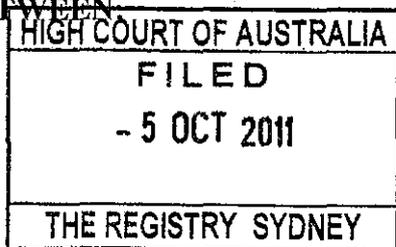


IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

No. S 288 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN



ROADSHOW FILMS PTY LTD (ACN 100 746 870)  
 AND THE OTHER PARTIES IN SCHEDULE 1  
 Appellants

IINET LIMITED (ACN 068 628 937)  
 Respondent

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### RESPONDENT'S SUBMISSIONS

#### Part I: Suitable for publication

1. The respondent (iiNet) certifies that this submission is in a form suitable for publication on the Internet.

#### Part II: Statement of issues

- 20 2. Did, in all of the circumstances of the case, iiNet authorise acts of primary infringements committed by users of its facilities.

#### Part III: Section 78B of the *Judiciary Act 1903*

3. iiNet certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*, and, in its view, such notice is not required.

#### Part IV: Factual issues in contention

4. iiNet contests the appellants' narrative of facts in Part V of their submissions (AS) in the following respects.
- 30 5. "*The appellants' capacity to finance and create films depends on copyright law*": AS 5. There is no evidence to support this; it was not found by the courts below.
6. The appellants oversimplify the allocation of IP addresses to iiNet customers and iiNet's ability to match the customers with the IP addresses: AS 6. iiNet kept records enabling it to identify the subscriber to whom an IP address had been assigned at a particular date and time, but those records would need to be analysed to act on the AFACT allegations. iiNet did not (except under a particular order for discovery in these proceedings) undertake that task: primary judgment [50], [122]-[124], [509]; Emmett J [232], [292]; Nicholas J [544]-[546], [569]-[570].<sup>1</sup>

<sup>1</sup> (2010) 263 ALR 215 at 230-1 [50], 244-5 [122]-[124], 326 [509]; (2011) 275 ALR 1 at 53 [232], 66 [292], 124 [544]-[546], 130 [569]-[570].

7. “iiNet was also aware that half of all internet traffic on its system was BitTorrent traffic and that a substantial proportion of that traffic involved infringement of copyright”: AS 10. In fact, the trial judge found that there was no evidence of the extent of BitTorrent traffic involving infringing material, or what proportion thereof involves material infringing the appellants’ copyright: primary judgment [241].<sup>2</sup>
8. “iiNet was aware of the BitTorrent protocol and its use in the unauthorized sharing of files”: AS 10. iiNet’s senior executives were aware of the protocol only in general terms: primary judgment [467].<sup>3</sup> Neither Mr Malone (iiNet’s managing director) nor Mr Dalby (its chief regulatory officer) had ever used it or seen it in operation.<sup>4</sup>
- 10 9. The appellants submit that the AFACT notices were delivered “with a spreadsheet containing information that had been recorded by the DtecNet Agent”; they refer to those spreadsheets as the “DtecNet spreadsheets”: AS 14. iiNet was told nothing at all before the commencement of proceedings about the existence of DtecNet or its methods: Nicholas J [764].<sup>5</sup> See para 16 below as to the limitations placed on the DtecNet report. The appellants’ computer forensics expert, Mr Carson, had to research extensively before he was able to report on the subject: primary judgment [466].<sup>6</sup> Further, the AFACT Notices had a “lack of information” (Nicholas J [757]-[765], [783]<sup>7</sup>) and were “no more than [sic] assertions”: Emmett J [211].<sup>8</sup>
- 20 10. In AS 15, the appellants reproduce and footnote Emmett J [174] but – without marking the ellipsis – they omit his Honour’s critical qualifying statement that it was only “[T]o the extent that it could rely on the information provided by the infringement notices” that iiNet could identify customers. Unlike copyright infringement, when iiNet suspends or terminates subscribers’ accounts for non-payment (AS 8), iiNet does not need to rely on evidence from a third party: primary judgment [429]-[430]; Emmett J [206].<sup>9</sup>
- 30 11. The appellants submit that at the time of receiving the AFACT notices “iiNet said that it understood how AFACT came to its allegations”: AS 16. That statement is taken out of context, but importantly the Court found that “that level of appreciation is different from knowing how such allegations came to be made, that is, how those IP addresses, dates and times were generated” (primary judgment [467]<sup>10</sup>) and that Mr Dalby did not understand certain aspects of the AFACT notices: primary judgment [206]; Nicholas J [559]-[560].<sup>11</sup>
12. AS 17 is argument, not facts. Nicholas J better characterised these matters:<sup>16</sup>

*... the appellants sought to demonstrate that the respondent was indifferent to iiNet users acts of copyright infringement by reference to various internal communications between officers of the respondent including Mr Malone and Mr Dalby. ... [The communications] were mostly to the effect that the respondent was not required to act on the AFACT notices ...*

<sup>2</sup> (2010) 263 ALR 215 at 266 [241].

<sup>3</sup> (2010) 263 ALR 215 at 317 [467].

<sup>4</sup> Malone XXN T659.36-46, 833.11-13; Malone RXN T921.21-22; Dalby XXN T962.13-15.

<sup>5</sup> (2011) 275 ALR 1 at 170 [764].

<sup>6</sup> (2010) 263 ALR 215 at 317 [466].

<sup>7</sup> (2011) 275 ALR 1 at 169-70, [757]-[765], 173 [783].

<sup>8</sup> (2011) 275 ALR 1 at 49 [211].

<sup>9</sup> (2010) 263 ALR 215 at 307-8 [429]-[430]; (2011) 275 ALR 1 at 47 [206].

<sup>10</sup> (2010) 263 ALR 215 at 317 [467].

<sup>11</sup> (2010) 263 ALR 215 at 260 [206]; (2011) 275 ALR 1 at 128 [559]-[560].

<sup>16</sup> (2011) 275 ALR 1 at 171 [770]-[771].

... the primary judge accepted Mr Malone's evidence that the respondent did not approve of iiNet users engaging in copyright infringement.

13. There can be no debate about the content of the 20 November 2008 press release but its characterisation at AS 19 is strained to say the least. The appellants' reliance on it is forensic exaggeration. With respect, Jagot J's reliance on it<sup>20</sup> is misplaced. It referred to iiNet's intention to defend the proceeding and expressed the view that the AFACT notices were not sufficient to require it to disconnect any iiNet user's service. The press release also stated that "iiNet does not in any way support or encourage breaches of the law, including copyright infringement" and that iiNet "had repeatedly passed on copyright holders' complaints to law enforcement agencies for investigation": primary judgment [502]; Nicholas J [753].<sup>21</sup> It can be set aside for the purposes of this case. The press release was directed to the public, not specifically to iiNet's customers: primary judgment [476], [478].<sup>22</sup> The press release was downloaded only 33 times.<sup>23</sup>
14. "On 5 February 2009 the appellants served a report from DtecNet": AS 20. The appellants now say, for the first time in this way, that this case raises the issue of "from what date" iiNet authorised infringing conduct: AS 2(a). Accordingly, the detail relating to the DtecNet report is highly germane. It was served unfiled on 5 February 2009 on iiNet's solicitors under a confidentiality claim that prohibited it being provided to iiNet. It was filed and served on 25 February 2009 as Mr Løkkegaard's Conf Ex KL-2, and was gradually released at iiNet's insistence (so it could answer the allegation of primary infringement – see primary judgment [469]; Nicholas J [765]<sup>25</sup>) to iiNet's executives. However, disclosure was subject to the executives' individual confidentiality undertakings and was explicitly (and impliedly<sup>26</sup>) for the sole purpose of the conduct of the proceedings. The report was tendered in evidence on 12 October 2009.<sup>27</sup> Confidentiality was maintained.<sup>28</sup> On 10 November 2009<sup>29</sup> the confidentiality claim over Mr Løkkegaard's oral evidence was withdrawn. However, the DtecNet report remained confidential, although non-confidential extracts were tendered on 12 October 2009<sup>30</sup> and, more substantially, on 10 November 2009.<sup>31</sup>
15. "iiNet has never contended that the knowledge it had acquired from April 2009 was irrelevant to the question of authorization or that the evidence of continuing infringements ought to be rejected": AS 21. That is not so. At the trial, in opening, iiNet plainly stated that the case should be decided based on iiNet's knowledge at the commencement of proceedings.<sup>32</sup> It said so in closing,<sup>33</sup> on appeal,<sup>34</sup> in its special leave summary of argument<sup>35</sup> and it says so here.
16. "iiNet relied on knowledge it had acquired during the course of the proceedings in support of its "Telco Act defence": AS 21, citing paras 3-5 of the Notice of

<sup>20</sup> (2011) 275 ALR 1 at 103 [434], 108-110 [469], [474], [476(6)].

<sup>21</sup> (2010) 263 ALR 215 at 324 [502]; (2011) 275 ALR 1 at 168 [753].

<sup>22</sup> (2010) 263 ALR 215 at 319-320 [476], [478].

<sup>23</sup> Exhibit #T.

<sup>25</sup> (2010) 263 ALR 215 at 318 [469]; (2011) 275 ALR 1 at 170 [765].

<sup>26</sup> *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; see also *Hearne v Street* (2008) 235 CLR 125.

<sup>27</sup> T346.25-44.

<sup>28</sup> T1085.34-5.

<sup>29</sup> T1085.3-25.

<sup>30</sup> Exhibit #H; T347.34-348.24.

<sup>31</sup> Exhibit #SS; T1085.27-46.

<sup>32</sup> T103.31-36.

<sup>33</sup> Respondent's Response to the Applicants' Outline of Closing Submissions in Reply, para 2.

<sup>34</sup> Respondent's Outline of Submissions in Answer, para 44; T146.33-147.33.

<sup>35</sup> Respondent's Summary of Argument, para 20.

Contention. Those paragraphs make no reference to knowledge that iiNet acquired during the course of the proceedings.

17. The appellants' contentions concerning iiNet's position on the status of allegations of infringement arising after the commencement of proceedings (AS 22) are misconceived: cf. Nicholas J [653]-[655].<sup>36</sup> The pleading and particulars reveal a single case of authorisation, based on the AFACT notices from July 2008. There was no further or alternative allegation pleaded or particularised that iiNet's position changed after the commencement of proceedings by reason of the provision of the DtecNet explanation<sup>37</sup> and that explanation was never advanced as a particular relied upon for knowledge. The case was not put on a *quia timet* basis. The expression *quia timet* only appears in the trial transcript in 2 references by iiNet's senior counsel to a case (no longer pursued) on copying to DVDs. It first appears in the appellants' submissions to the Full Court at para 28. As iiNet submitted at trial, the appellants did not say that their authorisation case might differ depending upon the time at which iiNet's conduct was considered.<sup>38</sup> Consistently with this, iiNet submitted in the Full Court that knowledge acquired solely while actively defending the claim litigation could not form the basis for that claim.<sup>39</sup>
18. Contrary to AS 24, the trial judge did not find that "iiNet had the legal and technical ability to prevent the acts of infringement ... and that it had steps available to it to prevent or avoid the acts, including suspending or terminating services, which it did not take"; no such statement appears in the references given at AS fn 35. Rather, iiNet did not have any direct control over what materials a user of its network made available online: Nicholas J [722].<sup>40</sup> Nor did iiNet have power to deny users access to particular copyright material on the internet, short of denying access to the internet as a whole: Nicholas J [723].<sup>41</sup>
19. In AS 25, the appellants say that the quoted finding of the trial judge was not challenged on appeal. It was.<sup>42</sup>
20. There are further facts relevant to this appeal.
21. In 2008-2009, iiNet had approx. 490,000 subscribers and was, after Telstra and Optus, the third largest ISP in Australia: primary judgment [4]; Nicholas J [529].<sup>43</sup> As to be expected from a general purpose ISP, the services provided by iiNet could be used for email, social networking, online media and gaming, voice over internet protocol (VoIP) and the operation of virtual private networks (VPNs): Emmett J [73].<sup>44</sup> Termination or suspension of accounts also used for telephony would result in telephone services to those households being cut off.
22. In addition to the express contractual prohibition on its customers using iiNet's services to infringe copyright (see AS 7-8), iiNet publicised the prohibition on its website (Emmett J [82]-[83]; Nicholas J [731])<sup>45</sup> trained its employees in relation to

<sup>36</sup> (2011) 275 ALR 1 at 147 [653]-[655].

<sup>37</sup> cf. Further Amended Statement of Claim, paras 63-70; Appellants' Particulars to the Amended Statement of Claim, paras 74-78A; Appellants' Supplementary Particulars to the Further Amended Statement of Claim, paras 10-11.

<sup>38</sup> Respondent's Response to the Appellants' Outline of Closing Submissions in Reply, para 2.

<sup>39</sup> Respondent's Outline of Submissions in Answer to the Appeal, para 44.

<sup>40</sup> (2011) 275 ALR 1 at 162 [722].

<sup>41</sup> (2011) 275 ALR 1 at 162 [723].

