

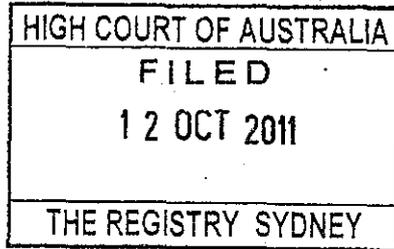
BETWEEN:

ROADSHOW FILMS PTY LTD  
AND OTHERS

Appellants

IINET LIMITED

Respondent



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INTERVENER'S SUBMISSIONS  
(COMMUNICATIONS ALLIANCE LIMITED)

**Part I: Suitable for publication**

1. This submission is in a form suitable for publication on the internet.

**Part II: Basis for intervention**

2. Communications Alliance Limited (**Comms Alliance**) seeks leave to intervene in the appeal as *amicus curiae*<sup>1</sup>, or alternatively, as an intervener<sup>2</sup>. This intervention is sought to be made on the basis that:

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- (a) the legal interests of the members of Comms Alliance which are internet services providers (ISPs) are likely to be substantially affected by the decision of the High Court in this case;
- (b) Comms Alliance wishes to present arguments in addition to those made in the submissions of iiNet dated 5 October 2011 (RS); and
- (c) Comms Alliance wishes to make submissions on matters of principle which provide a larger view of the matter before the Court than that put by the parties<sup>3</sup>.

3. This intervention is sought to be made in support of the respondent.

30 **Part III: Why leave should be granted**

4. Comms Alliance is the primary telecommunications and internet industry body in Australia and has members which include major telecommunications carriers, carriage service providers and ISPs. The members are set out in Exhibit JLS-2 to Mr Stanton's

<sup>1</sup> *Levy v Victoria* (1997) 189 CLR 579 at 604 – 605.

<sup>2</sup> *Levy v Victoria* (1997) 189 CLR 579 at 602.

<sup>3</sup> *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312.

affidavit of 11 October 2011, and those members which are ISPs are indicated by an asterix in that exhibit.

5. Leave should be granted to Comms Alliance for essentially four reasons.
6. **First**, because the decision of the High Court will have profound implications for the legal liability of ISPs in relation to infringement of copyright by their customers, quite apart from the liability of iiNet on the facts of this case. Comms Alliance submits that it is uniquely placed to speak for ISPs, each of whom now face the prospect, if the Full Court's decision is successfully appealed, of being required to implement significant changes to their business against the threat of being found liable for authorising the copyright infringements of their users. There would be a very significant negative impact on the interests and business of ISPs if the appellants succeed in the contention in paragraph 60 of their submissions (**AS**), namely that ISPs are liable for authorising infringement of copyright by their users unless they implement and operate at their own cost a system for dealing with allegations of copyright infringement by their customers, including matching IP addresses, sending notices of infringement, maintaining records and applying sanctions such as suspension and termination of customers' internet service.
7. It is notable that paragraph 7 of ARIA's submissions dated 16 September 2011 (**ARIAS**) indicates that ARIA seeks to intervene in support of the appellant on the basis that ARIA's legal interests are affected. The effect on the liability of ISPs is the reverse of the effect on ARIA, because if the appeal is allowed ISPs will become liable to persons such as the appellants, ARIA and APRA in circumstances where ISPs are not presently liable.
8. **Secondly**, Comms Alliance wishes to present arguments in addition to those made in the submissions of iiNet dated 5 October 2011. Those submissions are set out in part V below.
9. **Thirdly**, the submissions which Comms Alliance seeks to make in part V are made at the level of principle, including important issues as to the proper construction of s. 101(1A) and s. 112E of the *Copyright Act* 1968 (**the Act**), and the nature of "reasonable steps" which may be taken by an ISP. Those submissions are made from an independent industry perspective. The submissions are not confined to the particular interest that the respondent has in succeeding on the facts of this case, but take into broader interests, including the reasonable steps available to businesses (including Comms Alliance members) in a similar position to the respondent, to prevent or avoid the doing of infringing acts. The submissions also canvass international approaches to the "reasonable steps" question.
10. **Fourthly**, Comms Alliance's intervention will not lengthen or interfere with the appeal. If the Court were minded to hear any oral argument on any matters arising out of the submissions in Part V below, such argument would be extremely brief and as directed by the Court.

#### **Part IV: Relevant provisions**

11. Comms Alliance accepts that the annexures to **AS** and **RS** accurately set out the relevant statutory provisions in force at the relevant time.

## Part V: Submissions

### V(i) General comments on doctrine of authorisation

12. The factual circumstances of the case of *University of New South Wales v Moorhouse*<sup>4</sup> represent the outer boundaries of the concept of authorisation, which has its origins in English law. A finding of liability on the facts of the present case would entail an unwarranted expansion of that doctrine. *Moorhouse* is, on one view, already an international outlier, and the appellants' attempt to expand it still further has serious implications for ISPs.
- 10 13. In Canada and the United Kingdom, authorisation has been interpreted more narrowly than in *Moorhouse*. In *Amstrad Consumer Electronics plc v The British Phonographic Industry Ltd*<sup>5</sup>, a case involving a dual audio cassette player, Lawton LJ said<sup>6</sup> that the concept of granting or purporting to grant to a third person the right to do the act complained of came much nearer to the meaning of the word "authorize" than the synonyms approved in *Moorhouse*, an approach which was accepted by the House of Lords in *CBS Songs Ltd v Amstrad Consumer Electronics plc*<sup>7</sup>. The present common law position in the United Kingdom remains unchanged from that stated in *Amstrad*.
- 20 14. In *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, a unanimous Supreme Court of Canada explicitly rejected the approach taken in *Moorhouse* on the basis that it "shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole" (at [41]). That rejection may well have depended upon a view that "countenance" in *Moorhouse* had a wide meaning.
- 30 15. In *CCH Canadian*, McLachlin CJ, writing for the Court, held (at [38]) that, in Canadian law: (i) 'Authorize' means to "sanction, approve and countenance"; (ii) "countenance" in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour, encourage"<sup>8</sup>; (iii) authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than positive and direct, including a sufficient degree of indifference, however a person does not authorize infringement by authorizing mere use of equipment that could be used to infringe copyright<sup>9</sup>; (iv) courts should presume that a person who authorizes an activity does so only so far as it is accordance with the law; (v) this presumption may be rebutted if it is shown that a certain relationship or degree or control existed between the alleged authorizer and the persons who committed the copyright infringement.
- 40 16. In US law, the relevant doctrine is contributory or vicarious infringement. In *Sony Corp of America v Universal City Studios* 464 US 417 (1984), the Supreme Court held that the sale of Betamax videotape recorders did not constitute contributory infringement as that product was "capable of substantial non infringing uses" (at 442). In *WEA*, Gummow J considered *Sony*: "The result [of *Sony*] is to give the concepts of 'authorization' and 'contributory infringement' an operation in the United States

