

**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 FIVE

AUTHORISATION

**Filed on behalf of the
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5-A. INTRODUCTION

- 5-1. The applicants' submissions suggest that iiNet's conduct falls squarely within the principles of authorisation liability and that iiNet's arguments in defence of this case are "extreme", "fanciful and absurd."¹ Any objective analysis of the law of authorisation of copyright infringement reveals that the case sought to be made by the applicants requires a considerable development of the law and an unwarranted expansion of the meaning of "authorize" established by many years of judicial consideration. Indeed, the applicants put forward a case in stark terms that the combination of knowledge (of primary infringements) and a power to prevent (expressed as, eg., any power to switch-off) equals authorisation, which travels well beyond any decided case in Australia and, so far as the respondent's researches reveal, in the world.
- 5-2. These submissions address the relevant authorities before turning to the evidence demonstrating that iiNet clearly and publicly promotes the distribution of licensed content and clearly prohibits users from infringing copyright via its facilities. This should be the end of the case: if this evidence is accepted, it could not be said that iiNet "sanctions, approves or countenances" infringing activity by Internet users.
- 5-3. Furthermore:
- (a) It is common ground that there cannot be authorisation in the absence of the necessary "control" or "power to prevent". iiNet submits that this control must be in relation to the particular means of infringement used by the primary infringer. In the present case, that is BitTorrent client software such as uTorrent over which iiNet has no control. If this proposition is accepted, it is fatal to the applicants' case.
 - (b) iiNet is constrained by the Telco Act from using or disclosing information relating to the contents or substance of a communication that it has carried, carriage services provided to a person, or to the affairs or personal particulars

¹ See AS 197. The adjectives are not resiled from: see ACS p 53 fn 197.

of another person, specifically any of its customers. For this reason, iiNet is not able to act upon the applicants' notices of alleged infringement in the absence of a court order and the applicants' case fails at the threshold. Detailed submissions on the application of the Telco Act are provided in Chapter 7 of these submissions.

- (c) iiNet receives up to 350 emails per day alleging copyright infringement and on average 5,000 IP addresses per week.² Even if there were no statutory restriction on the use or disclosure of information relating to the substance of communications, carriage services supplied or the affairs and personal particulars of its customers, to act on these notifications (which are received in varying formats), iiNet would have to implement and maintain substantial information and management systems at unknown cost³ (there has been no offer from the applicants to contribute).
- (d) An IP address does not identify the user of a computer. It is simply the address of a device through which one or more computers connects to the Internet. A user engaging in infringing conduct may be the partner, child, flat-mate, employee or customer of the account holder. Where an account holder uses wireless connectivity, it is possible for a stranger to use an IP address allocated to the account holder. This range of possibilities means that an automated regime of warnings and disconnections is obviously inappropriate. Varying circumstances applying to each customer would require case by case treatment. Self-evidently, this would be a time- and resource-intensive undertaking.
- (e) If iiNet were to implement a regime of this type, it would lose customers to other ISPs such as Telstra and Optus⁴ who not only do not have such regimes but whose customers' activities, apparently, AFACT and the studios have either decided to condone by not issuing notifications; or not pursuing the

² Malone #2 paras 5 and 10 JCB Vol A2 tab 30 pp 2-4.

³ Malone #2 paras 8-20 JCB Vol A2 tab 30 p 7.

⁴ Or another of the 400 or so ISPs in Australia who do not appear to have a policy of the kind required by the applicants. The applicants identified 5 ISPs in Australia who have published what they regard as appropriate policies. There are approximately 450 ISPs in Australia. Malone XXN T 775.25.

alleged authorisation infringements thereby created.⁵ The applicants trumpet iiNet's candid evidence to this effect as if it seals iiNet's fate, but this submission encapsulates the flaw in the applicants' case: the applicants assume that iiNet is obliged to take steps to protect their copyright (specifically in this case to terminate account holders). This is not the statutory question. The question to be addressed under the Act is whether iiNet authorised the doing in Australia of any act comprised in the copyright. In considering this question and assuming the necessary control or power to prevent to exist, the Court must consider, among other things, whether iiNet took any reasonable steps to prevent or avoid the doing of the act. The cost to iiNet of engaging in the steps proposed by the applicants is an obvious and legitimate factor in the consideration of whether such steps were reasonable. There is no duty on iiNet to prefer the applicants' interests to its own.

- (f) iiNet is a carriage service provider that provides facilities for making, or facilitating the making of, communications within the meaning of s 112E of the Act. The applicants' case is that the continued provision of those facilities by iiNet to users who used them to engage in an act comprised in the copyright amounts to authorisation by iiNet of such conduct. This outcome is precluded by s 112E. Detailed submissions on s 112E are provided in Chapter 6 of these submissions.

5-4. It should not be thought appropriate to place an added burden on ISPs such as iiNet on the assumption that there is no satisfactory alternative to the problem of addressing copyright infringement by Internet users. There is a well-established and obvious alternative: the preliminary discovery procedures of this Court as described in Order 15A of the Federal Court Rules. The applicants are not willing to attempt to use this well-established avenue for enforcement of their rights directly against the Internet users they accuse of engaging in infringing conduct. Not one of the applicants has applied for preliminary discovery from iiNet or any other ISP in order to identify the account to which an IP address was allocated in order to sue or warn an end-user.

⁵ It is clear that only iiNet was sued for authorisation infringement from among the 4 targeted by DtecNet on the MPA's instructions. See *Gane XXN T 255-258*.

iiNet has consistently maintained that it would readily comply with such an order and indeed has joined with other ISPs in proposing a streamlined preliminary discovery process to facilitate such an approach.⁶

- 5-5. Presumably the applicants, who secure enormous profits from the exploitation of their copyright, are not willing to investigate individual end-users because of the cost involved; yet they expect iiNet to bear the costs of investigating users accused of infringement and of enforcing the applicants' copyrights by suspending or terminating customer accounts. Even now, having obtained details of 20 sample accounts, the applicants have not pressed for personal details of the account holders⁷ or sought leave to use such details for the purpose of proceeding directly against end users. Leave is necessary because of the rule in *Harman v Home Office* but would almost certainly be granted.⁸
- 5-6. The applicants put to Mr Malone that the alternative to the implementation by iiNet of the disconnection regime it propounds is for the rights owners to sue iiNet's customers.⁹ They add the rhetorical flourish that customer's children would also have to be sued.¹⁰ This is, of course, nonsense. The applicants are "armed to the teeth with legal talent"¹¹ familiar with the procedures of this Court. There could be no debate that after a prospective applicant in this Court identifies one or more potential respondents, for example following a preliminary discovery exercise,¹² the commencement and scope of any subsequent litigation is completely at the discretion of that prospective applicant. The preliminary discovery process would be directed to seeking documents only from account holders, who are by definition 18 and over. No children would be sued, or served with process, unless the applicants chose to do so.

⁶ *Dalby* paras 17, 32-33 *JCB* Vol A2 tab 31 pp 7, 15-16; Ex SJD-1 pp 130-190 *JCB* Vol B8 tab 91

⁷ Either on discovery or by way of orders of the type made in *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133

⁸ *Authors Workshop v Bileru* (1989) 16 IPR 661.

⁹ AOS T 209.7-11.

¹⁰ AOS T 209.7 and T 534.19-20.

¹¹ *Malone* XXN T 821.24-25. The compliment is returned.

¹² iiNet does not understand the applicants to contend that they would have to bring a separate preliminary discovery application in respect of each user who might be potential respondent. Their "legal talent" (there acting for the record companies) did not suggest as much to Tamberlin J in *Sony Music Entertainment (Australia) Ltd v University of Tasmania* (2003) 129 FCR 472. iiNet submits there is no basis for such a view.

The applicants could make such an application once or twice a year following updated DtecNet reports in order to identify new infringers. The present filing for such an application in this Court is \$1,881.00. The DtecNet reports are obtained in any event and thus do not represent additional cost. The cost of preparing and making such applications would decrease as they became routine. iiNet has indicated time and again¹³ that it will be entirely co-operative in such an application. Mr Malone has explicitly warned consumers, including on the Whirlpool Forum as long ago as 2005, if the copyright owners can be bothered chasing downloaders, they will get sued, and that this will actually happen at some stage in the future.¹⁴

- 5-7. There is no obligation on an applicant who obtains preliminary discovery to proceed against any or all of the potential respondents identified through that procedure. In the context of the present proceeding, had the applicants obtained preliminary discovery from iiNet that revealed details of customers whose accounts were identified by DtecNet as involved in infringing activity, the next steps available to the applicants are as varied as the extent of their commercial and legal ingenuity. For example, they might send a warning letter to all such potential respondents. The applicants might identify that some potential respondents' accounts appear more frequently in the DtecNet analysis and choose to proceed only against those customers. There would be an almost infinite number of possibilities available to the applicants in those circumstances.
- 5-8. If customers wished to dispute or explain any matter arising from a warning letter, letter of demand or commencement of proceedings, they could communicate with the applicants (or their lawyers), that is, directly with the owner of the rights alleged to be infringed. However, the applicants wish to place the burden in relation to alleged infringements of the applicants' rights over iiNet's network of:
- (a) reviewing the extent of supporting information provided by the copyright owner such as the AFACT notices and DVDs;

¹³ Dalby paras 32-33 JCB Vol A2 tab 31 pp 15-16; Dalby, Ex SJD-1 pp 63-190 JCB Vol B8 tab 90.

¹⁴ See postings on Whirlpool at Ex. MMM-1 pp 813-815 JCB Vol B7 tab 89.

- (b) forming value judgements about how to proceed against various customers; and
- (c) dealing with complaints, disputes and/or explanations from customers in response to allegations and any escalation to the ombudsman

directly on iiNet. This is not analogous to iiNet engaging in such conduct in relation to its own business, for example with respect to unpaid bills. It is entirely appropriate that iiNet engage in the latter role. The applicants have not demonstrated why iiNet should perform such a function with respect to the enforcement of the applicants' rights other than to say a failure to do so amounts to authorisation. Ordinarily, in matters of private law, property rights¹⁵ are enforced by the owners of those rights.

5-B. PRINCIPLES

- 5-9. iiNet agrees that the introduction of s 101(1A) of the Act did not change the meaning of the word "authorizes" in s 101(1) and that the earlier authorities continue to inform the construction and application of s 101(1).¹⁶ However, the applicants' treatment of the authorities fails to consider the important factual aspects of those cases which is essential for a considered understanding of the statements of principle therein.

Adelaide Corporation

- 5-10. The decision of the High Court of Australia in *Adelaide Corporation v Australasian Performing Right Association Ltd*¹⁷ is significant, both for its own reasoning and authority and because it was heavily relied upon in the modern leading High Court decision in *Moorhouse*.¹⁸ The High Court held that there was no permission¹⁹ to engage in infringing acts in the following circumstances:²⁰

¹⁵ Of which copyright is a species: s 196(1) of the Act.

¹⁶ AS 65; ACS 76.

¹⁷ (1928) 40 CLR 481

¹⁸ And in subsequent decisions of this Court, including Full Courts.

¹⁹ The *Copyright Act 1911* (UK) used "permits" which the Court been held in *Moorhouse* to be synonymous with "authorize". As submitted below, the continued reliance of the High Court and this Court on *Adelaide Corporation* confirms that it is regarded as an authority relevant to the question of authorisation.

²⁰ *Adelaide Corporation* at 482 – 485.

- (a) The appellant corporation let its town hall to a concert promoter for four days on terms which permitted the town clerk to:
- (i) cancel the letting at any time; and
 - (ii) require the promoter to supply him with the programme for the planned concerts and, in his absolute and unfettered discretion, prohibit and stop the performance of such programme if he considered the programme objectionable or unsuited to the venue.
- (b) After the letting arrangement was made, APRA notified Adelaide Corporation that it appeared that various musical works would be publicly performed at the town hall, that APRA owned the public performance right in those works and that no licence was given for the public performance of those works. APRA alleged that if Adelaide Corporation permitted the performance it would infringe copyright. Adelaide Corporation acknowledged receipt of the letter.
- (c) On the next day, a concert took place at the town hall and one of the works mentioned in APRA's letter was publicly performed and proceedings against Adelaide Corporation followed.

5-11. Higgins J held:²¹

“[T]here is not the slightest evidence of any ‘sanction, approval or countenance’²² given by the Corporation....

...

At most, it might be said that the Corporation showed itself indifferent; but, as ‘indifference’ has a rather dyslogistic sense, let us say that the Corporation remained neutral. The problems involved in the letter of 7th October [from APRA] called for consideration and caution: and the Corporation had not the function of policing the provisions of the Copyright Act on behalf of alleged owners of copyright. The Corporation would know that if [the promoter] was infringing the Act the plaintiff had its remedy against [the promoter] by injunction and damages; and that under sec. 17 of the Australian Act, the

²¹ *Adelaide Corporation* at 497 – 498.

²² ie the definition of “authorize” confirmed in *Moorhouse* and other cases. There can be no doubt that the decision is squarely applicable to authorisation. The applicants’ fervent opposition to this is doubtless engendered by their recognition of the very specific dangers to their case posed by *Adelaide Corporation*.

plaintiff, by giving express notice, could make those performing liable to the criminal law. As the learned Judges of the Supreme Court have said, mere indifference or omission cannot be treated as "permission" unless the Corporation had the power to permit the performance, and unless there was some duty to interfere; and it had no such power, no such duty. ... [I]t had no duty toward the plaintiff except not to "permit" the singing of the song for profit. [Emphasis added]

5-12. iiNet submits that the following passage of his Honour's judgment is important:²³

"But the plaintiff has another string to its bow. It relies, by its counsel, on clause 16 of the conditions of hire of the hall, which prescribes that the Town Clerk may, if in his judgment he thinks fit, cancel the letting, returning the deposit and the rent for the unexpired term. That is to say, that, as the Corporation has no power to prevent directly the singing of the song, it should smash the lease, refunding money paid for all future performances of every kind, and thus prevent all singing of any sort. This seems rather an extreme suggestion. The doctrine as laid down by Atkin LJ is that 'permit' means ... 'to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it.' Is the smashing of the lease a 'reasonable step' under the circumstances? It is not a step which would in itself prevent the infringement of the copyright, but a step which would do much more: it would put an end to the lease. ... In my opinion, Atkin LJ meant just what he said--he had in his mind a power to prevent the specific act (here the infringement of the copyright), not a power which, if exercised, would put an end to the whole relationship of lessor and lessee." [Emphasis added]²⁴

5-13. His Honour continued:²⁵

"Even if we treat the Corporation as 'indifferent' (or neutral), it had a right to be indifferent (or neutral); and the letter of 7th October [from APRA] could not deprive the Corporation of that right. As Bankes LJ said in the Ciry Case, the indifference was 'not of a kind to warrant the inference of authorization or permission. It was the indifference of one who did not consider it his business to interfere, who had no desire to see another person's copyright infringed, but whose view was that copyright and infringement were matters for' others (here [the promoter]) 'to consider.' The essence of the position is that [the promoter], had, on the existing facts, control of the performers as to what they should sing, whereas the Corporation had none." [Emphasis added].

5-14. The Full Court of the Supreme Court of South Australia had held below in finding Adelaide Corporation liable that:²⁶

²³ *Adelaide Corporation* at 498 to 499.

²⁴ The words in bold will be familiar – they are the constituent elements of s 101(1A) of the Act.

²⁵ *Adelaide Corporation* at 500.

“there was one thing which the defendant might have done, but apparently did not do. When the letter dated 7th October was received it might have been transmitted or its contents notified to the responsible parties, together with some warning or protest or at least some indication of a desire on the part of the defendant that its hall should not be used for the purpose of infringement. We feel bound to say that in our opinion this omission evidences a degree of indifference which suggests that the defendant had no real desire to prevent its hall from being used for this purpose. ... The defendant's attitude was that it was not concerned to interfere; but in adopting this attitude we think that it failed to realize that there is at least some obligation to withhold countenance or support to what is commonly called ‘piracy.’ This is really the crux of the case. We think that under the circumstances the defendant abstained from taking the reasonable step to prevent the performance of the particular work in question.... A fair view of the facts is this. The Town Clerk was in a position to enforce any protest he might see fit to make...; and in our opinion the proper inference from the evidence is that the defendant on receipt of the letter of 7th October knew or had good reason to anticipate that the song ‘I heard you singing’ would be performed, that it was within its power to prevent it by protesting, that it failed to take this reasonable step to that end, and that it thereby exhibited a degree of indifference which justifies the conclusion that it permitted the use of the hall for the purposes of the performances of the particular work complained of.”

5-15. Higgins J rejected this conclusion in the following manner:²⁷

“the passage involves, in my opinion, an unjustifiable shifting of the burden of proof. It is for the plaintiff to prove that the defendant permitted the performance; not for the defendant to intimate to [the promoter] that it was not permitting. ... The Corporation had no contractual or other relation with the plaintiff; and the facts are quite consistent with a reasonable hesitation to assume any responsibility as lessor for its lessee's conduct in regard to alleged copyright, or any responsibility for paying any licence fee to copyright owners. With all respect, I deny that it was within the power of the Corporation to prevent the singing of the song, and that, even if it had any such power, it was a duty of the Corporation to exercise that power.”

