

**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

CHAPTER THREE

PRIMARY INFRINGEMENT

&

ABSENCE OF LICENCE

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3-A. PRIMARY ACTS OF INFRINGEMENT

- 3-1. This section of iiNet's closing submissions responds to Section B2 (paras 42-66) and Section D (paras 216-291) of the Applicants' Closing Submissions. It also responds to some aspects of the volume "Applicants' Closing Submissions – Primary Infringements Bundle". The need to focus on primary acts of infringement is not, as the applicants suggest¹, a diversion in this case.
- 3-2. Authorisation is not something that can be considered in the abstract, but includes consideration of the specific circumstances of what it is that is said to be authorised. This is clearly established by *WEA International Inc v Hanimex Corp Ltd*.² Contrary to the applicants' submissions³, the nature of the primary infringements does matter and proper consideration of iiNet's alleged authorisation must be carried out with regard to them.
- 3-3. A related consideration is that where rights are defined and regulated by detailed statutory provision, as in the *Copyright Act 1968*, it is necessary to pay close attention to the detail. The history of judicial consideration of the scope of rights given under the Act, whether traditional copyright, or neighbouring rights, or what Gummow J has pointed out are sometimes referred to as "paracopyright"⁴, shows that under examination of the detailed statutory provisions creating and regulating copyright the scope of those rights is carefully circumscribed⁵.

¹ AS 21.

² (1987) 17 FCR 274 at 278, 287-288.

³ AS 21, 182, 185.

⁴ *Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors* [2005] HCA Trans 30 p 42.

⁵ For example, although in the outcome of *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 a plurality of the High Court held that the now-repealed s 26 of the Act conferred a strict liability, on a carrier such as Telstra, for carriage of infringing copyright material, that was not the view of Toohey and McHugh JJ, or of Gummow J at first instance, or of Sheppard J in the Full Court. That illustrates that there can be a legitimate divergence of opinion on the scope of these rights. Similarly, in *Stevens v Sony*, Sackville J at first instance, and all 6 members of the High Court who heard the appeal, took the same view of a number of different aspects of infringement or construction, while French, Lindgren and Finkelstein JJ took a different view on the intermediate appeal on a critical issue of construction. Another example is the Panel case (*Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273) where there was a sharp division of judicial opinion on the proper construction of the rights in television broadcasts (with, ultimately, McHugh ACJ, Gummow and Hayne JJ, and Conti J at first instance, preferring the prevailing construction, while Callinan and Kirby JJ, and Sundberg, Finkelstein and Hely JJ in the Full Court, preferring another construction).

- 3-4. This is particularly important where the applicants have, extravagantly, said things such as that their evidence reveals “97,942 infringements”⁶. Presumably these figures are advanced for a genuine forensic purpose. If they are wildly inaccurate, which iiNet submits that they are, iiNet is entitled to challenge them. To say, as the applicants do, that to raise these points is “technical”⁷ or at the “periphery of the case”⁸ is, again, inapposite.
- 3-5. The applicants’ case depends on them identifying primary acts of infringement by what they have defined as “iiNet Users”. Thus the case in relation to the primary infringements will turn upon two questions: what are the alleged primary infringements, and have they been committed by “iiNet Users”?

Number of primary infringements

- 3-6. It is not possible to discern from the evidence how many primary infringements have been demonstrated by the applicants. Working from the only detailed information available, in respect of the 20 nominated accounts, the number of possible alleged infringements if each separate film or episode is one “making available online”, and the number is confined (as it should be) to the Identified Films, then the number of suggested primary infringements drops from the applicants’ asserted 911⁹ to just 79, that is, an average of 4 films per selected account of those 20 nominated accounts over 59 weeks¹⁰. That usage amounted to a small proportion of these accounts, quotas and Internet activity, as will be demonstrated elsewhere. These 20 nominated accounts were, of course, selected after painstaking analysis by the applicants’ solicitors and can readily be inferred to represent, from the applicants’ perspective, the “pick of the bunch”; but even taking them to be simply representative and applying that factor to the figure of 97,942 infringements across all accounts

⁶ Williams #1 paras 3, 4 JCB Vol A2 tab 23 pp 1-2; Williams #6 paras 7, 8 JCB Vol A2 tab 34 p 2 .

⁷ AS 21 and ACS 251.

⁸ AS 21.

⁹ Supplementary Particulars to FASOC, 19 September 2009, para 5(a) JCB Vol A1 tab 4 p 3.

¹⁰ Calculated by counting the number of unique hashes in accounts RC-01 to RC-20, visible in Ex MJW-10.

investigated by DtecNet, it reduces to around 8,493¹¹ – again, certainly not trivial, but not with the headline value of the applicants' near-100,000.

3-7. Against that background, this outline addresses the contentious aspects of the alleged primary infringements.

Context of the infringements relied upon as it relates to numbers of infringements

3-8. An unusual feature of this case is that, quite unlike the circumstances in *Sharman* and *Cooper*, the alleged authorisation by iiNet is, on the applicants' own case, one that is constituted by acts that include actions of the applicants. In this respect it is not even like a trap purchase, where the ingredients of authorisation are all present and the trap purchaser merely creates an example of the authorisation and primary infringement happening: here, without the applicants' action of notification of iiNet of primary infringements, the authorisation, on the applicants' case, does not happen at all. This will be addressed further in the section of iiNet's outline dealing with authorisation.

3-9. The alleged authorisation comes about by the applicants taking two distinct steps:

- (a) first, targeting only iiNet accounts, by restricting the IP address range; and
- (b) secondly, sending the notifications.

3-10. One consequence of those considerations is that there is an air of unreality to the alleged "transmission" infringements. Such transmissions as occurred were all brought about by the DtecNet investigators, either in Australia or the Baltic states. But the investigators simply chose, including by using highly artificial means that would not normally arise in the use of BitTorrent, how many times they would cause a transmission. That is, indeed, one of the techniques of the DtecNet method.

3-11. The evidence on the default settings of the BitTorrent client, and the inferences to be drawn from, for example, the copies of particular films or episodes (eg, *Pineapple Express*) that stay for months and months on an identified user's computer¹², can

¹¹ That is, $79 \div 911 \times 97,942 = 8,493$.

¹² Carson FXXN T 443.24-444.16; Carson RXN T 520.1-15.

support an inference no wider than that the user is engaged in one, active, “making available online” per identified film title.

- 3-12. As said in opening¹³ iiNet does not suggest that the number of infringements (by Identified Films being “made available online”) reduces to a trivial number; or indeed to a number that would not be of concern to the applicants. The applicants, of course, bear the burden on proving the primary infringements. The evidence does not support anything like the 97,000-plus or-so infringements alleged by the applicants. The evidence does support the conclusion that the suggested infringing activity, being 911 over a 59-week period (even when one does not confine the activity to Identified Films) in relation to the 20 identified customers, are able to be characterised as only a small part of their available online activity for the period.
- 3-13. The Court should infer (in the absence of any direct evidence from the applicants about it) in relation to the infringements, that the users have, in respect of each film or episode identified, downloaded one copy, and kept that copy on their computer for the period or periods identified. So, taking the much-used example of the computer accessing the Internet via RC-08’s account, what happened was: someone downloaded one copy, once, of *Pineapple Express*¹⁴ and has not deleted it from their computer; and one copy, once, of *21* and has not deleted it from their computer. And in the case of RC-08, DetecNet operated their confidential system in such a way as to identify the ongoing presence of those films on the user’s computer – in the case of *Pineapple Express*, DtecNet made that electronic inquiry 38 times, and in the case of *21*, twice – but that was DtecNet doing something, not anyone at RC-08’s site.