<sup>42</sup> Notice of Contention (18 March 2010), para 5.

<sup>43</sup> (2010) 263 ALR 215 at 223 [4]; (2011) 275 ALR 1 at 122 [529].

<sup>44</sup> (2011) 275 ALR 1 at 18 [73].

<sup>45</sup> (2011) 275 ALR 1 at 20 [82]-[83], 163 [731].

copyright issues (Emmett J [84]; Nicholas J [731])<sup>46</sup> and promoted its Freezone service which provided its customers with incentives to download legitimate copyright material, including nearly 44% of the cinematograph films in issue in the proceeding: primary judgment [184], [503].<sup>47</sup>

23. From 2007, iiNet was participating in industry discussions with AFACT, Music Industry Piracy Investigations and ARIA regarding an industry code of practice to address online copyright infringement and it was proposing protocols to the Commonwealth Government: Emmett J [87]<sup>48</sup> and [88].<sup>49</sup>
- 10 24. At the relevant time, iiNet received allegations of infringement involving over 5,000 IP addresses per week (Emmett J [207]<sup>51</sup>) and had, for many years before the trial, received hundreds of emails daily (the “robot” notices) which made unreliable allegations of copyright infringement: primary judgment [192], [468]; Emmett J [261]; Nicholas J [625].<sup>52</sup> Voluminous samples of them were in evidence. iiNet did not appreciate the distinction between the investigative mechanisms used to produce the unreliable robot notices and that of DtecNet, the entity engaged to prepare the reports in the AFACT notices: primary judgment [468]-[469]; Nicholas J [625].<sup>53</sup> Some robot notices were also being sent to iiNet by the appellants.<sup>54</sup> iiNet formed the view that it was not obliged to go to the effort and expense of making any inquiries in response to the AFACT notices: Nicholas J [767].<sup>55</sup> This view was genuine: Nicholas J [775].<sup>56</sup> iiNet wanted an independent third party to assess the reliability and authenticity of the information provided by AFACT: primary judgment [469].<sup>57</sup>
- 20 25. The BitTorrent protocol was central to the proceeding; all of the alleged acts of primary infringement relied upon by the appellants occurred via BitTorrent: primary judgment [55], [402].<sup>58</sup> iiNet had no connection with the BitTorrent protocol, any organisation that produced BitTorrent client software, or any website that made available torrent files that relate to infringing material: primary judgment [407].<sup>59</sup> There are legitimate uses of BitTorrent: primary judgment [242].<sup>61</sup> There was no evidence of the extent of BitTorrent traffic that involved infringing material: primary judgment [241], [244].<sup>62</sup> There was no evidence that the majority (or even a
- 30 substantial) usage of the bandwidth allocated by iiNet to its subscribers related to the infringement of the appellants’ copyright: primary judgment [250]; Emmett J [73].<sup>63</sup> iiNet did not profit from copyright infringement occurring over its network: primary judgment [233]-[238]; Emmett J [200]; Nicholas J [641], [752].<sup>64</sup> A significant variable cost to iiNet was acquiring bandwidth and it was in iiNet’s interests to ensure that usage by its customers was low: Emmett J [70]-[71].<sup>65</sup>

<sup>46</sup> (2011) 275 ALR 1 at 20 [84], 163 [731].

<sup>47</sup> (2010) 263 ALR 215 at 255 [184], 324-25 [503].

<sup>48</sup> (2011) 275 ALR 1 at 20-21 [87].

<sup>49</sup> (2011) 275 ALR 1 at 20-21 [88].

<sup>51</sup> (2011) 275 ALR 1 at 47 [207].

<sup>52</sup> (2010) 263 ALR 215 at 257 [192], 318 [468]; (2011) 275 ALR 1 at 59 [261], 141 [625].

<sup>53</sup> (2010) 263 ALR 215 at 318 [468]-[469]; (2011) 275 ALR 1 at 141 [625]; Malone XXXN T706.30-31.

<sup>54</sup> Ex MMM-1, pp 801-802.

<sup>55</sup> (2011) 275 ALR 1 at 171 [767].

<sup>56</sup> (2011) 275 ALR 1 at 172 [775].

<sup>57</sup> (2010) 263 ALR 215 at 318 [469].

<sup>58</sup> (2010) 263 ALR 215 at 231 [55], 301 [402].

<sup>59</sup> (2010) 263 ALR 215 at 302 [407].

<sup>61</sup> (2010) 263 ALR 215 at 266 [242].

<sup>62</sup> (2010) 263 ALR 215 at 266 [241], 266-267 [244].

<sup>63</sup> (2010) 263 ALR 215 at 268 [250]; (2011) 275 ALR 1 at 18 [73].

<sup>64</sup> (2010) 263 ALR 215 at 264-265 [233]-[238]; (2011) 275 ALR 1 at 46 [200], 145 [641], 168 [752].

<sup>65</sup> (2011) 275 ALR 1 at 17-18 [70]-[71].

### Part V: Statutory provisions

26. iiNet accepts the appellants' Part VII. For the purposes of iiNet's contentions, parts of the *Telecommunications Act 1997* (Cth) are X.

### Part VI: iiNet's argument in answer to the appellants' and interveners' submissions

27. The appellants put forward a case in stark terms that the combination of knowledge or suspicion (of primary infringements) and a power to prevent (expressed as, e.g., any power to switch off) equals authorisation (AS 65-68), which travels well beyond any decided case in Australia.
- 10 28. They propound a case on authorisation on this approach by considering two issues in isolation. First, does the alleged authoriser know of or suspect infringements? Secondly, are there steps that, if taken by the authoriser, might deter the infringers? On the appellants' approach (and the interveners') the two questions are to be considered quite independently (AS 35-36, 66-68; submissions by the MEAA (MEAS) 11-12, 17); and if the answer to them both is Yes, then authorisation, via the weakest of its synonyms, "countenance", is made out.
- 20 29. Contrary to the appellants' and interveners' submissions, knowledge and "reason to suspect" must interact with what the accused authoriser can reasonably do. Thus in the case of a university photocopier, a proper notice would have been sufficient: that is the effect of *Moorhouse*. (By operation of s 39A of the *Copyright Act 1968* and *Copyright Regulations 1969* reg 4B and Sch 3 that an A4-sized notice was deemed sufficient by the legislature and the executive after *Moorhouse*.) But if what is asked is the institution of a warning/suspend/termination régime, as in this case mere "reason to suspect" is inadequate. There has to be trusted, accessible, clear and usable information. Thus AS 42 is wrong in its criticism of Emmett J for requiring, in these circumstances, unequivocal and cogent evidence.
- 30 30. The appellants propound a case, that iiNet had (a) reason to suspect primary infringements; (b) failed to issue even warnings (AS 36, 38, 68, 71); (c) even in relation to a single allegation of infringement (AS 73); (d) thus at least "countenancing" infringements (AS 72). This beguiling complaint ignores what, it became clear, AFACT and the appellants wanted from iiNet. They wanted iiNet to take on the burden of asserting and, if challenged by a subscriber, presumably defending, the evidence of primary infringements. They wanted iiNet to have a system in which warnings only played a rôle as the first step to suspension and termination. They wanted the system applied to every single notification of thousands of primary acts. There is no way in which they would have accepted that iiNet had satisfied their demands by issuing a warning over a single act. And as Nicholas J points out at [777]<sup>66</sup> the only possible case of authorisation they can advance is "countenance"; but as iiNet submits, if what it did was "countenance" in some weak or remote sense of that word, it is not a sense that is included in the statutory meaning of "authorize".
- 40 31. To succeed the appellants must ultimately prove conduct and circumstances from it is to be inferred that iiNet authorised its subscribers and other users to engage in proved acts of infringement. In all of the facts of this case, the requisite authority cannot be inferred. Further, the appellants would also need to prove that any such authority was acted upon by the infringing user, which they have not.

<sup>66</sup> (2011) 275 ALR 1 at 172 [777].

*Statutory construction – “authorizes”*

32. The starting point is, of course, the Act. The relevant question is what it means to authorize the doing of an act comprised in the copyright within the meaning of s 101(1). The answer is supplied by reading the statutory text in the light of its legal and historical context.<sup>67</sup>
33. Section 101 is found in Div 6 of Part IV of the Act, which deals with infringement of copyright in subject-matter other than works, including “audio-visual items” such as cinematograph films: s 100A.
- 10 34. Section 101(1A) in Div 6 provides that three matters must be taken into account when determining, for the purposes of s 101(1), whether a person has authorised a relevant infringing act with respect to an audio-visual item. Five points concerning the statutory language of s 101(1A) are important.
35. First, s 101(1A) is drafted in inclusive rather than exhaustive terms. The subparagraph does not purport to define what it means to authorise an infringement, but uses words such as “extent (if any)”, “include”, “nature”, and “reasonable”. Secondly, the statutory language used dictates that each of the matters to be considered under s 101(1A) are matters of degree (“extent”, “nature”, “reasonable” etc) which require careful evaluation and application to the facts at hand. There are no “Yes”/ “No” formulas. Thirdly, the use of the past tense in s 101(1A) (e.g “the person who did the act concerned”) confirms the conventional position that an act of infringement by authorisation is not complete until a person has acted upon the authority purportedly conferred. Fourthly, when s 101 is read as a whole, it is clear that the inquiry is not confined to an application of the dictionary meaning of synonyms of the word “authorize”, but rather, whether there is conduct from and circumstances in which the giving of an authority to infringe copyright is shown or must be inferred.
- 20
36. It is common ground that the drawing of s 101(1A) in this manner was intended to reflect the existing law, the authoritative exposition of which is *University of New South Wales v Moorhouse* (1975) 133 CLR 1, which in turn drew heavily on *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481. It is appropriate, then, to turn to consider those decisions.
- 30

*Moorhouse*

37. In *Moorhouse*, Gibbs J said that “*the question whether one person authorizes another to commit an infringement depends upon all the facts of the case so that a decision on a particular set of circumstances may be of no assistance in other cases*”.<sup>68</sup>
38. It is instructive to bear in mind that the members of the Court in *Moorhouse* did not think they were providing a rule or principle under which liability in broad and general terms would be created, by which, for example, copyright owners of repertoires of works or subject-matter could have broad findings of liability made against providers of services. As Jacobs J (with whom McTiernan ACJ concurred) said (at 23-24): “*This case was frequently described by counsel for the first-named respondent as a test case but it could only be so described in relation to the circumstances proved in evidence.*” Gibbs J said (at 12): “*It will be seen that the*
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<sup>67</sup> *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273 at [10] to [12].

<sup>68</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 (emphasis added).

*present appeal, although intended to be a test case, is of limited significance*"; his Honour then went on to make the remark quoted at para 37 above.

39. The reasons for judgment in *Moorhouse* (at 12-13 per Gibbs J) reveal the following propositions: "Authorize" means "sanction; approve; countenance" and can mean "permit". A person cannot authorise an infringing act without some power to prevent it. This is a necessary but not sufficient condition. Express or formal permission or sanction, or active conduct indicating approval, is not essential; inactivity or indifference, exhibited by acts of commission or omission may reach a degree from which authorisation or permission may be inferred. Thus a failure to take action will only constitute authorisation if it reaches the requisite degree. The word "authorize" connotes a mental element. It cannot be inferred that a person authorised an infringing act by mere inactivity unless he or she knew or had reason to suspect that the act might be done. Again, this is a necessary but not sufficient condition. It is a question of fact in each case what is the true inference to be drawn from the accused conduct. Also in *Moorhouse* (at 21), Jacobs J considered that, in cases where there was no express permission or invitation to engage in the infringing conduct, the relevant question was whether such permission or invitation may be implied.
40. These propositions must be understood in the context in which they were identified and applied.
- 20 41. In *Moorhouse*, the defendant university supplied to Mr Brennan both the book from its library from which an infringing copy was made and a machine in the library enabling the copy to be made.<sup>69</sup> The university was aware of assertions by the Australian Copyright Council that had given it enough information to suspect that some infringing copies were likely to be made.<sup>70</sup> The majority framed its implied "invitation" to users of the library by reference to circumstances where the library owner places copying machines in the library and provides access to books on the library shelves.<sup>71</sup> Jacobs J for the majority held that the invitation was "unlimited" and therefore that the infringing conduct was authorised. Mr Brennan "used the library book or books and the library copying machine in terms of the invitation apparently extended to him"<sup>72</sup> and the "unqualified nature of the invitation sufficiently caused him to do the acts which he did and which were comprised in the copyright of the [copyright owner]" (emphasis added).<sup>73</sup> The "fatal weakness in the case for the University [was] the fact that no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright."<sup>74</sup>
- 30
42. The causal element identified by Jacobs J (underlined above) is important. There must be some nexus between the invitation extended by the alleged authoriser and the conduct of the primary infringer. In *WEA v Hanimex*<sup>75</sup> the situation there presented did not call upon the Court to "express any general views as to what necessary element of connection or control must exist for there to be an authorisation".<sup>76</sup> That was because "the statutory description of authorising a person to [copy a sound
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<sup>69</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20.