5-16. In rejecting the allegations of copyright infringement, Gavan Duffy and Starke JJ held:²⁸

“It is said, however, that this permission should be inferred because when the Corporation learned that the performance was about to take place it did nothing. Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity

²⁶ *Adelaide Corporation* at 501.

²⁷ *Adelaide Corporation* at 502.

²⁸ *Adelaide Corporation* at 504 – 505.

or 'indifference, exhibited by acts of commission or omission, may reach a degree from which an authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of' (Performing Right Society v Ciry Theatrical Syndicate²⁹). The conduct of the Corporation must, therefore, be examined. It was informed by the plaintiff that the song in which it claimed copyright would be sung ... at the Town Hall. By clause 16 of the letting agreement it was provided [that the town clerk could cancel the letting.] Despite the notice given to the Corporation, it neither exercised this power nor took any step to induce the hirer to prevent the performance. Now, the clause does not give the Corporation any control over [the promoter] or [the performer] or over concerts given by them in the Town Hall: all it authorizes is a termination of the contractual relationship constituted by the letting agreement. The failure to prevent that which a man can legally prevent may be evidence of his consent to its coming into, or continuing in, existence; but no inference of consent should be drawn against one who having no such right remains quiescent and declines to alter his legal relations in order to acquire such a right." [Emphasis added].

5-17. In dissent, Isaacs J said that infringement would lie where a person knew or had reason to know or believe that the particular work will or may be performed “and, having the legal power to prevent it, nevertheless disregards that power and allows his property to be used for the purpose.”³⁰ (This is, in effect, the applicants’ over-broad case that knowledge plus power equals authorisation.) In *Moorhouse*, discussed below, Gibbs J considered this statement to be “too widely expressed”.³¹)

5-18. The following may be said about *Adelaide Corporation*:

- (a) it is a decision of the High Court;
- (b) contrary to the submission at ACS 115 to 118, the different legislative provision in question does not relevantly distinguish the decision from the present case;³²
- (c) the words in bold in the passage from the reasons of Higgins J extracted at paragraph 5-12 above is the clearest statement in the pre-Digital Agenda Act

²⁹ [1924] 1 KB at 9.

³⁰ *Adelaide Corporation* at 490 - 491.

³¹ *Moorhouse* at 13.

³² See oral submissions at T 1234.25 – 1235.9, 1246.12.

cases of the s 101(1A) framework. By way of contrast, while Gibbs J's approach in *Moorhouse* is relevant and important, his Honour did not analyse the issue in terms of the "relationship" between alleged authoriser and the primary infringer and the word "relationship" does not appear in *Moorhouse* at all;

- (d) *Adelaide Corporation* was cited repeatedly in *Moorhouse*, *Nationwide News*, *Metro* and *Cooper* (all addressed below), has never been questioned by the High Court or a Full Federal Court, and remains of undiminished authority in all presently relevant aspects;
- (e) although much of the discussion was about the statutory language to "permit", the Court treated "authorize" and "permit" synonymously³³ and Higgins J applied the accepted definition of "authorize";³⁴
- (f) the applicants' position in the present case mirrors precisely the approach of the South Australian Supreme Court that was rejected in the High Court and the statement of Isaacs J in dissent considered by Gibbs J in *Moorhouse* to be overbroad;
- (g) Adelaide Corporation's power to terminate the lease of the town hall was unfettered.³⁵ It was wider than iiNet's rights under its Customer Relationship Agreement; indeed, because Adelaide Corporation could cancel the lease for any reason, and contrary to ACS 120-125, iiNet is less likely to be found to authorise because its rights are fettered;³⁶
- (h) just as Adelaide Corporation was under no duty to control or interfere with the concert, neither is iiNet under any duty to control or interfere with the communications of its subscribers or other Internet users. The submission at

³³ *Moorhouse* per Gibbs J.

³⁴ *Adelaide Corporation* at 497.

³⁵ See submissions of Dixon KC at 486.

³⁶ The submission at ACS 125 is inaccurate if it is intended to suggest that the CRA states explicitly that the customer must ensure non-copyright infringing use. iiNet relies on clauses 4.1 and 4.2 in so far as they require the customer to "comply with all laws" and prohibit use of the service "to infringe another's person's rights" or "for illegal purposes or practices" and the CRA forbids the customer from allowing anyone else to do so.

ACS 126 to the effect that a duty to act is not part of the law of authorisation is wrong. It is the essence of the applicants' case that iiNet had, and has, a duty to interfere in its user' conduct and Bennett J in *Metro* referred to this duty in her discussion of *Adelaide Corporation* without demur;

- (i) iiNet accepts that *Moorhouse* overruled *Adelaide Corporation* to the extent it was considered that authorisation or permission must be conferred with respect to the specific work in question.³⁷ However, as submitted below with respect to *Moorhouse*, the facts of each case will determine whether there is a sufficient nexus between the alleged authoriser and the copyright material in question. In *Moorhouse*, it was the provision of the library books; in *Wurlitzer*, it was the provision of the records; in *Cooper* it was the provision of a website, over which full control was maintained, specifying the links to the infringing material; and in public performance cases involving APRA such as *Jain* and *Metro*, it is the fact of APRA's almost universal repertoire that means that any band performing (or recorded music played) in premises under the authoriser's control will infringe in the absence of a licence, and it is a simple blanket licence that is available;
- (j) the fact that Adelaide Corporation was given clear and simple notice of the anticipated infringement, in marked contrast to the present case (where iiNet was only notified of alleged past infringements with reference to lengthy spreadsheets and masses of material in electronic form such as CD and DVDs) is a matter suggesting that iiNet is in a stronger position to resist an allegation of authorisation;³⁸
- (k) just as APRA had the right to proceed against the promoter and the performer for copyright infringement, so have the present applicants the right to proceed against Internet users who infringe their copyright;
- (l) the absence of any ability of iiNet to control the manner in which Internet users use BitTorrent client software and the applicants' contention that iiNet's

³⁷ ACS 127.

³⁸ cf ACS 128.

means of control or power to prevent infringing activity is to disconnect account holders is analogous to the suggestion that Adelaide Corporation should “smash the lease” and prevent singing of any sort which Higgins J described as “extreme” and not a “reasonable step”.³⁹ iiNet does not presently have the technical capacity to “watch” the communications passing over its network and accordingly again is in a stronger position to resist an allegation of authorisation than the lessor in Adelaide Corporation who could readily have attended at the hall to listen to the songs; and

- (m) there was no suggestion that Adelaide Corporation, described as “neutral” or “indifferent”, had been involved in any prior consideration of how to address issues of copyright infringement arising through use of its facilities. The evidence in the present case reveals a pattern of encouragement by iiNet of the distribution of licensed content⁴⁰, discouragement of copyright infringement⁴¹ and involvement in industry-wide efforts to find a solution to the problem⁴². In this sense, it is far less “neutral” or “indifferent” than Adelaide Corporation but, rather, pro-copyright.

5-19. The applicants’ attempts to ignore *Adelaide Corporation* should be rejected.⁴³ Successive High Court and decisions of the Full Court of this Court have not done so. To the contrary, it has been and remains a key source of guidance on the law of authorisation in this country.

Moorhouse

5-20. The defendant university supplied to Mr Brennan⁴⁴ both the book from its library from which an infringing copy was made and a machine in the library enabling the

³⁹ *Adelaide Corporation* at 498.

⁴⁰ *Malone #1* paras 44-67 *JCB* Vol A2 tab 30 pp 16-20; *Malone Ex MMM-1* pp 128-154 *JCB* Vol B6 tab 89.

⁴¹ *Malone #1* paras 230-233 *JCB* Vol A2 tab 30 pp 56-58; *Malone Ex MMM-1* pp 803-825 *JCB* Vol B6 tab 89.

⁴² *Dalby* paras 32-33 *JCB* Vol A2 tab 31 pp 15-16; *Dalby, Ex SJD-1* pp 63-190 *JCB* Vol B8 tab 90.

⁴³ *ACS* 113-129; T 1064.21-38; *AOS* T 1094.34-41; T 1098 – 1106.

⁴⁴ A graduate of the University who photocopied a chapter or story from two books obtained from the University library shelves: *Moorhouse* at 7.

copy to be made.⁴⁵ The university was aware⁴⁶ of assertions by the Australian Copyright Council that had given it enough information to suspect that some infringing copies were likely to be made.⁴⁷ The majority considered the question in terms of whether an “invitation” might be implied that users of the library might make such use of the photocopying facilities as they thought fit in circumstances where the library owner places copying machines in the library and access provided to books on the library shelves.⁴⁸ The majority held that the invitation was “unlimited” and therefore that the infringing conduct was authorised. Mr Brennan “used the library book or books and the library copying machine in terms of the invitation apparently extended to him”⁴⁹ and the “unqualified nature of the invitation sufficiently caused him to do the acts which he did and which were comprised in the copyright of the [copyright owner].”⁵⁰ The “fatal weakness in the case for the University [was] the fact that no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright.”⁵¹

- 5-21. The causal element identified by Jacobs J (underlined above) is important. There must be some nexus between the invitation extended by the alleged authoriser and the conduct of the primary infringer. No such nexus is demonstrable here.
- 5-22. Gibbs J noted that “the question whether one person authorizes another to commit an infringement depends upon all of the facts of the case so that a decision on a particular

⁴⁵ *Moorhouse* at 20.6.

⁴⁶ Counsel for the University sought to rely on the House of Lords’ decision in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 on the question of corporate knowledge: *Moorhouse* at 7.1. The principles of corporate knowledge have been misapplied in the present case by the applicants and iiNet makes submissions on this issue below.

⁴⁷ If the applicants’ submission at T 1065.39 is intended to suggest that the university did not receive notice of alleged copyright infringement, it is incorrect.

⁴⁸ *Moorhouse* at 21.6.

⁴⁹ *Moorhouse* at 23. This was the basis of the majority’s finding.

⁵⁰ *Moorhouse* at 23, emphasis added.

⁵¹ *Moorhouse* at 17.

set of circumstances may be of no assistance in other cases.”⁵² His Honour then relied on *Adelaide Corporation* in five respects:⁵³

- (a) “authorize” has been held to mean “sanction, approve, countenance”;
- (b) “authorize” can also mean “permit” and the words were treated synonymously in *Adelaide Corporation*;
- (c) a person cannot “authorize” an infringement of copyright unless he has some power to prevent it;
- (d) authorisation or permission may be inferred from inactivity or indifference that reaches the necessary degree; and
- (e) the word “authorize” connotes a mental element and the statement by Isaacs J in dissent in *Adelaide Corporation* that it was enough if the alleged authoriser “knows or has reason to know or believe that the particular act of infringement ‘will or may’ be done” may have been too widely expressed.

5-23. iiNet submits that the High Court was specific, and deliberately so, in identifying the means of infringement. The majority noted that the university had provided “a machine at the library which would enable copies to be made”.⁵⁴ Gibbs J too emphasised the specific machine as the means of infringement in his statement relied upon by the applicants as the key statement of principle.⁵⁵ The Court did not refer to control or the power to prevent in broader terms, such as the power to exclude visitors from the library altogether.

5-24. If the applicants’ submit that the relevance of the provision of the copyright material, the library books, was limited to knowledge,⁵⁶ then such a submission is mistaken. A reading of the judgment as a whole makes it clear that all of the Justices considered

⁵² *Moorhouse* at 12.6; see also Jacobs J (with whom McTiernan ACJ agreed) at 21.3

⁵³ *Moorhouse* at 12.6 - 13.2.

⁵⁴ *Moorhouse* at 20.6.

⁵⁵ *Moorhouse* at 13.3.

⁵⁶ AOS T 1065.29-33; T 1066.45-46.

the provision of the books central to the question of whether the university had authorised the infringing conduct. For example, Gibbs J said:⁵⁷

The University had the power to control both the use of the books and the use of the machines. In the circumstances, if a person who was allowed to use the library made a copy of a substantial part of a book taken from the open shelves of the library, and did so otherwise than by way of fair dealing for the purpose of research or private study, it can be inferred that the University authorized him to do so, unless the University had taken reasonable steps to prevent an infringing copy of that kind from being made. [emphasis added]

5-25. If the books were only relevant to knowledge, the University's control over them (as opposed to mere supply or awareness) would not arise. The majority emphasised the joint supply of books and photocopy machines in even clearer terms, for example:⁵⁸

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

and ultimately this led to the majority finding:⁵⁹

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

5-26. Further, a later High Court in considering *Moorhouse* emphasised the provision of the books as the copyright material in addition to the machines: see the discussion of *Australian Tape Manufacturers* in para 5-38 below.

5-27. The applicants seek to characterise ineffective supervision of the photocopier by library staff as an "enforcement" step so as to draw a comparison with iiNet's CRA.⁶⁰ None of the Justices considered this issue in the context of "enforcement" and so this strained characterisation is not supported in the decision. More importantly, in the absence of any credible evidence that iiNet staff should be looking over users' shoulders to supervise their use of the Internet, a suggestion repugnant to ordinary

⁵⁷ *Moorhouse* at 14.8.

⁵⁸ *Moorhouse* at 20.6; see also at 21.7 - 21.9, 22.5 – 22.7

⁵⁹ *Moorhouse* at 23.4

⁶⁰ ACS 88, T 1067.45 – 1068.24.

notions of privacy and in breach of the *Telecommunications (Interception and Access) Act 1979*, the attempted analogy has no foundation.

- 5-28. The present is a very different case to *Moorhouse*. First, iiNet does not supply the means of infringement. It is the BitTorrent client software (such as uTorrent) that permits Internet users to make available online or electronically transmit copyright subject matter using the BitTorrent protocol.⁶¹ iiNet has no relationship or connection with the company BitTorrent Inc or the BitTorrent protocol, it did not create the BitTorrent protocol or any BitTorrent client software and does not and has never operated, promoted or supported the BitTorrent protocol or any BitTorrent client software.⁶² A user of the Internet who wishes to engage in BitTorrent communications acquires BitTorrent client software, installs it and uses it all without the knowledge, let alone the invitation, of iiNet.⁶³
- 5-29. Secondly, iiNet's "invitation" to its customers with respect to their use of the Internet provided via iiNet's facilities is, and at all relevant times has been, qualified. There is no express or implied invitation to users of iiNet's services to engage in copyright infringing activity and iiNet requires its customers:
- (a) to comply with all laws;
 - (b) not to use or attempt to use the services provided by iiNet to infringe another person's rights; and
 - (c) not to use or attempt to use the services provided by iiNet for illegal purposes or practices.⁶⁴

⁶¹ cf *Universal v Sharman* (the *Kazaa* case) where the respondents provided the file sharing software and were found to authorize the acts of users of that software in committing acts comprised in the copyright in sound recordings. This decision is discussed further below.

⁶² Malone #1 paras 189-190 JCB Vol A2 tab 30 p 49. To say that the users infringe by using the Internet and therefore iiNet has provided the means of infringement would be to hold an electricity supplier liable because the photocopier in *Moorhouse* needed electricity to operate.

⁶³ iiNet made media releases available for download via the BitTorrent protocol which of course iiNet expects would be obtained by people who had downloaded and installed BitTorrent client software from elsewhere on the Internet. The evidence shows that the particular press release complained of by the applicants was downloaded 33 times (Ex T). This is *de minimis* in relation to authorisation.

⁶⁴ iiNet Customer Relationship Agreement clauses 4.1, 4.2, Malone #1 paras 196 - 199 JCB Vol A2 tab 30 pp 50-51; Ex MMM-1 pp231-232 JCB Vol B6 tab 89.

- 5-30. iiNet also warns its customers that the hosting or posting of copyright material using an iiNet service is a breach of the Customer Relationship Agreement.⁶⁵ Even if iiNet's Internet services could be described as the relevant "means of infringement" (which iiNet denies), those warnings are equivalent to the "notice placed on the machines" that Gibbs J found would have removed the "fatal weakness" of the library's case in *Moorhouse*.
- 5-31. Thirdly, unlike the University and the supply of books, iiNet does not make available to Internet users via the BitTorrent the copyright subject-matter, in this case the Identified Films (or, indeed, any films). Rather, iiNet promotes an extensive array of licensed content for the enjoyment of its customers. This is addressed in more detail below.
- 5-32. Fourthly, it is a critical limb of the applicants' case that they have notified iiNet of alleged primary infringements and that iiNet has encouraged further acts of infringement because it failed to disconnect users.⁶⁶ iiNet's decision not to disconnect could only operate as encouragement to an infringing user (1) if that user believed that iiNet had detected that particular user's infringing conduct and, (2) by reason of iiNet's failure to disconnect, believed that iiNet implicitly approved of the conduct. There is simply no evidence to that effect. The far more likely assumption of an infringing user is that iiNet does not know what he or she is up to. Continued access in those circumstances cannot amount to authorisation or an "invitation" to engage in acts comprised in the copyright.
- 5-33. Thus the factors critical to a finding of authorisation in *Moorhouse* – supply of the means of infringement, supply of the copyright subject-matter, absence of warning and an unqualified invitation to use the means of infringement – are all absent here.
- 5-34. The applicants' attempt to describe the present case of one of "knowledge" and "control"⁶⁷ is a late and inaccurate attempt to characterise the facts of the present case as sufficiently close to *Moorhouse* to suggest that authorisation should be found. As

⁶⁵ webpage at <http://www.iinet.net.au/legal/copyright.html>: Malone #1 para 73 JCB Vol A2 tab 30 p 21; Ex MMM-1 p415 JCB Vol B6 tab 89.