¹³ AS 9, OOR T 106.8-16 and 110.3-7.

¹⁴ The Applicants have added into the “Primary infringements bundle” matter that is not in evidence anywhere. The bundle for *Pineapple Express* is an example. The page numbered C10 – it is not a useful number as the bundle is unnumbered – giving a summary for *Pineapple Express* says certain things about awards for which actors in the film were nominated etc. This is not in the evidence anywhere. (The logical place for it would be Ms Solmon’s affidavit at JCB Vol A1 tab 15 but there is nothing there about it.) As it turns out, it does not much matter as the information goes nowhere, but it is not an appropriate way to foist material on either the Court or the respondent.

3-B. MAKING COPIES BY DOWNLOADING FILMS VIA BITTORRENT

- 3-14. The applicants allege that computers being accessed by connections being provided on iiNet accounts have, at some stage before the relevant DtecNet investigation¹⁵, or, on occasion, while the DtecNet investigation was taking place¹⁶ had infringing copies of Identified Films placed onto their hard disks. See ACS para 234.
- 3-15. The applicants correctly say that this in substance is not in dispute. While it simply cannot be determined in respect of all of the Identified Films, and all the instances of their being present on users' computers, that they were definitely downloaded by that user through an iiNet connection – not least because the user may have switched from another ISP – iiNet accepts that a proportion of them would meet that description.
- 3-16. For the purposes of this proceeding and this hearing, it can be accepted that a number of films and episodes have been downloaded by people using iiNet connections. However, it is equally overwhelmingly likely that on every occasion, or practically every occasion, there was just one copy downloaded through one iiNet account.

3-C. MAKING FILMS AVAILABLE ONLINE

Less than 100% shown as being made available

- 3-17. This topic is dealt with at ACS 252-253, in relation to films “made available online”.
- 3-18. For the purpose of the exercise of calculating the acts of making available online, iiNet does not suggest that the Court should go through the evidence to work out whether instances of a percentage of less than 100% of being made available online are less than a substantial part. That concession is made simply to relieve the Court of going through a laborious exercise that will not significantly affect any real issue in the proceeding. It should not be taken to amount to a concession that the assessment of substantial part does not need to be considered in the context of the alleged electronic transmission of copyright material.

¹⁵ In the case of a film showing 100% as available.

¹⁶ In the case of a film showing less than 100% being made available, and thus at some point in the process of being downloaded.

3-19. However, it is necessary to respond to the submission made in ACS 253¹⁷. The applicants put that because a part is “essential to the watching of the whole film” the part is “substantial”. For reasons that are dealt with below, that submission cannot be maintained.

Proper construction of “make available online”

3-20. iiNet’s Statement of the Nature of its Case has, since promptly after its executives were able to consider the technical evidence served, made it clear that where the applicants’ evidence shows that 100% of an Identified Film was available for download, iiNet does not contest that, on the balance of probabilities, the applicants will establish a user of a computer connected to the Internet via a connection supplied by iiNet was making the film available online. Similarly iiNet has accepted that that “making available online” was “to the public”.

3-21. (The reason that iiNet accepts that the communication was “to the public” is that the communication is analogous to someone performing a song in a park: one does not need resort to the particular, special meaning that “the public” has developed in copyright law (as to which see paras 3-53 to 3-67 below); the breadth and general nature of the “audience” is sufficient. This can be contrasted with the closed or limited circumstances of some of the cases¹⁸ where an extended, special meaning of “the public” has been used.)

iiNet’s submission on the text of the Act

3-22. The variety of communication infringement described by the shorthand “make available online” derives from the following highlighted words of the definition of “communicate” in s 10(1) of the Act:

communicate means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.

¹⁷ The submission introduced as “secondly”.

¹⁸ For example, *APRA v Commonwealth Bank* 1992 40 FCR 59 (Gummow J); *Telstra Corp Ltd v Australasian Performing Rights Association Ltd* (1997) 191 CLR 140. This topic is addressed in detail below.

- 3-23. The proper scope of any exclusive right depends upon the proper construction of the relevant sections. In relation to cinematograph films, when considering infringement, one starts with s 101 which relevantly provides that “*a copyright subsisting by virtue of [Part IV] is infringed by a person who ... does in Australia¹⁹ ... any act comprised in the copyright*”. By s 13(1) a reference to “an act comprised in the copyright in ... the subject-matter” is to be read as a “*reference to any act that, under this Act, the owner of the copyright has the exclusive right to do*”. Turning then to s 86, copyright in relation to cinematograph film is the “*exclusive right to do all or any of the following acts ... to communicate the film to the public*” (emphasis added).
- 3-24. It can readily be appreciated that the linguistic structure of the Act is related to the doing of acts, for the purposes of infringement, by “a person”.
- 3-25. The verb in the expression “make available online” is “make”. That is the act that the infringer must do in relation to the film. In iiNet’s submission, that act is done when, in the present circumstances, the user of BitTorrent accumulates the film (or a substantial part of it) for the first time on his or her hard disc and starts the sharing process. That user, in the factual circumstances of BitTorrent use, commits that act once. As the Court has heard²⁰ the usual and default setting of BitTorrent clients is to keep the film available without any further overt acts done in relation to the film files by the BitTorrent user. Of course there will be periods during which the film cannot be accessed because the BitTorrent user has either quit the client application, logged off the Internet (or been logged off the Internet), or switched the PC off. However, once the PC is switched back on, the Internet reconnected and the BitTorrent client launched, the film that has been “made available” continues to be “made available”.
- 3-26. iiNet’s construction is supported by the observations of Tamberlin J in *Cooper*²¹ at [62], where his Honour refers to three examples urged on him by the record companies in that case and drawn from the extrinsic material of what would amount to “making available online”.

¹⁹ In this part of the argument only the “primary” act of infringement is being addressed.

²⁰ OOR T 119.9-120.5, T 120.38-121.2 and T 121.36-43; Carson FXXN T 443.24-444.16; Carson RXN T 520.1-15.

²¹ *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at [62].

- 3-27. The applicants contend in ACS 254-255 that there is a fresh “making available online” each time the Internet is disconnected and then connected (for whatever reason; although as a fallback they perhaps accept that if the disconnection arises by a means other than conscious act of the user, that may be different) and *a fortiori* where the computer is switched off and then on. In other words, from one act consciously done by a person operating the PC (for example, entering the film name *Pineapple Express* into a BitTorrent client search, downloading a torrent and manipulating the program so as to download a whole copy of *Pineapple Express*) and make it available there will — almost inevitably — result in multiple acts of communication, and thus of infringement, because of the operation of the Internet and the switching on and off of the user’s computer. Given the relatively unlikelihood of a source (certainly in the BitTorrent environment) remaining on permanently without any interruption whatsoever, it follows that the legislature must have intended, on the applicants’ case, that a “making available online” would almost inevitably result in multiple acts of infringement.
- 3-28. That is plainly not so. Even in the direct area of infringement, it would make a nonsense of the terms of ss 115(5), as one limb of s 115(5), being that in para (c), would inevitably follow in relation to any action or infringement by communication by “making available online”.
- 3-29. But there are also other indicators that the applicants’ argument is incorrect.