<sup>70</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 14.

<sup>71</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 21.

<sup>72</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 23.

<sup>73</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 23, emphasis added.

<sup>74</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 17.

<sup>75</sup> *WEA International Inc v Hanimex Corporation Ltd* (1989) 17 FCR 274.

<sup>76</sup> *WEA International Inc v Hanimex Corporation Ltd* (1989) 17 FCR 274 at 287.

recording] is not satisfied until such a person has acted upon the authority purportedly conferred”.<sup>77</sup>

Adelaide Corporation

43. In *Moorhouse* both Gibbs J<sup>78</sup> and Jacobs J<sup>79</sup> said in terms that they were applying the decision of this Court in *Adelaide Corporation*.

10 44. In *Adelaide Corporation* the majority (Higgins, Gavan Duffy and Starke JJ) reversed the Full Court of the Supreme Court of South Australia, which had held, in finding Adelaide Corporation liable, that a warning or protest might have been sent. Higgins J sets out a lengthy passage from the Full Court’s judgment in which it said that the Corporation should have at least passed on APRA’s letter to the lessee. Higgins J firmly rejected that suggestion in the following manner:<sup>81</sup>

*... the passage involves, in my opinion, an unjustifiable shifting of the burden of proof. It is for the plaintiff to prove that the defendant permitted the performance; not for the defendant to intimate to [the promoter] that it was not permitting. ... I deny that it was within the power of the Corporation to prevent the singing of the song, and that, even if it had any such power, it was a duty of the Corporation to exercise that power.*

45. In rejecting the allegations of copyright infringement, Gavan Duffy and Starke JJ held:<sup>82</sup>

20 *Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity or ‘indifference, exhibited by acts of commission or omission, may reach a degree from which an authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of.*

30 46. Gibbs J relied on *Adelaide Corporation* in five respects:<sup>83</sup> first, “authorize” has been held to mean “sanction, approve, countenance”; secondly, “authorize” can also mean “permit” and the words were treated synonymously in *Adelaide Corporation*; thirdly, a person cannot “authorize” an infringement of copyright unless he has some power to prevent it; fourthly, authorisation or permission may be inferred from inactivity or indifference that reaches the necessary degree; and fifthly, the word “authorize” connotes a mental element.

“means”

47. iiNet submits that the High Court was specific, and deliberately so, in identifying the means of infringement. The majority noted that the university had provided “a machine at the library which would enable copies to be made”.<sup>84</sup> Gibbs J too emphasised the specific machine as the means of infringement in his statement relied upon by the appellants as the key statement of principle.<sup>85</sup> A proper analysis of the judgements in *Moorhouse* show that it was the provision of both of photocopiers and books that made the difference there. See paras 48-51 below. The Court did not refer

<sup>77</sup> *WEA International Inc v Hanimex Corporation Ltd* (1989) 17 FCR 274 at 288.

<sup>78</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12-13.

<sup>79</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20.

<sup>81</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 502.

<sup>82</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 504-505.

<sup>83</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12-13.

<sup>84</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20.

<sup>85</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13.

to control or the power to prevent in broader terms, such as the power to exclude visitors from the library altogether, or suspend their access rights.

48. The appellants' case proceeds on the footing that the provision of internet connections to subscribers is the equivalent of providing the photocopier in *Moorhouse*. This disregards the importance of the provision by the University of the copyright material, the book. A reading of *Moorhouse* as a whole makes it clear that all of the Justices considered the provision of the books central to the question of whether the university had authorised the infringing conduct. For example, Gibbs J said at 14 that *The University had the power to control both the use of the books and the use of the machines*.<sup>86</sup>

49. The majority emphasised the joint supply of books and photocopy machines in even clearer terms, for example:<sup>87</sup>

*The question is whether in the circumstances of the case the appellant in supplying the book from its library and in providing a machine at the library which would enable copies to be made authorized the infringement.* [emphasis added]

and ultimately this led to the majority finding:<sup>88</sup>

*He went there and used the library book or books and the library copying machine in terms of the invitation apparently extended to him. In my opinion the appropriate finding in these circumstances is that the University authorized his acts.* [emphasis added]

50. Further, in subsequent consideration of *Moorhouse*, this Court has emphasised the provision of the books as the copyright material in addition to the machines: see *Australian Tape Manufacturers v The Commonwealth* (1993) 176 CLR 480 at 498.

51. As iiNet submitted at trial and to the Full Court, the “means” (the provision of which both Gibbs J and the majority attached liability) was a photocopying machine together with books. This no doubt informs what Gibbs J had to say about guidance to libraries at 12.<sup>89</sup> See also *WEA*<sup>90</sup> where Gummow J points out that in *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 only the records (= books) were supplied, but that the result would have been different if a taping machine (= photocopier) had also been supplied. iiNet maintains that submission in this Court: it did not provide the films (= books). Cases such as *Cooper*<sup>91</sup> which have extended *Moorhouse* to those who supply only “technology” (= photocopier) may have gone too far, see para 70 below.

#### *The “reasonable step” in Moorhouse*

52. It is also instructive to note what would have been a “reasonable step” in *Moorhouse* that would, it appears, have satisfied both Gibbs J and Jacobs J. That was the placing of an adequate notice near the photocopiers. While the Court did not go into what notice would have been adequate, the one there was plainly not.

<sup>86</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 14.

<sup>87</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20; see also at 21-22.

<sup>88</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 23.

<sup>89</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12.

<sup>90</sup> *WEA International Inc v Hanimex Corporation Ltd* (1989) 17 FCR 274 at 286.

<sup>91</sup> *Cooper v Universal Music Australia* (2006) 156 FCR 380.

*This case is very different to Moorhouse*

53. The present is a very different case to *Moorhouse*. First, unlike e.g. *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 (the Kazaa case), iiNet does not supply the software that is the engine of infringement. See para 25 above. Secondly, iiNet’s “invitation” to its customers with respect to their use of the Internet provided via iiNet’s facilities was, and at all relevant times has been, qualified. There was no express or implied invitation to users of iiNet’s services to engage in copyright infringing activity and iiNet requires its customers: to comply with all laws; not to use or attempt to use the services provided by iiNet to infringe another person’s rights; and not to use or attempt to use the services provided by iiNet for illegal purposes or practices: primary judgment [99]; Emmett J [76]; Nicholas J [556].<sup>92</sup> iiNet also warns its customers that the hosting or posting of copyright material using an iiNet service is a breach of the Customer Relationship Agreement: primary judgment [99]; Emmett J [82]; Nicholas J [556].<sup>93</sup> Even if iiNet’s Internet services could be described as a relevant “means of infringement” (which iiNet says it does not because it does not provide photocopier + books; or BitTorrent), those warnings are equivalent to the “notice placed on the machines” that Gibbs J found would have removed the “fatal weakness” of the library’s case in *Moorhouse*. Moreover, the circumstances of internet subscription, where a subscriber must agree to the terms and conditions that contain the warning,<sup>94</sup> take the circumstances well outside those in *Moorhouse*, where the Court found that library users were not sufficiently alerted to the fact that they should not infringe.<sup>95</sup> Thirdly, unlike the University and the supply of books, iiNet does not make available to Internet users via BitTorrent the copyright subject-matter, in this case the Identified Films (or, indeed, any films). Rather, iiNet promotes an extensive array of licensed content for the enjoyment of its customers: see para 22 above. Fourthly, it is a critical limb of the appellants’ case (AS 71-72) that they have notified iiNet of alleged primary infringements and that iiNet has encouraged further acts of infringement because it failed to disconnect users. But iiNet’s decision not to disconnect could only operate as encouragement to an infringing user (1) if that user believed that iiNet had detected that particular user’s infringing conduct and, (2) by reason of iiNet’s failure to disconnect, the user believed that iiNet implicitly approved of the conduct; or, put another way, that iiNet was inviting the user to use iiNet connections to infringe copyright. There is simply no evidence to that effect. The appellants’ suggestions of “signalling its stance” (e.g. AS 71) in relation to the press release, and Jagot J’s embracing of the proposition that the press release “encouraged” infringement are, with respect, untenable. The far more likely assumption of an infringing user is that iiNet does not know what he or she is up to. Continued access in those circumstances cannot amount to authorisation or an “invitation” to engage in acts comprised in the copyright.
- 40 54. Thus the factors critical to a finding of authorisation in *Moorhouse* – supply of the means of infringement includes supply of the copyright subject-matter, absence of warning and an unqualified invitation to use the means of infringement – are all absent here.

<sup>92</sup> (2010) 263 ALR 215 at 239-40 [99]; (2011) 275 ALR 1 at 18-19 [76], 127 [556].

<sup>93</sup> (2010) 263 ALR 215 at 240 [99]; (2011) 275 ALR 1 at 20 [76], 127 [556].

<sup>94</sup> Malone #1 para 95.

<sup>95</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 15, 22-23.

“from what date”

55. The need – emphasised in the cases, especially *WEA* – to concentrate on the nexus between the accused authorisation and the identified acts of primary infringement is made all the more acute where an alternative case is brought that, by reason of the accused authoriser’s developing state of mind, the authorisation arises from a particular point in time. That is the appellants’ “from what date” case: **AS 2(a)**.
56. The appellants’ case in the litigation was, and is, predicated on an elaborate and complicated notification process that they set up through their industry body the MPA and its Australian arm, AFACT. Despite occasionally protesting otherwise at the trial, their allegations of authorisation depended entirely upon their notification scheme. AFACT sent iiNet notices on a weekly basis from 2 July 2008. They listed dozens of IP addresses to which AFACT agents had connected, and from which they could obtain copies, and did obtain fragments of copies, of the appellants’ “Identified Films” (the sample set of 86 films upon which the hearing proceeded). Their case that iiNet came under a duty (imposed only by their view of the *Copyright Act*) to match the IP address to customers, contact those customers, threaten suspension or disconnection of Internet access and, failing some (unspecified) curative action, suspend or terminate those connections, and that iiNet neglected that duty leading to authorisation, was entirely based on the notices.
57. Except in the most general way the appellants do not, and have never, identified particular acts of infringement that, by reason of the awareness, coupled with inactivity, iiNet is said to have authorised. Conceivably, on the basis on which they have fought the case to date – i.e., that over the whole period from notifications starting in June 2008 to the trial in October 2009, iiNet authorised all the primary infringements in all the notices – no such analysis was needed. But if, as they alternatively now assert, there are later points in time as candidates for the requisite knowledge, then the analysis is necessary.
58. iiNet submits, of course, that it is not liable for authorisation at any time. But even if one were to accept the appellants’ (now) alternative approach which says that this Court should identify a time, between mid-2008 and the end of 2009, the only reasonable candidate is the date that the confidentiality regime applying to the DtecNet report was lifted (it having been admitted into evidence on 12 October 2009, thus discharging the implied and express *Harman* undertaking), which was on 10 November 2009. The clock for warnings, notices and other steps would then have started. But as the appellants point out (**AS 22**), the pre-trial notices ceased in August or September 2009 so no primary infringements, required by the authorities, are demonstrated. Thus, on the facts in this case, there can be no liability for authorisation even if the appellants’ system was effective after explanations. Put another way, there would nothing to remit to the Full Court as sought in Notice of Appeal order 7.

“sanction, approve, countenance”

59. *Moorhouse* does not support the proposition that the Act can be construed by applying the definition “sanction, approve, countenance” in a manner whereby the furthest reaches of any of those terms can be applied in place of the statutory term “authorizes”. As Kitto J cautioned in *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 633, “fallacy lurks in paraphrase”. See also *Cozens v Brutus* [1972] AC 854 at 861-862, 867 where the House of Lords rejected the application of words from dictionary definitions in lieu of the statutory language. In *CCH Canadian Ltd v*

*Law Society of Upper Canada* at [38], McLachlin CJ delivering the judgment of the Supreme Court of Canada said<sup>98</sup> that “Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to, sanction, permit, favour, encourage”. In *Australasian Performing Right Association v Jain* (1990) 26 FCR 53 at 61, a Full Federal Court (Sheppard, Foster and Hill JJ) observed that “It may be that not every act which amounts to the countenancing of something is an authorisation.” iiNet respectfully submits that this must be right; indeed it is, with respect, too tentatively expressed.

60. Thus, when in **AS 63** the appellants, in criticising Nicholas J, say “[T]hat is not what “countenance” means”, the criticism is misplaced. His Honour was not, and should not have been, considering what “countenance” means. His Honour should have been, and was, considering what “authorize” means.