<sup>4</sup> (1975) 133 CLR 1.

<sup>5</sup> [1986] FSR 159.

<sup>6</sup> [1986] FSR 159 at 207.

<sup>7</sup> *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1054 per Lord Templeman.

<sup>8</sup> *The New Shorter Oxford English* (1993), vol. 1, at p. 256, was the source used by McLachlin CJ.

<sup>9</sup> Note the similarity with s. 112E (see section V(x) below).

apparently no wider than currently given to ‘authorisation’ in the Australian and English cases” (at 285).

17. In more recent litigation involving peer-to-peer technology, *MGM Studios, Inc v Grokster, Ltd* 545 US 913 (2005), the Court held that a defendant is liable for acts of infringement by third parties if they “distribute a device *with the object of promoting its use to infringe copyright*, as shown by clear expression or other affirmative steps taken to foster infringement” (at 936, emphasis supplied). Footnote 12 of the Court’s opinion, delivered by Souter J, states that “in the absence of other evidence of intent, a court would be unable to find contributory infringement merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial non-infringing uses. Such a holding would tread too close to the *Sony* safe harbor” (at 940).

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**V(ii) Meaning of “authorize”: “sanction, approve, countenance”**

18. Legal and historical context<sup>10</sup> is relevant to the task of construction of section 101(1A) of the Act.
19. The use of the phrase “sanction, approve, countenance” as a definition of the statutory term “authorize” has its origin in the decision of Tomlin J in *Evans v E Hulton and Co Ltd*<sup>11</sup>. The dictionary meaning used in *Evans*<sup>12</sup> appeared in the edition of the *Oxford Dictionary* current as at 1924<sup>13</sup>, as sense 3 of the meaning of the word “authorize”, as follows:

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“to give formal approval to; sanction, approve, countenance”.

20. The dictionary definition takes the form of two slightly different meanings, separated by a semi-colon, with each of the words after the semi-colon providing close synonyms for the intended second meaning. Even if the phrase is to be read disjunctively, each of the words “sanction, approve, countenance” affect the range of available meanings of each of the other words in the list. Each near-synonym is expegetical, added to clarify the meaning of each other word.

21. The appellants urge an almost mechanistic application of the phrase “sanction, approve, countenance”. But neither the phrase, nor any single word in it (in particular, “countenance”<sup>14</sup>), can be divorced from the context and considered in isolation. The appellants’ approach:

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- (a) impermissibly proceeds as though the statute contained the words “sanction, approve or countenance” instead of the word “authorize”;
- (b) fails to take into account the textual context in which the word “authorize” appears (see section V(iii) below);
- (c) treats as irrelevant the precise factual circumstances which obtained on the two occasions on which the words “sanction, approve, countenance” have been

<sup>10</sup> *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at [10] – [13].

<sup>11</sup> (1924) 131 LT 534; [1924] WN 130. *Evans* is referred to as one of the two apparent sources of the phrase by Bankes LJ in *Falcon v Famous Film Players* [1926] 2 KB 475 at 491, the other being *Monckton v Pathé Frères Pathephone Ltd* [1914] 1 KB 395. However, *Monckton* does not contain the phrase, thus isolating its origin to *Evans*.

<sup>12</sup> *Evans v E Hulton and Co Ltd* (1924) 131 LT 534 at 535; [1924] WN 130 at 131.

<sup>13</sup> James A. H. Murray (ed.), *A New English Dictionary on Historical Principles; Founded Mainly on the Materials Collected by The Philological Society* (1888), Oxford: Clarendon Press, Vol I (A and B) at 572.

<sup>14</sup> See AS 63 and 72, relying on “countenance” and “countenancing” respectively.

held by this Court to be appropriate synonyms for “authorize” (see section V(iv) below); and

- (d) ignores the manner in which *Moorhouse* has been applied by the lower Courts, and hence had its meaning elucidated, and in particular, ignores the state of the decided cases at the time of the introduction of the Digital Agenda Bill – those decided cases represented, as at 1999-2000, “*the principles that currently exist in common law*” as referred to in the extract from the Revised Explanatory Memorandum quoted by the appellants at AS 31 (see section V(v) below).

**V(iii) Meaning of authorize: textual considerations**

- 10 22. Section 101(1A), which refers to the authorised act being “*any act comprised in the copyright*”, needs to be read in the light of sections 13 and 86 of the Act. Section 13(1) provides that “*a reference in this Act to an act comprised in the copyright in a work or other subject matter shall be read as a reference to any act that, under this Act, the owner of the copyright has the exclusive right to do*”. Relevantly for present purposes, section 86 states:

“For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts:

...

- 20 (c) to communicate the film to the public.”

23. Thus, in the present case, the relevant “*act comprised in the copyright*” for the purposes of s. 101(1A) is the act of communicating the copyright film to the public. The further references in s. 101(1A) to “*the act concerned*” and “*the act*” are also references to the act of communicating the copyright film to the public. Inserting those definitions into section 101, the section reads:

30 “(1) 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 *authorizes the doing in Australia of, [communicating the film to the public]*.