Applicants’ construction inconsistent with “repeat infringer”

- 3-30. The applicants’ construction of “make available online” as being an act repeated each time a user goes offline and returns online, with respect to material that the user has only once tagged or treated so as that it becomes accessible each time there is a reconnection to the Internet, is also incompatible with the reasonable understanding of the notion of “repeat infringer” in condition 1 of item 1 of the safe harbour conditions in s 116AH. The exclusive right to “make available online” was intended to embrace a vast range of Internet activity, including putting up websites, sharing material, making files available on FTP, making files available from any download source, and the like. To place a file in one location so as to be accessible by any one of those

commonplace means, may constitute an infringement, but it would make a nonsense of the notion of “repeat infringer” if the infringement were repeated every time there was a temporary interruption to the Internet connection, and the like.

Applicants' construction inconsistent with Part VB

3-31. Part VB (s 135ZB to 135ZZH) was inserted into the Act in 1989²² and deals with reproducing and communicating works etc by educational and other institutions. It is commonly known as the “educational photocopying” area of the Act, although its reach has, since its enactment, been extended to electronic dealings for educational purposes. Educational institutions that give a notice in the prescribed form to a declared collecting society can therefore undertake a range of closely prescribed activities, most of them in exchange for the payment of equitable remuneration to the collecting society. The “remunerable” types of copying are set out, for example, in s 135ZMC, 135ZMD, 135ZMDA and 135ZME.

3-32. The educational bodies pay equitable remuneration for such electronic use as determined by the copyright tribunal under s 135ZWA. Subsection 135ZWA(2A) is as follows:

135ZWA Electronic use notices

(1) If an electronic use notice is given by, or on behalf of, an administering body, the amount of equitable remuneration payable to the relevant collecting society by the administering body for licensed copies and licensed communications made by it, or on its behalf, while the notice is in force is an amount (whether an amount per year or otherwise) determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(2) The matters and processes constituting an electronic use system, and any matters that are necessary or convenient to be assessed or taken into account for the purposes of the system, must be determined by agreement between the administering body and the relevant collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

²² Due to the constitutional invalidity of the original, amending Act, Part VB and other provisions were re-enacted in 1993. Nothing turns on this.

- (2A) If:
- (a) a work is reproduced by, or on behalf of, an administering body, or is taken under this subsection to have been so reproduced; and
 - (b) the reproduction is communicated by, or on behalf of, the body by being made available online, or is taken under this subsection to have been so communicated; and
 - (c) the reproduction remains so available online for longer than the prescribed period;
- then, when that period ends:
- (d) the work is taken to have been reproduced again by, or on behalf of, the body; and
 - (e) the reproduction mentioned in paragraph (a) is taken to have been communicated again by, or on behalf of, the body by making it available online for a further prescribed period.

3-33. Subsection 135ZWA(2B) accepts that sub-s (2A) has in effect brought about an artificial state of affairs. If the applicants' argument were correct, s 135ZWA(2B), and other similar provisions, would not be required; but, moreover there would be enormous impracticalities in determining how many communications had been made. Similar problems would arise under s 135ZY(1)(a).

Summary

3-34. The proper construction of the Act leads to the result that there is only one "making available online" of each film or episode on each account identified by the applicants in the evidence.

3-D. "ELECTRONICALLY TRANSMIT ... TO THE PUBLIC"

3-35. In this area of alleged primary infringement, the exclusive right upon which the applicants rely is a branch of the right "to communicate the film ... to the public" (s. 86(c)).

3-36. The respondent submits that this aspect of the applicants' case cannot be made out. That there needs to be a focus on this issue results entirely from the forensic decision of the applicants to seek to extract from the gathered material every conceivable argument, no matter how strained, about infringement, apparently with the purpose of creating spectacular numbers for "jury" purposes.

3-37. As outlined in iiNet's oral opening²³, there are three reasons why the transmissions identified in the DtecNet notifications are not evidence of infringing acts by iiNet users.

First reason: no "substantial part" electronically transmitted

3-38. This section responds to ACS 264-265.

3-39. It is a fundamental requirement of copyright law that if an act is done to less than the whole of a work or other subject-matter, it is not a infringement unless it is done to a substantial part.²⁴ It is a feature of BitTorrent that the chunks fetched by a downloader are but fragments of the whole film.²⁵ On the evidence, the applicants have not established that any fetching was:

- (a) unlicensed; and
- (b) of a substantial part of any particular cinematograph film.

(It is not permissible now, if it ever was, to make out infringement by the taking of small but regular helpings: see *IceTV*.²⁶)

3-40. The applicants' response on this issue is given on three bases.²⁷ The first is an appeal to "traditional principles" on the assessments of substantiality²⁸. The second is the entirely novel suggestion that many different electronic transmissions of a film to a user via BitTorrent protocol are "in substance one act in which users participate". The third argument is not an argument at all as to the substantial part issue in relation to transmissions; it is a submission that even if the Court is against the applicants, there are other acts of infringement that they can call on.

²³ ROS T 108.28-126.16.

²⁴ Section 14 of the Act; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd & Ors* (2004) 218 CLR 173 at 293 [47].

²⁵ Carson FXXN T 445.45-46; AOO T 17.6-10.

²⁶ See *IceTV v Nine Network Australia* (2009) 254 ALR 386 at [21].

²⁷ ACS 265.

²⁸ The traditional principles are of course the only ones that can be applied: there is no special case, as it is a question of fact in each case.

3-41. Thus, iiNet has only to answer two arguments: that which relies on “traditional principles” and that which submits that the transmissions by many people are “in substance one act”.

Many transmissions, one act

3-42. The novel argument can be despatched summarily. Assuming (against iiNet’s case, see below) that the transmissions of all the pieces to make up a substantial part of one film are made by the person making the film available, not by the fetcher (that is, DtecNet), the evidence shows²⁹ that the pieces come from all over the world. There is not a shred of evidence upon which the Court can proceed in relation to any single line of all the hundreds of thousands of lines on the AFACT spreadsheets, that any one act of transmission caused by one DtecNet request was accompanied by another act of transmission that took place in Australia. Acts of primary infringement must take place in Australia. That is the end of that.

Traditional principles

3-43. Accordingly, the argument returns to “traditional principles”.

3-44. First, no transmission is ever arguably of a substantial part, on a quantitative assessment. The transmissions³⁰ are of minuscule proportions – almost always less than one percent and mostly around 1/10 or 1/5 of a percent – of films and TV episodes. For a 45-minute “television hour”, 1/5 of one percent is 5.4 seconds. For a 2-hour feature film, it is 14 seconds.

3-45. As to a qualitative assessment – the far more important part of the assessment – this is not even attempted by the applicants and, indeed, they could not and did not really embark upon such an assessment either in evidence or in submissions. As the decisions of Conti J³¹ and the Full Court³² make clear, and as is confirmed time and again by the High Court³³, the assessment simply cannot be made.

²⁹ Ex NJC-1 JCB Vol B1 tab 14 p 26 ; Carson FXXN T 441.10-12.

³⁰ As can be seen by going through any of the spreadsheets that are part of the notifications in Ex BI and following.

³¹ *TCN Channel Nine & Ors v Network Ten* (2001) 108 FCR 235 per Conti J at [41]-[46] and [67]-[70].