*Knowledge; reason to suspect*

61. The question of the knowledge required for a person to be held to authorise a primary act of copyright infringement (**AS 2(b)**) is the wrong question and a false issue in the appeal. Gibbs J held in *Moorhouse*, “it could not be inferred that a person had, by mere inactivity, authorised something to be done if he neither knew nor had reason to suspect that the act might be done”.<sup>100</sup> When such knowledge or reason to suspect is present, one then looks to the other circumstances of the case to see if authorisation may be inferred.
62. As Gibbs J observed, “the principles laid down by the [Copyright] Act are broadly stated ... and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case.”<sup>101</sup> Questions that routinely arise in authorisation cases such as knowledge or reason to suspect, control or power to prevent, and taking of reasonable steps, do not exist as simple “yes or no” propositions to be applied mathematically so as to compel a finding of authorisation if a particular combination of those factors can be identified. Rather, each of those factors is a matter of degree. The trier of fact must weigh, not only the presence or absence of those factors but, if present, the extent to which each factor exists in a particular case before deciding whether “inactivity or indifference, exhibited by acts or commission or omission, [have reached] a degree from which an authorization or permission may be inferred”.<sup>102</sup> It is in this context that the observation of Gibbs J at 13 as to knowledge or suspicion (set out in full at **AS 32**) should be understood.<sup>103</sup>
63. The enquiry as to the reasonableness of the conduct of the alleged authoriser, as raised by his Honour in this passage, must, to be consistent with his Honour’s earlier observations, encompass a decision by the alleged authoriser not to act in response to a reasonable suspicion of underlying acts of copyright infringement. To hold otherwise would be to deny room for any “indifference”. The law is not that an alleged authoriser must take such reasonable steps as are available to it if he or she has knowledge or reason to suspect that underlying acts of copyright infringement have been or will be committed. As Jacobs J said in *Moorhouse*:<sup>105</sup> “it is a question of fact in each case what is the true inference to be drawn from the conduct of the person

<sup>98</sup> *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [38].

<sup>100</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12-13.

<sup>101</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12.

<sup>102</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 per Gibbs J, citing *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 504.

<sup>103</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13.

<sup>105</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 21.

who is said to have authorised”, citing Bankes LJ in *Performing Rights Society Limited v Caryl Theatrical Syndicate Limited* [1924] 1 KB 1 at 9. The absence of a positive duty on an alleged authoriser to act so as to prevent or avoid underlying acts of copyright infringement is consistent with the approach taken to the question of authorisation by the majority in *Moorhouse*.

64. The introduction of section 101(1A) the *Copyright Act* is consistent with this approach. The appellants’ submissions as to the effect of section 101(1A) overreach. The “certainty” it was said to provide (AS 31) has been misunderstood. If the legislature had wanted to codify the passage of Gibbs J at 133 CLR 1 at 13 (set out at AS 32) as the appellants would read it, then the provision would have had to make express reference to the alleged authoriser’s state of knowledge and required a finding of authorisation where the alleged authoriser had the requisite knowledge or suspicion and failed to take reasonable steps to limit its use to legitimate purposes.
65. Section 101(1A) does nothing of the kind. Its inclusive but not exhaustive approach recognises that the various factors relevant to the question of authorisation are matters of degree. Ultimately the trier of fact must weigh all of the 101(1A) factors and any other relevant factors, discussed in detail elsewhere. Emmett and Nicholas JJ have done just that, as did the trial judge.

#### *Indifference*

66. The topic of indifference was given considerable attention in *Adelaide Corporation*. Higgins J held:<sup>109</sup>

“Even if we treat the Corporation as ‘indifferent’ (or neutral), it had a right to be indifferent (or neutral); and the letter of 7th October [from APRA] could not deprive the Corporation of that right.”<sup>112</sup>

67. iiNet submits that a copyright owner cannot impose a duty to act upon a service provider merely by providing it with allegations of infringements by its customers. The facts of the present case show that iiNet did not respond to the AFACT notices in the manner demanded by the appellants. It was not, however, indifferent to the issues of copyright infringement by its customers. It took the steps set out in paras 22 and 23 above. Its decision not to react to the AFACT notices in the manner demanded by AFACT, on the appellants’ behalf, was made in the context of receiving thousands of unreliable infringement allegations per week: primary judgment [192], [468]; Emmett J [261]; Nicholas J [625].<sup>117</sup> Even viewed objectively, iiNet’s conduct was not such as to justify an inference that an invitation was extended to customers to infringe.

#### *Section 101(1A) – the factors to be taken into account*

68. The mandatory, but not exhaustive, considerations in s 101(1A) are expressed in terms identifying them as matters of degree, not absolutes: the extent if any of the power to prevent, the nature of the relationship, other reasonable steps. This, in combination with the obligation to consider all other relevant matters, demonstrates that the question of authorisation in sub-s 101, as informed by sub-s 101(1A), is not answered as though it were a formula where the satisfaction of each element will always lead to the same outcome. For example, it is not sufficient to establish that an alleged

<sup>109</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 497-498.

<sup>112</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 500.

<sup>117</sup> (2010) 263 ALR 215 at 257 [192], 318 [468]; (2011) 275 ALR 1 at 59 [261], 141 [625].

authoriser has the power to prevent infringing conduct. One must consider the extent of that power and the implications of its exercise and balance those matters against the other facts of the case. Although knowledge of the infringing acts is not referred to in sub-s 101(1A), it is undoubtedly a highly relevant factor as identified by Gibbs J in *Moorhouse*. The existence of the relevant knowledge is unlikely to be susceptible of a “yes” or “no” answer. Matters such as the specificity or level of detail of the relevant information, the confidence level in the accuracy of the information, the extent to which the information was understood and the steps needed to use the information so as to do something about the primary acts of infringement may arise and, again, will need to be balanced with all of the other facts in the case. This approach is simply rejected by the appellants (AS 51-53) and the interveners: ARIA’s submissions (ARIAS) 10.

#### *Power to prevent*

69. Attention must be given to the proper meaning of each of the statutory phrases, which should be construed in the light of their purpose and context, context being widely viewed.<sup>118</sup> The context here includes the judicial heritage of phrases that appear in section 101(1A). Thus, the phrase “power to prevent” is used by Gibbs J in *Moorhouse* but plainly referenced to *Adelaide Corporation*; the reference to *Adelaide Corporation* is to (1928) 40 CLR 481 497-498 (a more precise reference would be 498-499) (Higgins J) and 503 (Gavan, Duffy and Starke JJ); and there it is plainly derived from the observation of Atkin LJ in *Berton v Alliance Economic Investment Co* [1922] 1 KB 742 at 759.

70. There is nothing in that heritage that indicates that the word “prevent” should be given other than its ordinary meaning, which is a narrow one.<sup>119</sup> In construing the meaning of “power to prevent” in sub-s (1A)(a), in *Cooper v Universal Music Australia* (2006) 156 FCR 380 the Full Court of the Federal Court, with great respect, went too far, although it is not essential to iiNet’s case here that *Cooper* be wrong. The relevant reasoning is that of Branson J at [29]-[42];<sup>120</sup> French J agreed at [1]<sup>121</sup> with both Branson and Kenny JJ. Kenny J did not analyse the meaning of “power to prevent”. That is not to say that power to prevent, e.g. by supervision or the placing of notices, in the context of operating a library with both books and photocopiers in it, in the context of *Moorhouse*, was incorrect. It does, however, militate against giving a broad meaning to “prevent” in the statutory context, by extending it to including a “*power not to facilitate the doing of [an] act by, for example, making available to the public a technical capacity calculated to lead to the doing of that act*” (Branson J at [41]).<sup>122</sup> Indeed, the tentative nature of many of her Honour’s steps in the reasoning leading to paragraph [41] of *Cooper* shows its uncertain foundation.)

#### *The nature of the relationship*

71. AS 68 relies upon the finding of the Full Court that iiNet had a contractual relationship with its customers as a relevant matter for the purposes of s 101(1A)(b). Of course, the need to consider the CRA and its terms under s 101(1A)(b) is axiomatic. However, any contractual relationship is governed by its terms. Here, the

<sup>118</sup> See, e.g., *Stevens v KK Sony Computer Entertainment* (2005) 224 CLR 193 at 230 [124] ff per McHugh J.

<sup>119</sup> See *Stevens v KK Sony Computer Entertainment* (2005) 224 CLR 193 at 209 [38], 211 [46], 213 [55], 256 [206].

<sup>120</sup> *Cooper v Universal Music Australia* (2006) 156 FCR 380 at 387-90 [29]-[42].

<sup>121</sup> *Cooper v Universal Music Australia* (2006) 156 FCR 380 at 382 [1].

<sup>122</sup> *Cooper v Universal Music Australia* (2006) 156 FCR 380 at 389 [41].

CRA expressly forbid the subscriber from engaging in, or allowing any persons to engage in, acts of infringement: Nicholas J at [728].

72. Further, some perspective is required when applying this factor. The nature of the relationship between an ISP and a subscriber is influenced by matters other than the bare contractual terms. Internet use takes place in the privacy of the home or work environment. The ISP may have (as ii did here at the time) half a million or more subscribers, and countless more users who are not subscribers (e.g. in the case of schools or libraries, internet cafes or wi-fi hot spots). As one commentator has stated, the freedom of usage in the private home or workplace, combined with the en masse volume of consumers privately using facilities, means that in “no meaningful sense” can the nature of the relationship be confined to strictly contractual considerations.<sup>123</sup>
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73. Considerations of this kind formed no part of the reasons of Jagot J, who confined her analysis of the nature of the relationship to the strict contractual rights, including the right to terminate (at [428] to [430]). iiNet respectfully submits that that approach was in error. The nature of the relationship, as evinced by the CRA, was that the subscriber was expressly not authorised to engage in infringement. In the context of this case, iiNet’s failure to invoke its contractual right of termination could not invite any inference to the contrary.

*Reasonable steps*

- 20 74. The appellants pleaded that iiNet took no steps, or no adequate steps, to prevent or avoid the primary acts of infringement. By way of particulars, the appellants alleged that iiNet took no reasonable steps and identified – but only at the broadest level of generality – steps that they said iiNet could have taken.<sup>124</sup> It was clear from para 96 of the particulars that it was the AFACT notices that were said to provide the necessary foundation for the steps proposed. The appellants’ case was that iiNet’s failure to take steps following receipt of the notices amounted to authorisation. The reasonableness of any decision not to act as suggested is necessarily a relevant consideration in the determination of authorisation, whether as part of s 101(1A)(a) or (c) or as part of all of the relevant facts that must be considered. Thus the approach of Emmett J at [205],
- 30 [210]-[211] and Nicholas J at [782]-[783]<sup>127</sup> was entirely appropriate and orthodox. Their Honours concluded respectively that it was not reasonable to require iiNet to take the steps particularised and that it was not unreasonable for iiNet to decide not to act in this manner. Whether these are really the opposite sides of the same coin or different conclusions is of no moment. Each was open on the evidence. There is no challenge to a finding of primary fact that would unseat either conclusion. No error is demonstrated.
- 40 75. As the primary judge recorded at [97]-[100]<sup>128</sup> the text of the “notices of infringement” is instructive. After the recitation of various background matters and a reference to the attached spreadsheet the letter said that “failure to take action to prevent infringements from occurring ... where iiNet knows that infringement are being permitted may constitute authorisation of copyright infringement”. It did not say that authorisation was the infringement with which they were concerned. It did not mention any possibility that iiNet itself might have proceedings brought against it. It

<sup>123</sup> Birchall, “A doctrine under pressure: The need for rationalisation of the doctrine of authorisation of infringement of copyright in Australia” (2004) 15 AIPJ 227 at 233.7.

<sup>124</sup> Applicants’ Particulars to the Amended Statement of Claim, paras 95-97.

<sup>127</sup> (2011) 275 ALR 1 at 47 [205], 48-49 [210]-[211], 173 [782]-[783].

<sup>128</sup> (2010) 263 ALR 215 at 238-40 [97]-[100].

went on to say that AFACT and its members required iiNet to take certain action, which was to “prevent” customers from continuing to infringe copyright and to “take any other action available under the CRA which is appropriate having regard to their conduct”. (The extracts from the CRA attached to the notices included cl 4.1 the obligation to obey all laws, cl 4.2 the obligation not to use the service for illegal purposes and cl 14 the power to iiNet’s capacity to “cancel, suspend or restrict” the service.) It will be noted that there was no reference whatsoever to issuing warnings. Indeed The first time that the appellants indicated that the steps that they expected might have been taken included warnings was the service of the statement of claim and its separate particulars document on 20 November 2008. They never suggested that warnings would have been acceptable to them. They never suggested any frequency or timing of warnings. They never addressed in any evidence (despite bearing the burden of proof on s 101 including s 101(1A)) the cost or feasibility of any warning/suspension/termination régime.

