

**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 FOUR

THE DIGITAL AGENDA REFORMS

**Filed on behalf of the
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4-A. LEGISLATIVE HISTORY OF THE COPYRIGHT AMENDMENT (DIGITAL AGENDA) ACT 2000

4-1. Sections 101(1A) and 112E were introduced to the Act as part of the reforms set out in the *Copyright Amendment (Digital Agenda) Act 2000* (**Digital Agenda Act**). The *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* published on 6 December 1999 by the House of Representatives Standing Committee on Legal and Constitutional Affairs sets out a useful summary of the history of the Digital Agenda Act:¹

1.2 The process began in 1993 with the establishment of the Copyright Convergence Group (CCG). The CCG was tasked with considering the appropriateness of protection under the Copyright Act 1968 for broadcasts and other electronic transmissions and the underlying copyright materials used in those transmissions. The CCG reported in August 1994. Although it did not make any legislative response to the CCG's recommendations, in its 1996 election platform, Australia Online, the Government supported the key recommendation made by the CCG, to introduce a broadly-based technology-neutral transmission right into the Copyright Act.

1.3 In July 1997, the Government issued a discussion paper titled 'Copyright Reform and the Digital Agenda'. The purpose of the paper was to seek comments on the proposed scheme for the introduction of new enforcement measures and a new package of rights for copyright owners, including a proposed transmission right and the right of making available to the public.² The Government received 70 submissions in response to the discussion paper, which on the whole supported the scheme.

1.4 On 30 April 1998, the Attorney-General, the Hon Daryl Williams AM QC MP, and the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, announced their decision to implement the Digital Agenda copyright reforms. Both of the Ministers' respective departments have been involved in the policy formulation and implementation throughout the drafting process, and the departments made joint submissions to this Committee during its inquiry.

1.5 On 26 February 1999 the Government released an Exposure Draft of the Copyright Amendment (Digital Agenda) Bill 1999. The Government received

¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* at pp 1-2, citations omitted.

² Discussion Paper, *Copyright Reform and the Digital Agenda: Proposed transmission right, right of making available and enforcement measures*, July 1997, Preface.

over 80 submissions and held numerous meetings with affected interests including three workshops on the key areas.³

1.6 On 2 September 1999, the Attorney-General introduced the Copyright Amendment (Digital Agenda) Bill 1999 (the Bill) into the House of Representatives. The Bill as introduced contains significant revisions on the Exposure Draft, largely in response to the submissions the Government received. The changes between the versions of the Bill are outlined later in this chapter. Some of those submissions were repeated in evidence to the Committee.

- 4-2. Following the introduction of the *Copyright Amendment (Digital Agenda) Bill 1999 (Digital Agenda Bill)* into Parliament on 2 September 1999, a further consultation and review process was conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs, the results of which were published on 6 December 2009 along with a number of recommendations in respect of further amendments. Many of these recommendations were incorporated as further amendments to the Digital Agenda Bill.⁴ One of the recommendations made by the Committee was as follows:

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

(d) whether the person knew the infringing character of the act or was aware of facts or circumstances from which the infringing character of the act was apparent.⁵

While the legislature adopted many of the other amendments, it did not adopt the above recommendation. This is relevant to the constructions of ss 101(1A) and 112E as addressed further below.

- 4-3. The Digital Agenda Bill received Royal Assent on 4 September 2000 and the amendments to the Act commenced on 4 March 2001.

³ AGD e-news on Copyright, Issue 9, September 1999.

⁴ *Supplementary Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999* p.2. The Supplementary Explanatory Memorandum sets out the amendments made to the Digital Agenda Bill as a result of the recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs.

⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* at p 104, recommendation no. 33.

4-B. POLICY AND OBJECTS OF THE DIGITAL AGENDA ACT

- 4-4. iiNet submits that it is important to recognise the context in which ss 101(1A) and s 112E were included in the Digital Agenda Bill. In the Exposure Draft and Commentary published in February 1999 (**Exposure Draft**), a discussion of the provisions is set out under the heading “*Limitation of liability of carriers and carriage service providers.*”. The Exposure Draft provides:

*The Government recognises that Telecommunications carriers and carriage service providers (including ISPs) play a key role in the online delivery of content and the operation of the information economy. To encourage continued investment in these crucial new online businesses, the Government’s intention is that ISPs should be provided with a legislative frame-work that gives certainty about their responsibilities to copyright owners and the steps they need to take to avoid infringing copyright.*⁶
[emphasis added]