- 3-46. The issue can be tested against the factual high point of the applicants' case on "substantial part" of transmissions which is first, the *ex post facto* stitching together by Mr Herps of all the pieces downloaded from one iiNet account holder of the film *Pineapple Express*³⁴ and secondly his similar exercise in relation to *Harry Potter: The Order of the Phoenix*.³⁵
- 3-47. These examples illustrate even more starkly the difficulties of the applicants' case. One can take *Pineapple Express*. The 90 seconds of *Pineapple Express* artificially stitched together and coming as the result of minuscule pieces taken over some months do not, in iiNet's submission, in any event amount of a "substantial part" of *Pineapple Express*. (The Court should not be diverted by the way in which Mr Herps has constructed the copy, which image is held on the screen while the other 115 minutes and 30 seconds of the film are missing.)
- 3-48. There is simply no evidence from anybody associated with the film of the kind that would be led in a case concerning substantial part to assist the Court with why these 90 seconds (which are in 45, 8 and 47 second bursts) have any relative importance to the film as a whole³⁶. Indeed, the Court has been told nothing about the film and why these sequences would be important. Watching them they are not self-evidently important or substantial, on a qualitative assessment.
- 3-49. The applicants have not established the parts to be substantial parts, or to combine to a substantial part.
- 3-50. If the applicants' case on substantial part fails on *Pineapple Express* and *Harry Potter: The Order of the Phoenix* then it must, of course, fail on all films. However,

³² *TCN Channel Nine Pty Limited v Network Ten Pty Limited* (No 2) [2005] FCAFC 53 at [9]-[38] and [46-65].

³³ *IceTV v Nine Network Australia* (2009) 254 ALR 386 at [154]-[171]; *Stevens v KK Sony Computer Entertainment* (2005) 224 CLR 193 and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd & Ors* (2004) 218 CLR 173 at [47].

³⁴ Herps #4 para 3-10. Compare the argument on, and evidence about, the tiny clips in the Panel case: see FN 34 and 35.

³⁵ Herps #4 para 4-11.

³⁶ Herps #4 para 10 does not attempt the task. Indeed it is highly doubtful that Mr Herps could give such evidence.

even if it did not fail on *Pineapple Express*, it fails as a general proposition, because the parts downloaded are so minuscule.

- 3-51. The applicants seem to suggest that if a part is “viewable” or “recognisable” or “identifiable”³⁷ it is substantial. That is not correct, as consideration of the *Panel* case shows.³⁸ Moreover, they also suggest that if it is “essential”³⁹ the same follows. That is contrary to principle: see eg *Data Access v Powerflex*⁴⁰, reversing *Autodesk v Dyason*⁴¹ on such an approach.

No unfairness to Applicants or rightsholders

- 3-52. That is not to suggest that the applicants would not have a remedy for infringement of copyright somewhere. A user of BitTorrent in another country who obtains some tiny portions of a film from Australia may not be engaging in electronic transmission under the Australian *Copyright Act*, but doubtless wherever it is in the world that they assemble all the packets and chunks and create a complete movie, they will infringe the reproduction right in the film under their domestic legislation. But that is not a matter of concern for this Court.

Second reason: not “to the public” in the context of electronic transmission

- 3-53. This section responds to ACS 266-275. iiNet submits that the electronic transmissions are not “to the public”.
- 3-54. The applicants put forward five enumerated arguments. They are answered as follows:

³⁷ ACS 265 FN 304.

³⁸ See FN 34 and 35; see *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd & Ors* [2005] HCA Trans 842, per McHugh J “*The issue which the applicant seeks to bring into this Court is one of fact and degree. It is not one of law as such, although self-evidently the Court is applying the Copyright Act 1968 (Cth). The courts, including the Federal Court, must apply the statute. They must be careful against turning factual synonyms into legal tests. The synonyms or descriptions used by Justice Finkelstein are factual synonyms. In other cases they will no doubt be entitled to respect but they do not bind as a matter of law*”.

³⁹ ACS 253.

⁴⁰ *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 166 CLR 228

⁴¹ *Autodesk Inc v Dyason* (No 2) (1992) 176 CLR 299.

- (a) The first argument in ACS 267, misstates the effect of *Telstra v APRA*. This is dealt with in more detail below.
- (b) The second argument, which relates to *Cooper* and *Sharman*, is also dealt with below.
- (c) The third argument, in ACS 269, incorrectly focuses on the “request”, not the “transmission”. It is the “transmission” that has to be “to the public”.
- (d) The fourth argument in ACS 270 suggests that while the “making available online” is “to the public”, it would be extraordinary if the “transmission” is not to the public. There is nothing extraordinary about it. It is simply a matter of examining the communication in each case and determining whether or not it is “to the public”.
- (e) The fifth argument suggests that iiNet’s argument is contrary to the legislative history and background. iiNet does not agree. The legislative background, and the fact that the “technology-neutral right of communication to the public” replaced both the broadcast right, and the previously very narrow diffusion service right⁴², does not affect the meaning of “to the public”. The argument based on the 1996 WIPO copyright treaty (see ACS 273-275) is in any event circular, as the explanatory materials would still require the identification of whether people are members “of the public”. Moreover, resort to explanatory materials of that kind cannot overcome the effect of a clear decision of a majority of the High Court, such as is found in *Telstra v APRA*⁴³; still less one that was delivered after the date of the 1996 WIPO treaty.

Telstra v APRA

3-55. First, *Telstra v APRA*.

3-56. That communication will only be “to the public” if it is to the “copyright owner’s public”. The authoritative exposition of this topic is in the judgment of Dawson and

⁴² Previously in s 26 of the Act.

⁴³ *Telstra Corp Ltd v Australasian Performing Rights Association Ltd* (1997) 191 CLR 140.

Gaudron JJ in *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140, with whom Toohey J (at 158) and McHugh J (at 174) agreed⁴⁴.

- 3-57. (In light of the concurrence of four members of the High Court on their proper approach, Kirby J's view (at 202-203), while consonant with the majorities, and supportive also of iiNet's position, does not with respect need close attention.)
- 3-58. It is essential to their Honours' reasoning, where the communication⁴⁵ is in a closed setting, that it be taking place in a commercial context. See the references to "commercial setting" and "commercial character" at CLR 191 at 157.
- 3-59. In the one-on-one exchanges of the electronic transmissions in this case, neither party, and in particular the deemed transmitter, is acting in a commercial setting. Therefore the transmission is not "to the public". Finally, again the evidence has only strengthened iiNet's arguments on whether, in the case of the electronic transmission, the communication is "to the public". It is not "in public" or "to the public" in any classical or usual sense. It is a one-to-one encrypted communication. As is clear from the applicants' own case and the evidence⁴⁶ the third party, which is the tracker site, has dropped out entirely when the communication of the pieces of copyright the subject matter commences.
- 3-60. As Dawson and Gaudron JJ point out:

"A performance or broadcast to the world at large is obviously a performance or broadcast to the public."

That is why iiNet accepts that the "making available online" of films is "to the public".

- 3-61. Their Honours go on:

⁴⁴ *Telstra Corp Ltd v Australasian Performing Rights Association Ltd* (1997) 191 CLR 140.

⁴⁵ In *Telstra Corp Ltd v Australasian Performing Rights Association Ltd* (1997) 191 CLR 14, a "performance".

⁴⁶ Carson FXXN T 44.20-35.

“But the situation becomes a little more difficult in the case of a performance or broadcast to a limited class of persons. In that context, in considering what constitutes a performance in public, the cases recognised that the relationship of the audience to the owner of the copyright is significant in reaching a conclusion. It is from this that the notion of the copyright owner’s public developed.”

