounts. But this would not merely avoid further infringement; it would deny to the iiNet customers non-infringing uses of the iiNet facilities.”<sup>55</sup> Their Honors’ exercise in distinguishing the small act of passing on warning notices from the broader apparent duty of (contractually) controlling users to prevent infringement is similar to the distinction that Justice Hayne drew in *Modbury Triangle* between the act of leaving the car park light on and the broader purported duty of preventing harm caused by third parties outside the occupant’s control. Ultimately, the core consideration is not what small acts iiNet could have done to hinder infringement, but whether iiNet had a specific duty to act in this way.<sup>56</sup>

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52. *Id.* at [71] (French CJ, Crennan and Kiefel JJ); see also Gummow and Hayne JJ *id.* at [139].

53. Although it should be noted that commentators have argued that industry codes requiring ISPs to pass on warning notices and take other measures (including terminating user accounts) are unlikely to be formed post-*iiNet*, given the strong position that ISPs now find themselves in: see, e.g., David Lindsay, *ISP Liability for End-User Copyright Infringements: The High Court Decision in Roadshow Films v iiNet* 62(4) TELECOMM J. OF AUST. 53.1, 53.18 (2012).

54. *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [138] (Gummow and Hayne JJ).

55. *Id.* at [139].

56. This is a point that Justice Hayne made clear in oral arguments (addressing counsel for the appellants): “You cannot take these matters to account in determining whether there is authorisation without first having your concept of what constitutes authorisation. Now, the arguments you have been presently advancing seek to begin with questions of reasonable steps, fasten upon the fact that there is no response to your notice, but then seem, if I may say so, Mr. Bannon, to slide imperceptibly by the word “therefore” to the conclusion that there is authorization.” *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCATrans 323 (30 November 2011).

## VI. Control in tort and control in copyright – same or different?

Control has long been a central feature of authorisation liability in Australia. It was central to the findings in *University of New South Wales v Moorhouse*, and the accepted understanding of s. 101(1A)(a) of the *Copyright Act 1968*, which directs a court to consider a person's "power to prevent" the infringement, is that it deals primarily with control. It is reasonable to inquire, then, as to why Justices Gummow and Hayne saw fit to consider the principle of control in tort law when applying the authorisation doctrine in *Roadshow Films v iiNet*, particularly when Australian courts have traditionally rejected the relevance of tort law to intermediary copyright liability. If copyright has its own conception of control, separate to that in tort, is it really helpful to resort to tort law principles?

Tort law principles help in this area because tort's notion of control is more rigorous than that currently found in copyright law. Power to prevent in the *Copyright Act 1968*, for example, speaks to capacity, not obligation. It says nothing about what an intermediary *ought* to do. Tort law's concept of control, on the other hand, is influenced by notions of deterrence and individual responsibility, which ask firstly whether a person has acted wrongfully in his or her exercise of control and secondly what the wider ramifications of imposing liability will be. Is it proper that the person be held liable? How will that person (and persons in similar situations) alter their behavior in response to liability, and is that desirable for the fluid functioning of society? These are public policy questions that copyright law provides little scope to ask.<sup>57</sup>

Further, copyright law tends to confuse power to prevent under s. 101(1A)(a) with reasonable steps under s. 101(1A)(c). If causation is not properly addressed,<sup>58</sup> then some reasonable steps may mistakenly be held to affect power to prevent. For example, sending warning notices to internet users might be perceived to have some impact on levels of infringement, so an intermediary might be held liable for authorization for failing to warn, notwithstanding that this is not a real power to prevent. On one view, iiNet came close to being held liable for this very thing – had there been an industry protocol in place or had the

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57. These questions are sometimes raised in intermediary copyright liability cases, but analysis tends to fall into what Julie Cohen calls the liberty/efficiency binary - either arguments favor finding intermediaries liable to the full extent that they are able to prevent infringement in some way, because this would be economically efficient, or they disfavor finding liability on the grounds that technology intermediaries need extensive freedom to operate and innovate. See Julie E. Cohen, *Configuring the Networked Citizen*, in *IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21<sup>ST</sup> CENTURY* (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds., Stanford University Press 2012)(available for download at <http://scholarship.law.georgetown.edu/facpub/803/>). A tort law analysis may provide a more careful way to interrogate these concerns without automatically favoring copyright holders or intermediaries. Importantly, it may provide scope to consider the interests of internet users within the authorization doctrine.