(1A) In determining, for the purposes of subsection (1), whether or not a person *has authorised the doing in Australia of [communicating the film to the public]* without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- 40 (a) the extent (if any) of the person’s power to prevent the [*communication of the film to the public*];
- (b) the nature of any relationship existing between the person and the person who [*communicated the film to the public*]; and
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of [*communicating the film to the public*], including whether the person complied with any relevant industry codes of practice.”

(definitions inserted, and emphasis supplied).

A similar exercise may be undertaken in relation to ss. 31 and 36 of the Act, which were considered in *Moorhouse*.

24. Expanding out the section in this way invites close attention to the statutory connection between the word “authorizes” and the copyright material. That statutory connection between the verb “authorizes” and the copyright material infringed, being the subject matter of the act being authorised, means that the relationship of the primary infringer and the alleged authoriser in relation to the copyright material (here “the film”, in *Moorhouse*, the book) is highly relevant in determining any question of authorisation.

10 **V(iv) Meaning of authorize: context of *Adelaide Corporation* and *Moorhouse***

25. *Moorhouse* took “sanction, approve, countenance” from *Adelaide Corporation v Australasian Performing Right Association Ltd*<sup>15</sup>, which itself<sup>16</sup> took the expression from *Falcon v Famous Players Film Co*<sup>17</sup>. Although *Evans v E. Hulton and Co*<sup>18</sup> is not referred to in *Adelaide Corporation*, it is clear that *Falcon* took the expression from *Evans*<sup>19</sup>. The shades of meaning which may be given to “sanction, approve, countenance” must be read so as to be consistent with the factual circumstances in which that phrase was adopted.

- 20 26. Significantly, both *Evans* and *Falcon* involved facts far more proximate to the infringing act than the present case, and which went far beyond “countenance”. In *Evans*, Tomlin J said<sup>20</sup>: “Where a man sold the rights in relation to a manuscript to another with a view to its production, and it was in fact produced, both the English language and commonsense required ... to hold that this man had ‘authorised’ the printing and publication”. In *Falcon*<sup>21</sup>, the defendants made a film of a play in America, imported it into England, and purported to let the right to exhibit it to the proprietor of a picture theatre, in circumstances where it was held that the defendants had no rights to the play, and the exhibition of the film infringed the plaintiff’s copyright in the play. The defendants were held to have authorized the infringement by the picture theatre.

- 30 27. Moreover, the contrasting factual circumstances, and outcomes, of *Adelaide Corporation* and *Moorhouse*, considered together with the lineage of the phrase (*Oxford Dictionary – Evans – Falcon – Adelaide Corporation – Moorhouse*), provide a sound guide to the metes and bounds of “sanction, approve, countenance” when understood as a definition of “authorize”.

28. In *Adelaide Corporation*, where the majority held there was no authorisation, Higgins J said at 497:

- 40 “This action has, by consent, been tried on the motion affidavits; and there is not the slightest evidence of any ‘sanction, approval or countenance’ given by the Corporation to the performance of the song in question”.

<sup>15</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481.

<sup>16</sup> *Adelaide Corporation* (1928) 40 CLR 481 per Isaacs J at 489.

<sup>17</sup> [1926] 2 KB 474.

<sup>18</sup> (1924) 131 LT 534; [1924] WN 130.

<sup>19</sup> See footnote 11 above as to the origin of the phrase.

<sup>20</sup> (1924) 131 LT 534 at 535; [1924] WN 130 at 131.

<sup>21</sup> [1926] 2 KB 474.

29. In *Adelaide Corporation*, there was no legal or other relationship between the alleged authoriser and the primary infringer in relation to the copyright material. Although there was a legal relationship of lessor and lessee in relation to the hire of the premises, that relationship did not touch upon the copyright material.

10 30. Further, and importantly, the mere giving of notice of infringement in *Adelaide Corporation* was not sufficient to bring the requisite relationship into existence. That is doctrinally sound: there must be features of the relationship that involve the copyright material which can be objectively tested prior to the giving of any notice. Otherwise, a copyright owner could unilaterally bring into existence a duty to act (on pain of authorization) by the mere giving of notice to any person who could, as a matter of pure causation, prevent the infringement.

20 31. By contrast, in *Moorhouse*<sup>22</sup>, and crucially, the University was owner and supplier of the chattel embodying the copyright material (the book), as well as the means of copying (the photocopier) and the premises on which the copying was to take place. The University thus was the bailor of the copyright material and the primary infringer the bailee of the copyright material infringed, in circumstances where the primary infringer did not otherwise have any right to physical possession of the copyright material such as would enable them to make copies of it. There was thus a clear relationship (even a legal relationship) between the University and the primary infringer in relation to the copyright material infringed. The primary infringer also had a sufficient right to be in the University library to make him at least licensee of the library's facilities<sup>23</sup>, including the photocopier.

V(v) **Application of *Moorhouse* prior to the introduction of s. 101(1A)**

30 32. At AS 34, the appellants attempt to downplay the effect of decisions applying *Moorhouse*. However, the reported decisions in the 25 year period between 1975, when *Moorhouse* was decided, and 2000, when the *Copyright Amendment (Digital Agenda) Act 2000* was passed<sup>24</sup>, placed importance upon the existence of some form of *relationship* between the alleged authoriser and the primary infringer *in relation to the copyright material infringed* (or the lack of any such relationship, leading to a finding of no authorisation). The relationship may have entailed some *control* over the copyright material infringed, but it at least entailed some *connection* between the alleged authorizer and the primary infringer in relation to the copyright material infringed, and a relationship which did not involve that copyright material was not sufficient. See<sup>25</sup>:

40 (a) *RCA Corporation v John Fairfax & Sons Ltd* [1981] 1 NSWLR 251 at 259-260, in which Kearney J held that the defendant publisher of a newspaper article extolling the virtues of home taping from the radio had not authorized any infringements:

<sup>22</sup> (1975) 133 CLR 1 per Gibbs J at 13, 14 and 20; Jacobs J at 21-22.

