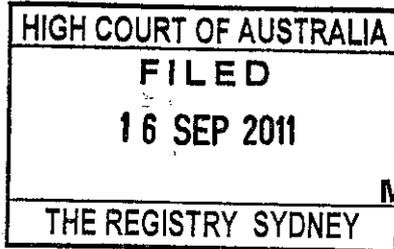


BETWEEN: **ROADSHOW FILMS PTY LIMITED (ACN 100 746 870)**
AND 32 OTHERS
Appellants

and

IINET LIMITED (ACN 068 628 937)
Respondent

**MEDIA, ENTERTAINMENT AND ARTS ALLIANCE AND
SCREEN ACTORS GUILD**
Interveners



20 **INTERVENERS' SUBMISSIONS IN SUPPORT OF INTERVENTION, AND UPON
THE APPEAL**

Part I: Suitable for publication

1. The interveners certify that this submission is in a form suitable for publication on the Internet.

Part II: Basis of intervention

2. The Media, Entertainment and Arts Alliance ("MEAA") and Screen Actors' Guild ("SAG") seek leave to intervene in the appeal, or alternatively to be
30 heard, together, as *amicus curiae*. They seek to make submissions in support of the Appellants.
3. The MEAA is the union and professional association for those involved in the media, entertainment, sports and arts industries. It was formed from, inter alia, the former Actors Equity and Australian Theatrical & Amusement Employees Association and is the trade union representing employees and free-lancers engaged in the film industry, including performers.

Filed on behalf of the Media Entertainment and Arts Alliance and Screen Actors Guild
on 16 September 2011 by:

BANKI HADDOCK FIORA Tel (02) 9266 3400 Fax (02) 9266
SOLICITORS 3455

Level 10, 179 Elizabeth Street Email haddock@bhf.com.au

Sydney, NSW 2000 Reference Kate Haddock

4. The SAG is a union established and based in the United States. It represents about 125,000 actors working in film, television and other media.
5. Members of the MEAA and SAG include almost all actors employed by the Appellants or by production companies that supplied the Appellants with the productions which are the subject of these proceedings. Members of MEAA and of SAG have both direct and indirect interests in the copyright in films in which they appear. Directly, they may be the owners of copyright pursuant to Part IV of the *Copyright Act* or the holders of rights in performances arising under Part XIA¹. Indirectly, and more commonly, standard employment contracts in the film production industry provide that actors may be paid a 'residual' on, for example, sales of DVDs, television screenings, digital sales or pay-per-view download services.
6. MEAA acts as the representative of its members in collecting and distributing residuals to its actor members.

Part III: Why leave should be granted

7. Unlike the Appellants, MEAA and SAG are not-for-profit industrial organisations representing the interests of thousands of individual workers engaged in the film and television production industries. Although as administrators of copyright-based residual royalties, and representatives, in some cases, of owners of copyright or rights in performances, the interests of MEAA and SAG have much in common with those of the Appellants, they are also distinct.

¹ In the class of copyright productions in suit in these proceedings – feature films intended for theatrical release – direct ownership of copyright by performers is not common, and does not arise in either of the examples addressed in the interveners' evidence. That evidence shows that all copyrights are usually assigned to the producer, in consideration for, in part, the residual rights next described.

Part IV: Applicable provisions and regulations

8. The interveners adopt the statement of relevant provisions in Annexure 1 to the Appellants' submissions, and agree that they were in force at all relevant times, and remain in force, in the form there set out.

Part V: Submissions

9. The interveners wish to address submissions to the issue of the necessary level of knowledge of a respondent to support a finding of authorisation, and to the interaction between knowledge and "reasonableness". The majority in the Full Court, have:

- 10 9.1.1. Mistaken the role played by "reasonableness" of potential preventative steps under s 101 (1A) (c) of the *Copyright Act*, allowing that requirement to colour the court's approach to other issues;
- 9.1.2. Introduced (particularly per Emmett J) a requirement that the copyright owner prove to the ISP that particular acts of infringement have occurred, before proceeding to consider whether the ISP, by its inaction, should be found to have authorised those acts. That is both to introduce a requirement not found in the Act, and to erect barriers to effective enforcement of copyright that only the largest and best resourced copyright owners can hope to overcome;
- 20 9.1.3. (Again, particularly per Emmett J) determined that the full cost of reasonable steps to limit or prevent infringement of copyright by unauthorised file-sharing must fall on the copyright owner, rather than falling on or being shared by the ISP; and
- 9.1.4. Reversed the true test, asking whether it was not unreasonable for the Respondent "[to fail] to take steps to issue warnings or terminate or suspend accounts" (per Nicholas J at [783]) rather than asking whether those were reasonable steps that were available to the Respondent.