- 3-62. Their Honours then set out a number of cases which deal with small audiences, or audiences that were located in places to which the public did not generally have access. The discussion must, of course, be read in the light of the fact that what is being discussed there is public performances, not electronic transmissions. Their Honours then turned to deal with *Rank Film Production Limited v Dodds* [1983] 2 NSWLR 553 at 559, a case in which films were transmitted from a video cassette recorder in a motel office to TV sets in motel rooms. The performance was held to be “in public”. Dawson and Gaudron JJ with approval the observations of Rath J in *Rank Film*:

“In the present case the motel guest in his room may easily be envisaged as part of the copyright owner’s public. It is not that it restricted the size of the audience, or the privacy of the surroundings, that is decisive on the issue; the critical matter is the presentation of the movie by the occupier of the motel to his guest in that capacity.”

- 3-63. As Dawson and Gaudron JJ say (191 CLR at 157) it is the commercial setting of the use that creates an expectation in the copyright owner to expect payment for the authorised performance. As their Honours said:

“Callers on hold constitute the copyright owner’s public, not because they themselves would be prepared to pay to hear the music, but because others are prepared to bear the cost of them having that facility.”

- 3-64. Applying the approach agreed on by the majority of the High Court in *Telstra v APRA*⁴⁷, the Court here will not, with respect, hold that the electronic transmissions are “to the public”.

- 3-65. This is confirmed by comparing this case with the facts of *Telstra v APRA*. The provision – e.g. by Premier Cabs⁴⁸ – of music on hold was for the commercial

⁴⁷ *Telstra Corp Ltd v Australasian Performing Rights Association Ltd* (1997) 191 CLR 140.

⁴⁸ A factual situation in the *Telstra* case: see *APRA v Telstra* (1993) 46 FCR 131 (Gummow J) at 132.

purpose of retaining customers. That moved the customers from being private participants in a one-on-one communication to “members of the copyright owners’ public”. There is no such commercial relationship between the iiNet user making the film available online and the fetching downloader. Here, that is so, contrary to iiNet’s argument, the iiNet user is “determining the content” of the transmission. It is, of course, *a fortiori* if the fetching downloader is doing the transmitting; a communication to oneself can never be “to the public”.

***Sharman and Cooper* and “to the public”**

3-66. As to *Sharman and Cooper*, it is clear that the point was simply not argued. Not being argued, and being an element of infringement, it was necessarily assumed by the trial judge in each case. It is quite different when the point is squarely raised, as it is by iiNet in the present case. Thus the suggestion that the argument is “contrary to authority in the online context” in ACS 268 is incorrect.

Third reason: the person who is making the transmission and is therefore doing the infringing act is not the iiNet user

3-67. This section responds to ACS 257-263.

3-68. The next fatal flaw in the electronic transmission case is the identification of the person doing the act. The applicants’ case is, of course, explicitly confined to authorisation by iiNet of persons (defined in para 59 of the Further Amended Statement of Claim) as “iiNet’s Customers” and other persons accessing the Internet by means of the iiNet internet services as the “iiNet Users”. It is, for example, no part of the applicants’ case that iiNet has authorised the activities of DtecNet. However, it is DtecNet or its agents, working in Denmark or the Baltic States, who, under the Australian legislative scheme, are taken to be the makers of the communications by electronic transmission. The evidence as it has emerged has only strengthened iiNet’s case on this question.

3-69. The applicants raise four arguments against iiNet’s submissions on the application of s 22(6).

The evidence on the operation of BitTorrent

- 3-70. The first argument⁴⁹ is that it is contrary to the evidence before the Court as to how BitTorrent works.
- 3-71. Contrary to the applicants' submissions, the request from the requesting computer is the sole causative factor in the transmission taking place, and in its content. As Mr Carson agreed⁵⁰ a requesting computer never gets a chunk or piece that it has not asked for. As the DtecNet evidence made clear⁵¹, once the "agent" (which is the requesting computer) receives the "unchoke" message, it is "allowed to request data from the peer ... and then proceeds to download data from the user, by sending requests for specific parts of the torrent".
- 3-72. None of this language is apt to represent a decision-making process by the user's computer; all of it is apt to describe a process of determining the content by the fetching computer.

Cooper did not decide this issue

- 3-73. The second argument⁵² is predicated on the basis that in *Cooper Tamberlin J* expressly held that the remote servers where the sound recordings were located had "determined the content of the communications" when they were electronic transmissions as well as when they were the making available of recordings online. Then the applicants say that that finding was repeated and endorsed by the Full Court (ACS 260).
- 3-74. It is incorrect to say that Tamberlin J made a finding, on a contested point, that the remote websites were the electronic transmitters of the recordings. His Honour's explicit finding⁵³ is, in terms, only about the "making available" of material. The holding is made in the context of a submission by the record companies that it was

⁴⁹ ACS 258.

⁵⁰ Carson FXXN T 447.1-6.

⁵¹ Confidential Ex KL-2, JCB Vol B3 tab 53, section 5.2.4, page 49.

⁵² ACS 259-260

⁵³ *Universal Music Australia Pty Ltd v Cooper* 150 FCR 1 at [76]

Mr Cooper, and not (or not only) the remote website, who determined the content. His Honour rejected that contention. There does not appear to have been any contest that, in the alternative, the remote websites had determined the content of what they were making available.

- 3-75. The other passage to which the applicants draw the Court's attention is a passage where his Honour is again dealing with the question of whether Mr Cooper had "made available" the sound recordings; and his Honour makes the comment that it is the remote websites that did so, then said "and [it is the remote sites] from which the digital music files are downloaded as a result of a request transmitted to the remote website"⁵⁴. His Honour then goes on to say at [66] that Cooper did not transmit the sound recordings; that the transmission is to a member of the public⁵⁵ and his Honour then records at [68] that the remote websites have "electronically transmitted the music sound recordings to the public". However, that is not a finding made on a contested point. The point does not appear to have been argued; and certainly his Honour does not offer any reasoning on it. In contrast, the point is contested here.
- 3-76. The suggested "repetition and endorsement" by the Full Court is also an illusion. At 156 FCR 380 at [108] Kenny J is merely recording the findings of Tamberlin J. It is plain from the submissions that her Honour records at [115] and following that the finding at [108(5)] was not contested. The Full Court can in no sense be taken to have "endorsed" the finding. Moreover, the remarks of Branson J referred to the applicants at ACS 260 fn 298⁵⁶ are not in the context of the primary infringement; they are in the context of a discussion of authorisation.
- 3-77. *Cooper* does not assist the applicants.

⁵⁴ *Universal Music Australia Pty Ltd v Cooper* 150 FCR 1 at [63].

⁵⁵ But, as submitted above, this is not the result of a contested argument on the point.

⁵⁶ At 156 FCR 380 at [43].

Effect of s 22(6A) on the construction of s 22(6)

3-78. The applicants misconstrue s 22(6A)⁵⁷. The reference there to “gaining access” means the act of browsing a website by entering its URL into a browser or by clicking on a link (which, as a technical matter, necessarily involves causing whatever is on the page accessed to travel over the Internet to the computer of the person browsing). If there is any doubt about that, the extrinsic materials clear it up⁵⁸. The passages from the Explanatory Memorandum cited by the applicants do not assist them.

3-79. First, unusually, sub-s 22(6A) has an example appended to it in the following terms (which was not set out by the applicants at ACS 261):

- (6A) To avoid doubt, for the purposes of subsection (6), a person is not responsible for determining the content of a communication merely because the person takes one or more steps for the purpose of:
- (a) gaining access to what is made available online by someone else in the communication; or
 - (b) receiving the electronic transmission of which the communication consists.

Example: A person is not responsible for determining the content of the communication to the person of a web page merely because the person clicks on a link to gain access to the page.