- 4-5. The Exposure Draft identifies that the provisions of the Digital Agenda Bill “*limit and clarify the liability of carriers and ISPs in relation to both direct and authorisation liability.*”⁷ In relation to authorisation liability, the Exposure Draft provides:

*The draft Bill implements a two pronged approach to providing certainty and limiting the authorisation liability of carriers and ISPs. The first element is codification of authorisation principles which currently exist at common law. The second element is to expressly limit the liability of ISPs and carriers for authorisation of copyright infringements on their networks in certain circumstances.*⁸ [emphasis added]

- 4-6. These elements were the introduction of ss 101(1A) and s 112E respectively. It is clear that the legislature introduced these provisions specifically with the limitation of liability of carriage service providers in mind given their “*key role in the online delivery of content and the operation of the information economy*”⁹ and to “*encourage continued investment in these crucial new online businesses*”.¹⁰

⁶ Exposure Draft and Commentary - *Copyright Amendment (Digital Agenda) Bill 1999* pp 29-30.

⁷ Exposure Draft and Commentary - *Copyright Amendment (Digital Agenda) Bill 1999* p 30.

⁸ Exposure Draft and Commentary - *Copyright Amendment (Digital Agenda) Bill 1999* p 31.

⁹ Exposure Draft and Commentary - *Copyright Amendment (Digital Agenda) Bill 1999* pp 30.

¹⁰ Exposure Draft and Commentary - *Copyright Amendment (Digital Agenda) Bill 1999* pp 30.

- 4-7. The Explanatory Memorandum to the Digital Agenda Bill introduced in Parliament in September 1999 (**Explanatory Memorandum**) provides that one of the objectives of the Digital Agenda Bill was to:

*“ensure that copyright law provides carriers and carriage service providers (including ISPs) with reasonable certainty about liability for infringements that occur on their facilities or infrastructure”.*¹¹ [emphasis added]

- 4-8. The Explanatory Memorandum echoed the observations of the Exposure Draft as to the important role played by carriage service providers in the information economy, the need to encourage investment and the need for greater certainty.¹²

- 4-9. The Explanatory Memorandum also provides as follows:

*The need for copyright reform with respect to third-party distributors online, ie, carriers and carriage service providers (including Internet service providers (ISPs), was highlighted by the 1997 High Court decision in APRA v Telstra. In light of this case, carriers and carriage service providers including ISPs have expressed concerns that they face a considerable, uncertain and unreasonable degree of liability in relation to copyright infringements carried out on facilities provided by the carriers and carriage service providers. Given the important role that ISPs in particular play in facilitating access by Australians to online services and electronic commerce, legislation providing for liability for copyright infringements in the online environment ought to be clearly defined and fairly applied.*¹³ [emphasis added]

- 4-10. The Explanatory Memorandum indicates that the legislature considered three options with regard to amendments to the Act concerning the liability of carriage service providers for authorisation of copyright infringement.¹⁴ First, not making any amendment to the Act such that the issue of authorisation would be left to be determined by the common law. Secondly, setting out the list of factors in s 101(1A) but not including an express limitation of liability for carriage service providers. Thirdly, setting out a list of factors in s 101(1A) and including an express limitation of liability for carriers and carriage service providers. In relation to the option of not

¹¹ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 7.

¹² Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 4.

¹³ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* pp 5-6.

¹⁴ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* pp 9-10.

making any amendments to the Act in relation to carriage service providers the Explanatory Memorandum states:

*The option of making no amendments to the Act and relying on contractual means to provide protection in the online environment is not an acceptable option.*¹⁵

- 4-11. One of the problems with not making amendments to the Act was that “users of copyright material would face possible inconvenient copyright control over their most fundamental operations.”¹⁶ The Explanatory Memorandum provides the following example:

*For example, ISPs might find themselves liable for authorising copyright infringements by doing no more than providing facilities for persons transmitting copyright material without permission of the copyright owners.*¹⁷

- 4-12. In the second reading speech the Attorney-General referred to the context and purpose of the Digital Agenda Bill:

*The reforms will update Australia's copyright standards to meet the challenges posed by rapid developments in communications technology, in particular the huge expansion of the Internet. This extraordinary pace of development threatens the delicate balance which has existed between the rights of copyright owners and the rights of copyright users. The central aim of the bill, therefore, is to ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment.*¹⁸ [emphasis added]

- 4-13. In relation to the amendments affecting carriage service providers, the Attorney stated:

The amendments in the bill also respond to the concerns of carriers and carriage service providers, such as Internet service providers, about the uncertainty of the circumstances in which they could be liable for copyright infringements by their customers. The provisions in the bill limit and clarify the liability of carriers and Internet service providers in relation to both direct and authorisation liability. The amendments also overcome the 1997

¹⁵ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 12.