⁶⁶ AS 7, 214, 219.

⁶⁷ AOS T 208036-42 and T 212.1-20

outlined above, the facts of the present case are far removed from *Moorhouse*. Authorisation liability is not established by invoking a mantra such as “knowledge and control”. The question is a matter of fact to be considered in each case.

Amstrad (House of Lords) and Australian Tape Manufacturers (High Court of Australia)

5-35. *CBS Songs Ltd v Amstrad Plc*⁶⁸ concerned the promotion and sale of a sound system possessing the following feature which was the subject of particular promotional emphasis:

“‘high speed dubbing’ enabling you to make duplicate recordings from one cassette to another, record direct from any source and then make a copy and you can even make a copy of your favourite cassette.”⁶⁹

5-36. The House of Lords noted that it was “statistically certain that most but not all [such products] are used for the purpose of home copying in breach of copyright.”⁷⁰

5-37. Various copyright owners sought to restrain Amstrad from selling the product “without taking such precautions are necessary reasonably to ensure that copyrights in sound recordings or musical works... are not infringed by the use of such machines.”⁷¹ The relief sought was modified in the House of Lords to an injunction restraining Amstrad “from extolling the advantages of double-speed taping and [compelling] Amstrad to give due notice to a purchaser that copying of copyright material is unlawful.”⁷² Lord Templeman⁷³ noted that it was doubtful that such relief would effect any material reduction in home copying.⁷⁴

5-38. The copyright owners’ primary submission was that Amstrad authorised copyright infringement. The House of Lords dismissed this proposition on the basis that Amstrad had no control over the use of their models once sold.⁷⁵ In *Australian Tape*

⁶⁸ [1988] 1 AC 1013.

⁶⁹ *Amstrad* at 1050H

⁷⁰ *Amstrad* at 1050D.

⁷¹ *Amstrad* at 1051E.

⁷² *Amstrad* at 1052D.

⁷³ With whom Lords Keith of Kinkel, Griffiths, Oliver of Aylmerton and Jauncey of Tullichettle agreed.

⁷⁴ *Amstrad* at 1052D.

⁷⁵ *Amstrad* at 1054E.

Manufacturers Association Ltd v The Commonwealth,⁷⁶ the High Court of Australia stated the position in light of *Moorhouse* and *Amstrad* as follows:

“It follows that manufacture and sale of articles such as blank tapes or video recorders, which have lawful uses, do not constitute authorisation of infringement of copyright, even if the manufacturer or vendor knows that there is a likelihood that the articles will be used for an infringing purpose such as home taping of sound recordings, so long as the manufacturer or vendor has no control over the purchaser's use of the article. It was the absence of such control in CBS Songs Ltd that constituted the critical distinction between the decision in that case and the decision in University of New South Wales v Moorhouse, where the University had power to control what was done by way of copying and not only failed to take steps to prevent infringement but provided potential infringers with both the copyright material and the use of the University's machines by which copies of it could be made.”

5-39. As submitted above, the means of infringement in the present case is BitTorrent client software. iiNet has no control over the manner in which such software is used by Internet users and, in accordance with *Amstrad*, as approved by the High Court in *Australian Tape Manufacturers*, no authorisation ought to be found. The applicants' solution to the problem of copyright infringement via BitTorrent is for iiNet to disconnect customers who were allocated IP addresses through which the applicants allege infringing conduct occurred. This is not a means of controlling the manner in which BitTorrent client software is used but rather prevents any, even non-infringing, use of not only BitTorrent but of any other Internet activity.⁷⁷ This is a wholly unreasonable and disproportionate approach. The product supplied by iiNet is access to the Internet which may be used for an infinite number of non-infringing activities. iiNet cannot control the manner in which users use their own software or the Internet. On the authority of *Moorhouse*, *Amstrad* and *Australian Tape Manufacturers*, iiNet cannot be liable for the infringing acts of its users.

⁷⁶ (1993) 176 CLR 480 at 498.

⁷⁷ Unless and until alternative access to the Internet is obtained.

Jain

- 5-40. The respondent in *Australasian Performing Right Association v Jain*⁷⁸ was the chief executive officer and financial controller of the corporate owner of the Old Windsor Tavern. Although he was one of five directors and one of four shareholders, Mr Jain was assumed to have more active involvement in the control of the company's affairs.⁷⁹ The company did not contest the allegations that musical works had been publicly performed at the hotel without a licence and orders were made against it accordingly. Mr Jain was alleged to have authorised the infringing acts of the company. He successfully resisted this contention at trial but an appeal to the Full Court was uncontested and successful.
- 5-41. An officer of APRA contacted Mr Jain to inform him of the unlicensed public performances that had taken place at the hotel.⁸⁰ Mr Jain refused to discuss the matter, saying that it should be left to the solicitors⁸¹. In response to a letter from APRA's solicitors requiring that the hotel apply for a licence or undertake not to perform music in public at the premises, the hotel's solicitors said that APRA's claims had been "noted" and that a considered reply would be provided shortly⁸². This did not occur and proceedings followed.⁸³
- 5-42. Importantly, the Court found that:

*"Mr Jain had the power to control what music was played at the Tavern and also to determine whether a licence from the appellant would be applied for. He did nothing about the matter at all. He allowed a situation to develop in which bands went on playing the appellant's music night after night. Despite assurances that his solicitors would consider the matter and get in touch either with the appellant itself or its solicitors, nothing of this kind occurred."*⁸⁴

⁷⁸ (1990) 26 FCR 53.

⁷⁹ *Jain* at 54.

⁸⁰ *Jain* at 55.

⁸¹ *Jain* at 55.

⁸² *Jain* at 56.

⁸³ *Jain* at 56

⁸⁴ *Jain* at 61.

- 5-43. The step available to Mr Jain to prevent any infringement occurring, securing a licence from APRA, was obvious, easy to accomplish, comprehensive and, by statutory definition,⁸⁵ reasonable. The universal nature of APRA's repertoire means that any venue for the public performance of live or recorded music would infringe APRA's rights unless a licence was obtained.⁸⁶ The Court noted that "[i]t may be that not every act which amounts to the countenancing of something is an authorisation. Every case will depend upon its own facts. Matters of degree are involved"⁸⁷ but a venue owner's absolute control over what is played, the certainty of infringement regardless of what is played and the ease and certainty of avoiding infringement by taking a blanket licence, meant that Mr Jain's conduct amounted to authorisation.
- 5-44. Mr Jain was found to be the controlling mind of a company that did not dispute that it had infringed copyright. That factual scenario bears no parallel to the position of an ISP with respect to allegedly infringing acts of Internet users. Here, iiNet cannot control the content of communications across its network, in the same way that a provider of a telephone line cannot know when or where a person making a call might utter a defamation or a threat. The range of uses to which the Internet might be put is almost infinite and an enormous number of such uses will not infringe copyright. There is no equivalent to an APRA blanket licence that an ISP can obtain to avoid infringement.
- 5-45. This is far from a case in which iiNet engaged in a "studied and deliberate course of action in which it decided to ignore the applicants' rights". To the contrary, the evidence in the present case reveals a pattern of conduct on the part of iiNet to:
- (a) encourage its customers to obtain licensed content;
 - (b) discourage customers from infringing copyright; and

⁸⁵ APRA's licences being under the supervision of the Copyright Tribunal. See, as then in force, the definition of "licence" in s 136(1) of the Act and see ss 154 and 157.

⁸⁶ *Jain* at 61

⁸⁷ *Jain* at 61

- (c) work with industry, government and rights holders to develop an industry-wide approach to copyright infringement via peer-to-peer services.⁸⁸

5-46. The applicants contend to the contrary—because iiNet would not adopt the applicants' preferred course of warning and disconnection; but this submission mistakenly conflates with applicants' rights with the applicants' demands. For the reasons given in these submissions, the applicants' case in this respect displaces the statutory test: iiNet's decision not to adopt the applicants' regime does not amount to the authorisation of Internet users to infringe copyright

Metro on George

5-47. *Australasian Performing Right Association Ltd v Metro on George Pty Ltd*⁸⁹ was a similar case to *Jain* in that it concerned a venue for the public performance of music that had not secured a licence from APRA. For the reasons outlined in relation to *Jain*, such cases are of little, if any, assistance by way of factual analogy to the present case. However, Bennett J did make some important observations:⁹⁰

- (a) her Honour applied the “sanction, approve or countenance” definition, applying *Adelaide Corporation*;⁹¹
- (b) authorise can also mean permit and applies both to an express and an implied permission or invitation: *Moorhouse*;⁹²
- (c) a finding of authorisation depends upon all of the facts of the particular case: *Moorhouse*;⁹³
- (d) “Control is necessary to constitute authorisation to infringe copyright; mere facilitation of the infringing conduct is insufficient, as is knowledge that there

⁸⁸ This evidence will be addressed below.

⁸⁹ (2004) 61 IPR 575

⁹⁰ Emphasis added.

⁹¹ *Metro* at [16].

⁹² *Metro* at [16].

⁹³ *Metro* at [17].

is a likelihood that there will be infringing use: *Australian Tape Manufacturers*”;⁹⁴

- (e) “In *Moorhouse*, the power to control photocopying by the provision of both the copyright material and the photocopying machines by which copies could be made did constitute authorisation. A person cannot be said to authorise an infringement unless he or she has some power to prevent it.”;⁹⁵
- (f) while authorisation may be inferred where inactivity or indifference reaches a sufficient degree, “mere indifference cannot be treated as ‘permission’ unless there was some power to permit the performance and unless there was some duty to interfere”, citing *Adelaide Corporation*;⁹⁶
- (g) “[T]he extent to which a party is obliged to use legal powers in a contract in order to take reasonable steps must... vary with the facts of the particular case”, referring to *Adelaide Corporation*,⁹⁷ in other words, a party is not always obliged to use its powers to take reasonable steps;
- (h) “Metro was in control of the premises. Metro advertised the performances. It operated the box office”;⁹⁸
- (i) the same evidence that established infringement under s 36 of the Act⁹⁹ established infringement¹⁰⁰ under s 39(1).¹⁰¹

5-48. As noted above, not only was Metro in control of the premises, but by advertising the performances and operating the box office, it promoted the specific performances giving rise to the infringement of copyright. As will be seen below, this direct promotion was a factor that arose in *Cooper* but is absent from the present case.

⁹⁴ *Metro* at [18].

⁹⁵ *Metro* at [18].

⁹⁶ *Metro* at [19].

⁹⁷ *Metro* at [61].

⁹⁸ *Metro* at [73].

⁹⁹ Equivalent to s 101.

¹⁰⁰ *Metro* at [85].

¹⁰¹ Equivalent to s 2(3) of the *Copyright Act 1911* (UK) in issue in *Adelaide Corporation*, thus emphasising the overlap between “authorize” and “permit” in this context.

Nationwide News v CAL

5-49. A unanimous Full Court made important observations concerning authorisation in *Nationwide News Pty Ltd v Copyright Agency Ltd*.¹⁰² That case concerned whether educational institutions had copied substantial parts of published editions in which copyright was owned by Nationwide News and it was alleged that CAL had authorised these infringements.

5-50. Sackville J, with whom Jenkinson and Burchett JJ agreed¹⁰³, held:

- (a) a person does not authorise an infringement merely because he or she knows that another person might infringe the copyright and takes no step to prevent the infringement;¹⁰⁴
- (b) knowledge that a breach of copyright is likely to occur does not necessarily amount to authorisation, even if the person having that knowledge could take steps to prevent the infringement, citing *Australian Tape Manufacturers and Adelaide Corporation* (both *supra*).¹⁰⁵

Sharman

5-51. The software in question in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*¹⁰⁶ was a peer-to-peer file sharing product called Kazaa by which users shared large numbers of unlicensed copyright sound recordings. The companies found to have authorised the infringing acts of users were Sharman Networks – the provider of the Kazaa file sharing software and “operator of the Kazaa system”¹⁰⁷ – and the Altnet companies which were found to be co-principals with Sharman in the operation of the Kazaa system.¹⁰⁸

¹⁰² (1996) 65 FCR 399.

¹⁰³ 65 FCR 399 at 401

¹⁰⁴ *Nationwide News* at 422G.

¹⁰⁵ *Nationwide News* at 424A.

¹⁰⁶ (2005) 65 IPR 289

¹⁰⁷ *Sharman* at [401].

¹⁰⁸ *Sharman* at [468].

- 5-52. The Kazaa software (or KMD – Kazaa Media Desktop) was a graphical user interface which permitted access to two networks, FastTrack and Joltid PeerEnabler. By means of FastTrack, KMD users could make available, search for and download files.¹⁰⁹ Any person with access to the Internet could obtain KMD from the Kazaa website.¹¹⁰ iiNet submits that the KMD software is analogous to BitTorrent client software such as uTorrent and that FastTrack is, for present purposes, functionally equivalent to the BitTorrent protocol. The applicants appear to accept this analogy¹¹¹, although they fail to press it home: instead of seeking to proceed against the distributor of BitTorrent, as the record companies sued the distributor of KMD, the applicants here instead entered into contractual relations with BitTorrent Inc.¹¹²
- 5-53. Sharman exhorted users to use Kazaa to share files, including via a “Join the Revolution” campaign based on file-sharing, particularly of music, and which was scornful of the attitude of record and movie companies in relation to their copyright works in circumstances where Sharman knew that files shared by Kazaa users were largely copyright works.
- 5-54. Sharman was able to control to some extent users’ infringing activities by the implementation of keyword filtering or “gold file flood filtering” which were technical measures that Wilcox J found would have substantially reduced the incidence of copyright infringements by Kazaa users.¹¹³ This led directly to his Honour’s approach to the question of relief – his Honour held as follows:¹¹⁴

I am anxious not to make an order which the respondents are not able to obey, except at the unacceptable cost of preventing the sharing even of files which do not infringe the applicants’ copyright¹¹⁵. There needs to be an opportunity for the relevant respondents to modify the Kazaa system in a targeted way, so as to protect the applicants’ copyright interests (as far as possible) but without unnecessarily intruding on others’ freedom of speech and communication. The evidence about keyword filtering and gold file flood

¹⁰⁹ Sharman at [59].

¹¹⁰ Sharman at [67].

¹¹¹ ACS 54, note 59.

¹¹² See Ex 15 tabs 8, 10, 11, 12, 13.

¹¹³ Sharman at [414].

¹¹⁴ Sharman at [520].

¹¹⁵ One might paraphrase, Except at the unacceptable cost of cutting-off subscribers’ Internet connections.

filtering, indicates how this might be done. It should be provided that the injunctive order will be satisfied if the respondents take either of these steps. The steps, in my judgment, are available to the respondents and likely significantly, though perhaps not totally, to protect the applicants' copyrights.
[Emphasis added]

5-55. In his review of the principles, Wilcox J cited *Adelaide Corporation*,¹¹⁶ *Moorhouse*,¹¹⁷ *Nationwide News*,¹¹⁸ *Amstrad*,¹¹⁹ *Australian Tape Manufacturers*,¹²⁰ *Metro on George*¹²¹ and *Cooper* at first instance.¹²²

5-56. Wilcox J considered that Sharman, the provider of the KMD software and operator of the Kazaa website, had engaged in positive acts where Sharman knew that the files shared by Kazaa users were largely copyright works and which had the effect of encouraging copyright infringement including Sharman's:

- (a) website promotion of KMD as a file-sharing facility;
- (b) exhortations to users to use this facility and share their files; and
- (c) promotion of the "Join the Revolution" movement, which was based on file-sharing, particularly of music and which scorned the attitude of record and movie companies in relation to their copyright works.¹²³

5-57. The following matters arise in the context of the present case:

- (a) iiNet provides services as a general ISP; it does not market a particular piece of software;
- (b) as submitted above, iiNet does not provide or operate the BitTorrent file sharing client software (such as uTorrent), nor is it a co-principal with any business that does;

¹¹⁶ *Sharman* at [367].

¹¹⁷ *Sharman* at [367] and following.

¹¹⁸ *Sharman* at [370]

¹¹⁹ *Sharman* at [374] and following.

¹²⁰ *Sharman* at [379] – [380].

