IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD1802 of 2008

BETWEEN

ROADSHOW FILMS PTY LTD (ACN 100 746 870) AND ORS

Applicants

and

IINET LIMITED (ACN 068 628 937)

Respondent

RESPONDENT'S OUTLINE OF FINAL SUBMISSIONS

Filed on behalf of the
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Ref: GXP:1331775(Graham Phillips)

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CHAPTER ONE

INTRODUCTION

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1-A. OVERVIEW

1-1. The respondent, iiNet Limited ("**iiNet**") is an Internet Service Provider (or "**ISP**"). It is engaged in the provision, to over 490,000 subscribers, of a fundamental utility, access to the Internet. For many of those subscribers it is also their provider of telephony services.[1]

1-2. iiNet is listed on the Australian Stock Exchange.[2] It has some 1,300 employees, including employees in Australia, New Zealand and South Africa. It has an annual turnover of some $400 million.[3]

1-3. iiNet's activities do not differ fundamentally from the other major providers of similar utility services, such as Telstra and Optus.[4] Through it, its subscribers connect to the Internet for all the uses to which the Internet can be put: emailing, web browsing, entertainment, interpersonal communication, business, financial transactions and the like.[5]

1-4. The applicants assert that iiNet has infringed the applicants' copyright in the Identified Films by authorising infringing acts of iiNet's customers, and of other persons who access the Internet through connections provided to iiNet's customers.[6]

1-5. iiNet has not infringed the applicants' copyright. It has not authorised, in the sense that term is used in the *Copyright Act* 1968 ("**the Act**") and in the cases[7], any acts of iiNet users.

1-6. The applicants' case is pleaded as follows: because their agent AFACT[8] sent iiNet notices (the "**notifications**") on a weekly basis from 2 July 2008 (which listed dozens

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[1] Malone#1 para 30 JCB Vol A2 tab 30 p9.

[2] Malone#1 para 30 JCB Vol A2 tab 30 p9.

[3] Ex DB-1 p 203 JCB Vol B6 tab 87.

[4] Carson XXN T 418.10-23, 419.8-27

[5] Malone#1 para 33 JCB Vol A2 tab 30 p11.

[6] Applicants' Opening Outline ("**AS**") para 5.

[7] See **Chapter 5** below.

[8] Australian Federation Against Copyright Theft ("**AFACT**").

of IP addresses to which AFACT agents had connected, and from which they could obtain copies, and did obtain fragments of copies, of the applicants' Identified Films), iiNet came under a duty to contact its customers to whose accounts the notified IP addresses had been allocated, to threaten them with suspension or disconnection of their Internet access and, failing some (unspecified) curative action, actually to suspend or terminate those connections. The applicants suggest that iiNet neglected that duty and that such neglect constitutes authorisation.

1-7. The fundamental ingredient of the applicants' case is that iiNet is required to notify its customers when IP addresses linked to their accounts are identified to iiNet. It is from there that various "sanctions" should, the applicants submit, be imposed. But, importantly, it is necessary to consider the basis for the notification requirement. There is no express statutory obligation on iiNet to notify its customers in such circumstances; the highest the applicants can put it is to rely on the doctrine of authorisation. However, the authorities make it clear that the question of authorisation is to be considered in all of the circumstances of the case. One does not start with the question "*Can iiNet justify not notifying its customers?*" While iiNet has given ample justification for its position, the relevant enquiry is "*Has iiNet authorised the infringing acts of the users of its facilities?*" An objective appraisal of iiNet's conduct, viewed as a whole, compels a negative answer.

1-8. iiNet prohibited infringing conduct in its customer contract, gave warnings on its website to the same effect and encouraged the use of and provided access to licensed content. iiNet was under no duty to notify, warn, suspend or disconnect customers; or to adopt any other measure or refrain from any other conduct belatedly relied upon by the applicants. It clearly did not authorise any infringing acts of its users. And, contrary to iiNet's primary submission, even if it authorise the infringing acts of users, the law would specifically excuse it: see s 112E and the safe harbour provisions[9] of the Act. These are dealt with in detail in **Chapters 6** and **8** of these submissions.

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[9] Division 2AA of Part V of the Act.

1-9. iiNet does not condone the infringement of copyright. The fact that it defends this proceeding does not amount to condoning the infringement of copyright. The fact that it submits that the applicants have greatly exaggerated the number of infringements in their evidence does not amount to a suggestion that the applicants' copyright is not valuable and deserving of protection. The fact that it submits that, in assessing questions of authorisation of infringement, there should be a balancing of its position with that of the applicants, does not amount to a suggestion that the applicants' rights are not valuable and should not be protected. In fact iiNet has made it plain that it will cooperate with any sensible employment of the known procedures of the courts to assist the applicants in pursuing those who, according to the applicants, are infringing their copyright.

1-10. In fact, and to the contrary, iiNet promotes the access to and use of legitimate, authorised content (including many of the Identified Films) to its subscribers. It can fairly be said that it is at the forefront of Australian ISPs in doing so.[10] It is generally accepted that the Internet is becoming a very important channel for the sale and commercial distribution of copyright material, including films. iiNet is promoting that channel, including for films distributed by those associated with the applicant studios.[11] iiNet's activities are the antithesis of what the applicants accuse it of, which is to condone the infringement of copyright.

1-11. The Court should not, iiNet submits, be distracted by:

(a) the applicants' new case, emerging in that rare creature of an "opening in reply" is that the real vice in iiNet's conduct was the alleged positive acts, commissions, rather than the failing to act, omissions, following receipt of the AFACT notifications; or

(b) suggestions that iiNet could or should have briefed its staff to respond to BitTorrent enquiries in a certain way, disabled Freezone, changed its business

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[10] Ex MMM-1 JCB Vol B6 tab 89 pp 129, 131; Ex FF, iiNet Media Release "It's Free ABC for iiNet Customers", 23 July 2008.