3-80. What sub-s (6A) is plainly intended to do – and this made abundantly clear by both the example and the Explanatory Memorandum – is to provide that if, by merely straying onto a website by clicking a link, one thereby causes the content of that website – including pictures, sound files, and whatever the website owner has chosen to place on its home page – to travel over the Internet and arrive on the clicker’s computer, the clicker is not taken to have determined the content of that transmission. That is achieved not least by the word “merely” in the *chapeau* to s 22(6A) and in the Explanatory Memorandum (twice), but also by the use of the expression “gaining access” in s 22(6A)(a).

3-81. Once that is appreciated, it is clear that the insertion of s 22(6A) supports iiNet’s, not the applicants’, construction of s 22(6) and its application to the present facts.

⁵⁷ AS 179.

⁵⁸ See *Copyright Amendment Act* 2006, EM Sch 7 p 130.

Making “further” copies on DVD etc

- 3-82. This topic is dealt with in ACS 235.
- 3-83. The asserted primary infringements of making further copies on DVDs or other transportable media are not supported by the evidence. The fact that Mr Herps and Mr Fraser did so (they were, after all, gathering evidence) is not indicative of anything. And in any event even if the applicants were to persuade the Court that such copying might on occasion occur, the issue of the nexus between the primary act and the alleged authorising behaviour comes into play. *Post hoc* is not *propter hoc*.
- 3-84. No iiNet witness was cross-examined on this topic.
- 3-85. Moreover, given that the only examples of this activity in any concrete terms, as required by *WEA v Hanimex*, are activities of the applicants' agents, the question of whether they are infringements at all – because they have been licensed by the applicants – arises. See below.

Summary

- 3-86. The applicants have not made out any “electronic transmissions” by “iiNet Users” (using their term)⁵⁹.

3-E. ABSENCE OF LICENCE

- 3-87. This section responds to ACS 280-286.
- 3-88. As the applicants correctly pointed out in the opening outline⁶⁰ they bear the burden, as part of proving both primary infringement and infringement by authorisation, that the acts complained of were committed without their licence. That is the effect of *Avel v Multicoin Amusements*⁶¹.

⁵⁹ Other than Mr Herps and Mr Fraser. But see below as to the fact that they were licensed, which renders their activities non-infringing.

⁶⁰ At AS 50.

⁶¹ (1990) 171 CLR 88.

- 3-89. iiNet has always accepted⁶² that, to the extent primary acts of infringement are established, it did not have the licence of any of the applicants to authorise those acts.
- 3-90. To the extent that the applicants rely on the activities of Mr Herps and Mr Fraser in establishing speculative acts of primary infringement, those acts were plainly licensed.
- 3-91. As to DtecNet there is in fact no alleged act of primary infringement by DetecNet and accordingly the reservation was unnecessary. iiNet agrees with ACS 281 that the Court will not need to decide any issue in relation to DtecNet and absence of licence.
- 3-92. The applicants assert that the primary acts of infringement were done without the licence of the copyright owners. iiNet has accepted that proposition in relation to the vast number of alleged primary incidences of activity (ie, the acts identified in the AFACT notifications based on the DtecNet investigations⁶³. Where iiNet has refused to admit that the acts were unlicensed is in relation to the activities of Mr Herps and Mr Fraser and, if necessary, Mr Carson. Why, one asks, do the applicants seek to hang on to the fiction that the employees of AFACT, which is entirely a creature of the MPA and of the studios, did not act within the studios' authority when making films for the purpose of gathering evidence? Why would the applicants seek to characterise AFACT's employees, and a respected expert witness retained for the purposes of this case, as being infringers of copyright?
- 3-93. The reasons appear to be that each of Mr Herps and Mr Fraser did the following – unremarkably, given that they were conducting an investigation, and not engaging in the natural, non-forensic behaviour of the identified primary users – which the applicants seek to rely upon to extend iiNet's liability:
- (a) First, by the use of a tool⁶⁴ that a normal BitTorrent user would be highly unlikely to use (and indeed would be foolish to use, given that it would slow their downloads down from hours to days if not weeks), they confined

⁶² Amended Defence para 66, JCB Vol A1 tab 6 p 21.

⁶³ Amended Defence para 61, JCB Vol A1 tab 6 p 14.

⁶⁴ An IP address filter (.ipfilter.dat).

themselves to obtaining a copy of particular movies solely from iiNet's IP address sources⁶⁵. The Court can safely proceed on the basis that that is not something that happens outside the investigative sphere.

- (b) Secondly, Mr Herps and Mr Fraser burnt copies of films on DVDs. There is no evidence to show that this is something routinely done, or done at all by persons who have downloaded the applicants' films via BitTorrent and make them available via iiNet IP addresses.

3-94. The applicants seek that the Court make a finding that there are by extension many such primary infringements and in due course a finding that iiNet has authorised them. As the evidence has emerged, the only such instances were licensed by the applicants and accordingly are not evidence of infringement at all. That is because they were done by Mr Herps and Mr Fraser (and perhaps Mr Carson).

3-95. It is for the applicants to prove absence of licence as it is an ingredient of infringement: *Avel v Multicoïn Amusements*⁶⁶. A reference to "licence" in the Act, does not, of course, mean a written licence or even an explicit licence. It extends to every type of approval or permission, even of the most casual kind. As s 15 makes plain, an act is deemed to be done without the licence of the owner if the doing of the act was authorised by a licence binding the owner of the copyright; although the concept of "licence" travels further than that. However, the cases make it clear that any kind of approval, express or implied, of the copyright owner will amount to an answer to infringement⁶⁷.

The affidavit evidence

3-96. The applicants' evidence on this issue, attempting to discharge their *Avel* burden, was in the affidavits of Mr Phillipson,⁶⁸ Mr Wheeler,⁶⁹ Mr Perry,⁷⁰ Ms Solmon,⁷¹

⁶⁵ Herps #2 para 9, JCB Vol A2 tab 25 p 2; Fraser #1 para 8, JCB Vol A2 tab 24 p 2.

⁶⁶ (1990) 171 CLR 88.

⁶⁷ Laddie et al, *The Modern Law of Copyright and Designs*, 3rd ed., (2000) pp 093 [24.2], 911 [24.14]; *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1988) 12 IPR 487 at 490 (Full Court)

⁶⁸ JCB Vol A1 tab 12 (Village Roadshow) para 49 p 7.

⁶⁹ JCB Vol A1 tab 13 (Fox) para 50 p 9.

Ms Reed,⁷² Mr Kaplan,⁷³ and Ms Garver.⁷⁴ In each case the “absence of licence” evidence was in a standard form⁷⁵. In each case it depended on a combination of alleged personal knowledge and review of books and records of a particularly nominated company.

- 3-97. The effect of those paragraphs as apparently put forward by the applicants is that Mr Herps, Mr Fraser and Mr Carson are embraced in the definition in each case of “iiNet customers”. The evidence related in very general terms to a large class of customers. It did not purport to say, in particular, that Mr Herps, Mr Fraser and/or Mr Carson were not licensed.
- 3-98. The cross-examination revealed that that broad and general evidence was not sufficient to displace the Avel burden in any event; and amply demonstrated that the activities of Mr Herps and Mr Fraser were ultimately approved of – in advance – by the applicants. In particular, the evidence shows that in the case of each company the conduct of the investigations was left to either the MPA or the MPA and AFACT. Moreover, it shows in many cases that the knowledge or enquiries of the studio witnesses simply would not have revealed the absence of a licence to a vast number of authorised persons. In addition, many of the searches could not have revealed persons whose names were not actually recorded at the head offices and would not have picked up even major sub-licensees.