<sup>23</sup> (1975) 133 CLR 1 per Jacobs J at 23.2.

<sup>24</sup> The amendments made by the *Copyright Amendment (Digital Agenda) Act 2000* commenced into force on 4 March 2001.

<sup>25</sup> Other cases decided in this period consistent with the above propositions include *Fasold v Roberts* (1997) 70 FCR 489; *Watson v De Havelland* (1994) AIPC 91-086.

“Accordingly on this aspect I would uphold the defendants' contention, there being no evidence to suggest that the defendants had any control over, or connection with, any person who may have committed an infringement following upon the publication of the subject article. *Nor of course, does this case involve the supply of materials to be used in the infringement.*” (emphasis supplied).

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- (b) *Copyright Agency Ltd and others v Haines and another* [1982] 1 NSWLR 182<sup>26</sup> at 186-187, and 191-192, where the inclusion of the copyright works in the “departmental material” referred to in the judgment, which was prescribed for schools by the Education Department, was important to the finding of authorisation of copyright infringement by officers of the Education Department;

- (c) *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 287, where, in finding there was no authorization, Gummow J said:

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“As I have indicated, in this case the applicants have not shown any *direct connection or control between the respondent and any unauthorised reproduction of the sound recordings* in respect of which the applicants hold the copyrights” (emphasis supplied).

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- (d) *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53 at 61: Mr Jain was a director and chief executive of a company which had engaged bands to perform at the company's hotel. Thus, there was a relationship between Mr Jain and the copyright material – he was the controlling mind of the company which engaged bands for the express purpose of performing copyright material. Further, it was held (at 61) that “*Plainly Mr Jain had power to control what music was played at the Tavern*” (note the use of the word “what”, rather than the use of the word “whether”).

- (e) *Australian Tape Manufacturers Association Ltd and others v Commonwealth of Australia* (1993) 176 CLR 480 at 498, where Mason CJ, Brennan, Deane and Gaudron JJ explained *Moorhouse* by saying:

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“the University had power to control what was done by way of copying and not only failed to take steps to prevent infringement *but provided potential infringers with both the copyright material and the use of the University's machines by which copies of it could be made.* Accordingly, in *Moorhouse*, authorization was made out” (emphasis supplied).

- (f) *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 at 422-423, in which the Full Court of the Federal Court re-affirmed the importance of the fact that, in *Moorhouse*, the University supplied both the books and the photocopier, and said:

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<sup>26</sup> The appeal from this decision, on a different point, is reported as *Haines v Copyright Agency Ltd* (1982) 42 ALR 549.

“a person does not authorize an infringement merely because he or she knows that another person might infringe the copyright and takes no step to prevent the infringement”.

10 (g) *Henley Arch Pty Ltd v Clarendon Homes (Aust) Pty Ltd* (1998) 41 IPR 443 at 463 – 464, which involved a finding of authorization against Campbell, a managing director of Clarendon who was responsible for the final approval of all new designs for homes to be designed, constructed and marketed by Clarendon, and who had seen, and was aware of, the applicant’s Oakridge design which he knew was to form the basis of the respondent’s Carrington design; and

20 (h) *Tolmark Homes Pty Limited v Paul* (1999) 46 IPR 321 at [42] to [47], which involved a finding that a homeowner had authorised the copyright infringement of Tolmark Homes’ plans committed by the builder of her home, where the homeowner had rejected plans initially proposed by that builder and presented Tolmark Homes’ plans as the favoured design solution, and then accepted a quote by the builder for the construction of a home based on Tolmark Homes’ plans.

33. It was the above state of authorities which represented the “*currently existing common law*” as referred to in the Revised Explanatory Memorandum of the Digital Agenda Bill. There was no case prior to 2000 which even remotely approached the expansive reading which the appellants now seek to give to *Moorhouse*, and by extension s. 101(1A).

30 **V(vi) The nature of any relationship existing between the person and the person who did the act concerned: s. 101(1A)(b)**

34. Three points may be made about the construction of s. 101(1A)(b).

40 35. **First**, it follows from the state of the authorities prior to the enactment of s. 101(1A)(b) that the relevant relationship must be a relationship which in some way relates to the copyright material which has been infringed. That is, a relationship of lessee and lessor, supplier and customer, or director and company, does not tend in favour of any finding of authorisation unless that relationship also in some way features, or relates to, the copyright material infringed. That aspect of the common law as it existed in 2000 is accommodated in s. 101(1A)(b) by the words “the nature of any relationship”. The cases which have considered authorization since s. 101(1A) commenced are, with perhaps one exception<sup>27</sup>, consistent with that proposition.

36. **Secondly**, the focus is on the bipartite relationship between the alleged authorizer and the primary infringer; not any tripartite relationship which involves the copyright owner. Any attempted insertion by the copyright owner of themselves into that

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<sup>27</sup> To the extent that the single judge decision of *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244; 64 IPR 57 suggests otherwise, it is respectfully submitted that the case is inconsistent with *Adelaide Corporation*. Bennett J made a finding of authorisation even though the facts of that case pointed away from the existence of any relationship in relation to the copyright material (see the findings at [13] to [15], and [68] – [73]). Note the reliance by APRA on *Metro on George* at APRAS 3 and 25.

relationship through the issuing of notices, or demands to take action, cannot affect the characterisation of the bipartite relationship. The “nature” of that bipartite relationship must be characterised independently of any allegations of infringement which are made by the copyright owner.