[11] Dalby #1 paras 117-130 JCB Vol A2 tab 31 pp 35-39.

model so as to revert to excess usage charges instead of shaping, or changed its behaviour in any other (unpleaded and unparticularised) way.

1-12. As pleaded and properly considered, the applicants' case is, and has always been, that iiNet failed to act in response to the AFACT notifications in the required manner, namely notice to the customer and consequent suspension, disconnection or termination.

1-B. THE APPLICANTS' APPROACH

1-13. The applicants take iiNet to task in various ways for daring to defend this proceeding. Even iiNet's statements in the press that it proposes to do so, or submissions made in Court on motions[12], have been turned around in short order as particulars of intransigence and flagrancy.

1-14. iiNet's measured defence to the proceeding[13], or aspects of it, is and are described variously in the applicants' submissions as "curious"[14], "misconceived"[15], "untenable"[16], "nonsense"[17], "absurd"[18], "hopeless"[19] and "desperate"[20], to identify a few epithets. The clearest example of the gross exaggeration of the applicants' case is the wholly overblown attack on the credit of Mr Malone and Mr Dalby. In truth, not only should their evidence be accepted in its entirety, the applicants themselves rely heavily on it and indeed submit that they do not need adverse credit findings in order to succeed. This makes the credit attack all the more regrettable.

1-15. The fact that the applicants raised, for the first time four weeks after the commencement of the trial, the provision of the Freezone as a matter said to

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[12] See transcript 25.3.09.

[13] Notably, iiNet through its pleading, and in its statement of case, has put a number of matters out of contention and simplified what the applicants have made into an unnecessarily complex case.

[14] AS 20.

[15] AS 21.

[16] AS 23.

[17] AS 185.

[18] AS 259.

[19] AS 271.

[20] AS 272.

demonstrate iiNet's authorisation of the infringing acts of its users,[21] demonstrates the artificial prism through which the applicants view this proceeding. Apart from impeaching their own witnesses[22], the suggestion that an incentive for users to obtain licensed content condones the exchange of unlicensed content is self-evidently absurd.

1-16. Perhaps the overexcitement with which the applicants sometimes manifested the argument is to be understood in this way. If one looks at the issues raised purely from the perspective of movie studios, and on the assumption that the most important thing on iiNet's agenda should be to deal with their complaints about copyright infringement, it is perhaps understandable. It is when one looks at it from the perspective of the iiNet business as a whole that it becomes narcissistic to say the least.

1-17. iiNet is entitled to attempt to grow its profits for the benefit of its shareholders. It is entitled, as a retail business, to put customers first in order to retain and attract customers and thereby grow its profits. It must obey the law in doing so but, contrary to the applicants' submissions, the fact of doing so is not itself a breach of the law. Absent a clearly defined and specific obligation to the contrary, iiNet's management is obliged to put the company's interests before those of third parties. The applicants' notice and disconnection regime, incorrectly put forward as a necessary step in avoiding liability under s 101 of the Act, does not represent such an obligation.

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[21] Malone XXN T 858.24 to 859.30.

[22] Phillipson XXN T 399.6-9; Kaplan XXN T 460.42-45; Perry XXN T 484.44-47.

1-C. STRUCTURE OF SUBMISSIONS

1-18. **Chapter 2** of these submissions addresses the important aspects of the evidence adduced during the trial. It also responds to the unwarranted attacks on the credit of Mr Malone and Mr Dalby in the applicants' closing submissions ("**ACS**").

1-19. The issues in the case should then be approached as a series of careful logical steps as follows, and which should be answered, in iiNet's submission, as follows:

(a) First, the precise acts of primary infringement, and their scale should be correctly identified and established. iiNet submits that in the final analysis the only acts of primary infringement that the Court will find on the balance of probabilities are likely to occur in the day-to-day activities of some iiNet users are the making available of cinematograph films online to the public, and the associated making of copies on some users' computers. Primary infringement is addressed in **Chapter 3** of these submissions.

(b) Secondly, the question of authorisation should be approached on ordinary and orthodox principles. Despite the applicants' rhetoric, this case goes well beyond any other, anywhere in the world, in extending liability to a utilities provider/carriage service provider for authorisation of copyright infringement. iiNet will succeed on the issue of authorisation on an application of the ordinary and well established principles of that doctrine. Sub-section 101(1A) of the Act was introduced in 2000 as part of the so-called Digital Agenda reforms. These reforms are considered in **Chapter 4**. **Chapter 5** deals with the principles of authorisation liability and their application in the present case.

(c) However, additionally, on the proper interpretation of Part 13 of the *Telecommunications Act* 1997 (Cth) (the "**Telco Act**"), thirdly the Telco Act also supplies a complete answer to the applicants' case. This issue is dealt with in **Chapter 7**.

(d) However, were the Court against iiNet either on authorisation on general principles, or on the application of the Telco Act, then fourthly s 112E

provides a complete answer to the applicants' case against iiNet for authorisation infringement for the reasons advanced in detail in **Chapter 6**.

(e) Even if s 112E does not provide such protection, then fifthly the safe harbour provisions dramatically limit the remedies available to the applicants. **Chapter 8** addresses the construction of the safe harbour provisions of the Act and their application to this case.

1-20. The conclusion in **Chapter 9** of these submissions answers the questions raised in the statement of issues annexed to iiNet's written outline of opening submissions. iiNet submits that the Court would answer those questions in the same manner with the result that the Application would be dismissed with costs.[23]

[23] iiNet reserves its position in respect of an application for a costs order other than on a party and party basis with respect to certain of the claims made by the applicants. Naturally it will await the Court's reasons for judgment before making any such application.