*Emmett J and Nicholas J*

76. If one reaches a view that there were in the circumstances no reasonable steps to be taken, then one can reach the view that it was not reasonable to take any steps in those circumstances. Section 101(1A) should be so construed. That is what Emmett and Nicholas JJ did, correctly.
- 20 77. The appellants mischaracterise the reasons of Emmett J at [210]-[211] and [257]:<sup>129</sup> AS 38-39, 41. His Honour’s reasons were to the effect that it was not unreasonable for iiNet to abstain from acting on the AFACT notices – or, put another way, reasonable steps did not include acting on the AFACT notices – in circumstances where the allegations were made in the absence of any offer to reimburse and indemnify iiNet in relation to action taken against primary infringers and made when the state of iiNet’s knowledge at the relevant time was equivocal. DtecNet’s methods had not been explained or knowledge of them could not be used, and the notifications had not been verified. In other words, had those matters been different, iiNet might not have been able to justify not acting in response to the notices. Emmett J was simply giving content to his approach to the question of reasonableness on the facts of the present case.
- 30 78. The reasons of Nicholas J at [764]<sup>130</sup> should be similarly construed. Nicholas J was clearly of the view that in the circumstances – that is, given the quality of the information supplied to iiNet, and the restrictions on the use of that information – the issuing of warnings, termination and suspension of particular accounts, did not amount to reasonable steps: see [763]-[764].<sup>131</sup> AS 54 wrongly ascribes Nicholas J’s comments to the period before April 2009; Nicholas J was plainly of the view that information of the requisite quality and utility was not in iiNet’s hands until after the restrictions had been lifted; see again para 14 above.
- 40 79. The appellants wrongly suggest that Emmett J held that there were reasonable steps available (AS 38). At [210] Emmett J plainly held that before the steps would be reasonable, a scenario along the lines that his Honour sets out in four bullet points and a number of sub-paragraphs should exist. That is not a finding that, in the circumstances at any time in these proceedings, let alone at the commencement of the proceedings, such steps were reasonable. At [188], his Honour identifies one

<sup>129</sup> (2011) 275 ALR 1 at 48-49 [210]-[211], 58 [257].

<sup>130</sup> (2011) 275 ALR 1 at 170 [764].

<sup>131</sup> (2011) 275 ALR 1 at 170 [763]-[764].

reasonable step, which is the giving of a clearly worded and accurate warning. But mere warning was not in substance ever said by the appellants to suffice. At [189] his Honour goes no further than saying that termination is not *per se* unreasonable, but his Honour qualifies that by saying it would be a reasonable step only “at least in some circumstances”.

80. The appellants criticise Emmett J’s approach in [210] as amounting to “judicial legislation without any safeguards or guidance as to how costs or indemnification will work in practice” (AS 44). His Honour was not crafting “judicial legislation” but rather indicating the circumstances that would have been necessary to require action by iiNet. Further an insistence that an ISP take a complex series of steps including warnings (which as Emmett J says at [188] would need to be “clearly worded and accurate”; and despite the centrality of the warning notice in *Moorhouse*, neither that case nor any subsequent one gives any assistance as to what that wording would be) without indicating what frequency or interval would be reasonable, and suspension or termination again without any indication of after what preconditions and with what capacity for restoration there might be, would equally amount to judicial legislation without any safeguards or guidance as to how it would work in practice. A particular mischief of the present case was that neither the appellants nor AFACT at any time gave (and still do not give) any indication of what they will accept as “reasonable” in relation to those matters.

#### *Jagot J*

81. The appellants rely (AS 69-71) on the reasons of Jagot J at [471]-[477]<sup>132</sup> in challenging the correctness of the majority’s conclusion. With respect, her Honour’s attempt to distinguish *Adelaide Corporation* (at [473]<sup>133</sup>) should not be accepted. In neither that case nor the present could the alleged authoriser directly control the conduct of the primary infringer—here, iiNet could only react to allegations and ultimately withdraw the facility provided. As the intermediate court said in *Adelaide Corporation*,<sup>134</sup> a lessor such as the Adelaide Corporation could easily have warned its tenant not to engage in the suspected acts, just as it was said iiNet should have done so. But the majority in the High Court disagreed with the court below which thought a warning should have been sent.<sup>135</sup> The ultimate sanction, “smashing the lease” – here, disconnecting the internet service – are drastic measures of similar import. Indeed, albeit in different contexts, this Court<sup>136</sup> and the Federal Court<sup>137</sup> have referred to the “grave consequences” (*Bradley* at 566) that ensue from depriving people of telecommunications and the undesirability of doing so “completely” when all that offers is a “particular use” (*Kendall* at 350).
82. The facts demonstrated that iiNet was not indifferent to copyright infringement generally; Jagot J’s reasons, such as at [474]<sup>138</sup> are concerned only with the reaction to the AFACT notices. Her Honour misconstrued the 20 November press release ([474] and [476(6)]<sup>139</sup>) and appeared to suggest that contractual power amounted to actual control over what users did on the internet: [476(3)].<sup>140</sup> Justice Jagot’s repeated

<sup>132</sup> (2011) 275 ALR 1 at 109-110 [471]-[477].

<sup>133</sup> (2011) 275 ALR 1 at 109 [473].

<sup>134</sup> (1928) 40 CLR 481 at 501

<sup>135</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 502.

<sup>136</sup> *Bradley v The Commonwealth of Australia and Another* (1973) 128 CLR 557

<sup>137</sup> *Kendall v Telstra Corporation Ltd* (1994) 124 ALR 341.

<sup>138</sup> (2011) 275 ALR 1 at 109 [474].

<sup>139</sup> (2011) 275 ALR 1 at 109 [474], 110 [476(6)].

<sup>140</sup> (2011) 275 ALR 1 at 110 [476(3)].

references to iiNet’s knowledge regarding BitTorrent ([429], [450], [468], [476(2)]<sup>141</sup>) and the extent of infringing traffic over its network are inconsistent with the unchallenged findings. Contrary to the impression given by her Honour, there was no finding that iiNet could monitor user behaviour or could detect infringements in real time and prevent them; any power of iiNet’s was entirely reactive to historical conduct. Her Honour failed to consider the unchallenged finding that the point of iiNet’s response to AFACT was that it wanted an independent party to assess the reliability and authenticity of the information provided by AFACT: at [469].<sup>142</sup> Given this finding, it was, with respect, wrong for her Honour to infer ([474])<sup>143</sup> that iiNet’s executives had no interest in the credibility or reliability of the AFACT information.

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83. Justice Jagot’s approach leaves no room for legitimate indifference or inactivity, contrary to *Moorhouse*. Her Honour’s seminal conclusion ([477])<sup>144</sup> that iiNet’s position was one of “tacit approval” was not open in light of the unchallenged acceptance of Mr Dalby and Mr Malone’s evidence to the contrary: primary judgement [133]-[135], [215], [501]-[504]; Nicholas J [646], [771]-[773], [777].<sup>145</sup> Moreover, her Honour’s summary of facts leading to a conclusion of “countenancing” [476(1)-(7)] disregards the need for “sanction, approve, countenance” to be authorisation that acts on the mind of the primary infringer. iinet’s internal e-mails were entirely invisible to its subscribers.

#### 20 *Reasonable steps – cost and complexity*

84. The appellants make much of the fact that a smaller ISP acquired by iiNet, Westnet, passed on some notices received from copyright owners: see **AS 40, 45**. Understanding what actually happened at Westnet puts the matter into perspective. A small percentage was forwarded. They were not AFACT notices. The process was not automated. It was being done by a network management centre. There was a lot of manual intervention.<sup>146</sup>

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85. Contrary to **AS 40**, primary judgment [434] was not erroneously based on Malone #2 para 17 (which had been admitted as submission only). The primary judge [434] discusses the considerations identified in Malone #2; which could just as easily have been identified in submissions from the Bar table. It is notable that the appellants never thought to lead any evidence as to the cost or suggested simplicity of these matters, although they bore the burden of proving the elements of s 101(1A); it is also to be noted that without evidence the interveners appear to suggest that the steps would not be costly or burdensome: APRA’s submissions (**APRAS 22**; **MEAAS 13-14**). The speculation in **APRAS 23 and 24**, to the contrary of what APRA is putting, shows that the appellants failed to discharge the burden. The Court should not proceed in the absence of evidence to assume that a warning/suspension/termination régime is sufficiently simple and cheap to make it reasonable. Unlike *Moorhouse*, where self-evidently the placement of a proper notice on photocopiers was simple and cheap, the same is not the case here.

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86. The appellants (**AS 39**) and the interveners (the MEAA’s submissions (**MEAAS 12-16**, **APRAS 22**) submit that Emmett J did not rely on any specific finding of the trial

<sup>141</sup> (2011) 275 ALR 1 at 101 [429], 105 [450], 108 [468], 110 [476(2)].

<sup>142</sup> (2011) 275 ALR 1 at 108 [469].

<sup>143</sup> (2011) 275 ALR 1 at 109 [474].

<sup>144</sup> (2011) 275 ALR 1 at 110 [477].

<sup>145</sup> (2010) 263 ALR 215 at 246-47 [133]-[135], 261 [215], 324-25 [501]-[504]; (2011) 275 ALR 1 at 146 [646], 171 [771]-[773], 172 [777].

<sup>146</sup> Malone XXN T 635

judge or evidence to reach the conclusion at [205] that “It was not reasonable to require iiNet to undertake the immense amount of work, cost and effort required in order to set out, review and analyse the allegations in the information provided with the Infringement Notices”. The appellants criticise the trial judge for reaching a similar conclusion at [434] where his Honour referred to Malone #2 at para 17. However, the appellants omitted the trial judge’s conclusion at [430]:

*copyright infringement is not a straight ‘yes’ or ‘no’ question. The Court has had to examine a very significant quantity of technical and legal detail over dozens of pages in this judgment in order to determine whether iiNet users, and how often iiNet users, infringe copyright by use of the BitTorrent system. IiNet had no such guidance before these proceedings came to be heard.*

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87. There was substantial evidence before the primary judge to support his Honour’s finding as to the cost, effort and complexity of reviewing and dealing with the AFACT Notices.<sup>147</sup>

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88. The appellants (**AS 44-45**) and the interveners (**MEAAS 21, APRAS 27**) submit that Emmett J’s “preconditions of reimbursement and indemnification” at [210] are “unsupported by authority and irrelevant to establishing whether there is knowledge or a reason to suspect”, and that this approach has never “been addressed at any stage of the case”. That is incorrect. iiNet’s submissions at trial squarely raised the question of costs in the context of reasonable steps. To act on notifications of infringement, iiNet would have to implement and maintain substantial information systems at unknown costs and that there has been no offer from the appellants to contribute (in contrast, iiNet is reimbursed for complying with requests for subscriber information from law enforcement agencies).

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89. Mr Dalby considered that acting on the AFACT letters in the way apparently required by AFACT would likely increase iiNet’s exposure to contractual liability to its subscribers. There is potential for significant personal and/or commercial disruption in the event of disconnection and if iiNet started terminating its subscribers accounts based on the AFACT letters, subscribers would make complaints to the Telecommunications Industry Ombudsman and iiNet could be sued. Up to 10 November 2009, iiNet would not have been able to deal with or deflect complaints by explaining the DtecNet method.

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90. The difficult issues concerning how the range of possible steps identified by the appellants might operate, including the nature of the evidence to be provided to ISPs, the costs involved in administering notices and appropriate due process for consumers have recently been considered by the legislature in the United Kingdom and New Zealand: see the *New Zealand Copyright (Infringing File Sharing) Amendment Act 2011* and regulations made thereunder and see the United Kingdom *Digital Economy Act 2010*.

91. There is no indication in the Copyright Act that ISPs should bear the costs of protecting the appellants’ property interests. To the contrary, in defining an industry code established under s 116AB of the *Copyright Act 1968*, *Copyright Regulations 1969* reg 20B provides that technical measures imposed by the code must not impose

<sup>147</sup> For example, see primary judgment [199], Emmett J [100], Jagot J [311];<sup>147</sup> Malone #2 at para 11, Dalby at paras 26-27; Malone XXN T769.12-23; Malone XXN T756.1-12; Exhibit A2, tab 123, pp 1-2, 4; Dalby at para 86; Dalby XXN T1023.7-1024.28; Exhibit SJD-1 p 79; primary judgment [430 (primary judgment [435])<sup>147</sup>). All required expenditure in circumstances where iiNet does not profit from the infringements: see above.

substantial costs of carriage service provided or substantial burdens on their systems or networks.

