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 SIX

SECTION 112E

Filed on behalf of the
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6-A. INTRODUCTION

6-1. The applicants propound[1] an extremely limited application of s 112E. They submit that whenever any factual element bearing upon the question of authorisation arises[2], s 112E is rendered impotent. The self-defeating construction of the provision was revealed in the following submission:[3]

> *an analysis [of] the cases on authorisation prior to the introduction of communication rights and in particular [Moorhouse], makes it clear that the mere supply of a photocopying machine of itself, which was the device used to engage in primary acts of infringement, of itself could not have constituted or authorisation. There had to be something more.*
>
> *But what was more, it might be thought need not be much more, and in particular, as I say, knowledge or reason to suspect is immediately a matter which takes one out of the ["merely"], and this court in Cooper said as much.* [Emphasis added]

6-2. First, this is not what the Court said in *Cooper*. Secondly, this submission is to the effect that provision of a facility, without more, does not amount to authorisation; something more is needed. But, according to the applicants, when something more is added, such as "knowledge", s 112E falls away. In other words, one moves from no authorisation to being deprived of the protection of s 112E with no middle ground. On this approach, the provision has no work to do.

6-3. That limitation on the operation of s 112E is unsupported on a plain reading of the provision, consideration of the legislative history and of the authorities cited and, iiNet submits, the construction put forward by the applicants cannot be sustained. The clear purpose of the provision is to provide a defence to authorisation. The legislature must have intended s 112E to have some effect. Accordingly, there must be circumstances where a person, having found to have authorised an infringement of copyright, is able to rely on this defence.

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[1] AS 97-104; ACS 154-164; AOS T 1052.40-1053.9.

[2] AS 98: ACS 155; *"As soon as any additional factual element [beyond the provision of facilities] was present that bore upon the question of authorisation, the provisions of s 112E were of no consequence."*

[3] AOS T 1052.40-1053.1.

6-B. DIGITAL AGENDA ACT AND S 112E

6-4. A general overview of the legislative history of the Digital Agenda Act is set out in Chapter 4 above and demonstrates that s 112E was introduced specifically as a result of the legislature's concern over the liability of carriers and carriage service providers.

6-5. Section 112E of the Act provides:

> *A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.*

6-6. The applicants' opening and closing written submissions state that there "*cannot be in any doubt*"[4] that s 112E was "*introduced with a narrow focus*".[5] For this contention they cite a discussion paper that according to the applicants, "*accompanied the relevant Bill*".[6]

6-7. The applicants are incorrect in saying that the discussion paper accompanied the Digital Agenda Bill. As the dates on the discussion paper and the Exposure Draft make clear, the discussion paper was published more than two years prior to the Digital Agenda Bill being introduced into Parliament.[7] The Government received 70 submissions in response to the discussion paper[8] which were considered and consolidated into the Digital Agenda Bill introduced in Parliament in September 1999 following additional consultation and review after the release of the Exposure Draft in February 1999.

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[4] AS 44; ACS 164.

[5] AS 44; ACS 164.

[6] AS 44; ACS 164. See Discussion Paper, *Copyright Reform and the Digital Agenda: Proposed transmission right, right of making available and enforcement measures,* July 1997, Preface.

[7] The purpose of the discussion paper was to, among other things, "*seek the views of the community on the legislative scheme proposed in this paper to reform copyright law to respond to the challenges posed by new technologies and the on-line environment*" *See* Discussion Paper, *Copyright Reform and the Digital Agenda: Proposed transmission right, right of making available and enforcement measures,* p xii.

[8] Attorney-General's Department (AGD) website:http://law.gov.au/publications/digitalsubs.htm.

6-8. The Exposure Draft, under the heading "Limitation on liability of carriers and carriage service providers" states that the

> *"Government recognises that Telecommunications carriers and carriage service providers (including ISPs) play a key role in the online delivery of content and the operation of the information economy. To encourage continued investment in these crucial new online businesses, the Government's intention is that ISPs should be provided with a legislative frame-work that gives certainty about their responsibilities to copyright owners and the steps they need to take to avoid infringing copyright.*[9] [emphasis added]

6-9. The Explanatory Memorandum provides that in relation to the benefits of the express limitation of liability:

> *"Carriers and carriage service providers (including ISPs) would benefit from the limitation on their liability for the authorisation of copyright breaches, and the resulting increased certainty in the industry about liability for copyright infringements on their facilities or network infrastructure."*[10] [emphasis added]

6-10. In respect of the text of s 112E, the Explanatory Memorandum provides:

> *Item 95 inserts a new s 112E ("Communication by use of facilities provided by carriers or carriage service providers") that has the effect of expressly limiting the liability of carriers and carriage service providers for authorisations of copyright infringements on their networks. The section provides that carriers and carriage service providers will not be taken to have authorised an infringement of copyright in a film, sound recording, television broadcast or sound broadcast merely because they provide the facilities by which that material is communicated to the public. The reference to "facilities" is intended to include physical facilities and the use of cellular, satellite and other technologies. A corresponding new provision in relation to works is provided in new s.39B.*[11] [emphasis added]

6-11. In the version of the Digital Agenda Bill set out in the exposure draft released in February 1999, the liability of CSPs was limited to "physical facilities". In the version of the Digital Agenda Bill introduced to Parliament in September 1999, these provisions were extended to cover all facilities provided by the carrier or ISP, not just

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[9] Exposure Draft and Commentary to the *Copyright Amendment (Digital Agenda) Bill* 1999 pp 29-30.

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

[11] Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill* 1999 p 58.

the physical facilities.[12] Further amendments were made to the Digital Agenda Bill in order to address certain recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in December 1999 and to implement further changes resulting from consultation with interests, and implement necessary technical amendments.[13] The relevant amendments increased the scope of s 112E so that it also applied to providers of digital storage services as well as carriage service providers.[14]

6-12. The Supplementary Explanatory Memorandum to the Digital Agenda Bill (**Supplementary Explanatory Memorandum**) sets out the additional amendments made to the Digital Agenda Bill pursuant to the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs. It relevantly provides:

> *63. Amendment 26 amends Item 95 of Schedule 1 of the Bill by omitting clause 112E (Communication by use of facilities provided by carriers or carriage service providers) and replacing it with a new clause (Communication by use of certain facilities).*
>
> *64. New clause 112E has the effect of expressly limiting the authorisation liability of persons who provide facilities for the making of, or facilitating the making of, communications. The clause provides that such persons are not taken to have authorised the infringement of copyright in an audio-visual item merely because another person has used the facilities to engage in copyright infringement.*[15]

6-13. The applicants contend that their construction of s 112E *"can be understood by reference to the circumstances in which the provision came to be introduced and the extrinsic material"*. In fact a detailed examination of extrinsic materials and legislative history show that the construction of s 112E intended by the legislature is one completely at odds to the construction propounded by the applicants. While the agreed statement made by the 1996 Diplomatic Conference adopting Article 8 of the

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[12] Also see the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* at p 5.

[13] Supplementary Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 2.

[14] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* at p 105.

[15] Supplementary Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* p 13.

World Intellectual Property Organisation (**WIPO**) Copyright Treaty[16] may have been the genesis of legislation in this area, by the time that the final version of the Digital Agenda Bill was passed, the scope of s 112E had been considerably widened pursuant to years of consultation and review by the Commonwealth Government.

6-14. It is clear from the extrinsic materials that in the course of the consultation and review process the legislature, in recognising the important role that carriage service providers play in facilitating access to online services and electronic commerce, was concerned about the uncertainty faced by carriage service providers in relation to liability for copyright infringement. With this in mind, the legislature introduced into Parliament the Digital Agenda Act, the objects of which are, among other things, to:

(a) ensure the efficient operation of relevant industries in the online environment;[17]

(b) promote certainty for information technology industries that are investing in and providing online access to copyright material;[18]

(c) provide reasonable access and certainty for end users of copyright material online;[19] and

(d) ensure the promotion of new technologies.[20]

6-15. It is antithetical to the certainty sought to be achieved and the broader objectives of the Digital Agenda Act to exclude from the operation of s 112E circumstances where factual elements of authorisation arise. On its face, this is the very time when the provision should be engaged.

6-16. Therefore there is nothing in the statute or background material that supports the applicants' construction that *"as soon as any additional factual element was present that bore upon the question of authorisation, the provisions of s 112E were of no*

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[16] Referred to by the applicants at ACS 163.

[17] *Copyright Amendment (Digital Agenda) Act* 2000 s 3(a).

[18] *Copyright Amendment (Digital Agenda) Act* 2000 s 3(b).

[19] *Copyright Amendment (Digital Agenda) Act* 2000 ss 3(a)(iii), 3(c) 3(d).

[20] *Copyright Amendment (Digital Agenda) Act* 2000 s 3(a)(i) and s.3(e).

consequence". The applicants' construction of s 112E is contrary to the stated intention of the legislature.