¹²¹ *Sharman* at [381] and following.

¹²² *Sharman* at [387].

¹²³ *Sharman* at [405]-[406].

- (c) iiNet exhorts users to use the Internet lawfully, not to engage in file sharing in a way that would encourage copyright infringement;
- (d) iiNet is not in a position to modify the BitTorrent software so as to reduce the extent of copyright infringement; and
- (e) the applicants' proposal for preventing or avoiding infringement – the disconnection of iiNet customers to whom IP addresses appearing on AFACT notices were allocated – would prevent those customers, and users of their accounts eg. children, from engaging in any Internet activity¹²⁴ and in many cases from using telephony services.¹²⁵ This is manifestly excessive in circumstances where Wilcox J regarded the prevention of file sharing that did not infringe copyright as an “unacceptable cost”. The applicants' proposal is far more severe, *a fortiori* where iiNet is not the provider of the means of infringement.

Cooper

5-58. The relevant facts of *Cooper v Universal Music Australia Pty Ltd*¹²⁶ are as follows:

- (a) Mr Cooper was the registered owner of the domain name “mp3s4free.net” and the originator, owner and operator of the website “MP3s4FREE”. MP3 is a common format of music file. “4FREE” speaks for itself. Mr Cooper's website did not contain any music files but rather provided access to such files at other locations by means of hyperlinks. The free, pirated music was, in other words, one click away. It was admitted in the proceeding that the overwhelming majority of music files linked to Mr Cooper's website were the subject of copyright.¹²⁷ The website was highly structured, organised,¹²⁸ user-

¹²⁴ Subject to them re-joining iiNet by using new contact details or joining another ISP, in either case reducing any preventative effect of a disconnection strategy.

¹²⁵ See eg *Malone #1* para 39 *JCB* Vol A2 tab 30 p 9.

¹²⁶ (2006) 156 FCR 380. This is the Full Court decision. It is sometimes referred to simply as “*Cooper*” in this outline. Any reference to Tamberlin J's decision at first instance will be suitably distinguished.

¹²⁷ *Cooper* at [2].

¹²⁸ *Cooper* at [13].

friendly and attractive to users of the Internet.¹²⁹ The applicants' evidence indicated that the website was very successful in attracting significant user traffic.¹³⁰ There was no suggestion that there was any significant non-infringing aspect of Mr Cooper's website but, rather, it is clear that Mr Cooper deliberately designed the website to facilitate infringing downloading of sound recordings.¹³¹

- (b) E-Talk Communications Pty Ltd and Com-Cen Pty Ltd together¹³² conducted business as an ISP called Com-cen. Com-cen did not merely provide Mr Cooper with access to the Internet, it also hosted Mr Cooper's "MP3s4FREE" website.¹³³ It did so for free in return for the display of Com-cen's logo on Mr Cooper's website with a hyperlink to Com-cen's website.¹³⁴ This arrangement was put in place after Mr Cooper approached Com-cen's employee Mr Takoushis with an offer for free hosting in exchange for free advertising on the MP3s4FREE website.¹³⁵
- (c) Com-cen was a small, tightly-knit operation of about eight employees. Mr Bal was a director and controlling mind of both E-Talk Communications Pty Ltd and Com-Cen Pty Ltd¹³⁶ and majority shareholder.¹³⁷ Mr Bal was keen to ensure that his companies were receiving some benefit in return for hosting the website for free.¹³⁸
- (d) E-Talk was aware of the high level of usage of Mr Cooper's website and of the copyright problems arising therefrom but took no steps to prevent the acts

¹²⁹ *Cooper* at [15].

¹³⁰ *Cooper* at [29].

¹³¹ *Cooper* at [149].

¹³² These companies had a common controlling mind in a Mr Bal: *Cooper* at [102].

¹³³ *Cooper* at [3]. Hosting a website involves storing the content of the website on a facility (a server) owned or controlled by the host.

¹³⁴ *Cooper* at [58].

¹³⁵ *Cooper* at [36].

¹³⁶ *Cooper* at [7].

¹³⁷ *Cooper* at [32].

¹³⁸ *Cooper* at [109(2)].

of infringement.¹³⁹ There were specific findings that Mr Bal had visited Mr Cooper's website and was aware of its contents.¹⁴⁰

- (e) E-Talk and Com-Cen had the power to prevent the doing of the acts concerned because they could withdraw the hosting of Mr Cooper's website.¹⁴¹ Rather than do this or pressuring Mr Cooper to stop his website being used for the predominant purpose of copyright infringements, E-Talk sought to obtain a commercial advantage over and above the payment for hosting services from advertising on the website.

5-59. Kenny J¹⁴² traced the principles through the authorities including with respect to *Moorhouse, Adelaide Corporation, Nationwide News, Jain* and *Metro on George*.¹⁴³

5-60. Central to the finding that E-Talk and Mr Bal authorised the acts of copyright infringement which resulted from the use of Mr Cooper's website was E-Talk's ability to stop hosting Mr Cooper's website and/or remove the website's connection to the Internet.¹⁴⁴ This would have been a direct, specific and proportional response to prevent the infringing activity. In the absence of any suggestion that Mr Cooper's website had any substantial non-infringing purpose or use, there could be no complaint that such action by E-Talk was unreasonable.

5-61. The applicants appear to submit that the Court should follow *Cooper* in the present case and thereby seek to characterise iiNet's conduct as relevantly indistinguishable from the ISP in *Cooper*.¹⁴⁵ This approach should be rejected. It is useful to compare the conduct of iiNet directly against the facts in *Cooper*:

¹³⁹ *Cooper* at [58].

¹⁴⁰ *Cooper* at eg [109(2)].

¹⁴¹ *Cooper* at [62].

¹⁴² With whom French J agreed (as his Honour did with Branson J) at *Cooper* at [1]

¹⁴³ *Cooper* at [136] – [146].

¹⁴⁴ *Cooper* at [64], [155], [157].

¹⁴⁵ AOS T 10.1-8, 91.11-21, 1078.40-1084 and 1086.25-1094.24; ACS paras 10, 19, 97-140

- (a) **Relevant services** It is common ground that the relevant services provided by iiNet in this proceeding are transmission based services.¹⁴⁶ In *Cooper*, the relevant services provided by the ISP were hosting services; specifically, the hosting of a website on the ISP's system¹⁴⁷ that linked to infringing content located on the Internet. Tamberlin J, at first instance, found that those supplied by Com-cen were category D activities within the meaning of Part V, Division 2AA of the Act.¹⁴⁸
- (b) **Size and nature of businesses** The ISP's business in *Cooper* was tiny; both Com-Cen and E-Talk were very small proprietary companies of which Mr Bal was a director and the controlling mind. All eight employees in the single premises were aware of the nature of Mr Cooper's website and their business's relationship with it¹⁴⁹. iiNet, on the other hand, is a large public company listed on the Australian Stock Exchange, is the third largest ISP in Australia with over 490,000 subscribers, is governed by a board of six directors and managed by an executive team of eight. In addition to technical and administrative staff, iiNet has approximately 600 customer service representatives in Australia, New Zealand and South Africa.¹⁵⁰ Its relationship with its customers is fundamentally different to the ISP in *Cooper*. Further, in the course of providing services to Australian subscribers, iiNet invests very significant sums of money in Australian telecommunications infrastructure which it uses to provide services to Australian consumers and leases to other telecommunication service providers.¹⁵¹ iiNet is a general purpose carriage service provider which, among other things, supplies transmission based services to hundreds of thousands of Australians. As such it is analogous to other large providers of services such as telephony or electricity with many

¹⁴⁶ Also referred to as Category A activities under Part V, Division 2AA of the Act or Internet access services.

¹⁴⁷ In other words, on physical infrastructure under the ISP's direct control such as a server.

¹⁴⁸ *Cooper* at [108], setting out findings of Tamberlin J.

¹⁴⁹ *Cooper* at [109]

¹⁵⁰ *Malone #1* paras 21, 22, 30 and 105 *JCB* Vol A2 tab 30 pp 5-6, 9 and 26.

¹⁵¹ *Buckingham* para 79 *JCB* Vol A2 tab 29 p 17; and Confidential Schedule paras 10-11 *JCB* Vol B6 tab 88 pp 2-3.

different subscribers. iiNet also provides a wide range of other services to its subscribers. It is simply not comparable to the ISP in *Cooper*.

- (c) **Ability to take action in relation to copyright material** As the relevant services provided by iiNet in this proceeding are transmission-based services, the relevant copyright material or links thereto are not stored on iiNet's network or system.¹⁵² iiNet cannot access the relevant copyright material,¹⁵³ review the relevant copyright material,¹⁵⁴ disable access to the relevant copyright material¹⁵⁵ or take down the relevant copyright material.¹⁵⁶ Further, in the case of transmission-based activity, any notification of a communication over an ISP's network is notification of an alleged event that occurred in the past that is no longer on its network and is unable to be independently confirmed by the ISP.¹⁵⁷ In this regard, it is not appropriate to think of iiNet "taking down" infringing material.¹⁵⁸ In the case of carriage service providers that host websites and content or provide links thereto (such as E-Talk/Com-Cen), they are able to directly access the infringing website, directly review the infringing website, directly disable access to the infringing content or directly take down the infringing website.¹⁵⁹ The factual circumstances relating the provision of services in *Cooper* are completely different to those relating to iiNet in this proceeding.¹⁶⁰

¹⁵² Carson XXN T 421.25-31

¹⁵³ Carson XXN T 421.30-31

¹⁵⁴ Carson XXN T 421.25-28. Note that to do this would, certainly on the applicants' case, involve infringement of copyright. Neither AFACT nor any applicant has offered to excuse such an infringement to allow iiNet to verify anything.

¹⁵⁵ Carson XXN T 421.33

¹⁵⁶ Carson XXN T 421.35-40

¹⁵⁷ Carson XXN T 421.25-32

¹⁵⁸ Carson XXN T 421.35-37

¹⁵⁹ Carson XXN T 421.35-40

¹⁶⁰ The safe harbour provisions in Part V, Division 2AA of the Copyright Act to show that hosting (Category C and D) and transmission based (Category A) activities are treated very differently by the legislature under Australian copyright law. The safe harbour provisions are illustrative of the fact that under the Act, an ISP may be under very different obligations depending on whether it is conducting hosting activities or transmission based activities. This is not by accident; the nature of each obligation on the ISP relating to a different activity under the safe harbour regime is reflective of the factual differences inherent in the supply of each of these services by ISPs to subscribers.

- (d) **Identification of individual responsible for infringing conduct** In *Cooper* there were no issues relating to the identification of the actual user of the computer connected to the notified IP address and that person's relationship to the account holder; indeed, it was clear that the identity of the operators of the infringing website were known to Com-cen, including its controlling mind Mr Bal. This can be contrasted with iiNet's position where it does not know who was responsible for the alleged acts; nor does its Managing Director, Mr Malone; nor Mr Dalby; nor does any other employee. In support of iiNet's position, the applicants' independent expert Mr Carson confirmed that an IP address does not identify a particular computer or user of a particular computer¹⁶¹; it merely points to a network device behind which several computers might operate which an unknown number of persons may use.¹⁶² These persons may be related or known to iiNet's account holder or may be completely unrelated and unknown persons (such as in the case of unauthorised access to wireless routers).¹⁶³ Further, Mr Carson confirmed that in his experience working with police, the identification of IP addresses to account holders was merely a first step of any investigation¹⁶⁴ and that further investigations would need to occur in order to identify the individual responsible for any infringement of copyright.¹⁶⁵ There was no suggestion in *Cooper* that any additional steps needed to be conducted in order to ascertain the identity of persons responsible for the infringing website – Mr Cooper's involvement was obvious and not in question. iiNet does not have investigative or interrogative powers in relation to copyright material located on its subscribers' computers. To the contrary, iiNet operates in a highly regulated environment where it is unable to monitor its subscribers' activities and is bound by various complex statutory regimes and codes relating to consumer protection, privacy and interception. The factual circumstances in

¹⁶¹ Carson XXN T 413.22-28; Carson XXN T 416.9-11.

¹⁶² Carson XXN T 413.35 to T 414.6.

¹⁶³ Carson XXN T 412.28-30.

¹⁶⁴ Carson XXN T 414.12-16; see generally Carson XXN T 414.12 to T 416.14.

¹⁶⁵ Carson XXN T 416.13-14.

this proceeding involve issues that were simply not raised, or applicable, in *Cooper*.

- (e) **Promotion of infringing website/software** iiNet did not and does not promote itself in conjunction with any infringing use of BitTorrent client software. In *Cooper*, the ISP placed its logo on the infringing website and thereby engaged in positive action to associate itself with the infringing conduct. Indeed, in this proceeding it is the applicants, not iiNet, whose logos appear on the BitTorrent website and had entered into agreements with BitTorrent Inc and the BitTorrent tracker site Mininova.¹⁶⁶ Further, the applicants have issued press releases supporting and encouraging the use of BitTorrent in relation to their own films.¹⁶⁷
- (f) **Profit from infringing activity** iiNet has not entered into any agreement with any of its subscribers that provides it with a commercial advantage from the infringing conduct that is over and above standard payment for Internet access services. iiNet's Customer Relationship Agreement is a "Standard Form of Agreement" under Part 23 of the Telco Act and has been provided to the Australian Communications and Media Authority.¹⁶⁸ As such, it complies with a range of other legislation, including consumer protection legislation and other telecommunications codes. Once iiNet's subscribers sign up to its Customer Relationship Agreement, iiNet of course profits from its customers' general use of the Internet; however, this is not tied to the use of BitTorrent client software, or more relevantly, infringing use thereof. To the contrary, BitTorrent traffic tends to use a large amount of bandwidth and iiNet makes higher profits if its customers use only moderate proportion of their bandwidth quota.¹⁶⁹ Additionally, the majority of iiNet's subscribers are on low to

¹⁶⁶ Oddly, given that fact, this is a site that, apparently, the applicants seek an order in this proceeding that iiNet block.

¹⁶⁷ Ex 15 tab 12 and tab 13.

¹⁶⁸ CRA clause 1.5, Ex 15 tab 21 p 81; s 481 Telco Act.

¹⁶⁹ Buckingham paras 85-86 JCB Vol A2 tab 29 pp 18-19; see confidential schedule paras 3-6 JCB Vol B6 tab 88 pp 1-2.

medium plans and use less than half their allocated quota.¹⁷⁰ In *Cooper*, the ISP was found to have a closer than normal commercial relationship with the operator of the infringing website which provided it with a commercial advantage from the infringing conduct that is over and above standard payment for hosting services. This is not comparable to iiNet's situation.

- (g) **No invitation** Com-cen never sought to qualify the terms of its invitation to users to use Mr Cooper's website. That invitation was extended by Com-cen hosting the website and endorsing it by means of advertising. There was no copyright warning or restriction imposed permitting only non-infringing use. Authorisation was probably inevitable in light of the principles in *Moorhouse*. By way of contrast, iiNet does not invite infringing use; on the contrary it warns customers against unlawful use by means of its Customer Relationship Agreement and the copyright notice on its website.
- (h) **Encouragement to use legitimate content** iiNet allocates significant financial and other resources in making legitimate, legal content available to its subscribers quota free via iiNet's Freezone. In particular many of the applicants' identified films are available for legitimate download via the Freezone,¹⁷¹ even in circumstances where iiNet subscribers' accounts have been shaped and they are not able to efficiently download other content on the Internet. In such circumstances, iiNet's subscribers are more than encouraged to download legitimate content, they are forced to download legitimate content. This was not the case in *Cooper*. "MP3s4FREE" explicitly discouraged legitimate access by proclaiming the attractions of a free alternative. If iiNet wanted to profit from illegal downloading it would not offer the Freezone, would not shape and would just charge high excess usage fees for the use of additional quota.

¹⁷⁰ See *Buckingham* paras 92-93 *JCB* Vol A2 tab 29 p 20.

¹⁷¹ *Dalby* paras 116-141 *JCB* Vol A2 tab 31 pp 34-44.

- (i) **Steps to prevent infringement of copyright** iiNet has taken steps in order to prevent or avoid copyright infringement occurring on its network including:¹⁷²
- (i) contractual rights under the Customer Relationship Agreement to take action against customers who engage in copyright infringement;
 - (ii) providing facilities to copyright owners for notification of copyright infringement, including email addresses, fax numbers and address details and publishing such details on its copyright webpage;
 - (iii) shaping accounts of customers who exceed their quota;
 - (iv) training Customer Service Representatives regarding file sharing and copyright infringement issues to the effect that peer-to-peer applications, as well as all other applications, are “unsupported”; and
 - (v) providing access to an alternative, legal, source of content through the Freezone.

There was no evidence of similar steps being taken by the ISP in *Cooper*.