*Interveners*

92. To the extent that the interveners make the same submissions as the appellants, these are referred and responded to above. iiNet further submits as follows.
93. ARIA erroneously submits (**ARIAS 28**) that iiNet accepted at trial that it had knowledge of “the infringements” from as early as 2005, and that Mr Malone admitted to this knowledge in newspaper interviews in January 2006. Those factual points were never put by the appellants. The reference to p 800 seems misplaced: that page of the first instance transcript (**ARIAS fn 19**) does not relate to any newspaper interview.
94. The submission at **APRAS 16** regarding s 115(3) is wrong and the provision is misquoted. Section 115(3) states that: “at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright (emphasis added).” APRA quotes this as though it says: “the defendant was not aware, and had no reasonable grounds for suspecting the infringement”. The section does not offer some protection to defendants who have no knowledge of the acts of infringement, rather, it offers some protection to those who have no knowledge that the acts were in fact infringing. An alleged authoriser who has no knowledge of the acts of infringement does not need such protection. Section 39(2)(a) similarly reads: “that he or she was not aware, and had no reasonable grounds for suspecting, that the performance would be an infringement of the copyright”.
95. The relevant inquiry under s 101(1A)(a) is not simply “*as to the existence of an unexercised power to prevent* (emphasis added)” (**APRAS 18**). Section 101(1A)(a) does not say “the existence of the person’s power to prevent”, it says “the extent (if any) of the person’s power to prevent”. No authority is given for the submission (**APRAS 20**) that in considering the nature of the relationship, an implicit analysis is “*what might have been done, but was not done, within that relationship*”.
96. APRA submits that “*in cases where there are multiple infringing acts, what matters is the power to prevent some or all of the infringing acts, and by so doing to reduce the prevalence of infringement*” (**APRAS 23(a)**), and APRA submits that a qualitative assessment is required to determine how easy or difficult it would be to exercise a power to prevent: **APRAS 23(b)**. iiNet agrees; that supports iiNet’s case.
97. APRA submits that “*Evidence of the capacity and relative ease with which a person can make changes to modern technology*” is relevant to the inquiry under s 101(1A)(c) (**APRAS 24**), and refers to the steps the respondents took in *Kazaa*. No submissions are made with respect to iiNet’s reasonable steps, but in any event, the facts of *Kazaa* were very different from this case.
98. APRA incorrectly submits at **APRAS 27** that Emmett and Nicholas JJ did not undertake a broad inquiry of all the circumstances, including the s 101(1A) factors and refer only to paragraphs [210]-[211] and [781]-[783] of their Honours’ judgments. Emmett J in fact considers authorisation at [171]-[211]; Nicholas J at [693]-[798].<sup>150</sup>

<sup>150</sup>(2011) 275 ALR 1 at 40-49 [171]-[211], 154-76 [693]-[798].

99. MEAA and SAG’s submission (MEAAS 9.1.2) that Emmett J introduced a requirement proof of infringement not found in the Act that has the effect of “[erecting] *barriers to effective enforcement of copyright that only the largest and best resourced copyright owners can hope to overcome*” is misconceived. Emmett J has not introduced a requirement; his Honour has said that in these circumstances (thousands of detailed allegations and a process leading to termination of accounts) the information must be verified. Nicholas J correctly states: “*Nor should it be up to the respondent to seek out this information from a copyright owner who chooses not to provide it in the first place*”: [764].<sup>151</sup>

## 10 Part VII: iiNet’s argument on its notice of contention

100. At [176] Emmett J says that iiNet “sought to assure its customers that it would not act on the infringement notices” and “[T]hat conduct is capable of constituting at least tacit approval”. His Honour gives no reference to the evidence for that “assurance”. Perhaps it is a reference to the November 2008 press release. If so, see above. iiNet did not offer any such assurance. It did not offer tacit approval. Similarly, Emmett J’s description of iiNet as having “demonstrated a dismissive and ... contumelious attitude to the complaints of infringement” ought to be set aside; as Nicholas J points out at [770] the use in internal communications of colourful language does not lead to that conclusion; and as his Honour points out in the next paragraph one must also accept the primary judge’s unchallenged acceptance of Mr Malone and Mr Dalby, including that iiNet did not approve of its users infringing copyright.
101. At [182] Emmett J says that among measures available to iiNet was “blocking sites or ports”. That was not so: see primary judgment [459] and Nicholas J [735]-[745].
102. At [193] Emmett J, in discussing s 101(1A)(a) and (c) says that by reason of the contractual and technical relationship between iiNet and its customers “*iiNet had the capacity to control the use of its services by its customers*”. However, as Nicholas J points out at [722] iiNet had no direct control over what material is used.
103. iiNet provides through its Freezone an avenue for, and encouragement of, legitimate use of material. See above. It is appropriate to look at the overall impression that iiNet conveys to its customers into account when considering whether or not it has extended an “invitation” to infringe. If one is going to assume – there was no evidence on the question – as Emmett and Jagot JJ did ([188]-[188]; [408]) that a warning would act on the minds of some users to deter them from copying, it is logical and rational to assume that placing accessible legitimate material before them would equally deter them. Emmett and Jagot JJ’s rejection ([203]; [445]) of that factor as bearing on authorisation was misplaced. Three of the studio witnesses and Mr Gane gave evidence that the provisions of legitimate material online would reduce the consumption of copyright infringing material: primary judgment [187]. The primary judge found that Freezone, which is a net cost to iiNet, would reduce infringements to some effect: primary judgment [188], [503].

### *Section 112E of the Copyright Act 1969 (Cth)*

104. There is no dispute that iiNet is a CSP (CSP) within the meaning of s 112E. The “*facilities*” that iiNet provides “*for making, or facilitating the making of, a*

<sup>151</sup>(2011) 275 ALR 1 at 170 [764].

*communication*” may be identified as all of the physical equipment and facilities by which it provides services as an internet service provider (ISP).<sup>152</sup>

105. In *Project Blue Sky Inc v Australian Broadcasting Authority*,<sup>153</sup> McHugh, Gummow, Kirby and Hayne JJ cited with approval *Commonwealth v Baume*<sup>154</sup> where Griffith CJ held that it was “a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent”.
106. The primary judge held that the only circumstance when the provision could have an effect is “when the person merely provides the facilities for the making of the infringement *and does nothing more*” (at [574]),<sup>155</sup> an approach he considered himself bound (at [575])<sup>156</sup> to apply by reason of the Full Court’s earlier decision in *Cooper v Universal Music Australia Pty Limited*.<sup>157</sup>
107. The Full Court in this case interpreted s 112E as a provision of very limited (if any) application, perhaps enacted out of an abundance of caution. Jagot J concluded that if it cannot be said that the person provided the facilities and another person used them, and no more, the conditions are not satisfied and the section is not available.<sup>158</sup> Nicholas J considered that s 112E made clear what is the position under s 101(1) in any event, namely that it cannot be inferred that a person authorises copyright infringement merely because he or she provides another person with communication facilities used by the other person to infringe copyright.<sup>159</sup> Emmett J emphasised the presence of the word “*merely*” in s 112E, and interpreted the section to mean that a service provider will not be liable merely by providing the facilities used by an infringer.<sup>160</sup>
108. iiNet contends that the Full Court erroneously failed to decide that merely because other persons used facilities provided by iiNet for making, or facilitating the making of, a communication to engage in acts comprised in the appellants’ copyright, in the circumstances of this case iiNet is not taken to have authorised any infringement of copyright by reason of s 112E. That is, on the proper construction of the section, the conduct of iiNet revealed by the evidence in this case did not extend beyond the mere use by another person of the facilities provided by iiNet, for the following reasons.
109. First, the provision of facilities to which s 112E refers must be taken to include all the usual incidents of the operation of the business of a CSP. That includes, among other things, the establishment of customer accounts, the entry into contractual and administrative arrangements with customers, the development of different communication services and plans, and communicating with customers about their accounts and use of the services provided. Secondly, there is no sufficient statutory warrant for the conclusion that iiNet’s conduct falls outside the area of application of the section if, in the course of the facilitation by iiNet of communications on behalf of its customers, iiNet comes to know or suspect of the use of its facilities for purposes

<sup>152</sup> Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 58.

<sup>153</sup> (1998) 194 CLR 355 at 382.

<sup>154</sup> (1905) 2 CLR 405 at 414.

<sup>155</sup> (2010) 263 ALR 215 at [574]. Emphasis in original.

<sup>156</sup> (2010) 263 ALR 215 at [575].

<sup>157</sup> (2006) 156 FCR 380 (FCAFC).

<sup>158</sup> (2011) 275 ALR 1 at [460] and [452]-[465] generally.

<sup>159</sup> (2011) 275 ALR 1 at [795] and [784]-[797] generally.

<sup>160</sup> (2011) 275 ALR 1 at [222], [228] and see [212]-[218] generally. That approach to the section appears to transpose the word “*merely*” from a description of the use by the infringer to a description of the provision of facilities.

that may involve the infringement of copyright (by some only of its customers, and not in advance of any particular infringing customer and use). Thirdly, iiNet's proposed construction is consistent with the apparent purpose of the provision. Section 112E was introduced into the Act as part of the Digital Agenda reforms, the relevant objects of which are set out in s 3(a)-(e) *Copyright Amendment (Digital Agenda) Act 2000*. Those objects, and the terms of s 112E, suggest that it is a beneficial provision and should be interpreted to give the fullest relief to a provider of facilities that the fair meaning of its language will allow.<sup>161</sup> Fourthly, any uncertainty in determining when a CSP provides facilities (within the meaning of s 112E, including all the usual incidents of its business in providing such facilities) is no more problematic than the uncertainty involved in the competing interpretation, by which an assessment must be made whether the CSP has acquired a sufficient knowledge or suspicion of the infringing acts to take it outside the operation of the section. Fifthly, iiNet's proposed construction recognises that a CSP might so conduct itself that it becomes liable for authorisation of an infringement of copyright by use by another person of its facilities. That might occur where the conduct of the CSP went beyond that which is within the ordinary scope of the provision of the facilities in question. Sixthly, the approach taken by the Full Court of the Federal Court in *Cooper* is consistent with the construction contended for by iiNet.<sup>162</sup> The facts of *Cooper* were overwhelming in demonstrating not only authorisation of copyright infringement by the ISP, but conduct far beyond the ordinary scope of the provision of web hosting and internet access facilities.

110. For those reasons, the Full Court in this case should have concluded that in the circumstances of this case iiNet is not taken to have authorised any infringement of copyright, by reason of s 112E of the *Copyright Act 1968*.

*Part 13 of the Telecommunications Act 1997 (Cth)*

111. Relevant provisions from Part 13 of the *Telecommunications Act 1997 (Cth)* (**Telco Act**) are reproduced in Annexure A to these submissions.

112. iiNet contends<sup>163</sup> that the Full Court erroneously failed to decide that (a) the use or disclosure by iiNet of the AFACT information, the score information and the rumba information (as defined in the Full Court at [230] and [479] and by the primary judge at [509]) was prohibited by s 276 of the Telco Act and none of the exceptions in Division 3 of Part 13 of the Telco Act applied; and (b) by reason of that prohibition, iiNet did not have "*the power to prevent*" an infringement of copyright by an iiNet user by use or disclosure of that information (within the meaning of s 101(1A)(a) of the *Copyright Act 1968*) and it would not have been "*reasonable*" for iiNet to take any steps inconsistent with that prohibition (within the meaning of s 101(1A)(c) of the *Copyright Act 1968*).

113. The issues at the trial about the meaning and effect of Part 13 of the Telco Act arose in the following context. The appellants claimed that there were various steps that iiNet could and should have taken once iiNet had been provided with the allegations in the AFACT Notifications, and that because iiNet did not take those steps it should be

<sup>161</sup> *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384, approved in *Waugh v Kippen* (1986) 160 CLR 156 at 164. See also *Zangzinchai v Millanta* (1994) 53 FCR 35 at 42-3 and *Comcare Australia v Pires* (2005) 143 FCR 104 at [47]. See also the Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* pp 15, 58.

<sup>162</sup> *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at [1], [57]-[60] and [170].

<sup>163</sup> Notice of Contention, para 3.

found to be liable for authorising the infringement of copyright.<sup>164</sup> The proper determination of that claim raised the question whether those suggested or hypothetical steps were lawful, technically possible and/or reasonable. iiNet relied, as one of its answers to the claim,<sup>165</sup> on its obligations to comply with Part 13 of the Telco Act, which in s 276 enacts a criminal offence for certain use or disclosure of protected information by a CSP or its employees.<sup>166</sup>

114. It is, of course, necessary to interpret a statutory provision in its context, which includes consideration of the mischief which one may discern (using legitimate means) the statute was intended to remedy. Consideration of the inconvenience or improbability of result may also assist a court in preferring to a literal meaning an alternative construction that is reasonably open and more closely conforms to that legislative intent.<sup>167</sup> Care is required in the application of those general principles to circumstances in which a statute imposes a broadly stated prohibition, breach of which is a serious criminal offence, and a series of carefully delineated statutory exceptions. An overly enthusiastic application of the “*purpose*” of a particular exception is likely to subvert the general prohibition.
115. Another relevant general consideration is that the “*use*” of information by iiNet (that the appellants say is not prohibited by s 276) may be one thing; but the prospect of permitted “*disclosure*” by iiNet of that information (to a DtecNet agent? to the appellants directly? to the police?) may be quite another, which deserves attention in any consideration of the consequences or effects of a particular statutory construction in the context of the general purpose of Part 13, namely the protection of communications.
116. *The operation of s 276 of the Telco Act* The primary judge identified the information in question in three categories.<sup>168</sup>
117. The evidence was that the AFACT information included, in addition to “*IP addresses and times*”, information about the hash value of the downloaded file, the identity of the motion picture or television program involved, the size and extent of the downloaded file and other data.<sup>169</sup> The evidence also was that (a) the “*score*” database was the database by which iiNet recorded the assignment of iiNet IP addresses. The database had an interface that could find (upon the insertion of IP address, date and time) the user name of the user to which that address was then allocated;<sup>170</sup> and (b) the “*rumba*” database was iiNet’s billing system and database, which contained not only the contact details of its subscribers but also subscription plan details, payment details and history, and other personal particulars.<sup>171</sup>
118. The primary judge concluded that the use or disclosure by iiNet of the AFACT information, the score information and/or the rumba information in the manner contemplated by the appellants was prohibited by s 276 of the Telco Act.<sup>172</sup> The

<sup>164</sup> Further Amended Statement of Claim, paras 63(d); Applicants’ Particulars, paras 79 to 96 (provided as particulars of paras 63 and 64 of the Further Amended Statement of Claim).