6-17. The statute and legislative history support the respondent's construction of s 112E. As it will be seen below, *Cooper* and *Sharman* do not alter this position.

6-C. SHARMAN AND COOPER

Legal principles

6-18. The facts in *Sharman* are set out above in Chapter 5. Wilcox J made a number of findings that support iiNet's construction of s 112E. First, the particular application of s 112E to ISPs was recognised:[21]

> *The background materials to the introduction of the section suggest that it was introduced in the context of the introduction of the communication right in order to protect the providers of Internet facilities such [as] ISPs (Internet service providers). ISPs provide computers, routers and cabling which physically receive, store and direct communications.*

6-19. Secondly, in relation to the construction of the term "facilities" Wilcox J agreed that *"the word 'facilities' should not be confined to physical facilities"*.[22]

6-20. In applying s 112E to Sharman, Wilcox J stated: [23]

> *The qualifying elements of s 112E apply to Sharman .*
>
> *(i) Sharman is '[a] person' (it does not matter whether or not it is a carriage service provider);*
>
> *(ii) Sharman provides facilities (it does not matter they are not physical facilities);*
>
> *(iii) the facilities are 'for making, or facilitating the making of, a communication' (an Internet file-sharing transaction).*
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> *It follows that Sharman is a person to whom s 112E may apply…..…*

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[21] *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 65 IPR 289 at [391].

[22] *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 65 IPR 289 at [394].

[23] *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 65 IPR 289 at [395] to [396].

6-21. Wilcox J went on hold that s 112E also applied to Altnet, the company that provided the facilities in conjunction with Sharman.[24] In this context it is significant that Wilcox J held that *prima facie,* the protection of the facilities in *Sharman* extended to provision of software, the very thing that had the infringing purpose and effect in that case.

6-22. In considering the construction of s 112E, Wilcox J stated:

> *"A statutory provision to the effect that a person is not to be taken to have authorised an infringement merely because another person does a particular thing leaves open the possibility that, for other reasons, the first person may be taken to have authorised the infringement. Such a provision does not confer general immunity against a finding of authorisation. Consequently, s 112E does not preclude the possibility that a person who falls within the section may be held, for other reasons, to be an authoriser. Whether or not the person should be so held is to be determined, in the present context, by reference to s 101 of the Act."*[25] [emphasis added]

6-23. Wilcox J stated that there needed to be an evaluation of whether there was 'something more' having regard to the factors listed in s 101(1A) of the Act, bearing in mind that this was not an exhaustive list.[26]

6-24. Wilcox J's statement regarding the construction of s 112E was cited by Kenny J in the Full Court decision of *Cooper*:[27]

> *"As his Honour noted at [399], s 112E "does not preclude the possibility that a person who falls within the section may be held, for other reasons, to be an authoriser". Whether there are "other reasons" depends on the matters identified in s 101(1A) and any other relevant matters."* [28][emphasis added]

Application of legal principles

6-25. It is clear that the statements by both Kenny J and Wilcox J are not authority for the applicants' proposed construction s 112E. They merely provide that there is a possibility that a person who provides facilities may still be held to have authorised

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[24] *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 65 IPR 289 at [468].

[25] *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 65 IPR 289 at [399].

[26] *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 65 IPR 289 at [401].

[27] The facts in *Cooper* are set out in Chapter 5.

[28] *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at [168].

"*for other reasons*" by reference to s 101(1A) and any other relevant matters.[29] This is far from being authority for the provision being of no consequence "*as soon as any factual element was present that bore upon the question of authorisation."* The correct view is that the factors in s 101(1A) and any other relevant facts are only a reference point by which that assessment is to be made.

6-26. In applying the above principle, Kenny J held: [30]

> *Nor can it be said that E-Talk and Mr Bal did no more than provide the facilities that were used to infringe the record companies' copyright. E-Talk, and, through E-Talk, Mr Bal, derived a commercial advantage from the website operated by Mr Cooper that was over and above payment for hosting services.* [emphasis added]

6-27. Kenny J did not find that the payment for hosting services itself was the reason for taking the ISP outside the protection of s 112E; it was the commercial advantage "over and above" the payment for such services. Secondly, there was no suggestion by Kenny J that s 112E failed to be of any effect as soon as any factual element was present that bore upon the question of authorisation. To the contrary, one particular factual issue was identified, after taking all the factual elements into consideration, that was clearly outside the ordinary matters implicit in the provision of facilities.