- (j) **Non-infringing use** As noted above, it was accepted in *Cooper* that the vast majority of links on Mr Cooper’s website led to infringing material and there was no non-infringing aspect of that website in any relevant degree. Again, the name MP3s 4FREE must be taken to have made that clear. In the present case, the relevant service provided by iiNet is access to the Internet, which may be used in vast number of non-infringing ways. There is also clear evidence that there are a number of significant non-infringing uses of the BitTorrent protocol and BitTorrent client software.¹⁷³
- (k) **Nature of applicants’ demands** In *Cooper*, there was only one infringing website. As it was on the ISP’s system, it could be taken down by the ISP, presumably in a matter of minutes. Once the website had been taken down, no

¹⁷² Malone #1 para 230 JCB Vol A2 tab 30 pp 56-57.

¹⁷³ Malone #1 pars 185-187 JCB Vol A2 tab 30 pp 45-49; Malone XXN T 659.40-46, 804.21-35; Ex MMM-1 pp 499-527 JCB Vol B7 tab 89 ; Ex 15 tabs 6, 7.

further action was required. By way of contrast, the applicants' demands in the present case require considerable changes in iiNet's business model: including: an automated notification and disconnection regime; expanded customer service capability; and apparently termination of the Freezone and the re-introduction of excess charges (rather than shaping) for exceeding quota. A related aspect of this question is the difference in the scope of infringement between *Cooper* and the present case. In *Cooper*, all infringing activity was concentrated through one website hosted by the ISP. The nature of the infringement in *Cooper* could be generally characterised as of narrow focus. In this proceeding, the applicants' case is that the infringing acts are spread across many users, although each deals with a relatively small number of different films. This could be generally characterised as infringement with a wide focus. Having regard to the nature of the relevant services and the relationship to the copyright material, the two scenarios are not comparable in any sense. The relevant power to prevent in *Cooper* was direct and proportionate. Any power to prevent in the present case (ie disconnection) is indirect and disproportionate.

- (1) **Consequences of applicants' demands** In *Cooper*, the consequences of Com-cen removing access to the infringing website were that subscribers were no longer able to access the website and Mr Cooper was no longer able to operate the website. This was a trivial imposition on commerce. Given that the overwhelming purpose of the website was to provide access to infringing material, it was not an onerous requirement. In the present case, the termination of Internet access to iiNet's subscribers is the only step that could prevent infringing activity through that account, whether or not the subscriber was the person responsible for the infringing conduct. Such subscribers and other legitimate users of the account would lose their Internet access for all purposes, whether or not those persons responsible for the infringing acts were in the same location as the account holder, known to the account holder or in any way connected or associated with the account holder. iiNet's account holders include and have included a range of different subscribers such as

households,¹⁷⁴ businesses¹⁷⁵ and primary schools,¹⁷⁶ all likely to depend on Internet access for their day to day activities. Many such subscribers use telephony services over the Internet such as VOIP which is attached to their Internet access service.¹⁷⁷ Termination of access to the Internet is likely to have considerable ramifications for those subscribers in relation to their day to day activities on both personally and commercially.

- (m) **General approach to copyright issues** There was no suggestion in *Cooper* that the ISP had addressed copyright issues more broadly. Rather, it was directly associated with, and promoted, the provision of infringing material via a website it hosted. By way of contrast, iiNet was involved in industry and government discussions about copyright issues, participated in joint submissions advocating procedural reform for the benefit of copyright owners and routinely takes down infringing material within its control when it receives the appropriate notices.¹⁷⁸

5-62. Thus *Cooper* on its facts is of little assistance to the resolution of the present case. But to the extent that it is, it assists iiNet, not the applicants, when properly understood.

5-C. THE COMPULSORY CONSIDERATIONS IN S 101(1A)

5-63. It is common ground that the introduction of s 101(1A) did not change the meaning of “authorize” in s 101(1) and that the three matters to be taken into account are not exhaustive.¹⁷⁹ It follows that those three matters are not to be applied like a mathematical formula in the consideration of whether a person is liable for authorisation. For example, if a person is found to have the power to prevent the doing of the act concerned, one does not simply conclude that authorisation is established. Similarly in the case of “reasonable steps”: one does not simply identify

¹⁷⁴ Malone #1 para 149 JCB Vol A2 tab 30 p 38

¹⁷⁵ Malone #3 para 12.

¹⁷⁶ Malone #3 para 23.

¹⁷⁷ Malone #1 para 149 JCB Vol A2 tab 30 p 38.

¹⁷⁸ Dalby paras 17, 32-33 JCB Vol A2 tab 31 pp 7, 15-16; Ex SJD-1 pp 130-190 JCB Vol B8 tab 91

¹⁷⁹ ACS 76.

some reasonable steps and if any have not been taken conclude the authorisation is made out. In every case the statutory question remains whether the alleged authoriser “authorizes the doing in Australia of any act comprised in the copyright” as that term has been interpreted in the above authorities.

Power to prevent

5-64. Gibbs J held in *Moorhouse* that a “person cannot be said to authorize an infringement of copyright unless he has some power to prevent it” and cited *Adelaide Corporation* as support for this proposition.¹⁸⁰ This did not form part of what the applicants describe as “the sentence which informs section 101(1A)”¹⁸¹ where Gibbs J referred to “control”. “Control” does not form part of the statutory language but the authorities appear to regard it as synonymous with “power to prevent”. It remains important to identify what it is said the alleged authoriser has power to prevent.

5-65. As noted above, in *Adelaide Corporation*, Higgins J observed:¹⁸²

*“permit”*¹⁸³ means “... to abstain from taking reasonable steps to prevent the act where it is within a man’s power to prevent it”... [ie] a power to prevent the specific act (here the infringement of the copyright), not a power which, if exercised, would put an end to the whole relationship.

5-66. The unifying theme of *Adelaide Corporation*, *Moorhouse*, *Amstrad*, *Australian Tape Manufacturers* and *Nationwide News* is that one cannot authorise if one does not have control, and mere facilitation, even with knowledge, is not sufficient. This line of reasoning was approved in *Metro on George* and reflected in *Sharman and Cooper*. It is clear from those cases that “control” and “power to prevent” were addressed in the context of the specific means of infringement (control over what was played in the premises, control over the photocopier and the library books, control over the KMD software and control over Mr Cooper’s website).

5-67. This must be so because, in a case like *Amstrad*, one would prevent infringement by withholding sale of the article with infringing uses. But in *Australian Tape*

¹⁸⁰ *Moorhouse* at 12.8 citing *Adelaide Corporation* at 497-498 and 503.

¹⁸¹ AOS T 1064.7, referring to *Moorhouse* at 13.4.

¹⁸² *Adelaide Corporation* at 498.9 – 499.1.

¹⁸³ or, iiNet submits, “authorize”

Manufacturers, the High Court considered the issue as control over the use of the article. There is no authority for the proposition in Australia that the power to prevent in s 101(1A)(a) extends beyond the particular means of infringement to a broader capacity to withhold a general facility that would have the effect of preventing a broad range of conduct including infringing activity. If such a construction were thought open on the face of the provision, it would require a conclusion that the introduction of s 101(1A) effected a change in the law of authorisation which is contrary to the apparent legislative intention revealed in the extrinsic materials.¹⁸⁴

5-68. The alleged power to prevent the doing of infringing acts by users in the present case may be considered as two sides of the same coin:¹⁸⁵

- (a) iiNet has the technical power to disconnect users who access the Internet through iiNet's facilities; and
- (b) iiNet has the contractual power in certain limited circumstances to terminate the Internet service of subscribers who breach the CRA.

5-69. iiNet submits that this is not a relevant power to prevent the doing of the act concerned. Consistent with the High Court's approach in *Adelaide Corporation* in the passage addressing the constituent elements of s 101(1A), disconnection would not in itself prevent the infringement but would do much more: it would put an end to the whole relationship of ISP and subscriber and would foreclose all Internet activity (not merely infringing BitTorrent activity) by the subscriber via iiNet's facilities.

5-70. If the question is considered as one of "control" as discussed by Gibbs J in *Moorhouse*, then iiNet can only control technically the fact of a subscriber's access to the Internet. The CRA itself provides no control over a customer's use of the Internet short of the technical ability to disconnect. However, iiNet submits that to apply *Moorhouse*, one must consider whether there is control over the "means by which an

¹⁸⁴ Addressed in Chapter 4. Such a construction would also be contrary to the agreed position of the parties that s 101(1A) did not intend to change the common law but iiNet accepts that the Court is not bound by an agreed position between the parties in matters of statutory construction.

¹⁸⁵ ACS 306.

infringement of copyright may be committed”.¹⁸⁶ It is nonsensical to speak of the Internet as the “means of infringement” in the relevant sense. There is no direct, specific or proportional step that iiNet can take to prevent the infringement occurring short of disconnecting all Internet service to the subscriber.

5-71. The applicants’ reliance on *Cooper* in this context is misplaced.¹⁸⁷ There the Full Court held that the relevant “power to prevent” encompassed “making available to the public a technical capacity calculated to lead to the doing of [the infringing] act.”¹⁸⁸ The relevant technical capacity, a website hosted by the ISP in that case, was directly within the ISP’s control and could be readily taken down in a direct, specific and proportional response to the infringing activity. There is no calculated causing of copyright infringement in iiNet’s provision of Internet transmission services. The infringing material does not reside on its system. There is no direct, specific or proportional step available to it to prevent the infringing conduct without also preventing Internet access generally. *Cooper* does not assist the applicants.

5-72. In their oral reply the applicants’ case changed somewhat. Doubtless realising the problems faced by their case on acts of omission, they seek artificially to characterize the recurring reconnection of customers as an act of commission.¹⁸⁹ The change persists.¹⁹⁰ Neither the pleadings nor the repeated particulars ever suggested acts of commission.¹⁹¹ This is another example of the artificial prism through which the applicants view iiNet’s business and the operation of the Internet generally. The reference to “reconnecting” customers to the Internet suggests that someone within iiNet (a natural person) is making conscious and informed decisions and taking deliberate steps to connect a customer or other user to the Internet. The proposition of course is nonsense. For so long as a customer has a current account that has not been

¹⁸⁶ *Moorhouse* at 13.4

¹⁸⁷ ACS 308, 309.

¹⁸⁸ *Cooper* at [41], emphasis added.

¹⁸⁹ AOS T 211.3-212.15 and 214.08; ACS 128, 310. Pleadings and particulars raising an omission in terms of a failure to disconnect do not make a case of commission by repeated re-connections.

¹⁹⁰ ACS 15, 310

¹⁹¹ The closest the applicants come is paragraph 63(e) of the further amended statement of claim. However, the particulars to paragraph 63(e) point to the applicants’ particulars to the Further Amended Statement of Claim at paragraphs 80, 81 and 84 to 86, each of which makes it clear that only acts of omission are relied upon.

suspended or terminated the technology of running an enormous and complex Internet operation will permit them access. The spectre raised by the applicants of someone sitting at iiNet somewhere and wondering, “*Will we or won't we plug these people in today?*” is ludicrous. As long as the account remains active, when a network device (such as a modem) calls for a connection, iiNet's facilities generate it automatically. Customer disconnections and reconnections are happening hundreds or thousands of times a day.¹⁹² It is an entirely passive matter which would only change if iiNet took some positive step such as suspending or terminating the account.

5-73. The applicants' late conversion to the proposition that iiNet's alleged authorising arises out of acts of commission (rather than omission) should be seen for the “clever” piece of thinking that it is. It is notable that the applicants – who bear the burden of proof on authorisation, of course – did not put on any evidence about the operation of an ISP (despite that fact that their entire case is based on the ISP industry). They confine themselves to criticising iiNet for not putting forward a witness from its technical staff, or an independent technical expert. Quite what technical evidence about the operation of an ISP that witness was supposed to answer is not clear. But one thing is clear, which is that not until the applicants' “reply opening” on the fourth day of the hearing¹⁹³ did they suggest that iiNet in some way engaged in a conscious reconnection, being something other than non-termination, of customers. The applicants' case on commission of positive acts is nothing more than the flip side of their consistently-put case about failure to act.¹⁹⁴

5-74. Further, to succeed on this argument, the applicants would need to establish that a natural person within iiNet knew that a relevant customer has been identified in an AFACT notification which provided all of the appropriate information needed to satisfy iiNet of the likelihood of infringement and consciously chooses to reconnect that person in that knowledge. This is of course nonsense. There is no evidence that any natural person within iiNet ever knew the identity of a customer connected with

¹⁹² Mr Carson agreed that from the point of view of the user who is browsing the Internet with their browser open, that these disconnections and reconnections may well happen without the consumer knowing it has happened. Carson XXN T 506.40-507.26, 508.11-14.

¹⁹³ 9 October 2009, AOS T 211.30-212.15, 214.08.

¹⁹⁴ ACS 36 (footnote 43), 129, 325 and 451.

an AFACT notification (prior to the matching exercise ordered by the Court for the purposes of the twenty sample accounts arising in discovery in the proceeding). To speak of the corporate knowledge of iiNet comprising the contents of the AFACT notifications and customer details cross-referenced with IP session details recorded in its databases¹⁹⁵ is to ignore a fundamental aspect of corporate personality. There is no such thing as corporate knowledge in the absence of a natural person having that knowledge. In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,¹⁹⁶ Viscount Haldane LC said:

a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation.

- 5-75. This statement was cited with approval by the House of Lords in *Tesco Ltd v Natrass*¹⁹⁷ (itself cited by counsel for the University in *Moorhouse* on the question of corporate knowledge). This fundamental proposition was confirmed by the High Court of Australia in *Hamilton v Whitehead*.¹⁹⁸
- 5-76. Contrary to the impression created by their submission at ACS 356, the applicants did not demonstrate that any natural person within iiNet knew that from November 2008 to August 2009 the customer designated as RC-08 had been making available online the film *Pineapple Express*. Far less did any natural person choose to re-connect RC-08 notwithstanding such knowledge.
- 5-77. Thus the case of positive steps by re-connection fails at both technical and legal levels.
- 5-78. On the applicants' case, the requirement of power to prevent or control is necessary to a finding of authorisation.¹⁹⁹ As submitted, iiNet does not have power to prevent the doing of the act concerned within the meaning of s 101(1A) and does not have control

¹⁹⁵ ACS 310, 356.

¹⁹⁶ [1915] AC 705.

¹⁹⁷ [1972] AC 153 at 187.

¹⁹⁸ (1988) 166 CLR 121. See also Austin & Ramsay, *Ford's Principles of Corporation Law*, 12th ed, (2005) pp 808, 817, 820.

¹⁹⁹ AOS T 1051.22-34

over the means of infringement. It follows that iiNet does not authorise the infringing acts of users of its facilities. The question of reasonable steps and the other matters relied upon by the applicants do not arise.

The nature of any relationship

- 5-79. Section 101(1A)(b) requires analysis of the relationship, if any, between the alleged authoriser and the person who did the act concerned. iiNet's CRA, whereby a subscriber contractually assumes responsibility for the conduct of all users of the service, cannot displace the statutory question. Where the person who did the act concerned is not the actual subscriber (and there is no way of knowing when this is the case except for Messrs Herps and Fraser), there is no direct relationship with iiNet. That person is not bound by any provision of the CRA.
- 5-80. The submission at ACS 314 is wrong and proceeds on a fundamental misunderstanding of ordinary contract law. iiNet cannot by the terms of a contract it has with a customer make another person a party to the agreement or somehow otherwise involved in a contractual relationship with iiNet. To hold the named customer responsible for the conduct of those other persons does not render those other persons in a direct contractual relationship with iiNet. iiNet does not purport to bind all users by its terms and conditions but rather, for obvious reasons, holds the named customer responsible for all users of the service provided to it. As with telephony, gas, electricity, and water, this is a completely unremarkable state of affairs.
- 5-81. It is common ground that iiNet has a contractual relationship with its subscribers.
- 5-82. Subject to these matters, it is unclear how the matters at ACS 318 assist the applicants. There could be no dispute that "the iiNet users who infringe use the very services provided by iiNet to iiNet customers". Primary infringement occurs via BitTorrent use on the Internet and iiNet provides access to the Internet. The fact that iiNet obtains a financial advantage from the fact that users other than customers use its services is wholly unremarkable. The applicants appear to suggest that each member of a household should have his or her own Internet account. It would follow

that he or she would also have a separate telephone, electricity and water account too because there is something sinister in premises having a single point of contact for the provision of utilities.

- 5-83. It is not clear why customers upgrading to higher plans²⁰⁰ is relevant to the nature of the relationship between iiNet and its users. This submission of the applicants is repeated at ACS 413 and following and iiNet deals with this below.