58. See further Part VII.A. below.

AFACT notices been more comprehensive, it is possible that some judges may have been willing to hold iiNet liable for failing to take any action at all to impede infringement. But this would ignore the fact that no duty to act had been established. In this scenario, iiNet has no greater level of control than it did before. The reasonable steps consideration should not operate to preempt control.

If we view s. 101(1A) through the lens of tort law, however, it becomes clear the way in which paragraphs (a) and (c) relate to each other for omissions to act.<sup>59</sup> Paragraph (a) sets up whether there is a duty to act to prevent infringement (a duty which depends heavily on control) and paragraph (c) considers whether that duty has been fulfilled (or breached) by examining the steps taken by the intermediary. Without a *duty* to act, there can be no breach for failing to act and thus no authorization.

Where it is claimed that one person should be legally responsible for the acts of another, the duty of care of that person is intimately linked to the level of control he or she is able to exercise over the third party. Duty is dependent on control. Control, therefore, must be clearly defined – control *over what or whom*; control *how*. Power to prevent in copyright is not so specific. Power to prevent can be as straightforward as an on/off switch – technically, iiNet had a power to prevent infringement by terminating user accounts. The power to prevent inquiry is an exercise in ticking a box; it does not call for the same level of careful scrutiny as does the question of control. The *iiNet* High Court – even those judges who did not explicitly refer to tort principles – appeared to be more influenced by a tort conception of control than the copyright concept of power to prevent,<sup>60</sup> and in this sense they diverged from existing approaches to authorization liability. Under copyright, iiNet had a power to prevent infringement by terminating the accounts of infringing subscribers. Under a notion of control influenced by tort law, iiNet did not have a sufficient degree of control over the actions of subscribers for a duty to act to arise.<sup>61</sup> iiNet had no control over the BitTorrent software or the copyrighted content shared by users over BitTorrent. It could not supervise the many subscribers’ uses of the BitTorrent software. It could warn, but that is not control. Or it could use its contractual power to terminate the subscribers’ accounts, which is a step ill-adapted to the problem. The *iiNet* case is a cogent example of the differences between control under tort and control under copyright, and the poorly defined scope of the latter.

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59. For consideration of paragraph (b), see Part VII.B. below.

60. See, for example, the exchange between Justice Kiefel and the counsel for the appellants during oral arguments: “Kiefel J: But you have to say control over what. Control over their ability to --- Mr. Bannon: Infringe, yes. Kiefel J: Well, their ability to access the internet. Mr. Bannon: Yes, to access the internet. Kiefel J: That is rather a step removed from their ability to infringe which requires more.”: *Roadshow Films Pty. Ltd. v iiNet Limited* [2011] HCATrans 323 (30 November 2011).

61. This is not to say that an ISP will never be liable under a tort-influenced doctrine of authorization. Each case depends on its facts.

This is interesting because a theory of control influenced by tort law could help to bring cohesion and clarity to the doctrine of authorisation liability in Australia.

## VII. Other points to note

### A. Causation

It is useful to include a brief note on causation. In negligence cases, the plaintiff must establish that the defendant's breach of his or her duty caused the harm suffered by the plaintiff. Harrison Moore has argued that where the breach is an omission to act, it will be particularly difficult to show that the omission caused the harm.<sup>62</sup> This was illustrated in the *Modbury Triangle* case, where both Chief Justice Gleeson and Justice Hayne expressed doubt as to whether illuminating the car park would have deterred the assailants.<sup>63</sup> Chief Justice Gleeson noted that "facilitate" and "cause" are not the same thing – "[T]he appellant's omission to leave the lights on might have facilitated the crime, as did its decision to provide a car park, and the first respondent's decision to park there. But it was not a cause of the first respondent's injuries."<sup>64</sup> The same point can be made with respect to ISPs like iiNet: while the provision of internet access might have facilitated the infringements, it cannot be said to have caused the infringements. Further, it is not certain that sending warning notices would have deterred infringers or potential infringers.<sup>65</sup> Something more would be required before liability would attach to an ISP in iiNet's position.