10. The concept of “reasonable steps” appears to originate in the decision of Gibbs J in *Moorhouse v University of NSW* (1975) 133 CLR 1 at 13, although there had been similar considerations in earlier cases. His Honour there said:

10 ... a person who has under his control the means by which an infringement of copyright may be committed... and who make it available to other persons, knowing or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to its legitimate purpose, would authorize any infringement that results from its use.

11. The proper construction of Gibbs J’s use of “reasonableness” in this passage, is that his Honour separates the question of knowledge, and the question of the reasonableness of steps. That is to say, a person is not liable for authorisation unless they satisfy each of three separate tests: that they make available the means by which infringement may be committed; know or have reason to suspect that it is likely to be so used; and omit to take reasonable steps. Once a person is found to have known or had reason to suspect that infringement is occurring, the focus shifts to the availability of steps.

- 20 12. Emmett J at [205] mistakenly applies the test of reasonableness to the gaining of knowledge. His Honour also conflates the question of knowledge that the ISP’s services “are likely to be used for the purpose of committing an infringement” (necessary to attract a finding of authorisation) with knowledge of the particular work infringed, occasion of infringement and identity of infringer. His Honour said:

“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...”

- 30 13. The work and cost referred to by his Honour go to two issues. The information provided by the copyright owners in this case did not identify the individual iiNet customers whose accounts had been used for the infringing acts. Rather, it identified the relevant IP address and the time and date of infringement. That both permitted and required iiNet to consult its own

records to determine which customer had been assigned that IP address at that time. It is accepted that that step was required here, and is likely to be required in almost every case, before iiNet could take any action against the relevant customer. Whether that work could be described as “immense” would be a matter of fact in each case and the interveners do not have access to the confidential exhibits in this case to comment on his Honour’s finding. But it cannot be assumed that it would be immense in every case. If a member of the MEAA or the SAG provides evidence of a single occasion on which one particular IP address was used to make one specific copyright work available to the public, then the only task that is strictly required of iiNet is to check its own records to determine which of its customers had been assigned that IP address at that time, and to retrieve the name and address of that customer.

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14. The second aspect of work and costs referred to by his Honour appears to be directed to iiNet satisfying itself that the report is true. It is not clear why the scheme of the Copyright Act requires the Court to assume that iiNet must and will carry out that work. At trial it was accepted – the interveners do not seek to argue otherwise – that a purported notice of copyright infringement could be of such poor quality that it was reasonable for an ISP to ignore it. The “robot notices” were treated on all sides as falling into that category. It was also accepted that a notice could be of such quality that it constituted compelling evidence that an act of primary infringement had occurred, such as to satisfy the requirement that iiNet knew or had reason to believe that such acts were occurring. Emmett J appears to assume at [205] and elsewhere that there is an intervening category of notices which do not sufficiently inform iiNet to leave it in a position where it need only find out who the infringer was: but rather which either encourage or require iiNet to undertake a process of verification. Much – logically it must be most – of the work, costs and effort referred to in paragraph 205 appears to be directed to that second task.

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15. It is by no means clear why the Court assumed this work to be necessary. If a notice received from a copyright owner or person interested in copyright is defective in that it does not contain sufficient information to allow the alleged authoriser to know or have reason to believe that an infringement has occurred, the ISP is entitled to ignore it. If it does contain that information, then it must either take such reasonable steps as are available to prevent the infringement, or be prepared to accept the risk of being held to have authorised that infringement.
- 10 16. As the Appellants point out in their submissions, there is a particular irony in the reliance placed by Emmett J on this burdensome process, in that iiNet had made it clear in this case that it would not undertake such investigations no matter what information was provided to it. That is, the copyright owners failed to prove authorisation because they had not indemnified iiNet against a cost which iiNet would in fact never have incurred.
- 20 17. It follows that, in the intervener's submission, Emmett J has impermissibly mixed together two logically distinct enquiries: did iiNet know or have reason to suspect that acts of infringement were occurring?; and were there reasonable steps available to iiNet that it could have taken once it did know? The Act does not permit the 'sliding scale' adopted by Emmett J and (though less explicitly) Nicholas J, under which the more certain the ISP becomes of the infringements the more reasonable it becomes that it takes certain steps. For the purpose of assessing the reasonableness of steps one assumes the existence of the infringement. For the purpose of assessing whether the ISP knew or ought to have known, one puts aside the question of the resources available to it to respond if it does know.
- 30 18. The structure of sub-section 101(1A) support this analysis. If the ISP did not know or have reason to suspect that infringements were occurring, it will not be liable for authorisation, however simple the steps that were available to it to prevent those acts occurring. (More precisely, there is no liability for authorisation unless one knows or has reason to suspect that the relevant act is occurring. It is less clear that one must also know that it constitutes an infringement). The absence of any reference to knowledge of infringement in

s 101(1A) is explained because there can be no occasion to consider these other factors unless and until the alleged authoriser has been shown to know or have reason to suspect.