Reasonable steps

- 5-84. At the heart of the applicants' case is the submission that iiNet should have identified from its records the customer accounts associated with the activity described in the DtecNet notices and contacted, and disconnected, suspended or terminated that customer's account.²⁰¹
- 5-85. There is a debate in the proceeding about the sufficiency of the applicants' identification of the steps that it contents iiNet should have taken in response to the AFACT notifications.²⁰² Where a party accuses another of failing to take necessary action, ordinary forensic practice suggests that the action that should have been taken be identified in order that the defendant may explain its position. A plaintiff in those circumstances cannot criticise the defendant for failing to provide an adequate explanation as to the failure to take steps if it does not identify clearly the steps it says should have been taken. Accordingly, no weight should be given to matters now asserted by the applicants as steps that should have been taken that were not pleaded in the ordinary manner.
- 5-86. In any event, iiNet understands that an essential element of the case put against it is that it should have identified from its records the customer accounts associated with the activity described in the DtecNet notices. iiNet submits that Part 13 of the Telco Act prohibits such conduct and this submission is developed in Chapter 7 of this outline. If this submission is accepted, it is fatal to the applicants' case.

²⁰⁰ ACS 318

²⁰¹ Applicants' Particulars to the Amended Statement of Claim, para 97; JCB Vol A1 tab 3 p 20; ACS 323.

²⁰² ACS 325, 378 and following.

- 5-87. However, if iiNet is wrong about the Telco Act, it submits that the implementation of a notice and disconnection regime as demanded by the applicants was not reasonable not least because of the costs and complexity that would be involved in doing so.²⁰³ In particular, the applicants now rely on the US Notices received by iiNet as evidence of further knowledge and infringement. The applicants cannot have it both ways: if they are relevant, they are relevant for all purposes and there is no justification for implementing a response to the AFACT notifications but not others received by iiNet. Exhibit MMM-5²⁰⁴ comprises five volumes of US Notices received by iiNet in one week.²⁰⁵ As submitted, this would be some 12 trolley-loads of folders over a year. Mr Malone identifies the challenges in dealing with material on this scale. Neither Professor Horowitz (who prepared a report for the applicants that was not read) nor any other person with a computing background came forward to challenge this evidence.
- 5-88. The question of authorisation and reasonable steps cannot be divorced from what would have been practical for the alleged authoriser to do that it did not do, or from the question of what practical relief the Court should grant. So much was plainly recognised by Wilcox J in *Sharman*, when considering those very questions and limiting the relief granted to as to restrict only clearly infringing activity.²⁰⁶
- 5-89. At no stage in the supply of the notifications, other than saying in the standard form letters that some appear to be repeat infringers (without giving any guidance as to which pieces of the technical information should be used for that purpose), did AFACT set out that it apparently intended that iiNet should forward a notification of some kind to each and every one of the customers who had accessed the internet during the relevant one week period through one or more of the identified IP addresses. Counsel for the applicants kept on suggesting during cross-examination that this would be a routine task that could easily be automated. AFACT did not address, and the applicants continue not to address, at least the following problems:

²⁰³ This evidence, chiefly from Mr Malone's second affidavit, is addressed in Chapter 2 above.

²⁰⁴ JCB Vols B9-B13.

²⁰⁵ Malone #2 para 5, JCB Vol A2, tab 33 p 3.

²⁰⁶ *Sharman* at [520], as set out in para 5-54 above.

- (a) Did AFACT intend that iiNet should, having matched the IP addresses, check for particular customers appearing so as to consolidate the communication to the customer into one email? Or was it AFACT's intention that iiNet send possibly a dozen or so separate notifications in respect of one week to a customer who (by reason of keeping a film online for the week) turned up several times in the DtecNet data?
- (b) Was iiNet supposed to repeat the exercise the following week, conceivably to the same customers who conceivably simply kept making available online the same single copy of a film, or was iiNet supposed to give the customers a chance to look into the question and get back to them – say, 14 or 28 days later? A deadline reply of less than seven days is rare even in the world of letters of demand in urgent matters.
- (c) Was iiNet supposed to keep records, and if so what records, to cross-check against?
- (d) Was iiNet supposed to make a value judgment at some point about when, given weekly notices but, possibly, fortnightly or monthly reply periods, an alleged infringer had overstepped the mark?
- (e) The information is not self-evidently self-explanatory. Indeed it took a considerable volume of affidavit material to explain it in the present proceeding. The DtecNet method remains largely confidential. And the attachment to this chapter answering Sch V to the applicants' closing submissions shows how many unanswered questions might be raised about the material by, eg, irritated or argumentative consumers which the applicants and AFACT simply expected iiNet (and presumably other ISPs) to deal with.
- (f) What procedure was there to be for any accused customer who wished to dispute the facts or complain to the ombudsman? Unlike, for example, a query about its own bills or accounts, iiNet was not in that position to say anything more than: *That is the information we received. Like it or lump it.*

- (g) AFACT did not supply any number of a helpline or an email address, through which it could be contacted should a customer decide to query AFACT about the veracity of the allegations. Was iiNet supposed to supply that number itself? Had AFACT set up any kind of customer service staff, properly trained in the relevant statutory obligations, including state authorities, telecommunications legislation, privacy concerns and the like? There is no evidence that they had done anything of the sort. There is no indication in any of the notifications that they were prepared to do so.
- (h) What were the terms of the communications proposed to be sent to customers that would be satisfactory to AFACT? As AFACT have shown in the present litigation, they and the applicants are prepared to pick apart even the most innocuous of documents and find encouragement to infringement lurking in it.²⁰⁷ Unlike, for example, the more measured and potentially helpful approach of MIPI in early 2007²⁰⁸, the AFACT juggernaut included vast amounts of documentation being gathered in an attempt to render ISPs liable, but does not appear to have contained a single document actually designed to implement a serious process.
- (i) A similar range of uncertainties arises with respect to the manner in which iiNet might suspend or terminate a customer's account.

5-90. In essence the applicants are asking the Court to engage in a social and commercial experiment using iiNet as the guinea-pig. There is no guidance available to the Court on any evidence put forward by the applicant or extracted from iiNet in cross-examination that supports anything other than the vaguest notion that warnings of some form (being warning the text of which has never received consideration; the timing and repetition of which has never received consideration; the sanctions threatened by which have never received consideration; and the like) would have the effect of preventing or avoiding any infringements of copyright.

²⁰⁷ Eg, the welcome email to a new customer, which ended "Happy downloading", an example of which for the Court was taken to at Ex MJW-15 p47.

²⁰⁸ Ex SJD-1 pp 1-4, 6-14, 15-27 JCB Vol B8 tab 91.

5-D. OTHER MATTERS**Knowledge not limited to AFACT notices**

- 5-91. iiNet does not now, and never did, dispute that it had a general understanding that it was likely that some users of its services were engaging in copyright infringement through the use of BitTorrent.²⁰⁹
- 5-92. However, iiNet submits that it is only the AFACT notices which can be relevant to knowledge in this case. First, the applicants have not identified the primary infringement of the copyright in any Identified Film except with reference to an AFACT notification. Secondly, the steps that the applicants demand iiNet to take require provision of reliable details of IP address, date and time, file details including hash values as provided in the DtecNet data. The applicants have not articulated a case that iiNet is in a position to take meaningful steps on the basis of other knowledge. It does not assist the applicants to point to the knowledge held by alleged authorisers in other cases;²¹⁰ it is well-established that each case must be determined on its own facts. In each case, different knowledge will be available and different responses will be available; comparisons in this respect are odious.

Compelling evidence

- 5-93. There are many references to “compelling evidence” in the applicants’ oral and written submissions.²¹¹ But they disregard the context in which Mr Malone used that term. Mr Malone’s expression was expressly qualified. He stated that evidence so described ought to be tested, consistent with iiNet’s view that AFACT’s notices were mere allegations, albeit allegations supported by evidence:

Mr Bannon: Evidence which you thought proved it?

Mr Malone: I thought evidence which was compelling and ought to be tested.

²⁰⁹ ACS 332. In relation to note 347 at ACS 332: it refers to Buckingham para 28-32 but paras 28 and 30 were rejected; and Malone #2 paras 27-32 but paras 30-32 were rejected.

²¹⁰ ACS 339, 340.

²¹¹ iiNet has counted 36 references.

*Mr Bannon: Compelling evidence, correct?*²¹²

- 5-94. Mr Malone's expression must also be read in the context of the questioning to which it related, which was his statement on the Whirlpool forum of 13 December 2008:²¹³

Note the issue of disagreement here is very specific. iiNet does not accept that an unsupported and uninvestigated allegation is an infringement. It's just that, an allegation. We have yet to receive any independently verified notice that shows that a customer has actually infringed.

...

... iiNet has been asking AFACT to take a similar approach. If they believe that someone has done something naughty, then investigate it further. With the evidence that AFACT has, I'm betting that a magistrate will happily issue an order for us to disclose the account holder's identity for under \$50. AFACT can then directly contact the customer, warn them, raid them, or sue them. Whatever the action, it will be overseen by the independent legal system.

I can't bridge the gap from "allegation" to "punishment" in one step. ... We have consistently asked AFACT to take the proper steps of having the police, a court or another appropriate agency act as an umpire on these investigations ...

- 5-95. The evidence is that Mr Malone considered that the AFACT material was sufficient to enable the applicants to obtain a court order to enable the rights holders to take direct action against alleged infringers. Mr Malone's testimony was no more than this. Mr Malone repeatedly stated that the evidence required third-party review:²¹⁴

Compelling evidence, correct?---What was being alleged there was that customers did something at this time. I didn't know what your collection methods – sorry, I say "you", but I didn't know what AFACTs collection methods were, but believed that they should be reviewed by an independent third party to take them to the next step.

²¹² Malone XXN T 705.01-04.

²¹³ Ex A2, Tab 70. See also A2, Tab 90: Mr Malone's Whirlpool forum post of 7 December 2008: "... We thus far only have untested claims that an infringement may have occurred, using a method of data collection that has never been subjected to any external scrutiny. ... We explained (in detail) why the material did not meet a sufficient standard of proof and asked for AFACT to work through the courts and/or agencies to achieve the required standard".

²¹⁴ Malone XXN T 705.04-07.

5-96. And later:²¹⁵

Well, the examination they undertook was before the commencement of the proceedings, wasn't it?---Between July and December we did revert back to AFACT at the point in July and several times afterwards, to say that what you have got here appears to be legitimate from what you are showing to us. Why don't we go off to a court now, or to the police and get something done about this. As I say in here, we couldn't jump from allegation to punishment. We don't have the judicial ability to do that.

5-97. And later again:²¹⁶

You assessed it at the time, that is, at a time prior to December, as compelling evidence, didn't you?---It's evidence of incidents that were observed by AFACT's investigators, and that they claimed they observed. If that was taken to a court and said, here is what we saw, and subjected to a third party review, I was and still remain of the view that the court would be quite happy to let you take direct action against the clients.

5-98. And again:²¹⁷

I am only asking you about the evidence you have given in this court, Mr Malone?---Well, can I perhaps go – my understanding was these are things which are observed by AFACT investigators, not by iiNet. I believe the evidence, from what I have heard reported, and the way that AFACT collects them, that that is compelling evidence, and that AFACT should go off to the court, or the police, or to the AFP, or whoever, and take next action. It is not up to iiNet to assess what we should do with that evidence, regardless of how good it is.

5-99. And again:²¹⁸

And that was based, I suggest to you, on an assessment undertaken by Mr Parkinson and Mr Dalby and reported to you?---No. I have been seeing these notices for over a decade. I know what's being alleged in here. It's an allegation of something occurred at this time and this place. My view is then I didn't observe that occurring. I have no way of assessing if it was true or not. The only person that can verify if it was true was your own investigator, therefore your own investigator should take their evidence which is compelling and take it off to someone else for a third party review.

²¹⁵ Malone XXN T 706.13-19.

²¹⁶ Malone XXN T 706.37-42.

²¹⁷ Malone XXN T 707.39-45.

²¹⁸ Malone XXN T 707.39-45.

5-100. Mr Malone stated that he held such view in December 2008. He clearly set out that the point of time he was referring to was post commencement of the litigation.²¹⁹

5-101. Once the context of this evidence is properly understood, the applicants' submissions lose force considerably.

5-102. The evidence demonstrates that prior to the commencement of proceedings, iiNet did not attribute the AFACT demands special importance,²²⁰ although, as one would expect, they did generate some industry discussion. The applicants misconstrue the evidence they cite in support of the contrary proposition:

- (a) Mr Malone's evidence at T 707.1-4 was in relation to his opinion after he had seen the DtecNet report;²²¹
- (b) Mr Dalby's evidence was that the AFACT correspondence was in the nature of the robot notifications or the MIPI correspondence.²²² He was cross-examined²²³ only in relation to robot notices. The evidence clearly demonstrates that that the MIPI notices had led to industry discussions²²⁴ and the fact of such discussions following the AFACT notifications was not extraordinary.

5-103. The applicants' submission²²⁵ that the University of Washington article confirms the reliability of the information in the AFACT notices overreaches. Mr Dalby has no technical background and Mr Malone is a programmer with, prior to these

²¹⁹ Malone XXN T 704.44, 705.27-29, 706.15

²²⁰ Malone #1 para 242 JCB Vol A2 tab 30 p 63; See Malone XXN T 706.30-31 where he states, "We would regard it as being more of the same stuff that we have been receiving from the US from the last decade" and Dalby para 51 JCB Vol A2 tab 31 pp 18-19 where he states, "I did not understand the AFACT Letter as threatening legal proceedings" and "the impression I received from the correspondence was that it was in the nature of notifications and correspondence that had come over a considerable amount of time, either to iiNet in the form of the robot notification, or to other industry members such as the MIPI correspondence. See also Malone XXN T 707.41-42: "I had been seeing these notices for over a decade" and Dalby XXN, T 997-31: "I've participated in conversations about notices in general which would have encompassed the robotic notices, MIPI notices and then later the AFACT notices".

²²¹ ACS 344. Mr Malone's evidence referred to in the footnote above confirms his earlier view that the AFACT correspondence was in the nature of earlier notifications iiNet had received.

²²² Dalby para 51 JCB Vol A2 tab 31 pp 18-19.

²²³ ACS 344, note 361.

²²⁴ Ex SJD-1 pp47-48, 52-55, 59-62 JCB Vol B8 tab 91

²²⁵ ACS 346

proceedings, only a very general understanding of BitTorrent.²²⁶ While both had read the article prior to iiNet receiving the AFACT notifications, the contemporaneous correspondence²²⁷ demonstrates that what people took from the article was the fact that infringement detection methods were unreliable. It is artificial to suggest that someone in Mr Dalby's position, and later Mr Malone's, on reading the AFACT notifications would immediately recall the University of Washington article and think "*I see that this method overcomes the MediaSentry problem*". A line-by-line reading out loud of the University of Washington paper in the witness box may have been a clever forensic trick, but it does not illuminate iiNet's state of mind when Mr Malone and Mr Dalby read the article in the context of busy working lives focusing on issues that were quite properly far more important to them than the applicants' concerns.

5-104. The litigation commenced on 20 November 2008. iiNet's understanding of the AFACT allegations and the BitTorrent systems by necessity increased significantly following the commencement of proceedings.²²⁸ By 13 December 2008, this included:

- (a) service by the applicants of its Application, Statement of Claim, and Particulars of the Statement of Claim;²²⁹
- (b) technical advice to Mr Malone regarding the operation of BitTorrent²³⁰;
- (c) engagement by iiNet of solicitors²³¹ and counsel;²³²
- (d) service of Notice of Infringements, BitTorrent Reports and Repeat Infringer Bundles on iiNet's solicitors²³³

²²⁶ Malone XXN T 676.33-44, T802.25-26; Dalby XXN T 936.28.30.

²²⁷ Ex SJD 1 pp 211-20 JCB Vol B8 tab 91.

²²⁸ Malone XXN T 892.02-08.

²²⁹ On or about 20 November 2008

²³⁰ See for example A2, Tab 104 email dated 22 November 2008 from Mr Nick Andrew to Mr Malone. Malone XXN, T889.35-45 confirms that Mr Andrews is an iiNet engineer and that Mr Malone sought his assistance and that of other engineers, after the commencement of the proceedings, in understanding the applicants' material.

²³¹ Notice of Appearance filed 28 November 2008.

²³² Senior and junior counsel had also been briefed by then.

²³³ Gane #1 para 46 JCB Vol A1 tab 22 p 12.

AFACT notices were sufficiently understood

5-105. This issue is addressed in Chapter 2 in response to the unwarranted attack on Mr Dalby's credit.

Knowledge of repeat infringements

5-106. iiNet repeats its submissions at paragraphs 5-74 ff above in answer to the submission at ACS 356 regarding iiNet's corporate knowledge.

5-107. The applicants' submission at ACS 358 is inaccurate and unfair to the witness. The extracted passage of transcript immediately preceding demonstrates that Mr Malone rejected what he understood to be the cross-examiner's definition of "countenancing". In those circumstances, it is misleading to suggest that "the only excuse offered by Mr Malone ... as to why iiNet was not countenancing ... was ... litigation." He did not accept the premise.