### B. Special relationship

For omissions to act, the general rule is that *in the absence of a special relationship* there is no duty to control one person to prevent the doing of damage to another.<sup>66</sup> Tort law recognizes certain categories of special relationships where one person may be held responsible for the conduct of another – these include parents and children,<sup>67</sup> school authorities and

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62. Harrison Moore, *Misfeasance and Non-feasance in the Liability of Public Authorities (part 2)* 30 L.Q. REV. 415, 416 (1914).

63. *Modbury Triangle Shopping Centre Pty. Ltd. v Anzil* (2000) 205 CLR 254, 263 (Gleeson CJ); *id.* at 290-291 (Hayne J) ("The conduct of criminal assailants is not necessarily dictated by reason or prudential considerations.").

64. *Id.* at 269 (Gleeson CJ).

65. See *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 [138] (Gummow and Hayne JJ).

66. *Id.* 16 at [109]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 264 (Gleeson CJ); *id.* at 270 (Gaudron J); *id.* at 292 (Hayne J); *id.* at 299-300 (Callinan J); *Smith v Leurs* (1945) 70 CLR 256, 261-262 (Dixon J).

67. *Smith v Leurs* (1945) 70 CLR 256, 259 (Latham CJ); *id.* at 260 (Starke J); *id.* at 262 (Dixon J); *McHale v Watson* (1964) 11 CLR 384; *Cameron v Comm'r for Rys.* [1964] Qd R 480.

pupils,<sup>68</sup> and prison wardens and prisoners.<sup>69</sup> However, while courts may recognize a duty of care arising in particular fact circumstances, it is rare for new categories of “special relationships” to be established in tort.

It is unlikely that a special relationship would ever be shown to exist between copyright intermediaries (especially “passive” intermediaries) and their users, in the sense of a discrete category of relationship under tort. In copyright, the notion of special relationship, particularly in the context of s. 101(1A)(b) which directs courts to consider “the nature of any relationship existing between the person and the person who did the act concerned,” is best understood as a reference to the closeness of the relationship between the intermediary and the copyright infringer in so far as that helps to establish or deny a relationship of control.

### C. Unresolved issues: the importance of foreseeability

The dissenting judge in *Modbury Triangle*, Justice Kirby, discussed at length the relevance of the appellant’s knowledge or foresight of the harmful actions of the third parties.<sup>70</sup> His Honor stated that the more notice that is provided, the greater the foresight and the more likely it is that the defendant will be liable for failing to respond.<sup>71</sup> Justice Kirby also noted that knowledge, or reasonable foreseeability, was a dominant factor in similar US tort cases.<sup>72</sup> This article has focused on control, because control has always been the more important element in authorization liability in Australia.<sup>73</sup> However, knowledge was also a relevant element in the *Moorhouse* case, and featured in the *iiNet* case in relation to the adequacy of the AFACT notices. An interesting question is the extent to which an emphasis

68. *Commonwealth v Introvigne* (1982) 150 CLR 258; *Geyer v Downs* (1978) 138 CLR 91; *Carmarthenshire County Council v Lewis* [1955] AC 549.

69. *Home Office v Dorset Yacht Co. Ltd.* [1970] AC 1004; *Ralph v Stratton* [1969] Qd R 348; *New South Wales v Godfrey* (2004) Aust. Torts Reports ¶81-741. See also *Modbury* (2000) 205 CLR 254, 292 (Hayne J); cf. *Howard v Jarvis* (1958) 98 CLR 177; *Hall v Whatmore* [1961] VR 225.

70. Justice Kirby referred to evidence that the appellant was aware of the opening hours of the video store and that the respondent worked alone and was required to handle significant amounts of cash; that repeated complaints had been made to the appellant about the lights being turned off too early, accompanied by requests that the lights be kept on until employees had left work; and that in the months preceding the attack, a car window had been smashed, two attempts had been made to break into the ATMs, and a nearby restaurant had been broken into. *Modbury* 205 CLR 254, 271-273, 286 (Kirby J).

71. *Id.* at 283-284.