- 10 37. **Thirdly**, the temporal sense of the words “*nature of any relationship existing between the person and the person who did the act concerned*”, when considered with the words “*has authorised*” in the chapeau of s. 101(1A), indicates that the features of any relationship must be tested at the time of the occurrence of the act allegedly authorised. The features of that relationship are not changed by events which occur subsequent to the doing of the act, for example, the service of notices of infringement. In contrast, the submissions of APRA dated 16 September 2011 (**APRAS**) at paragraphs 25 and 26, seem to envisage that the “nature” of the relationship may be constantly re-characterised, depending on the demands of the copyright owner.
38. The cases of *Sharman*<sup>28</sup> and *Cooper*<sup>29</sup>, decided since the commencement of s. 101(1A), and relied upon by ARIA<sup>30</sup> and APRA<sup>31</sup>, are consistent with the above propositions.
- 20 39. In *Sharman*, the findings referred at [81], [84], [178] and [405] of that case constituted a relationship between the alleged authoriser and the primary infringers *in relation to the copyright material*. In *Sharman*, not only did the authoriser provide the technology which enabled infringement, but, crucially, took a commercial position explicitly adverse to copyright protection in the context of the use of technology designed to be used with material ordinarily the subject of copyright protection. Thus, *Sharman* is within the bounds of a proper application of the principles in *Moorhouse*.
- 30 40. In *Cooper*, a finding of authorisation was made against E-Talk, an ISP which **hosted** Mr Cooper’s website. Mr Cooper had posted on that website links to other websites from which infringing MP3 sound files could be downloaded. E-Talk not only hosted Mr Cooper’s website but advertised on it (at [64]), and thereby adopted or sponsored Mr Cooper’s links. There was thus a relationship between E-Talk and Mr Cooper in relation to the specific copyright material which could be downloaded by following the links. Hence E-Talk was found to have authorised the making available online of the infringing copyright material.
- 40 41. In contrast, the usual relationship between ISPs and their customers, and the relationship between iiNet and their customers in this case, does not relate to, and is not characterised by, the infringing copyright material. That is, the relationship between an ISP and its customer is ordinarily characterised by the supply of particular technological service involving transmission to and from the internet, rather than by any copyright material. In the same way, the relationship between a courier, or the postal service, and their customers, is characterised by the supply of the delivery service, rather than the delivery of any particular content. Australia Post would not authorise an infringement if a postman delivering registered mail were intercepted by

<sup>28</sup> *Universal Music v Sharman License Holdings Ltd* (2005) 220 ALR 1

<sup>29</sup> *Cooper v Universal Music Australia* (2006) 156 FCR 380

<sup>30</sup> **ARIAS 2**

<sup>31</sup> **APRAS 24**

AFACT and given actual notice that he was delivering a DVD duplicator and a copyright film to a person who intended to use both items for the purpose of infringing copyright, and the postman went ahead and delivered it anyway. The postman would not be analogous to the University in *Moorhouse*<sup>32</sup>. That is the position based on lack of authorisation, quite apart from any question of statutory immunity which Australia Post may have<sup>33</sup> (which, in any event, does not apply to registered mail<sup>34</sup>).

10 42. Accordingly, on the facts of the present case it ought to have been held that, for the purposes of s. 101(1A)(b), there was no relevant relationship between iiNet and its customers in relation to the copyright material allegedly infringed. The undoubted contractual relationship between iiNet and its customers in relation to the provision of the internet service did not relate to that copyright material. The only relevant relationship between iiNet and its users in relation to copyright material was that in relation to licensed material (see primary judgment [184] to [188]<sup>35</sup>).

**V(vii) Section 101(1A)(a): extent (if any) of the person's power to prevent the doing of the act concerned**

20 43. The state of the common law as at 2000, indicates that, in considering s. 101(1A)(a), *the focus must be upon a power to prevent communication to the public of the copyright material alleged to be infringed*, rather than any power to prevent all acts of communication to the public. In this regard, it is a fallacy of construction to assume that the greater must automatically include the lesser; a power to prevent transmission by disconnection should not, for the purposes of s. 101(1A)(a), be assumed to equate to the more specific power of which the statute speaks, namely, to prevent the communication of the film to the public.

30 44. In *Moorhouse*, the University could have prevented the infringement by imposing restrictions on the nature and extent of books which may be photocopied. The library users had no right to possession of the books absent the University granting that possession. That was a power to prevent in relation to the copyright material infringed. In contrast, in *WEA*, the blank tape manufacturer would undoubtedly have had the power to prevent any recordings being made on its blank tapes by not advertising or selling its blank tapes. But that was not a relevant power to prevent in relation to the copyright material infringed.

40 45. The power to prevent does not operate at a mere causation level. If a power to prevent communication of the film to the public included all powers which would prevent that act of communication on a "but for" analysis, then an electricity supplier would have a relevant power to prevent infringement by disconnecting the infringer from the mains. It is not to the point to say that the electricity company could avoid a finding of authorization on the basis of a lack of knowledge<sup>36</sup> or relationship<sup>37</sup>.

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<sup>32</sup> Despite the fact that s. 101 of the *Australian Postal Corporation Act 1989* (Cth) deems any article carried by Australia Post to be the property of Australia Post while it is being carried by Australia Post.

<sup>33</sup> *Australian Postal Corporation Act 1989* (Cth), s. 34(1).

<sup>34</sup> *Australian Postal Corporation Act 1989* (Cth), s. 34(2).

<sup>35</sup> (2010) 263 ALR 215 at 255-256.

<sup>36</sup> As to knowledge, on the argument of the appellants, it would be within the power of the appellants to establish knowledge on the part of the electricity supplier by serving a notice identifying the physical address where the infringements were occurring.

Rather, as a matter of statutory construction, the proper, and additional, answer is that the electricity company's undoubted power to prevent at a causation level is not a relevant "power to prevent" within the meaning of s. 101(1A)(a) because it does not relate to the copyright material infringed.