General knowledge of BitTorrent traffic

5-108. iiNet does not, and never did, dispute its general awareness of BitTorrent traffic, including its significant use for infringing purposes. However, there is no dispute that BitTorrent is used for substantial non-infringing purposes.²³⁴ Indeed, several of the applicants entered into agreements with BitTorrent Inc in order to take advantage of those non-infringing possibilities.²³⁵

5-109. Without disputing this general understanding, contrary to ACS 363, iiNet does not accept that US notices are reliable evidence of the conduct of users of its services. The method(s) of detection used in those notices have not been demonstrated to iiNet to be reliable. They do not fall within the same category as the DtecNet reports, after receipt of the DtecNet evidence.

²³⁴ Malone XXN T 804.21-35; Ex 14.

²³⁵ Gane XXN T 254.27-29, Kaplan XXN T 457.25-458.29; Perry XXN T 480.4-26 ; Wheeler XXN T 500.31-38 ; Garver XXN T 566.42-47.

5-110. iiNet submits that the Court will not be distracted by the reference to Deep Packet Inspection (“DPI”).²³⁶ It is not a pleaded matter and the applicants do not advance any reason as to why DPI is relevant, or reasonable.

No defence of “innocent infringement”

5-111. iiNet’s general understanding is not in dispute. However, prior to the receipt of the AFACT notices, iiNet was not in a position to know which customer accounts were associated with infringing activity in relation to the applicants’ films. No submission is advanced by the applicants that iiNet did have such specific knowledge.

5-112. There is no “significance” in the absence of a s 115(3) pleading.²³⁷ In the *Sharman* case, in reasons that do not appear to have formed a separate judgment, Wilcox J found that Sharman had waived privilege (via issue waiver) because it had put its state of mind in issue in pleading innocent infringement. In addition to iiNet’s general understanding, there are forensic reasons why such a defence would not be pleaded. No further admission is made and no inference arises. iiNet’s case is that it has not infringed copyright by authorising users’ infringing acts.

No action in response to AFACT notices²³⁸

5-113. iiNet agrees that it had formed the view by mid-July 2008 that it was not going to implement the notice and disconnection regime that AFACT demanded. It did regard the problem of copyright infringement by Internet users via BitTorrent to be the rights owners’ problem rather than iiNet’s. Although iiNet, like any customer-focused business, does not want to antagonise customers, this was only one factor bearing on this question.²³⁹ Having a firm belief that the law did not require it act, iiNet did not see why it should prefer the applicants’ business interests to its own. The implementation of the desired regime would have been complex and costly.²⁴⁰ The applicants do not propose to compensate ISPs such as iiNet for protecting their

²³⁶ ACS 362.

²³⁷ ACS 364.

²³⁸ ACS 366 – 377.

²³⁹ Malone XXN T 845.1-3: “And part of your concern...”

²⁴⁰ Malone #2 paras 10-12, 15 - 20, 33 JCB Vol A2 tab 33 pp 4-7, 10.

property interests. If iiNet is right as to the legal position, there is no reason for it to intervene.

5-114. (The studios' and AFACT's position in this regard is remarkable. They suggest that the fact of online piracy is resulting in very large losses to them. There can of course be a considerable debate about the quantification and how to quantify it, but if one accepts at face value AFACT and the studios' assertion that the cost is in the tens of millions of dollars per annum, it follows on their own argument that taking steps to reduce that infringement results in the studios being sole beneficiaries of a very significant upside. Yet they seek that upside without offering to pay a single cent of the costs of enforcement. On a review of the various submissions and correspondence relating to an industry-to-industry solution shows that ISPs and other service providers have consistently sought that the rights holder bear the cost, or at least part of the cost, of the enforcement processes.²⁴¹ That agreement has never been forthcoming. It is still not offered. All of those matters are matters that go to the "reasonableness" of any step: why should a service provider bear, or bear entirely, the costs of the rights holders' enforcement which is to the rights holders' benefit?)

Identification of steps that could have been taken²⁴²

5-115. iiNet repeats paragraph 5-85 above in relation to the applicants' failure clearly to articulate the steps they say iiNet should have taken.

Technical availability of such steps²⁴³

5-116. As submitted, iiNet's primary legal response to the applicants' notice and disconnection regime is that the necessary matching exercise is foreclosed by Part 13 of the Telco Act which is addressed in Chapter 7 of these submissions.

²⁴¹ See eg P2P File Sharing Strategy Pack - Dalby, Ex SJD-1 JCB Vol B8 tab 91 p 70 (entire document at pp 64-81); Internet Piracy (draft submission): Dalby, Ex SJD-1 JCB Vol B8 tab 91 p 117 (entire document at pp 102-120); Addressing Internet Piracy (final submission): Dalby, Ex SJD-1 JCB Vol B8 tab 91 p 156 (entire document at pp 132-160).

²⁴² ACS 378.

²⁴³ ACS 383.

5-117. iiNet agrees, and has never disputed, that performing the matching exercise necessary to identify the customer details is technically possible. The matching exercise for the sample 20 accounts for discovery purposes would not have been possible otherwise. However, neither Mr Dalby's cross-examination nor the document relied upon by the applicants²⁴⁴ casts any doubt on Mr Malone's second affidavit which addresses the challenges of implementing such a process in an automated manner on a large scale. Indeed, the internal company records support the view that there are challenges. A matching exercise for a given sample of IP addresses is not the issue in this case. AFACT's demands required iiNet to act in relation to large numbers of IP addresses being provided weekly. As submitted above, if iiNet were to implement such a regime in relation to AFACT notices, prudence would require it to deal with the US notices too, not to mention the inevitable waves of notices that would come from a broad range of further film copyright owners, and copyright owners of games, literary works such as educational materials, computer programs, sound recordings and the like.²⁴⁵

5-118. The iiNet internal communication relied upon by the applicants notes that the current tool for finding service and subscriber details from IP session details only allows a "single check each time" which is "insufficient for large volumes."²⁴⁶ The proposal to automate was said to "take a bit of work" and it was not clear when this could be "achieved cleanly". The current process required a "significant amount of manual handling."²⁴⁷ The latest statement of position was as follows:²⁴⁸

This is going to take a bit of work and there are a couple of problems with the request anyway.... [W] e have never been required to collect such a broad collection of data from the connection history side. This is obviously going to take a bit of work to implement.... We have some pretty specific and strict PCI requirements on what kind of customer data can be made publicly available. By publicly, I don't mean publicly outside the company; I mean there are only supposed to be a specific set of people internally that have access [to] customer data that is this detailed.... Providing this much information about a

²⁴⁴ Ex A3, tab 123.

²⁴⁵ See Ex 16, tab 1.

²⁴⁶ Ex A3 tab 123 p. 4 (IIN.02.0001.3737).

²⁴⁷ Ex A3 tab 123 p. 2 (IIN.02.0001.3735).

²⁴⁸ Ex A3 tab 123 pp. 1-2 (IIN.02.0001.3734-5).

customer also raises some major privacy concerns.... Now I don't really know anything about the procedure for requesting this information from us but I was under the impression that we only give out this kind of information if there is a court order to do so.

- 5-119. That is not evidence of an existing capacity to match efficiently large numbers of IP addresses with customer details and it reflects iiNet's natural and appropriate concern to keep its customers' details private.
- 5-120. Some of the so-called "sanctions" described in ACS 385 were raised for the first time in the cross-examination of Mr Malone. Where evidence in chief proceeds by way of affidavits prepared months before the trial it is simply not possible for iiNet to anticipate what the applicants might rely on as a "reasonable step" and box at shadows trying to cover the possibilities. The pleaded reasonable steps were notice and disconnection. iiNet asked for further particulars which the applicants declined to provide. Mr Malone's agreement in cross-examination that iiNet has the capacity to "playpen" customers is not evidence that iiNet can establish a system of automatically "playpenning" a potentially large number of customers who might be identified as a result of AFACT notifications and US notices. The relevant question – the suitability of "playpenning" for this purpose – was not put to Mr Malone. An answer to a general question cannot assist. The same reasoning applies to shaping and website blocking.
- 5-121. The draft eSecurity code is similarly of no assistance.²⁴⁹ iiNet was not involved in its preparation and Mr Dalby's comment that iiNet's participation was subject to whether the process can be automated and the developments costs are not prohibitive are precisely the issues raised by Mr Malone in his second affidavit in considering whether iiNet could implement a system for the automatic handling of the AFACT notifications and the US notices.

²⁴⁹ ACS 386.

Encouragement of iiNet users

5-122. Contrary to ACS 389, iiNet does not encourage users of its services to engage in copyright infringement. The circularity of the applicants' position is revealed in the following submission:²⁵⁰

For those users, who have infringed week to week, iiNet's encouragement to continue to engage in acts of infringement undoubtedly led directly to further infringement of copyright in the applicants' films. In a causal sense, iiNet's failure to take any action after having been notified of infringements is a cause of the infringements continuing.

5-123. Again, *post hoc* is not *propter hoc*. The applicants' case is that because there were infringements, iiNet must have encouraged them.

Encouragement by failure to take action

5-124. The applicants' case in this respect relies on reversing the onus of proof. The case now appears to be that iiNet has an obligation to discourage infringing acts by users.²⁵¹ None of the authorities reviewed above provides support for such a proposition.

5-125. The submission that "Mr Malone agreed that he was happy to tell iiNet's customers that they are safe in the knowledge that they can use the iiNet services to infringe copyright" (ACS para 394) is an inaccurate and unfair analysis of the transcript. First, to suggest that the evidence Mr Malone might give from the witness box is a public position that counts against it is to ignore the fact that the applicants commenced these proceedings, elected to cross-examine Mr Malone, and put to him a proposition in words of their choosing. The fact that Mr Malone happens to answer such a proposition is a circumstance entirely of the applicants' making. Secondly, the answer to the cross-examiner's proposition was that infringing users are not safe from action from the rights holder. Mr Malone agreed that they were safe, in the present circumstances, from iiNet disconnecting them. That was the proposition agreed to not that he was "happy to tell [his] customers" in the sense that he was eager to use the

²⁵⁰ ACS 30.

²⁵¹ ACS 395.

witness box to advance some ulterior position. Mr Malone was simply answering honestly, as a witness, a question that was put to him.

Press release dated 20 November 2008 – issued via BitTorrent

5-126. iiNet is a publicly listed company. It is hardly surprising that it places its public documents (such as annual reports, media communications, releases and statements from the stock exchange and the like) on its website. They are there as an historical record. The press release of 20 November 2008 (assuming for the moment that its text is offensive, which it is not) is plainly that: an historical record, available as such. It is not an utterance being made as of today by iiNet, were that a problem.

5-127. There is no suggestion that the sharing of the press release of 20 November via BitTorrent involved an infringement of copyright. The applicants submit that the fact it was made available in this manner “can only have operated as further encouragement to those of iiNet’s customers or users to who use BitTorrent.”²⁵² One might well ask the question “further encouragement to do what?” If it is simply an encouragement to download the press release via BitTorrent, it cannot assist the applicants. The applicants have not identified any basis for finding any broader encouragement.

5-128. The fact that iiNet released a press release for download via BitTorrent demonstrates only that there are legitimate non-infringing uses of the BitTorrent protocol, a matter which should not be in dispute. No person reading the press release made available for download via BitTorrent could form a view that iiNet condoned copyright infringing activity by its users. The press release, exhibit U, is unambiguous in its reflection of iiNet’s disapproval of such activity. It simply does not amount to evidence of authorisation. Even if the press release could assist the applicants in any way, the evidence suggests that it was downloaded via BitTorrent only 33 times²⁵³. This is not consistent with the image that the applicants attempt to portray of hordes of iiNet users eagerly downloading whatever BitTorrent content they can find, including this press release.

²⁵² ACS 408.

²⁵³ Ex T.

“Golden Girls” radio advertisement and other stray items

5-129. The reference to the “Golden Girls” should be seen in context. It was part of an advertisement informing the public as to the size of a gigabyte of data. The evidence demonstrates that legitimate music and video content is available online other than through the Freezone²⁵⁴ and it is useful for Internet users to have some idea of the size of these sorts of files. There is no suggestion that the *Golden Girls* series is in its first bloom of popularity as a television series. That is not to say the copyright in it is not worthy of protection but it suggests that the reference was intended to be a humorous reference to late 1980s pop culture. As the applicants’ opening revealed, it is newly–released, currently popular films which attract the bulk of the applicants’ concern. *Golden Girls* does not fit this profile. Mr Malone accepted that it was an unfortunate reference and proposed to remove it. Consistently with his approach to this litigation generally, he did not do so during the course of the litigation in order to avoid creating the risk of forensic consequences. AFACT never wrote to iiNet asking that the advertisement be removed.

5-130. It is a feature of cases such as this that applicants fossick around looking for traces of activity that support their case. The logical step that the Court then has to take is that, in the case of a large enterprise, those isolated instances that suit the applicant’s case should in effect be taken to add up to an enterprise of encouraging copyright infringement. In some cases that may well be true. For example, in *Sharman* none of the principals took the witness stand²⁵⁵, and there was no way of knowing whether the source code²⁵⁶ that had been supplied was the full source code; there was no available discovery of the entire Kazaa system²⁵⁷. Moreover, as the Court found, and as was plain, Kazaa had been invented with a predominating purpose of the infringement of copyright, particularly sound recording copyright.²⁵⁸

²⁵⁴ Ex 13.

²⁵⁵ *Sharman* at [24].

²⁵⁶ *Sharman* at [25], [197].

²⁵⁷ *Sharman* at [202].

²⁵⁸ *Sharman* at [194].

5-131. Here, the Court is instead presented with a large and thriving enterprise, built up over the years to provide all the services that internet users require, from the earliest days in Mr Malone's garage²⁵⁹ to the \$400 million dollar enterprise it is today.²⁶⁰ There is no suggestion that it has been built up as an infringing enterprise. Indeed the phenomenon of film downloading came upon it, not the other way around: it was running and building its business as a ISP from the days of dial-up only, and dial-up was and is totally impractical for downloading such large files²⁶¹; indeed, that had to wait until PC and Internet speeds made it possible, which has happened in the relatively short time frame since *Kazaa*. There can be no suggestion that some culture of infringement permeates iiNet. Accordingly, where there emerges the occasional – very occasional – use of word that might at worst be described as infelicitous, one simply cannot stitch those pieces together into a patchwork of an authorising mentality or an infringing culture. They are simply, at worst, scattered and isolated instances.

5-132. Indeed the applicants' own material suggests strongly that the relied-upon press releases and statements about the proceeding have demonstrably not had the effect of encouraging illegal file-sharing. In their final supplementary particulars dated 17 September 2009 the applicants track the cumulative "infringements" in the table in paragraph 59(a) and the number of acts each week over 59 weeks in the table in paragraph 5(b)²⁶². Laying a ruler over the first graph shows that the cumulative rate is a steady slope – ie no steepening of the curve which would reflect greater encouragement. And over the 59-week period the weekly level of infringements alleged is at week 59 almost exactly where it was in week 1. iiNet has pointed out elsewhere that they represent the industry of DtecNet more than reflecting any reality, but they are the applicants' tables.

²⁵⁹ *Malone #1* para 24 *JCB* Vol A2 tab 30 p 9

²⁶⁰ Ex DB-1 p 203 *JCB* Vol B6 tab 87.

²⁶¹ *Malone XXN* T 774.40-41; *ROS* T 155.22-156.2.

²⁶² *ACS* - Applicants' Submissions in relation to primary infringement bundle para 3 pp 2-3; Applicants' Supplementary particulars para 5 *JCB* Vol A2 tab 4 p 3.

Encouragement of upgrades and support

- 5-133. The applicants submit that iiNet's policy of shaping accounts of customers who exceed their current plans and offering plan upgrades has the effect of driving customers onto higher quota plans "where they will be in a position to, and in many cases will, download more content, including very large files constituting content such as copies of the applicants' films."²⁶³ There is simply no evidence to support this speculation as to the consequences of iiNet's policy concerning upgrades.
- 5-134. The applicants could only make this point good if they established that all downloading that uses up quota (ie, not in the Freezone) is infringing. This is clearly nonsense and the material tendered by iiNet shows the breadth of legitimate content available online other than in the Freezone.²⁶⁴ Further Mr Buckingham's evidence indicates that iiNet's customers are concentrated towards the lower end of the quota plans and typically use less than half of their allocated quota.²⁶⁵ Again, this is inconsistent with the image the applicants attempt to portray of vast numbers of iiNet customers ferociously consuming quota and eagerly being upgraded by iiNet to higher and higher plans. The evidence simply does not support this view.
- 5-135. Even the 20 sample accounts provided by way of discovery do not support the applicants' submission in this respect. Of the 20 accounts, 15 were shaped at some point over about a year and only 10 upgraded (although, inconsistently with the applicants' theory, RC-15 subsequently downgraded to his or her original plan).²⁶⁶
- 5-136. The applicants include the major Hollywood movie studios who assert that a large proportion of BitTorrent traffic comprises unlicensed versions of their films. They have probed relentlessly via DtecNet for BitTorrent traffic with iiNet IP addresses relating to the Identified Films and a range of Catalogue Films. The following emerges:

²⁶³ ACS 414.

