



## COURT OF APPEAL OF NEW ZEALAND

### TE KŌTI PĪRA O AOTEAROA

5 July 2018

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

*Ortmann v United States of America* CA302/2015, CA127/2017, CA128/2017, CA493/2017, CA494/2017, CA495/2017, CA511/2017

PRESS SUMMARY

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).**

1. The Court of Appeal today released a judgment upholding the finding of the District Court that Messrs Ortmann, van der Kolk, Batato and Dotcom (the appellants) are eligible to be extradited to the United States of America. The appellants are charged in the United States with criminal copyright infringement based on their involvement in the alleged “Mega conspiracy”, where through several companies they allegedly facilitated, encouraged and profited from significant mass infringement of copyright.
2. The United States relied on a range of extradition pathways in seeking the extradition of the appellants. The Court has confirmed all of these extradition pathways are available to the United States, and that the United States has tendered sufficient evidence to support their case on those pathways. With the Court upholding the appellants’ eligibility for extradition, the final decision as to whether the appellants should be extradited rests with the Minister of Justice under the Extradition Act 1999.

## **Background**

3. The alleged Mega conspiracy was primarily based around the business of two websites, Megaupload and Megavideo, which the United States alleges were used by the appellants to facilitate and encourage the uploading and viewing of pirated copyright material. On 6 February 2012, a Grand Jury in the United States indicted the appellants, and the United States then sought their extradition.
4. Extradition law usually requires that someone is charged with offences that are criminal in both the requesting state and the state where the person is found. In this case, that would require the United States prove that the conduct alleged against the appellants would be criminal according to New Zealand law. Extradition law also usually requires the requesting state make out a prima facie case on the evidence that the person did the conduct alleged.
5. On 23 December 2015, the District Court confirmed that the appellants were eligible for extradition on all the pathways relied on by the United States, and that there was prima facie evidence that supported the United States' allegations. The appellants unsuccessfully appealed that judgment to the High Court, though the High Court did consider that the extradition pathways that relied on s 131 of the Copyright Act 1994 could not be used by the United States.
6. Extradition appeals to the Court of Appeal must be on questions of law, and the High Court Judge gave leave to appeal on two questions: whether his findings on the extradition pathways available were correct; and whether he was correct to not require proof of the copyright status of the works the appellants are said to have infringed. The appellants also sought leave on a range of additional questions, alleging that the evidence relied on by the United States was insufficient, and that the United States misconducted itself such that the proceedings against them should be stayed.

## **The Judgment**

7. The Court first held that the United States needed to prove that the conduct alleged against the appellants was criminal according to both New Zealand and United States law, contrary to a prior decision (*United States of America v Cullinane* [2003] 2 NZLR 1

(CA)). This was consistent with the history of the Extradition Act 1999, English and Canadian authority, and with fundamental principles of extradition law.

8. The Court then held that the High Court Judge was right not to require proof of the copyright status of the works the appellants were said to have infringed. Extradition law focuses on the core criminality alleged, and matters that are not part of that core criminality are transposed from the requesting state into New Zealand law and assumed as part of the extradition process. Copyright status is such a matter but, even if it is not, the Court considered the evidence was sufficient on the point.
9. Turning to the particular pathways relied on, the Court disagreed with the High Court Judge and held s 131 of the Copyright Act could be relied on by the United States. It rejected a submission from the appellants that Parliament has chosen not to criminalise copyright infringement, and held a criminal offence is committed by anyone who knowingly possesses an infringing digital copy of a protected work in the course of a business with a view to committing any act that infringes copyright. Criminal copyright infringement is also possible under certain offences in the Crimes Act 1961, such as dishonestly accessing a computer system.
10. The evidence tendered to make out a prima facie case of that conduct was sufficient. The United States had relied on a record of case (ROC) as evidence, and that ROC was admissible as evidence and made out a sufficient basis for extraditing the appellants. An extradition hearing is not a trial on the merits, and the evidence relied on by the United States discloses a clear prima facie case to support the allegations that the appellants conspired to, and did, breach copyright wilfully and on a massive scale for commercial gain.
11. Finally, the question of whether the United States had engaged in misconduct was not of sufficient importance to warrant a further appeal to the Court, particularly given the narrow focus of the Extradition Act process. And in any event, the evidence the appellants say the United States wrongfully prevented them from calling would not affect the question of whether there is sufficient evidence to make out a prima facie case.

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