- 10 46. Whilst the outcome in *Cooper* could perhaps have been justified on its own facts, Comms Alliance respectfully supports the submissions of iiNet (**RS 70**), that, to the extent that Branson J's statement in *Cooper* at [41], second sentence, is to be taken as defining the scope of "power to prevent", it goes too far. That statement extends beyond a relevant power to prevent within the meaning of s. 101(1A)(a).
47. ISPs are unable to "take down" infringing material which they do not host (cf Nicholas J at [722] and [723]<sup>38</sup>) and cannot modify or prevent the use of BitTorrent software or other enabling software (cf primary judgment [407]<sup>39</sup>). Further, ISPs such as iiNet are unable to monitor or prevent the infringing transmissions over their network (primary judgment [403]<sup>40</sup>). Similarly, Australia Post cannot routinely monitor the content of letters and parcels delivered over its network.
- 20 48. Given that the focus ought to be on the power to prevent in relation to the copyright material, Comms Alliance submits that an ISP in the position of iiNet in the present case has no relevant power, or in the alternative, extremely limited relevant power, to prevent copyright infringements of the kind in issue in the present case. A power to suspend or disconnect the service in general is not a relevant power to prevent.

**V(viii) Whether the person took any reasonable steps to prevent or avoid the doing of the act: s. 101(1A)(c)**

- 30 49. The appellants have submitted that the reasonable steps available to the respondent included sending notices to infringing customers, warning of breaches of the respondent's contract with its customers, requesting that alleged infringing conduct cease, and after a graduated series of notices, suspending or terminating customers' internet services (**AS 68**).
50. Moral rights<sup>41</sup> apart (and none are asserted in this case), infringement of copyright is a statutory tort which may cause economic loss to the copyright owner. In considering "reasonable steps", there is an analogy between the considerations at play in the present case and those more routinely considered in negligence cases. In *Modbury Triangle Shopping Centre v Anzil* (2000) 205 CLR 254, Gleeson CJ (at 264) quoted with approval Dixon J's statement in *Smith v Leurs*<sup>42</sup>:
- 40 "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

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<sup>37</sup> As to relationship, it would not be a relevant relationship for the reasons discussed in section V(vi) of these submissions.

<sup>38</sup> (2011) 275 ALR 1 at 162.

<sup>39</sup> (2010) 263 ALR 215 at 302.

<sup>40</sup> (2010) 263 ALR 215 at 301.

<sup>41</sup> Part IX of the Act.

<sup>42</sup> (1945) 70 CLR 256 at 264, quoted by Gleeson CJ in *Modbury* at [20]; see also *Modbury* per Callinan J at [140].

under no duty of controlling another man to prevent his doing damage to a third”.

51. Both *Modbury Triangle* and *Smith v Leurs* were cases of physical injury. It is even more exceptional to find in the law a positive duty to act at one’s own expense, to prevent a third party causing pure economic loss to a stranger. As McHugh J said in *Perre v Apand*<sup>43</sup>:

10 “As long as a person is legitimately protecting or pursuing his or her social or business interests, the common law will not require that person to be concerned with the effect of his or her conduct on the economic interests of other persons”.

52. Those considerations, which were implicitly recognised by the primary judge (at [504]<sup>44</sup>), and reflect basal principles of the common law, ought to inform the Court’s construction of what are “reasonable steps” for the purposes of s. 101(1A)(c). As O’Connor J said in *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Proprietary Limited*<sup>45</sup>:

20 “as every citizen is at liberty prima facie to carry on his business in his own way within the law, it will not be held that the legislature has intended to impair that liberty unless it has expressed that intention by plain words or by necessary implication from the words it has used”.

53. An obligation to take the steps proposed by the appellants would impose a substantial and costly burden on ISPs, solely for the purpose of protecting the appellants from harm caused by the unlawful acts of third parties. In the present case, the primary judge found (at [435]<sup>46</sup>) that even if feasible, such a scheme would likely lead to significant expense being incurred by iiNet. That finding could be generalised to all ISPs. The series of steps and actions an ISP would have to take to set up a notice and disconnection scheme<sup>47</sup> would at least include: adjudicating on allegations of infringement, passing on notices, keeping records, implementing technical disconnections, and dealing with complaints both from alleged infringers and rights holders as to the action taken or not taken by the ISP. Having regard to the 5,000 IP addresses per week of which iiNet was notified (Emmett J [207]<sup>48</sup>), it may be inferred that any such scheme would require ISPs in the position of iiNet to employ additional staff to deal with complaints and seek to build a computer system to automate the notification process.

- 40 54. It is respectfully submitted that Emmett J’s findings at [208] – [211]<sup>49</sup>, and Nicholas J’s findings at [781] – [783]<sup>50</sup>, reflect a sound understanding of the commercial context in which reasonableness is to be tested. In pursuing their own legitimate

<sup>43</sup> (1999) 198 CLR 180 at [114] – [117], esp. at [115].

<sup>44</sup> (2010) 263 ALR 215 at 325.

<sup>45</sup> (1910) 10 CLR 457 at 464.

<sup>46</sup> (2010) 263 ALR 215 at 309.

<sup>47</sup> The New Zealand and UK legislation, discussed below, provides a good illustration of the level of complexity of any workable scheme.

<sup>48</sup> (2011) 275 ALR 1 at 47.

<sup>49</sup> (2011) 275 ALR 1 at 47-48.

<sup>50</sup> (2011) 275 ALR 1 at 173.

business interests, ISPs ought to be entitled to take the view that they do not wish to incur the legal risk and expense associated with sitting in judgment on uncertain allegations of infringement of copyright. To suggest that if an ISP takes that position, that is only consistent with the ISP authorizing infringement of copyright, is to view the world only through the spectacles of the appellants and their supporting interveners, all of whom are copyright owners.

10 55. If any such obligations were to be imposed on ISPs, a range of decisions will need to be made, including, but certainly not limited to: (i) the nature of evidence of infringement to be provided; (ii) the number of warning notices to be given; (iii) the means by which customers are tracked, and the interaction with privacy laws; (iv) whether the severity of infringements are to be take into account; (v) the means by which ISPs handle enquiries by customers in response to notices; (vi) the ultimate sanctions (such as suspension or disconnection) to be imposed; (vii) whether there should be exceptions to the sanctions for particular classes of customers (such as those requiring internet services for business purposes, or on the basis of personal need in the case of persons with disabilities or illness); (viii) how the potential liability of internet service providers in the event of improper disconnection may be excluded or limited (by way of an indemnity, for example); (ix) how the above considerations apply in situation where a single user may be the subject of various allegations from each of a variety of rights holders (for example, is the number of warning notices given to a particular user before disconnection cumulative across all rights holders or does the count start again for each different rights holder?); (x) how an ISP deals with the fact that it is only feasible to have one system, but different rights holders may have different demands (for example, one rights holder may require a more aggressive disconnection process than another rights holder, one rights holder may require more frequent communications than another rights holder).