²⁶⁴ Ex 13.

²⁶⁵ Buckingham paras 92-93 JCB Vol A2 tab 29 p 20.

²⁶⁶ ACS Schedule V; Conf. Ex MJW-15 JCB Vol B5 tab 64.

- (a) RC-01 had a Home 4 plan with 30GB peak and 30GB off peak quota – DtecNet only detected two films made available across the 59 weeks – *The Dark Knight* and *American Dad*. This user was shaped and upgraded his or her plan. The size of the applicants' film files (less than 1GB each)²⁶⁷ could not have been responsible for using up the quota. The inference may be drawn that the vast bulk of the quota was used for Internet activity that did not infringe the applicants' rights.
- (b) Ten of the sample accounts have five or fewer discrete hash values, including with respect to Catalogue Films.²⁶⁸ Assuming a file size of 1GB or less for each film, none of these users will get anywhere near their quota on the basis of the films DtecNet found to be made available. The percentage of quota apparently used by all of the 20 users was relatively small. See the attached table. The highest user, RC-13, who apparently had 51 films, would average four films per month comprising 4GB or less.

5-137. The submission at ACS Schedule V para 10(a) is wrong. It suggests that there is a pattern of customers being “bombarded” with invitations to upgrade and that there is an equal pattern of users taking up this option. The submission then suggests a separate pattern of invitations to upgrade combined with a quota warning and an equal pattern of users taking up this option. Two errors emerge: first, the evidence indicates that invitations to upgrade are only issued in conjunction with quota warnings.²⁶⁹ Secondly, not all users who receive invitations to upgrade accept. Thus there is no “equal pattern”.

5-138. The emotive language of “bombardment” obscures the true position. Quota warning emails are standard automated emails - they are even sent to iiNet customers on Home 7 accounts where there is no option for them to upgrade to a higher account.²⁷⁰ Mr Malone gave evidence that these emails are sent at most twice a month:

²⁶⁷ The size of the file can be calculated by dividing the % of file downloaded figure in Ex MJW-10 into 100 and then multiplying by the MB downloaded figure: eg for RC-1 *The Dark Knight*: 100/.06 x .45 = 750MB.

²⁶⁸ RC-01, 02, 03, 07, 08, 09, 12, 15, 19, 44: Ex MJW-10 JCB Vol B4 tab 58.

²⁶⁹ Conf. Ex MJW-15 JCB Vol B5 tab 64.

²⁷⁰ Conf. Ex MJW-15 JCB Vol B5 tab 64 p487.

*once when the customer reaches 80 per cent of their quota, saying at that point how, "You're getting close," and then when they reach 100 per cent of their quota it's done again, saying, "You've now exceeded your quota and you'll now be slowed down." So it's designed to present as a warning to let people know it's about to come and then designed to let them know why they've just been slowed down.*²⁷¹

5-139. Shaping is a sensible alternative to the excess charges model which allows users to do what they like during the month but they are at risk of a nasty surprise when the bill comes in. The communications between iiNet and users do not carry the freight perceived by the applicants. While users who are, or are about to be, shaped are invited to upgrade, each quota warning is accompanied by the message "*We hope this reminder helps you to budget your usage*".²⁷² In other words, you may choose not to upgrade, as did half of the sample accounts and this warning will remind you that your limit is approaching and you should ration your use to avoid being shaped. This is an entirely responsible message.

5-140. iiNet agrees that there is no policy that any use of BitTorrent should be discouraged.²⁷³ This could only be relevant to the question of authorisation if there were a positive duty on iiNet to discourage copyright infringement. There is no such duty. And again it is curious that these applicants should suggest that BitTorrent should be discouraged when many of them entered into contractual relations with BitTorrent, inc, such that their logos were on the home page of BitTorrent.com, only two clicks away from infringements of their own films.²⁷⁴

Failure to enforce terms and conditions – identity of infringer

5-141. Notwithstanding the provision of the CRA that makes the subscriber responsible for the act of any user of the service, the fact that the AFACT notices do not and cannot identify the actual infringer is relevant to the manner in which iiNet has chosen to deal with those notices. As submitted above, it is absolutely routine for a service provider to pick and choose the circumstances in which and the manner in which it

²⁷¹ Malone XXN T 842.29-34.

²⁷² ACS Schedule V para 19.

²⁷³ ACS 418.

²⁷⁴ Ex 1 tabs 1 & 2.

will enforce the terms of its contract with users. While Mr Dalby's evidence recognised that it may not make a difference from a purely contractual point of view, it remains relevant for companies to exercise value judgments in their response to breaches of their contracts. The difficulty in the exercise of value judgments with respect to the AFACT notices is that ultimately they relate to rights held by the applicants, not by iiNet. It follows that the rights owner should exercise the value judgment as to how to proceed against the range of alleged infringers.

Practicality of enforcing the CRA

5-142. The applicants have not advanced a satisfactory response to Mr Malone's evidence of the challenges in implementing a notice and disconnection regime in relation to the AFACT notices.²⁷⁵ Mr Malone, an experienced computer programmer, gave specific and detailed evidence of the challenges in implementing a system to implement such a regime. Mr Malone formed the view that it would be necessary for such a system to deal not only with the AFACT notices but with the US robot notices. He was not challenged in this view. The applicants chose not to lead evidence in direct answer to Mr Malone. The fact of the Westnet policy is not an answer to Mr Malone's evidence. The detail of that policy was not known to Mr Malone; he required it to be changed very shortly upon becoming aware of it. In the absence of any real understanding of the content of that policy it understandably forms no part of Mr Malone's consideration of the issues at outlined in his second affidavit. The applicants counter the evidence of these challenges with the suggestion²⁷⁶ that iiNet could deal with some of the allegations. With respect, this is an unhelpful submission as it raises far more questions than it answers: How would iiNet go about determining which of the myriad of allegations in the AFACT notices it should act upon? The experience of this trial shows that it is highly likely that, whatever selection had been made by iiNet, it would not have been acceptable to AFACT.

²⁷⁵ ACS para 431 and following.

²⁷⁶ ACS 438. This was put for the first time in closing oral address.

iiNet's reliance on the CRA

5-143. The applicants cannot have it both ways. First, they rely on the terms of the CRA as imposing effectively a duty on iiNet to interfere but they then submit that there is “in truth no qualification on the invitation by iiNet to its customers to use its services.”²⁷⁷

5-144. Mr Malone's answer in cross-examination was apposite: “this is a right, not an obligation on iiNet”.²⁷⁸ The relevant provision in the CRA exist purely for iiNet's benefit, to be enforced entirely at its discretion. The CRA to be agreed to by the customer on signing up remains a relevant qualification on how the customer might use the iiNet service.

Continuing to offer Internet services

5-145. The submissions at ACS 446 to 448 are a repetition of matters addressed elsewhere by the applicants. iiNet repeats its submissions at paragraphs 5-74 and following above with respect to corporate knowledge and at 5-133 and following with respect to shaping and upgrading.

5-146. It is not correct to say that iiNet has not dealt with the applicants' interests at all.²⁷⁹ iiNet has decided not to agree to AFACT's demand for a notice and disconnection regime. However, the means by which it discourages illegal use of its service and encourages access to legitimate content as addressed in these submissions remain useful and important contributions.

Alleged inactivity and indifference***Alleged failure to act***

5-147. iiNet repeats paragraph 5-146 above in answer to ACS 449-551.

²⁷⁷ ACS 445.

²⁷⁸ Malone XXN T 734.23-26, cited in ACS 443.

²⁷⁹ ACS 447.

Sending AFACT notice to police

5-148. The submission at ACS 455 is wrong: see s 132AJ of the Act and iiNet's submissions on primary infringement in Chapter 3 at 3-99 to 3-102. The cross-examination of Mr Dalby and Mr Malone on this issue was conducted on an incorrect basis in so far as it was put to lay witnesses that "commercial scale" is a necessary ingredient for every criminal offence under the Act. The applicants can get no assistance from that cross-examination.

5-149. Mr Malone's evidence that he did not know whether a crime had been committed should be accepted.²⁸⁰ He agreed that AFACT was not expressly alleging that a crime had been committed and that he had not formed the view that a crime had been committed but he could not rule it out.²⁸¹

5-150. The distinction the applicants strive to make between acts of copyright infringement which constitutes criminal activity and infringements which are civil breaches is inconsistent with emphasis that AFACT itself places on the criminal nature of copyright infringement. AFACT itself persistently blurs the distinction between civil and criminal infringement of copyright:

- (a) The most obvious example of this is the presence of the word "theft" in AFACT's name - Australian Federation Against Copyright Theft.
- (b) AFACT's press release of 29 August 2007 concerning a graduated response policy for ISPs refers to police raids and Customs seizures in relation to "Piracy in Australia".²⁸²
- (c) Consider also AFACT's notorious "*You Wouldn't Steal a Car*" campaign.

5-151. The AFACT Notice of Infringements also refer to AFACT acting on behalf of "*approximately 50,000 Australians directly impacted by copyright theft*".²⁸³

²⁸⁰ Malone XXN T 721.25 and following.

²⁸¹ Malone XXN T 724.6.

²⁸² Ex 3 p AFA.02.0001.0381.

²⁸³ Ex B1, tab 1 p 2.

5-152. It does not behove these applicants, conducting this litigation through an industry body that seeks to introduce the spectre of the criminal law over all of its public pronouncements, and having cross-examined two lay witnesses on an incorrect legal premise, to attack the evidence²⁸⁴ of those witnesses on the basis that they forwarded material to the police.

Response to “broader consideration of ‘reasonable steps’”

5-153. In their section E.9, the applicants descend to a miscellaneous collection of points, all of them characterising iiNet’s conduct through the curious prism of the primacy of the applicants’ rights over iiNet’s business. The following sections answer those points that arguably merit a response.

The Westnet policy

5-154. Westnet’s policy and Mr Malone’s discontinuance of that policy was disclosed to the applicants in the discovery produced by iiNet prior to the commencement of the hearing.²⁸⁵ The Applicants did not take any steps to obtain further information of the Westnet policy or details of its implementation by Westnet. There is no evidence of Westnet doing anything other than forwarding the notices it receives to its customers. There is no evidence that Westnet had a policy to or took any other action such as identifying customers who were sent more than one notice or terminated customer accounts or that Westnet’s policy incorporated any system for identifying repeat infringers.²⁸⁶ There is no evidence of the number of notices Westnet received that were handled under its policy.

5-155. It was not for iiNet to adduce documents in relation to these matters – it did not rely on Westnet’s policy in the proceeding. The applicants cannot seek to have inferences drawn to fill gaps in the evidence and no issue of *Jones v Dunkel* or *Blatch v Archer* arises because there was no fact in relation to it that iiNet was required to prove.

²⁸⁴ Such as at ACS 457 and 458.

²⁸⁵ Respondent’s discovery documents IIN.002.0001.3309, IIN.002.0001.3782, IIN.002.0001.4981 and IIN.002.0001.4972, produced on 29 September 2009 & Ex A2 tab 96.

²⁸⁶ Ex A2 tab 99 Email dated 17 September 2009 from Matt Hutchinson to Eric Cain.

Published policies of other ISPs

5-156. The applicants have not proved how any of the ISPs that have published copyright infringement policies actually implement them, if at all. There is evidence that a substantial number of ISPs have not published such policies, including Telstra and Optus, iiNet's largest competitors.²⁸⁷

IIA draft repeat infringer policy

5-157. The applicants' submissions²⁸⁸ do not indicate why Mr Malone's view of the document in question is relevant to the question of authorisation. It is not.

Freezone

5-158. The high point of the applicants' strained perspective is the submission that the provision of the Freezone by iiNet supports the applicants' case that iiNet authorises copyright infringement. The applicants note²⁸⁹ that content available through Apple's iTunes store must be purchased. The applicants do not grapple with the obvious difficulty of why a potential infringer would pay for anything from Apple through the Freezone if he or she were minded to get copies of films free through BitTorrent. It is plain that people who are minded to pay for legitimate content through the Freezone are unlikely to be the kind of people who seek to obtain counterfeit content for free. It follows that iiNet's promotion of the Freezone is inconsistent with encouraging infringing activity through customer accounts. The representatives of the applicant studios generally agreed the availability of legitimate content online acted as an incentive to use of such content and as a disincentive to use infringing content.²⁹⁰ Mr Gane agreed²⁹¹ that the promotion of legitimate content was something Ms Pecotic was referring to in a press release on 29 August 2007 as a factor that may

²⁸⁷ That will be apparent from an examination of bundles to be tendered of other large ISPs if agreement is not reached on the effect of the material and the bundles.

²⁸⁸ ACS 480 – 484.

²⁸⁹ ACS 495.

²⁹⁰ Phillipson XXN T 399.6-9; Kaplan XXN T 460.42-45; Perry XXN T 484.44-47.

²⁹¹ Gane XXN T 289.39 to 290.8.

change people's attitude towards online piracy.²⁹² Moreover, there is no bandwidth profit to iiNet flowing from the use of the Freezone.²⁹³ In relation to legitimate content generally, both within and outside the Freezone, two documents are attached which summarise exhibits 12 and 13.

Making further copies to DVDs

5-159. The applicants make no written or oral submission to the effect that iiNet authorises any acts of users to make further copies of films downloaded via BitTorrent, for example on DVDs. The general topic was addressed orally²⁹⁴ and in writing,²⁹⁵ including in an odd one page note handed up at the close of the applicants' address of which no authorship is claimed by any legal representative. However, the combined effect of those submissions is at best only that primary users might engage in such conduct. Not a word is said as to how iiNet authorises that particular conduct. It is necessary to demonstrate a causal connection between the conduct of the alleged authoriser and the primary acts of infringement. Even if the applicants establish the making of unlicensed copies to DVD, such conduct is even further removed from any conduct of iiNet that could be said to sanction, approve or countenance such activity. This aspect of the case can be dismissed forthwith.

5-160. iiNet submits that in any event, there is no reliable evidence of such conduct other than by licensed agents of AFACT.²⁹⁶ There is no evidence to support the oral submissions concerning the desire to watch such things on large screens or issues with computer storage capacity.²⁹⁷ iiNet's rejoinder is to observe the increasingly large size of computer monitors, the rapidly increasing size of computer hard drives and the common practice of computer users connecting their computers to their television screens. The documents at Exhibit A2 tab 33 appear to relate to a criminal investigation of a large scale counterfeit film distribution ring. The applicants have

²⁹² Ex 3.

²⁹³ Buckingham paras 77-78 JCB Vol A2 tab 29 p 17; Buckingham Conf Schedule para 9 JCB Vol B6 tab 88 p 2.

²⁹⁴ AOS T 1135.24-40.

²⁹⁵ ACS 235

²⁹⁶ See Chapter 3 above, para 3-85.

²⁹⁷ AOS T 1135.

been at pains to insist that the present case has nothing to do with criminal activity and cross-examined Mr Malone on this basis. These documents have nothing to do with this case.

5-E. CONCLUSION AS TO AUTHORISATION

5-161. The evidence demonstrates that iiNet did not authorise any user of its services to do any act comprised in the applicants' copyright because:

- (a) no express authority or invitation to do such acts was conveyed;
- (b) no implied authority or invitation should be found because:
 - (i) those acts were prohibited under, and a warning was published in, the Customer Relationship Agreement and the copyright page on iiNet's website;
 - (ii) iiNet encouraged subscribers to obtain licensed content via its Freezone service;
 - (iii) iiNet discouraged excessive bandwidth use by shaping subscribers accounts, consistent with its financial interest in subscribers using only a moderate proportion of bandwidth;
 - (iv) users accused by the applicants of committing primary acts of infringement did not know that they had been detected – it follows that they could not regard continued access to the Internet as a sign of approval or countenancing of their conduct by iiNet;
 - (v) iiNet did not provide to Internet users the means of infringement: BitTorrent client software or the copyright subject-matter the subject of the primary acts of infringement;
 - (vi) by reason of the Telco Act, discussed in detail below, iiNet did not have power to prevent the doing of acts comprised in the copyright because it could not use or disclose information relating to the substance of communications it carried or to the affairs or personal

particulars of its customers so as to disconnect particular subscribers and for this reason such a course was not a reasonable step in respect to the applicants' notifications;

- (vii) even if iiNet is wrong as to the construction of the Telco Act, iiNet's only power to prevent future acts of infringement was to disconnect subscribers;
- (viii) iiNet's decision not to notify subscribers of allegations of copyright infringement and thereafter disconnect them does not amount to the authorisation of infringing acts by users because the implementation of the applicants' regime was not a reasonable step for iiNet to take to prevent or avoid the doing of those acts due to the cost and complexity of doing so and the disproportionality of such a response; and
- (ix) iiNet's contractual relationship with its subscribers does not imply any authority or invitation in circumstances where the terms of the contract prohibit the conduct in question and the actual infringing user may well be the partner, child, flat-mate, employee or customer of the subscriber.