6-28. Kenny J's findings are consistent with Tamberlin J's finding in *Cooper* at first instance:[31]

> *The second to fifth respondents have assumed an active role by agreeing to host the website and assisting with the operation of the website, which are necessary steps to effectively trigger the downloading of the copyright material. The reciprocal consideration passing between them, namely, the free hosting in return for the display of the Com-Cen logo on the website, is an additional matter which takes the situation beyond the protection afforded by s 112E*. [emphasis added]

6-29. Again, the "additional matter" is identified by Tamberlin J as the free hosting in return of the display of the Com-Cen logo on the website which took the situation

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[29] While Wilcox J only refers to s 101 of the Act, the matters to be taken into account under s 101(1A) of the Act are not exhaustive.

[30] *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at [170].

[31] *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 at [131].

beyond the protection afforded by s 112E . Again, there was no suggestion by that s 112E failed to be of any effect as soon as any factual element was present that bore upon the question of authorisation.

Conclusion

6-30. Consequently, the authorities do not support the applicants' construction of s 112E.

6-D. OTHER FACTORS

Applicants' arguments

6-31. The applicants raise five arguments on the facts of the case as to why iiNet is not able to rely on s 112E as a defence.[32] However, there is a fundamental flaw in the applicants arguments – none of the arguments seek to engage the provision as a proper defence that has work to do – instead, each argument is based on the incorrect construction (discussed above) that as soon as any factual element is present that bears upon the question of authorisation, the defence has no effect. Put another way:

(a) if iiNet has not authorised it can rely on s 112E (but does not need to);

(b) if iiNet has authorised then it cannot rely on s 112E.

Knowledge

6-32. First, the applicants contend that "*iiNet's level of knowledge of itself is such as to take it outside the ambit of the provision*."[33] Quite what it means for a company in iiNet's position to have "knowledge of itself" is not clear. However, if all a copyright owner had to do to defeat s 112E in order to obtain the benefit of an ISP's deep pockets was tell it of infringing activity occurring on its network, the utility and objects of the provision would be set at nought.

6-33. Further, if s 112E only operated in circumstances in which the carriage service provider neither knew nor had reason to suspect that its facilities were being used to do an act comprised in copyright, the enactment of s 112E would not have been

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[32] ACS 587 – 593.

[33] ACS 588.

necessary. It was well established in Australian copyright law before the insertion of s 112E into the Act in 2000 that the word "*authorize … connotes a mental element and it could not be inferred that a person had, by mere inactivity, authorized something to be done if he neither knew nor had reason to suspect that the act might be done*". The Court would not attribute to the Parliament the enactment of a provision of no utility or substantive operation. It was not introduced out of an abundance of caution.[34]

6-34. When applying s 112E to the particular facts and circumstances inherent in the provision of transmission based services, on its proper construction, s 112E must apply to protect carriage service providers from liability for authorising infringements of copyright simply by providing the facilities that some other person uses to infringe copyright, whatever the mental state of the carriage service provider (that is, whether or not the carriage service provider knew about the use, had reason to suspect the use, or did not know about the use). That construction gives the section work to do, in light of the previous established law. It is also consistent with the explanatory material produced in respect of the provision, which reveals that the mischief to which the section was directed was to have the effect of "expressly limiting the authorisation liability of persons who provide facilities for the making of, or facilitating the making of, communications." Additionally, it accords with the decision made by the legislature <u>not</u> to include a fourth limb into s 101(1A), namely "*(d) whether the person knew the infringing character of the act or was aware of facts or circumstances from which the infringing character of the act was apparent.*"[35]

6-35. Knowledge of the kind asserted against iiNet in this case is not an "additional matter" of the kind referred to by Kenny J in *Cooper.*

Contracts with subscribers

6-36. <u>Secondly</u>, the applicants contend that iiNet "*has contractual rights vis-à-vis its customers which would entitle it to suspend or terminate their respective services on the grounds of infringement, yet it chooses not to exercise those rights.*"[36] The

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[34] *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at [39].

[35] See Chapter 4.

[36] <u>ACS</u> 589

existence of contractual rights with subscribers can hardly preclude iiNet from relying on s 112E. The stated purpose of s 112E is to provide limitations of liability to carriage service providers. Carriage service providers, by their very nature, provide services to subscribers pursuant to some form of contractual relationship. If the legislature had intended s 112E's operation to be confined to providers of facilities that do not have contractual relationships with subscribers, it would have limited its application to carriers (which provide the facilities to carriage service providers, not subscribers).