30 56. In contrast to that complexity, it is submitted that on the facts of *Moorhouse*, a proper warning notice posted on the photocopier to the effect that “machines were not to be used in a manner that would constitute an infringement of copyright”<sup>51</sup>, would have been sufficient to avoid a finding of authorisation, notwithstanding that the University itself provided the copyright material (which an ISP, of course, does not). In *CCH Canadian*<sup>52</sup>, it was relevant to the finding of no authorization that the Law Society had placed a notice in the following form near the photocopiers (at [39]):

40 “The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by the users of these machines”.

57. The legislature in New Zealand and the United Kingdom has recently considered the complex issues that arise in relation to the steps proposed by the appellants. In April 2011, the New Zealand Parliament passed the *Copyright (Infringing File Sharing) Amendment Act 2011*. The *Copyright (Infringing File Sharing) Regulations 2011* made pursuant to that Act set out the minimum requirements for notices provided by

<sup>51</sup> (1975) 133 CLR 1 per Gibbs J at 17. Jacobs J at 23 said that “the particular form of notice on the machines is a negative factor in that it did not in any relevant way limit the invitation which was implicitly extended to make use of the machines for photocopying as the user thought fit”.

<sup>52</sup> *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38].

rights owners to ISPs<sup>53</sup>, ISPs to account holders<sup>54</sup>, and any challenge to an infringement notice by an account holder<sup>55</sup>. The Regulations also provide that the maximum fee that an ISP may charge a rights owner for performing the functions required of it under the Act is \$NZ25 per IP address in a rights owners notice sent to the ISP<sup>56</sup>. Given that the total number of notices of infringement sent to iiNet involved over 5,000 IP addresses per week (Emmett J [207]<sup>57</sup>), rights holders would have been liable, on the New Zealand approach, to pay \$NZ75,000 per week to iiNet in respect of those notices. In the present case, no payment was offered or tendered along with the appellants' notices of infringement.

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58. In the United Kingdom, ss. 3-16 of the *Digital Economy Act 2010*<sup>58</sup> amends the *Communications Act 2003* to set up a scheme aimed at the reduction of online infringement of copyright<sup>59</sup>. The obligations require ISPs to: (a) notify their subscribers if the IP addresses associated with them are reported by copyright owners as being used to infringe copyright; (b) keep track of the number of reports about each subscriber; and (c) on request by a copyright owner, compile on an anonymous basis a list of those subscribers who are reported on by the copyright owner above a threshold set in a code of practice (the Initial Obligations Code). After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list. To safeguard the interests of subscribers, s. 13 of the *Digital Economy Act* introduces an amendment requiring extra-judicial appeal processes to be set up as part of the underpinning codes of practice.

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59. Significantly, s. 15 of the *Digital Economy Act* introduces an amendment empowering the Secretary of State by statutory instrument to make an Order addressing the question of costs-sharing or costs allocation incurred in complying with the initial obligations or any technical obligation. As at April 2011, such a statutory instrument, the *Copyright (Initial Obligations) (Sharing of Costs) Order 2011*, had been laid before the UK Parliament<sup>60</sup>.

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60. Comms Alliance submits that the factors outlined above can only lead to the conclusion that the implementation of a notice and disconnection scheme by the respondent go beyond "reasonable steps" for the purposes of section 101(1A)(c). As the New Zealand and UK legislation demonstrates, a notice and disconnection scheme is a complex balance of the competing interests of users, ISPs and copyright owners, and it is unreasonable that the sole burden of any such scheme should lie upon ISPs.

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<sup>53</sup> Regulation 4

<sup>54</sup> Regulation 5

<sup>55</sup> Regulation 6

<sup>56</sup> Regulation 7

<sup>57</sup> (2011) 275 ALR 1 at 47.

<sup>58</sup> This Act has been passed and commenced but its significant provisions do not yet operate due to the fact that OFCOM has not yet made an Initial Obligations Code pursuant to s. 124D of the *Communications Act* (as inserted by s. 6 of the *Digital Economy Act*).

<sup>59</sup> A good description of the scheme is given in *R (on the application of British Telecommunications plc & another) v Secretary of State for Business, Innovation and Skills* [2011] 3 CMLR 5; [2011] EWHC 1021 (Admin) at [10] – [51], which was an application for judicial review of the provisions of the *Digital Economy Act 2011*.

<sup>60</sup> *R (on the application of British Telecommunications plc & another) v Secretary of State for Business, Innovation and Skills* [2011] 3 CMLR 5; [2011] EWHC 1021 (Admin) at [31] and [36].

61. Comms Alliance further submits that disconnection (either suspension or termination of internet services) is not a proportionate action that the respondent may take to prevent alleged infringing conduct and therefore is not a “reasonable step”. Disconnection would prevent persons from, in many cases, using telephony services (including 000 calls) and seriously limit their ability to conduct normal commercial and social activities; the internet has a central role in almost all aspects of modern life, many of which have little or nothing to do with copyright works: for example, e-mail, online banking and retailing (see primary judgment [410] to [411]<sup>61</sup>). Disconnection would also adversely affect non-infringing users of the same internet service (for example, in families, share households, libraries, universities and other community facilities). Comms Alliance supports the submissions of the Australian Digital Alliance generally, and particularly in relation to the position of universities.
62. Moreover, such action will not necessarily achieve the aim it is designed to achieve. A determined infringer can easily sign up to another ISP after being disconnected from one ISP, and then when disconnected from the second ISP, sign up to a third, all the while infringing the same copyright film. In such an example, disconnection has not prevented further infringements, but has merely moved them to another ISP. The only course which would prevent further infringements across all ISPs is for the copyright owner to sue the primary infringer directly and obtain an injunction, which is, of course, binding upon the primary infringer regardless of which ISP is used. The effectiveness of the action to achieve its intended aim may be taken into account in evaluating its reasonableness.
63. In the present case, the express contractual prohibition on iiNet’s customers using its services to infringe copyright, together with the publication of that prohibition on its website (see **RS 22**), was sufficiently analogous to an appropriate warning on the photocopier which seemed to be contemplated in *Moorhouse*, so as to avoid a finding of authorization. That is so even if, contrary to section V(vi) above, there were found to be a relevant relationship between iiNet and its customers which related to the copyright material infringed.