¹⁶ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 12.

¹⁷ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 12.

¹⁸ The Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives (“Second Reading Speech”), Hansard, 2 September 1999, p 9748.

High Court decision of APRA v. Telstra in which Telstra, as a carrier, was held to be liable for the playing of music-on-hold by its subscribers to their clients, even though Telstra exercised no control in determining the content of the music played.

*Typically, the person responsible for determining the content of copyright material online would be a web site proprietor, not a carrier or Internet service provider. Under the amendments, therefore, carriers and Internet service providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material. The reforms provide that a carrier or Internet service provider will not be taken to have authorised an infringement of copyright merely through the provision of facilities on which the infringement occurs. Further, the bill provides an inclusive list of factors to assist in determining whether the authorisation of an infringement has occurred.*¹⁹ [emphasis added]

The above passage was referred to in *Sharman* at [398].

4-14. The objects of the Digital Agenda Act are set out in section 3²⁰:

The object of this Act is to amend the Copyright Act 1968 so as to:

- (a) ensure the efficient operation of relevant industries in the online environment by:
 - (i) *promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors; and*
 - (ii) *providing a practical enforcement regime for copyright owners; and*
 - (iii) promoting access to copyright material online; and
- (b) promote certainty for communication and information technology industries that are investing in and providing online access to copyright material; and
- (c) provide reasonable access and certainty for end users of copyright material online; and
- (d) *ensure that cultural and educational institutions can access, and promote access to, copyright material in the online environment on*

¹⁹ The Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives ("Second Reading Speech"), Hansard, 2 September 1999, p 9750.

²⁰ See the comment of the High Court on the objects in *Stevens v KK Sony Computer Entertainment* (2005) 224 CLR 193 at [9], [32] (Gleeson CJ, Gummow, Hayne & Heydon JJ); [204] (Kirby J).

reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors; and

- (e) *ensure that the relevant global technical standards which form the basis of new communication and information technologies, such as the Internet, are not jeopardised. [emphasis added]*

4-15. The applicants' demands²¹ of iiNet in the present case which, in reality, are an attempt to impose a different business model in relation to the enforcement of online copyright onto the respondent, and carriage service providers in general, are not reflected in the objects of the Digital Agenda Act.²² In particular, the demand that some of iiNet's subscribers be disconnected from the Internet is inconsistent with the objects of that Act referring to access to online material, even more so in light of iiNet's promotion of legitimate copyright material online through the Freezone.

²¹ Paragraph 97 of the applicants' particulars to the amended statement of claim JCB Vol A1 tab 3 p 20 and the other, recently introduced and unpleaded matters referred to elsewhere in these submissions.

²² It is not unusual for copyright owners to seek to control an unrelated industry in copyright cases presenting novel questions. See, for example: *CBS Songs Ltd v Amstrad Consumer Electronic plc* [1988] AC 1013 where Lord Templeman for the House of Lords stated at 1060-1061: "*In these proceedings the court is being asked to forbid the sale to the public of all or some selected types of tape recorder or to ensure the advertisements for tape recorders shall be censored by the court on behalf of copyright owners. The court has no power to make such orders and judges are not qualified to decide whether a restraint should be placed on the manufacture of electronic equipment or on the contents of advertising. No one is to blame for the present situation. Copyright law could not envisage and now cannot cope with mass production techniques and inventions which create a vast market for the works of a copyright owner but also provide opportunities for his rights to be infringed. Parliament could place limitation on the manufacture or sale of certain types of tape recorder and could prescribe notices and warnings be included in advertisements. Parliament might take the view that such restraints and prescriptions would constitute an unwarranted interference with the development of the electronic industry and be ineffective*". See also *Sony Corp v Universal City Studios Inc* 464 US 417 (1984) per Justice Stevens (delivering the judgment of the majority of the US Supreme Court) "*the judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative reference*" (at 429) and concluded that "*sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials*" (at 430). See also the legislative solution attempted with the enactment of Part VC in 1989; the attempt failed on constitutional grounds relating principally to parliamentary procedure: see *Australian Tape Manufacturers v the Commonwealth* (1993) 176 CLR 480.