72. *Id.* at 277-278, referring to *Lillie v. Thompson*, 332 US 459 (1947); *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F. 2d 477 (1970); *McClung v Delta Square Ltd. P’ship*, 937 SW 2d 891 (1996); *Ann M v. Pac. Plaza Shopping Center*, 863 P. 2d 207 (1993); *Butler v Acme Markets, Inc.* 445 A. 2d 1141 (1982); *Nivens v 7-11 Hoagy’s Corner*, 943 P. 2d 286 (1997); *Piggly Wiggly Southern, Inc. v. Snowden*, 464 SE 2d 220 (1995); *Holley v. Mt Zion Terrace Apartments, Inc.*, 382 So. 2d 98 (1980).

73. See *Univ. of N.S.W v Moorhouse* (1975) 6 ALR 193.

on knowledge or foresight might impact upon findings of liability in some cases. This is part of a larger project on intermediary copyright liability and the subject of another paper.

Additionally, it should be noted that the analysis in this article is relevant to ISPs and similar “passive” intermediaries. It does not consider those intermediaries that deliberately avoid control, like the defendants in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*.<sup>74</sup> Different considerations may (and probably should) apply for “bad actors”. This, too, is the subject of another paper.

### VIII. Conclusion

In the internet age, copyright owners are increasingly looking to online intermediaries to take steps to prevent copyright infringement. Sometimes these intermediaries are closely tied to the acts of infringement; sometimes – as in the case of ISPs – they are not. In 2012, the Australian High Court decided the *Roadshow Films v iiNet* case, in which it held that an Australian ISP was not liable under copyright’s authorization doctrine which asks whether the intermediary has sanctioned, approved or countenanced the infringement. The Australian *Copyright Act 1968* directs a court to consider, in these situations, whether the intermediary had the power to prevent the infringement and whether it took any reasonable steps to prevent or avoid the infringement. It is generally not difficult for a court to find the power to prevent infringement – power to prevent can include an unrefined technical ability to disconnect users from the copyright source, such as an ISP terminating users’ internet accounts. In the *iiNet* case, the High Court eschewed this broad approach in favor of focusing on a notion of control which, I have argued, was strongly influenced by principles of tort law. This is an important shift in the Australian analysis of intermediary copyright liability, which has never given much emphasis to potential overlap with tort law.

In tort, when a plaintiff asserts that a defendant should be liable for failing to act to prevent harm caused to the plaintiff by a third party, there is a heavy burden on the plaintiff to show that the defendant had a duty to act. The duty must be clear and specific, and will often hinge on the degree of control that the defendant was able to exercise over the third party. Control in these circumstances relates directly to control over the third party’s actions in inflicting the harm. Thus, in *iiNet*’s case, the control would need to be directed to the third party’s infringing use of BitTorrent; control over a person’s ability to access the internet is too imprecise.

Further, when considering omissions to act, tort law differentiates between the ability to control and the ability to hinder. The ability to control may establish a duty to act, and the court will then look to small measures taken to prevent the harm to determine whether

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74. 545 U.S. 913 (2005).

these satisfy the duty. But the ability to hinder will not suffice to establish liability in the absence of control.

Just as a tort plaintiff must show a breach of a duty in order to succeed in a negligence action, a copyright plaintiff should be able to point to a duty and breach before succeeding in an authorization claim against a “passive” intermediary like an ISP. This is appropriate because intermediary liability suits are not like other copyright infringement claims. Intermediary liability cases can have far-reaching ramifications for users who are not parties to the case but on whose allegedly infringing behavior the action is based. Where a court holds that an intermediary must take measures to terminate user accounts or to alter its products or services to impede infringement, then users who have not infringed copyright or who would otherwise have a viable defense to infringement may find their ability to access online services for communication, work and other facets of an internet-enabled life severely constrained. Plaintiffs should therefore be held to an appropriately high standard of proof, to counter the risks of harm to society that an uncertain and easy-to-establish intermediary liability doctrine can pose. In Australia, there needs to be a more coherent framework for determining the copyright liability of intermediaries, especially so-called “passive” intermediaries. Copyright’s current approaches are unclear and unpredictable, resulting in an ill-defined scope of liability. Concepts of duty and control informed by tort law may provide the additional benchmarks that copyright law currently lacks.