Interlude – why AFACT and the studios are accusing Messrs Herps and Fraser of criminal activity

- 3-99. Contrary to what seemed to be the thrust of the propositions that underlay some of the applicants’ cross examination of Mr Malone and Mr Dalby⁷⁶, it is strongly arguable

⁷⁰ JCB Vol A1 tab 14 (Paramount) para 55 p 8.

⁷¹ JCB Vol A1 tab 15 (Colombia) para 59 p 9.

⁷² JCB Vol A1 tab 16 (Disney) para 16 p 3.

⁷³ JCB Vol A1 tab 18 (Warner Bros) para 61 p 10.

⁷⁴ JCB Vol A1 tab 19 (Universal) para 62 p 9.

⁷⁵ With very minor variations.

⁷⁶ Malone XXN T 716.1-138.22; Dalby XXN T 993.35-995.42.

that, if proved to the requisite criminal degree of proof, the activities of Mr Herps⁷⁷ do involve the commission of a crime. When cross-examining on possible criminal activity in the context of the referral to Detective Sergeant Taylor, senior counsel for the studios emphasised what seemed to be put as a requirement, for there to be copyright crimes, of acts conducted “on a commercial scale”.⁷⁸ In fact, there are many offences that do not contain any element of “commercial scale”, and there is a very real likelihood that, in the absence of a licence from the copyright owners, Mr Herps was committing an offence.

3-100. Section 132AJ(1) provides as follows:

132AJ Possessing infringing copy for commerce

Indictable offence

- (1) A person commits an offence if:
- (a) the person possesses an article, with the intention of doing any of the following with the article:
 - (i) selling it;
 - (ii) letting it for hire;
 - (iii) by way of trade offering or exposing it for sale or hire;
 - (iv) offering or exposing it for sale or hire to obtain a commercial advantage or profit;
 - (v) distributing it for trade;
 - (vi) distributing it to obtain a commercial advantage or profit;
 - (vii) distributing it to an extent that will affect prejudicially the owner of the copyright in the work or other subject-matter of which the article is an infringing copy;
 - (viii) by way of trade exhibiting it in public;
 - (ix) exhibiting it in public to obtain a commercial advantage or profit; and
 - (b) the article is an infringing copy of a work or other subject-matter; and
 - (c) copyright subsists in the work or other subject-matter at the time of the possession.

3-101. The elements of this offence are as follows:

⁷⁷ And Mr Fraser, in his limited role. The remaining paragraphs of this section will refer just to Mr Herps. If every element were established, they would also apply to other users. That conclusion – which demonstrates that there was nothing illusory about iiNet referring the matters to Det Sgt Taylor, will be addressed again in relation to authorisation.

⁷⁸ Malone XXN T 717.21-722.40 ; Dalby XXN T 993.39-995.26 ; Dalby XXN T 1018.35.

- (a) a person possesses an article (s 132AJ(1)) which includes by definition a copy of a film in electronic form (see s 132AA, definition of “article”);
- (b) the person has the intention of, inter alia, “distributing it for trade” (s 135AJ(1)(a)(v)) or “distributing it to an extent that will effect prejudicially the owner of the copyright in the ... subject-matter of which the article is an infringing copy” (s 135AJ(1)(a)(vii)”: where “distribute” includes distribute by way of communication (see s 132AA, definition of “distribute”);
- (c) the article (ie, the electronic copy) is an infringing copy of a film (s 132AJ(1)(d); the notion of “infringing copy” (a defined term which appears in s 10(1)) imports the notion that the copy was made without the licence of the owner of the copyright - the very thing that the applicants assert that Mr Herps did not have;
- (d) copyright subsists in the film at the time of possession.

3-102. Notably, there is no reference to *commercial scale*, *commercial advantage* or *profit* in the offence. The studios are, in effect, asserting that Mr Herps has committed a crime in the course of conducting the investigations for them. If that seems odd, the answer to it is quite straightforward, Mr Herps was engaging in conduct that was authorised and approved by the studios via the MPA and AFACT. This is the answer to the applicants’ ACS 282.

Roadshow

3-103. In relation to Roadshow, Mr Phillipson agreed that Roadshow was a member of AFACT⁷⁹; he appeared to indicate that a Mr Kennedy had nominated films for inclusion in the proceeding⁸⁰; that Mr Kennedy was the person who had undertaken any investigation as to the persons licensed or otherwise to deal with any of the eight films⁸¹; and that in any event the evidence was necessarily not correct in its general

⁷⁹ Phillipson XXN T 388.27-31.

⁸⁰ Phillipson XXN T 392.15-20.

⁸¹ Phillipson XXN T 398.25-30.

terms because, even at December 2008, there would have been people able to download some legitimate programs (which would fall into the definition of “Roadshow Catalogue Films”) eg, via iTunes, and Roadshow would have no record of them⁸². The generality of the evidence is overcome by the inference that the AFACT investigators were acting legally.

Warner

3-104. In relation to Warner, Mr Kaplan accepted that the MPA and AFACT represent the interests of Warner in the direction of antipiracy programs⁸³; that AFACT’s investigations would be conducted so it would operate within the law and that Warner would not want the activities conducted illegally⁸⁴; and that Warner had properly monitored and authorised AFACT in relation to the activities that were conducted⁸⁵.

3-105. Then, he indicated that any examination of the books and records for the purposes of para 61(a) of his affidavit (which covered absence of licence) did not include the books and records of, at least the copyright owner in *Batman Begins*⁸⁶, and that from about June 2008 he or someone to his knowledge had selected titles that met the description “cleared for Australian litigation” and put them on the SharePoint system of the MPA⁸⁷.

3-106. Additionally, the following can be said about the Warner Bros films. The rights that are described in the “Change of ownership” confidential documents⁸⁸ are that certain specific bundles of rights have been dealt in by various Warner companies (the identity of them and in some instances the date of deadline, appears to remain a matter of confidentiality). The rights are described as “home entertainment rights” and “television rights”. There is also a reference in the case of the film *Batman Begins* to “all media distribution rights”. Nowhere in the evidence was the Court informed of

⁸² Phillipson XXN T 404.10-20.

⁸³ Kaplan XXN T 456.4-23.

⁸⁴ Kaplan XXN T 460.20-25.

⁸⁵ Kaplan XXN T 460.25-30.

⁸⁶ See the wording of Kaplan para 61(a) JCB Vol A1, tab 18; read with Kaplan XXN T 464.43.

⁸⁷ Kaplan XXN T 459.13-21.

⁸⁸ In the case of Warner, these are set out in confidential Exhibit DPK-2, JCB Vol B1 tab 22.

the actual content of these rights and, in particular, whether either bundle includes the right of distribution via downloading and, more particularly, via BitTorrent. It is axiomatic that those before the Court have to own the relevant right that is said to have been infringed, and that copyright is practically infinitely divisible: see s 30 and s 196.

3-107. Of course, in many instances the owner of the whole of the copyright is a party. But the point remains that generalised evidence as to the absence of licence in respect of a right the exclusive licensees of which may not even be present in the proceeding is insufficient in the circumstances to amount to a discharge of the *Avel v Multicoïn* burden.

3-108. And again, iiNet wishes to emphasise that this is only an issue in relation to Mr Herps, Mr Fraser and Mr Carson; it is only an issue because of the applicants' dogged adherence to the fictional proposition that those people were infringing copyright when they engaged in their activities as employees of AFACT or as respected experts engaged in this proceeding; and it is only an issue because the applicants maintain the extreme cases of 100% transmission from iiNet users, and of further DVD copying⁸⁹.