**V(ix) The relationship between reasonable steps and knowledge**

64. Comms Alliance respectfully agrees with, and adopts, the submissions of iiNet at **RS 29**. The level of knowledge that an ISP has of infringements will necessarily have a direct impact upon what steps are reasonable to take in response to allegations of infringement. Emmett and Nicholas JJ did not inappropriately apply the requirement of knowledge within the context of reasonable steps in section 101(1A)(c). An analogy with *Briginshaw v Briginshaw*<sup>62</sup> may not be exact in the present non-curial context, but nevertheless the existence of that principle supports the proposition that in assessing whether steps with potentially serious consequences, such as disconnection, are “reasonable” to take in response to an allegation, the clarity and cogency of the allegation is a relevant factor.

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<sup>61</sup> (2010) 263 ALR 215 at 302.

<sup>62</sup> (1938) 60 CLR 336 at 361-362 per Dixon J: “the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the *reasonable satisfaction* of the tribunal”.

V(x) Section 112E

65. Comms Alliance respectfully adopts the submissions made by the respondents at RS 104 to 110, and wishes to add the following in relation to the interaction between section 101(1A) and section 112E.
66. Both section 112E and subsection (1A) of s. 101 were introduced into the Act by the *Copyright Amendment (Digital Agenda) Act 2000*. One of the objects of the *Digital Agenda Act* was to create “certainty for information technology industries that are investing in and providing online access to copyright material”<sup>63</sup>.
67. The Exposure Draft of the Digital Agenda Bill stated that<sup>64</sup>:
- “The draft Bill implements a two pronged approach to providing certainty and limiting the authorisation liability of carriers and ISPs. The first element is codification of authorisation principles which currently exist at common law. The second element is to expressly limit the liability of ISPs and carriers for authorisation of copyright infringement on their networks in certain circumstances”.
68. The “two pronged approach” was s. 101(1A) and s. 112E. The introduction of the express factors in s. 101(1A)(a) - (c) evidently caused some concern that copyright owners would argue (as the present appellants now do) that the existence of one or more of those factors was established by the ordinary operations of an ISP which provided an internet service to a copyright infringer. On the appellants’ view, for example, the “power to prevent” in s. 101(1A)(a) includes the power to disconnect, and the “relationship” in s. 101(1A)(b) includes a mere contractual relationship to provide a carriage service. For the reasons discussed above, that construction of s. 101(1A) is incorrect. However, s. 112E was introduced so as to forestall any such argument, provide “certainty” to carriers and ISPs, and limit their liability.
69. On that view, s. 112E was introduced partly as a counterbalance to s. 101(1A), to ensure that the explicit listing of factors in s. 101(1A) did not have the unintended consequence of making it ambiguous as to whether the factors in s. 101(1A)(a) – (c) were enlivened in favour of a finding of authorisation by the mere provision of a carriage service which was used for infringement.
70. Following the introduction of the Digital Agenda Bill into Parliament on 2 September 1999, a further consultation and review process was conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs, the results of which were published on 6 December 1999 along with a number of recommendations in respect of further amendments. Many of these recommendations were incorporated as further amendments to the Digital Agenda Bill. One of the recommendations made by the Committee was as follows:

<sup>63</sup> *Copyright Amendment (Digital Agenda) Act 2000*, s. 3(b).

<sup>64</sup> Exposure Draft and Commentary – *Copyright Amendment (Digital Agenda) Bill 1999*, p. 31.

“The Committee recommends that proposed sections 36(1A) and 101(1A) of the Copyright Amendment (Digital Agenda) Bill 1999 each be amended to include a new subparagraph:

(d) whether the person knew the infringing character of the act or was aware of facts or circumstances from which the infringing character of the act was apparent”.

10 71. While the legislature adopted many of the Committee’s other recommendations, it did not adopt the above recommendation. The decision by the legislature to omit the knowledge factor from s. 101(1A), together with the terms of s. 112E, and the desire to limit the liability of carriers and ISPs, supports the proposition that the obtaining of knowledge of infringement was not considered by the legislature to tend towards authorisation in circumstances where that knowledge arose as part of the usual operation of the business of a carriage service provider.

20 72. Accordingly, to the extent that the carriage service provider’s mere provision of the service (including all the usual incidents of the operation of the business of a carriage service provider, see **RS 109**) would otherwise arguably give rise to one or more factors relevant under s. 101(1A)(a) – (c), and to the extent that any knowledge of infringement arises in ordinary course of provision of that service, s. 112E has the effect that the carriage service provider is not taken to have authorised the infringement merely because of the existence of those factors. Thus, s. 112E provides carriers and ISPs with certainty that they may carry on with the usual operation of their business, without the need to undertake complicated multi-factorial inquiries under s. 110(1A) to determine whether they may have any arguable liability for authorisation.

**V(xi) Conclusions**

30 73. Comms Alliance and its members do not condone copyright infringement and acknowledge the harm caused by unlawful file sharing on the internet. However, Comms Alliance submits that the present law of authorization provides no warrant for the imposition of the onerous obligations which the appellants seek to impose upon iiNet, and by parity of reasoning, upon all ISPs. Rather, the problem ought to be addressed by an equitable scheme which is either agreed between ISPs, copyright owners and consumer groups, or is the subject of legislation as in New Zealand and the UK.

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