<sup>165</sup> Amended Defence, para 63(o); Respondent’s Supplementary Particulars.

<sup>166</sup> As to penalty see s 4B(3) see also the *Crimes Act 1914* (Cth)

<sup>167</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

<sup>168</sup> (2010) 263 ALR 215 at [509], repeated in (2011) 275 ALR 1 at [230] and [479].

<sup>169</sup> (2010) 263 ALR 215 at [97] and [100].

<sup>170</sup> Malone #2, para 8.

<sup>171</sup> Malone #2, paras 8-9. The explanation of the sign up process for a subscription to iiNet services indicates the character and extent of the information that is provided by a subscriber and recorded in the rumba database: Malone #1, paras 78-100.

<sup>172</sup> (2010) 263 ALR 215 at [526], and at [513]-[526] generally.

following findings<sup>173</sup> were material to that conclusion and were not disturbed in the reasons of the Full Court: it was common ground that iiNet is an “eligible person” within the meaning of s 271; were any of the AFACT information, score information or rumba information sought to be put to the purpose of notifying or terminating subscriber accounts, that would be relevant “use” of that information for the purpose of s 276; it was common ground that the AFACT information was of the character described in s 276(1)(a)(i), (iii) and (iv); the score information was of the character described in s 276(1)(a)(i), (iii) and (iv) and the rumba information was of the character described in s 276(1)(a)(iv); it was common ground that the score information and the rumba information came into iiNet’s knowledge or possession in connection with iiNet’s business as a CSP, satisfying s 276(1)(b)(i); all three sources of information must be used “in order to bring about the result the applicants demand”.

119. Whereas the primary judge determined that the AFACT information clearly came into iiNet’s knowledge or possession in connection with iiNet’s business and thereby fell within s 276(b)(i), the Full Court considered that s 276(1)(b) was not satisfied in respect of that category of information.<sup>174</sup> iiNet contends<sup>175</sup> that the Full Court erred in that conclusion for the following reasons.

120. First, the text of s 276(1)(b)(i) is not limited to information or a document that is confidential or that is not publicly available. The prohibition is generally expressed and applies to “any information or document”.<sup>176</sup> Secondly, the gist of the AFACT Notifications is the repeated assertion that iiNet, as it carries on its business, wrongly permits users of iiNet services to make movies available online using BitTorrent. The AFACT Notifications invite iiNet to take some sort of action – that is, to adapt or change the way it carries on the business of providing the service of connecting users to the Internet. The information provided in the AFACT Notifications is, therefore, very clearly provided to iiNet “in connection with” its business as a CSP. Thirdly, even if one were to adopt the criterion that found favour in the Full Court to differentiate protected information from other information – information or a document acquired by virtue of the eligible person being in a position peculiarly to acquire information of that type<sup>177</sup> – the AFACT Notifications are of that character. The collection of asserted facts and opinions in the AFACT Notifications were provided to iiNet because of its peculiar position as a CSP. Fourthly, the Full Court’s identification of apparently inconvenient or absurd consequences arising from iiNet’s proposed construction is not compelling. As to Emmett J’s example,<sup>178</sup> information published in a daily newspaper would not, without more, be information that came to iiNet’s knowledge “in connection with” iiNet’s business as a CSP. As to Jagot J’s particular example,<sup>179</sup> it was speculative for her Honour to presume that iiNet committed an offence in providing the AFACT Notifications to the Western Australian police, without considering (for example) iiNet’s ability to invoke the exception in s 280(1)(b) of the Telco Act or ss 177 and/or 178 of the *Telecommunications (Interception and Access) Act 1979* (or some other provision in Chapter 4 of the latter Act). Her Honour’s more general consideration, namely the suggested absurdity of exposing persons to criminal sanctions for use of information

<sup>173</sup> (2010) 263 ALR 215 at [512]-[525].

<sup>174</sup> (2011) 275 ALR 1 at [235]; [486]-[487]; [799].

<sup>175</sup> Notice of Contention, para 4.

<sup>176</sup> See also Primary judgment [518]-[526].

<sup>177</sup> (2011) 275 ALR 1 at [235]; Jagot J at [485(4)].

<sup>178</sup> Emmett J at [235].

<sup>179</sup> Jagot J at [486].

from third party sources that is provided to the eligible person,<sup>180</sup> identifies a very wide range of potential circumstances in respect of which it is impossible to conclude that in each instance the consequence of attachment of criminal liability is absurd.

121. Accordingly, the AFACT Notifications satisfy the statutory description in s 276(1)(b) of the Telco Act and the prohibition in s 276 applies to use or disclosure of the AFACT information.

*The relevant exceptions in the Telco Act*

122. The primary judge concluded that the use or disclosure of relevant information was authorised by two of the exceptions in Division 3 of Part 13, namely s 279 (“*Performance of person’s duties*”) and s 289 (“*Knowledge or consent of person concerned*”). In the Full Court, their Honours were not of a uniform view in relation to the application of the relevant exceptions.
123. *The operation of s 279 of the Telco Act* The disclosure or use of the information by iiNet was not authorised by s 279 of the Telco Act because s 279(1) provides for an exception that operates only in respect of the employees or contractors of a CSP, not of the CSP itself. Had iiNet used the AFACT information, the score information and the rumba information in the manner contemplated, no doubt a number of employees would have been involved in the process. Section 279 provides an exception for such employees from personal criminal liability, to the extent that they used the information in the performance of their duties as an employee. However, as Jagot J correctly held,<sup>181</sup> the exception does not excuse or provide an exception for iiNet itself. That is, the exception does not relieve iiNet from corporate criminal liability.
124. *The operation of s 280 of the Telco Act* Section 280(1)(b) lifts the prohibition in s 276 if “*the disclosure or use is required or authorised by or under law*”. The primary judge concluded that s 280 of the Telco Act did not operate as an exception in the circumstances of this case.<sup>182</sup> That conclusion should be preferred to the determination of Emmett J and Jagot J in the Full Court.<sup>183</sup> The Full Court considered two sections - ss 101(1A) and 116AH(1) of the *Copyright Act 1968* – advanced by the appellants as provisions that require or authorise the disclosure or use of the information in question.
125. Section 101(1A) identifies the matters that a court must take into account when determining whether or not a person has authorised an infringement of copyright and it does not, expressly or by inference, require or authorise the disclosure or use of information of the character described in s 276 of the Telco Act.
126. Section 116AH(1) is one of the safe harbour provisions by which the *Copyright Act 1968* provides for a limitation on remedies against a CSP in copyright infringement proceedings. Emmett J and Jagot J considered that the existence of a provision providing a conditional limitation on the relief available against a CSP must be taken to authorise disclosure or use by the CSP of information and documents in its possession, so as to bring itself within the provisions.<sup>184</sup> However, the inferred

<sup>180</sup> Jagot J at [486].

<sup>181</sup> Jagot J at [489]-[490]. iiNet contends that Emmett J erred in finding that the use or disclosure by iiNet of the information was within the exception in s 279 of the Telco Act (at [238]-[241]).

<sup>182</sup> Primary judgment [533]-[539].

<sup>183</sup> Emmett J at [242]-[243]; Jagot J at [491]-[497].

<sup>184</sup> Emmett J at [243]; Jagot J at [493]-[497].

authorisation has an insufficient basis in the statute. The safe harbour provisions are expressed in terms that do not themselves authorise or require any particular conduct to have occurred, let alone the specific conduct prohibited by s 276 of the Telco Act. Section 280(1)(b) of the Telco Act should not be construed so loosely as to permit a CSP to use protected information simply because, for example, it is convenient in the implementation of a policy that the CSP itself writes and adopts.<sup>185</sup>

- 10 127. *The operation of s 289 of the Telco Act* iiNet contends that the Full Court erred in finding that the use or disclosure of the information was within the exception in s 289(a) and (b) of the Telco Act.<sup>186</sup> The contrary conclusion is correct, for the reasons given by Emmett J.<sup>187</sup>
- 20 128. The exception in s 289 applies only to one of the three relevant classes of protected information and documents referred to in s 276. A comparison of the terms of s 289(a) with the categories in s 276(1)(a) shows that the exception is directed to the category of information described in s 276(1)(a)(iv). The words in s 276(1)(a)(iv) should not be given a construction that renders the categories in subsections (1)(a)(i), (ii) and (iii) obsolete or superfluous. While there may be some instances of overlap (that is, information that is properly described by more than one category in s 276(1)(a)), the statutory enumeration of different categories in s 276 requires recognition and application in the construction of s 289(a). iiNet contends that the AFACT information included information about the ‘contents or substance of a communication’ carried by iiNet and the ‘carriage services supplied’ by iiNet, as described above, that falls outside the meaning of s 289(a). To that extent, the exception was not capable of being engaged in the circumstances of this case.
129. Section 289(b)(ii) of the Telco Act operates if the ‘other person’ “*has consented to the disclosure, or use, as the case requires, in the circumstances concerned*”. The words “*in the circumstances concerned*” cannot be left out of account in the proper construction of the subsection. In its natural and ordinary meaning, the subsection requires the identification of a particular or specific consent directed to the circumstances of the contemplated use or disclosure.
- 30 130. Considerations of statutory context support that conclusion. The list of exceptions in Division 3 includes, in s 290, an exception in cases of “*implicit consent*” (as the heading to s 290 refers to it), that is where it might reasonably have been expected that the sender and recipient “*would have consented*” to the disclosure or use if they had been aware of it. The structure of Division 3 is to deal first with cases of consent to use in the circumstances concerned (s 289) and then with cases of implicit consent (s 290). That structure and context confirms that the consent to which s 289 refers is an explicit and specific consent.
- 40 131. The question, then, is whether any part of the Customer Relationship Agreement (CRA) between iiNet and its customers constitutes consent to the use by iiNet of all of the relevant information in the circumstances concerned.
132. The first reason that clause 12.3(d) of the CRA does not amount to consent for the purposes of s 289(b)(ii) is that, whether the purposes enumerated in clause 12.3 of the CRA are read broadly or narrowly, the only information permitted to be used or

<sup>185</sup> See s 116AH(1) of the *Copyright Act 1968*, at item 1(1) of the table.

<sup>186</sup> Jagot J at [498]-[510]; Nicholas J at [799].

<sup>187</sup> Emmett J at [248]-[251].

disclosed by clause 12.3 is “*Personal Information*”. That is information that either reveals the identity of the subscriber or from which the identity of the subscriber can reasonably be ascertained. It is immediately apparent that at least the AFACT information includes information that falls outside the scope of the definition of “*Personal Information*” in the CRA. For example, the AFACT information includes (i) the identification of the motion picture or television show, and some information about the extent to which it was made available and downloaded, each of which reveals the substance or content of the communication carried by iiNet; and (ii) the fact that carriage services have been supplied to a person at a particular time or times. The use by iiNet of that information would be outside the agreement in clause 12.3 of the CRA because it is outside the meaning of “*Personal Information*”.

- 10 133. The second, and related, reason that clause 12.3(d) of the CRA does not amount to consent for the purposes of s 289(b)(ii) is that the AFACT information might well record information about the activities of a third person who uses an iiNet’s subscriber’s account, but who is not the subscriber who agreed to the CRA. In that situation – which it must be inferred occurs commonly – it is clear that the information relates to the affairs of another person but its use is not something to which the user of the service has given consent.
- 20 134. The third reason that clause 12.3(d) of the CRA does not amount to consent for the purposes of s 289(b)(ii) is that the terms of the purpose identified in clause 12.3(d) are insufficiently specific to permit the conclusion that the subscriber has given consent to use of information in the circumstances concerned in this case. Where the circumstances are unusual, as here,<sup>188</sup> the Court would be particularly astute to give content to all the words of the statute and require a clear demonstration that what is said to be “*consent*” is in truth consent to use or disclosure in the circumstances concerned.
- 30 135. The CRA reflects an agreement, at a high level of generality, that the customer will not use the services provided by iiNet illegally or in a way that infringes the rights of other persons.<sup>189</sup> The CRA also provides, at an equally high level of generality, that iiNet may (a) “*monitor*” usage of the service and communications over it,<sup>190</sup> and (b) restrict, suspend or cancel the service if the customer breaches a material term or for misuse of the service or if iiNet “*reasonably suspects fraud or other illegal conduct*” by the subscriber or other person.<sup>191</sup>
- 40 136. In that context, agreement to the use of Personal Information for the purpose of iiNet “*administering and managing*” a customer’s internet service cannot reasonably be taken to amount to consent to use of that information in order to suspend or terminate the customer’s account in response to the representations of an agent of rights holders that a user of the customer’s account is infringing the copyright of the rights holders by making films available or downloading them from the internet. Those steps are different from, or at the very least much more specific than, the general administration and management of a customer’s internet account. The consent, such as it is, does not speak to the circumstances concerned.