Paramount

3-109. In relation to Mr Perry of Paramount, again he confirmed that Paramount relies, via its membership of the MPA, on the MPA and, in Australia, AFACT, to act on behalf of Paramount in representing the interests of Paramount and anti-piracy programs⁹⁰; that when Paramount put titles on SharePoint as "cleared for Australian litigation" Paramount understood the title would be the subject of the sort of investigations that DtecNet was carrying out and the sort of investigations that AFACT was carrying out⁹¹; and that Paramount would expect that investigations and activities undertaken on its behalf by the MPA or AFACT would be conducted within the law and would

⁸⁹ Further Amended Statement of Claim para 60, JCB Vol A1 tab 2 p 15.

⁹⁰ Perry XXN T 477.19-44.

⁹¹ Perry XXN T 483.20-25.

not involve engaging in criminal activities or trespassing on the rights of any person, including on those of Paramount.⁹²

Disney

3-110. In relation to Ms Reed of Disney, it became readily apparent that Ms Reed did not have any involvement (as some of the other studio witnesses did have) with the MPA or AFACT and their antipiracy activities. However, it can be inferred that Disney's participation in the MPA (which Ms Reed confirmed⁹³) put it in the same position as the other studios in relation to conducting the activities of the MPA and AFACT. In relation to the enquiries that Ms Reed undertook for the purpose of giving the broad evidence in para 16 of her affidavit, the information either came from some conversations with two attorneys identified in the cross-examination⁹⁴ and a review of books and records that was confined to licences given by the Disney companies directly.⁹⁵ The generalised evidence, particularly once its foundation was exposed, cannot overcome the clear position that Mr Herps, Mr Fraser and Mr Carson were undertaking activities condoned by the applicants.

Fox

3-111. The evidence given in cross-examination by Mr Wheeler of Fox was to the same effect as that of Mr Kaplan's and Mr Perry's in relation to membership of the MPA and reliance on the MPA and AFACT.⁹⁶ He also agreed that eg, people in a position of iTunes end-users are the beneficiaries of licences ultimately granted by Fox to Apple⁹⁷; and that the right epigrammatically dealt with as "home entertainment rights" and "television rights" would in the actual agreements have quite elaborate terms with definitions and so forth.⁹⁸

⁹² Perry XXN T 484.10-27.

⁹³ Reed XXN T 490.9.

⁹⁴ Reed XXN T 491.34-36.

⁹⁵ Reed XXN T 491.43-492.6.

⁹⁶ Wheeler XXN T 494-496.

⁹⁷ Wheeler XXN T 500.15-17.

⁹⁸ Wheeler XXN T 502.29-41.

Universal

3-112. Ms Garver of Universal also gave evidence to Universal participating (through her “boss” Mr Kang) in the antipiracy activities of the MPAA⁹⁹; that she had been responsible for placing films on the MPAA’s SharePoint for use in the litigation¹⁰⁰; that in order to find out what was included in “home entertainment rights” and “television rights” and what was in “other rights”¹⁰¹ one would have to look at the documents and find out about it¹⁰²; and that her examination of books and records for the purpose of giving the evidence in her para 62 involved consulting a database that had the names of licensees on it and that she could not ascertain from that database who all the conceivable licensees would be throughout the world for any particular time.¹⁰³ It follows from this that Ms Garver’s general evidence at her para 62 does not extend to evidence sufficient to displace the *Avel v Multicoïn* burden in relation to the particular individuals, Mr Herps and Mr Fraser; or even if it did, that the countervailing evidence as to their authority from the MPA and AFACT would mean that the applicants had not discharged their burden in respect of those individuals and in respect of Universal Films.

Columbia

3-113. Finally, Ms Solmon on behalf of Columbia was the person who participated in the relevant MPA antipiracy working group, including in relation to the present investigation and AFACT.¹⁰⁴ She confirmed that the MPA acts on behalf of Columbia and other MPA members in directing antipiracy programs and that Columbia relies on AFACT, the MPA and external counsel to do that work,¹⁰⁵ that she supervised people placing Columbia titles onto SharePoint for the purposes of the

⁹⁹ Garver XXN T 564-565.

¹⁰⁰ Garver XXN T 567.25.

¹⁰¹ Ms Garver acknowledged that there are other rights at T 571.20-21.

¹⁰² Garver XXN T 571.26-27.

¹⁰³ Garver XXN T 571-572.

¹⁰⁴ Solmon XXN T 575.2.

¹⁰⁵ Solmon XXN T 576.29-39.

investigations,¹⁰⁶ and that the detail of the conduct of the investigation – as long as it remained within the law in the sense of not breaking the law, committing a crime or trespassing on anyone's rights, including Columbia's rights – were left to AFACT and to local external counsel¹⁰⁷; that a search by her or her staff to see whether someone was licensed in relation to particular film content would, if content were licensed over iTunes, pick up the name of the Apple company but not of Apple iTunes customers who legitimately downloaded films¹⁰⁸; and that the rights described in the "chain of title documents" would be defined in a somewhat more elaborate way than just the phrases "theatrical rights" and "home entertainment rights".¹⁰⁹

3-114. In relation to Ms Solmon's para 59, the evidence in broad terms about absence of licence, what was available was written licences in Columbia's records able to be searched by her paralegal.¹¹⁰ Generalised evidence in broad terms was not able to identify whether or not Mr Herps, Mr Fraser and Mr Carson were in fact licensed. The search could not have done so anyway. To that extent it also falls short of the *Avel v Multicoïn* burden. But in any event it certainly cannot displace the strong inference that they were engaging in conduct within the terms of the MPA's, AFACT's and Gilbert & Tobin's entrusted authority, not at least to conduct the investigation and gather the evidence legally. Again, at the risk of being repetitious, if – as the studios maintain – Mr Herps was downloading and making his copies etc without their licence, he was either committing a crime (s 132AL) or at the very least infringing eg Columbia's rights. The easy resolution of that difficulty is to find that he was doing it with the studios' authority.

Miscellaneous

3-115. The submission made in the last two sentences of ACS 282 is very curious. Activity is only "copyright infringing activity" if it is unlicensed. If you are licensed to engage in copyright infringing activity it is not copyright infringing activity.

¹⁰⁶ Solmon XXN T 578.11-24, although Ms Solmon declined to give detail on the basis of privilege.

¹⁰⁷ Solmon XXN T 579.14-18.

¹⁰⁸ Solmon XXN T 580.26-41.

¹⁰⁹ Solmon XXN T 582.18-28.

¹¹⁰ Solmon XXN T 583.8-20.

Summary

3-116. Mr Herps' and Mr Fraser's activities do not amount to an infringement of copyright because they were licensed to conduct them by the applicants.

3-117. This does no violence to long-standing approaches of the Courts to "trap" purchasing, as the applicants seem to suggest. Where the infringement is complete without the action of the trapper the trap is just evidence of the infringement. Thus, for example, where a trap purchaser goes into a store to buy an infringing copy, the offering for sale of the infringing copy is already an infringement. No question of licence from the trapper arises. And in any event in cases where the trapper has simply reproduced the ordinary, usual incidents of the applicable act of commerce, the Court can act *quia timet*. That opportunity arises when the Court is persuaded that for some reason the circumstances of the trap, while not themselves giving rise to liability, are the same as circumstances that would arise in ordinary commerce and that would attract liability. That is not the case here in relation to the contrived activities of Mr Herps and Mr Fraser in relation to burning to DVD, or forcing the download of 100% of a film.