19. Their Honours have followed the trial judge in introducing “knowledge of infringement” as an additional factor also to be considered along with power, relationship and reasonable steps. That would be correct (with respect) if it were done only to identify knowledge as a necessary but not sufficient condition for liability. But their Honours go on to treat it as one of the factors in a complex multi-factored analysis in which level of knowledge is weighed with the nature of the relationship and the ease of taking steps to determine an overall finding of reasonableness. That betrays error. A person either knows or does not know. He or she cannot know for the purpose of giving a warning, but not know for the purpose of suspending an account.
20. The evidence of the terms of the Respondent’s contractual power to suspend or terminate should also, with respect, have indicated that the analysis of the degree of knowledge was an inappropriate diversion from the statutory question. It was enlivened if the Respondent “suspects, on reasonable grounds, that its services have been used to infringe copyright” (per Nicholas J at [724]). That should have been an answer both to Emmett J’s concern that the ISP would have to undertake an elaborate review and verification of the information provided, and to Nicholas J’s concern (at [763]) that the DtecNet notices gave only reason to suspect, and not knowledge, of particular accounts being so used.
21. Emmett J’s conclusion also entails that an ISP can (in effect) select the level of knowledge to which it considers it must be satisfied before taking any action on notice of infringement, and then impose on the copyright owner the whole cost of meeting that requirement. His Honour’s suggestion at [210] is that a copyright owner bringing to the attention of an ISP copyright infringements which the ISP is said to have authorised, must offer an open-ended indemnity against the costs which the ISP may choose to incur in checking and verifying. A useful contrast can be drawn with the usual undertaking as to damages given in support of an interlocutory injunction.

That has the safeguards for the copyright owner of being subject to court scrutiny and involving payment only if the copyright owner is wrong in its claims. The proposed indemnity would (it appears) be against whatever actual costs were incurred in the ISP conducting such work as it saw fit.

'Reasonable' vs 'Not unreasonable'

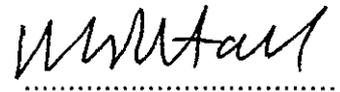
22. Nicholas J approached the question of the role of reasonableness in assessing the ISP's level of knowledge rather differently. At [749] his Honour (with respect) states the orthodox test from *Adelaide Corporation* and *Moorhouse*, that the ISP in each case would need to decide "whether the available material was sufficient to satisfy itself that it was appropriate for a warning to be issued...". That is to say, does the ISP know or have reason to suspect that a particular account is being used to infringe copyright? His Honour went on to say that because of the number of accounts and the number of allegations involved, it was for the copyright owner to proffer sufficient information for the ISP to know or have reason to suspect, and not for the ISP to ask or conduct its own inquiries if the copyright owner failed to give it the information needed to reach that level of knowledge or suspicion. His Honour addressed and answered that question, favourably to the Appellants, at [763] where he concluded that the notices did give reason to suspect that it was so. His Honour also concluded that warnings were a reasonable step: [749]. But at [783] the ultimate question is posed differently: was it unreasonable for the ISP to decline to take that step when it had reason to suspect?
23. The proper question to have posed at [783] was "Given that the Respondent has reason to suspect that this account is being used to infringe copyright, has power to issue warnings (followed if necessary by suspension or termination), and that such a step would be reasonable, has it authorised the further infringements which thereafter occurred on that account?" Instead his Honour asked "Given those facts, was it unreasonable not to send a warning?"

Conclusions

24. The effect of the errors identified in the majority judgements is to raise the obstacles to a copyright owner who seeks to have an ISP take responsibility for infringements shown to be occurring on its customers' accounts to such a level that none but the best resourced owners can hope to meet them, or afford to risk the attempt. The true task of the copyright owner should be, and be only, to do what is necessary to inform the ISP of the fact and scale of infringements and (to the extent that it is within the copyright owner's power) the identity of the accounts in issue. It is then for the ISP to decide how to act. If it properly takes the view that the information provided does not demonstrate a reasonable basis for believing that such acts are occurring, it need do nothing. If the information does provide such a basis, it must decide whether to take such reasonable steps as are open to it, or to risk a finding that its inaction amounts to authorising further infringements when they incur. The Act does not permit the ISP, or require the Court, to place any heavier burden on the copyright owner, either by the copyright owner itself proving infringement beyond the level of knowledge or reasonable suspicion, or by funding the ISP's own inquiries.

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20 Dated 16 September 2011



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Michael Hall
Counsel
Nigel Bowen Chambers
(02) 9930 7903
m.hall@nigelbowen.com.au