<sup>188</sup> The primary judge found that “*It cannot be suggested that any subscriber would be aware or be made aware, even by the CRA, that any information would be used against the person’s contractual interests on the basis of the AFACT notices*” (emphasis added): Primary judgment [546].

<sup>189</sup> See clauses 4.1 and 4.2 of the CRA.

<sup>190</sup> See clause 4.4 of the CRA.

<sup>191</sup> See generally clause 14.2 and the notice provision in clause 14.4 of the CRA. The quoted words appear in clause 14.2(j) of the CRA and it is that clause that the primary judge appears to have relied on as the relevant power to suspend or terminate: see Primary judgment [547].

137. For those reasons, s 289 does not provide an exception that would have applied to the conduct of iiNet had it taken the steps advocated by the appellants in response to the AFACT Notifications.

138. *The operation of s 290 of the Telco Act* The primary judge and Emmett J correctly concluded that s 290 did not operate as an exception in the circumstances of this case.<sup>192</sup> It is necessary to appreciate the limited scope of this exception. The words of s 290(a) replicate the words of s 276(1)(a)(i) and the exception only operates in respect of information that relates to the contents or substance of a communication. It is clear that the exception in s 290 does not extend to the disclosure or use of information of the varieties described in s 276(1)(a)(iii) and (iv). Accordingly, the exception in s 290 cannot operate so as to lift from iiNet the prohibition imposed upon it in respect of the use or disclosure of all of the AFACT information, score information and rumba information in the circumstances of this case.

139. In any event, even in the area in which it applies, the exception in s 290 only operates where having regard to all the relevant circumstances, it might reasonably be expected that the sender and the recipient of the communication would have consented to the disclosure or use, had they been aware of it. The relevant circumstances include that each user of the iiNet services (indicated by an IP address and a time and date stamp) has been said by AFACT to have made available copies of movies and thereby infringed the appellants' copyright. It is not reasonable to expect that persons who are prepared to misuse iiNet services for making available infringing copies of cinematograph films would have consented to the use by iiNet of the information it has or is provided with about the contents or substance of their communications. Even in the limited area in which it might otherwise have applied, s 290 has no operation here.

140. Accordingly, the prohibition in s 276 would have operated according to its terms.<sup>193</sup> iiNet could not lawfully have taken the steps for which the appellants contend, so the failure to take those steps cannot constitute the authorisation of infringement of copyright.

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<sup>192</sup> Emmett J at [252]-[254]; Primary judgment [540]-[542]; cf Jagot J at [511]-[514].

<sup>193</sup> This conclusion is also consistent with *Re Telstra* [2000] FCA 682 (Burchett J).

## ANNEXURE A to IINET's OUTLINE OF SUBMISSIONS

### Relevant statutory provisions – Part 13 of the *Telecommunications Act 1997* (Cth)

#### Part 13—Protection of communications

##### Division 1—Introduction

#### 270 Simplified outline

The following is a simplified outline of this Part:

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- Carriers, carriage service providers, number-database operators, emergency call persons and their respective associates must protect the confidentiality of information that relates to:
  - (a) the contents of communications that have been, or are being, carried by carriers or carriage service providers; and
  - (b) carriage services supplied by carriers and carriage service providers; and
  - (c) the affairs or personal particulars of other persons.
- The disclosure or use of protected information is authorised in limited circumstances (for example, disclosure or use for purposes relating to the enforcement of the criminal law).
- An authorised recipient of protected information may only disclose or use the information for an authorised purpose.
- Certain record-keeping requirements are imposed in relation to authorised disclosures or uses of information.

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#### 271 Eligible person

For the purposes of this Part, an *eligible person* is a person who is:

- (a) a carrier; or
- (b) a carriage service provider; or
- (c) an employee of a carrier; or
- (d) an employee of a carriage service provider; or
- (e) a telecommunications contractor; or
- (f) an employee of a telecommunications contractor.

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#### 273 Information

A reference in this Part to *information* includes a reference to opinion.

## Division 2—Primary disclosure/use offences

### 276 Primary disclosure/use offence—eligible persons

#### *Current eligible persons*

- (1) An eligible person must not disclose or use any information or document that:
- (a) relates to:
    - (i) the contents or substance of a communication that has been carried by a carrier or carriage service provider; or
    - (ii) the contents or substance of a communication that is being carried by a carrier or carriage service provider (including a communication that has been collected or received by such a carrier or provider for carriage by it but has not been delivered by it); or
    - (iii) carriage services supplied, or intended to be supplied, to another person by a carrier or carriage service provider; or
    - (iv) the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and
  - (b) comes to the person's knowledge, or into the person's possession:
    - (i) if the person is a carrier or carriage service provider—in connection with the person's business as such a carrier or provider; or
    - (ii) if the person is an employee of a carrier or carriage service provider—because the person is employed by the carrier or provider in connection with its business as such a carrier or provider; or
    - (iii) if the person is a telecommunications contractor—in connection with the person's business as such a contractor; or
    - (iv) if the person is an employee of a telecommunications contractor—because the person is employed by the contractor in connection with its business as such a contractor.

#### *Former eligible persons*

- (2) A person who has been an eligible person must not disclose or use any information or document that:
- (a) relates to a matter mentioned in paragraph (1)(a); and
  - (b) came to the person's knowledge, or into the person's possession:
    - (i) if the person was a carrier or carriage service provider—in connection with the person's business as such a carrier or provider; or
    - (ii) if the person was an employee of a carrier or carriage service provider—because the person was employed by the carrier or provider in connection with its business as such a carrier or provider; or
    - (iii) if the person was a telecommunications contractor—in connection with the person's business as such a contractor; or
    - (iv) if the person was an employee of a telecommunications contractor—because the person was employed by the contractor in connection with its business as such a contractor.

*Offence*

- (3) A person who contravenes this section is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 2 years.

Note 1: This section is subject to the exceptions in Division 3 of this Part and in Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

Note 2: See also sections 4AA and 4B of the *Crimes Act 1914*.

*Scope of subsection (1)—carriage by means of electromagnetic energy*

- 10 (4) Subparagraphs (1)(a)(i) and (ii) do not apply to a communication that is or has been carried by a carrier or carriage service provider unless the carriage was by means of, is by means of, or is proposed to be delivered by means of, guided and/or unguided electromagnetic energy.

**Division 3—Exceptions to primary disclosure/use offences****Subdivision A—Exceptions****279 Performance of person's duties**

- (1) Section 276 does not prohibit a disclosure or use by a person of information or a document if:
- (a) the person is an employee of:
    - (i) a carrier; or
    - (ii) a carriage service provider; or
    - (iii) a telecommunications contractor; and
  - (b) the disclosure or use is made in the performance of the person's duties as such an employee.

...

**280 Authorisation by or under law**

- (1) Division 2 does not prohibit a disclosure or use of information or a document if:
- (a) in a case where the disclosure or use is in connection with the operation of an enforcement agency—the disclosure or use is required or authorised under a warrant; or
  - (b) in any other case—the disclosure or use is required or authorised by or under law.

- (1A) In applying paragraph (1)(a) to the Australian Commission for Law Enforcement Integrity, the reference in that paragraph to the operation of an enforcement agency is taken to be a reference to the performance of the functions of the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*).

- (2) In this section:

**enforcement agency** has the same meaning as in the *Telecommunications (Interception and Access) Act 1979*.

### 289 Knowledge or consent of person concerned

Division 2 does not prohibit a disclosure or use by a person of information or a document if:

- (a) the information or document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and
- (b) the other person:
  - (i) is reasonably likely to have been aware or made aware that information or a document of that kind is usually disclosed, or used, as the case requires, in the circumstances concerned; or
  - (ii) has consented to the disclosure, or use, as the case requires, in the circumstances concerned.

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### 290 Implicit consent of sender and recipient of communication

Section 276 does not prohibit a disclosure or use by a person if:

- (a) the information or document relates to the contents or substance of a communication made by another person; and
- (b) having regard to all the relevant circumstances, it might reasonably be expected that the sender and the recipient of the communication would have consented to the disclosure or use, if they had been aware of the disclosure or use.

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### 292 Circumstances prescribed in the regulations

- (1) Section 276 does not prohibit a disclosure or use of information or a document in circumstances specified in the regulations.
- (2) Section 277 does not prohibit a disclosure or use of information or a document in circumstances specified in the regulations.
- (3) Section 278 does not prohibit a disclosure or use of information or a document in circumstances specified in the regulations.

### 293 Uses connected with exempt disclosures

- (1) Section 276 does not prohibit a use of information or a document if:
  - (a) the use is made for the purposes of, or in connection with, a disclosure of the information or document by the person; and
  - (b) because of this Division, the disclosure is not prohibited by section 276.
- (2) Section 277 does not prohibit a use of information or a document if:
  - (a) the use is made for the purposes of, or in connection with, a disclosure of the information or document by the person; and
  - (b) because of this Division, the disclosure is not prohibited by section 277.
- (3) Section 278 does not prohibit a use of information or a document if:
  - (a) the use is made for the purposes of, or in connection with, a disclosure of the information or document by the person; and
  - (b) because of this Division, the disclosure is not prohibited by section 278.

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**294 Effect of this Subdivision**

Nothing in this Subdivision limits the generality of anything else in it or in Divisions 3 to 5 of Part 4-1 of the *Telecommunications (Interception and Access) Act 1979*.

SCHEDULE 1

SECOND TO THIRTY-FOURTH APPELLANTS

UNIVERSAL CITY STUDIOS LLLP	PARAMOUNT PICTURES CORPORATION
<b>Second Applicant</b>	<b>Third Applicant</b>
WARNER BROS. ENTERTAINMENT INC	DISNEY ENTERPRISES, INC
<b>Fourth Applicant</b>	<b>Fifth Applicant</b>
COLUMBIA PICTURES INDUSTRIES, INC	TWENTIETH CENTURY FOX FILM CORPORATION
<b>Sixth Applicant</b>	<b>Seventh Applicant</b>
PARAMOUNT HOME ENTERTAINMENT (AUSTRALASIA)	BUENA VISTA HOME ENTERTAINMENT, INC.
<b>Eighth Applicant</b>	<b>Ninth Applicant</b>
TWENTIETH CENTURY FOX FILM CORPORATION (AUSTRALIA) PTY LIMITED	UNIVERSAL PICTURES (AUSTRALASIA) PTY LTD
<b>Tenth Applicant</b>	<b>Eleventh Applicant</b>
VILLAGE ROADSHOW FILMS(BVI) LTD	UNIVERSAL PICTURES INTERNATIONAL B.V
<b>Twelfth Applicant</b>	<b>Thirteenth Applicant</b>
UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP	RINGERIKE GMBH & CO KG
<b>Fourteenth Applicant</b>	<b>Fifteenth Applicant</b>
INTERNATIONALE FILMPRODUKTION BLACKBIRD VIERTE GMBH & CO KG	MDBF ZWEITE FILMGESELLSCHAFT MBH & CO KG
<b>Sixteenth Applicant</b>	<b>Seventeenth Applicant</b>
INTERNATIONALE FILMPRODUKTION RICHTER GMBH & CO KG	NBC STUDIOS, INC
<b>Eighteenth Applicant</b>	<b>Nineteenth Applicant</b>

DREAMWORKS FILMS L.L.C.

**Twentieth Applicant**

TWENTIETH CENTURY FOX HOME  
ENTERTAINMENT INTERNATIONAL  
CORPORATION

**Twenty-second Applicant**

PATALEX III PRODUCTIONS LIMITED

**Twenty-fourth Applicant**

SONY PICTURES ANIMATION INC

**Twenty-sixth Applicant**

SONY PICTURES HOME  
ENTERTAINMENT PTY LTD

**Twenty-eighth Applicant**

GH THREE LLC

**Thirtieth Applicant**

WARNER BROS ENTERTAINMENT  
AUSTRALIA PTY LTD

**Thirty-second Applicant**

SEVEN NETWORK (OPERATIONS)  
LIMITED

**Thirty-fourth Applicant**

WARNER BROS INTERNATIONAL  
TELEVISION DISTRIBUTION INC

**Twenty-first Applicant**

WARNER HOME VIDEO  
PTY LTD

**Twenty-third Applicant**

LONELY FILM PRODUCTIONS  
GMBH & CO KG

**Twenty-fifth Applicant**

UNIVERSAL STUDIOS  
INTERNATIONAL B.V.

**Twenty-seventh Applicant**

GH ONE LLC

**Twenty-ninth Applicant**

BEVERLY BLVD LLC

**Thirty-first Applicant**

TWENTIETH CENTURY FOX HOME  
ENTERTAINMENT LLC

**Thirty-third Applicant**