6-37. To the contrary, the extrinsic materials and legislative history clearly indicates that s 112E was specifically meant to provide limitation of liability to both carriers and carriage service providers. 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. As such, it complies with a range of other legislation, including consumer protection legislation and other telecommunications codes. The fact that a iiNet does not choose to enforce an optional contractual right pursuant to a third party demand in such circumstances does not affect its position regarding the provision of facilities or its reliance on s 112E. It is certainly not an "additional matter" of the kind referred to by Kenny J in *Cooper*.

Encouragement

6-38. Thirdly, the applicants contend that "*iiNet has positively encouraged the continuance of acts of copyright infringement in various ways.*"[37] These are said to include a public failure to take action, press releases (including press releases in relation to this proceeding), advertisements and emails regarding upgrades and provision of limited support. iiNet denies that any of these matters amount to an encouragement to engage in infringing acts for the reasons given in Chapter 5. iiNet simply encourages subscribers to use iiNet's facilities to obtain access to the Internet. A facilities provider encouraging subscribers to use its facilities cannot be characterised as "additional matters" of the kind referred to by Kenny J in *Cooper*. Section 112E should not be interpreted to protect only facilities providers who do not promote their services.

[37] ACS 590.

Commercial considerations

6-39. Fourthly, the applicants contend that "*the commercial considerations of this case have some analogy to Cooper.*"[38] This contention is plainly untenable. 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. As noted above, the CRA is a Standard Form of Agreement under Part 23 of the Telco Act and has been provided to the Australian Communications and Media Authority and is range of other legislation, including consumer protection legislation and other telecommunications codes. Once iiNet's subscribers sign-up to its CRA, iiNet 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.[39] Additionally, the majority of iiNet's subscribers are on low to medium plans and use less than half their allocated quota.[40] 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. There is plainly no analogy with *Cooper*; there is plainly no "additional matter" of the kind referred to by Kenny J in *Cooper*.

6-40. For the reasons advanced in Chapter 5, the applicants' reliance on the Freezone as a matter relevant to authorisation is hopeless. For those reasons, to suggest[41] that the promotion of access to licensed material is an "additional factual element ... that bears on the question of authorisation"[42] is straw-clutching of the highest order. It is irrelevant to the s 112E question. In any event, the provision of content services is not a disqualifying factor for s 112E; see paragraph 6-11 above regarding amendments to

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[38] ACS 591.

[39] Buckingham #1 paras 85-87 JCB Vol A2 tab 29 pp 18-19; Buckingham Con Ex DB-2 JCB Vol B6 tab 88 paras 3-6 pp 1-2.

[40] Buckingham #1 para 93 JCB Vol A2 tab 29 pp 20.

[41] ACS 592.

[42] ACS 582.

the Digital Agenda Bill that increased the scope of s 112E so that it also applied to providers of digital storage services as well as carriage service providers.[43]

Combination of factors

6-41. Fifthly, the applicants combine the above points (knowledge, contractual rights, encouragement and commercial considerations) to suggest that s 112E does not apply.[44] It is not clear whether this fifth argument is a new point or a summary of the above points. Either way, for the reasons outlined above, none of these factors are "additional matters" of the kind referred to by Kenny J in *Cooper*, whether taken singularly or together.

6-E. IINET'S EVIDENCE ON S 112E

iiNet's Facilities

6-42. There is no dispute that iiNet's facilities fall within the statutory language of s 112E and there is no threshold objection to its reliance on the provision as a defence to authorisation.[45]

6-43. The Explanatory Memorandum to the Digital Agenda Bill made it clear that "*the reference to 'facilities' is intended to include physical facilities and the use of cellular, satellite and other technologies* [emphasis added]". In *Sharman*, Wilcox J agreed with this construction stating that *" the word 'facilities' should not be confined to physical facilities"*. It is therefore clear that the "facilities" referred to in s 112E are not limited to physical facilities but include technology (including software and other relevant technology) used by iiNet in the course of providing services to its subscribers.

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[43] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* at p 105.

[44] ACS 593.

[45] Carson XXN T 419.26-27.

Investment

6-44. iiNet's evidence shows the extent to which it has invested in telecommunications infrastructure and online technology.[46] This is precisely the kind of investment that the Parliament wished to encourage in enacting the Digital Agenda reforms as noted in paragraphs 6-8 and 6-14(b) above. It is one of the primary players in the Australian telecommunications industry and has grown from extremely humble beginnings to a publically listed company on the Australian Stock Exchange, it has become the target of investment from a range of different shareholders.[47]

6-45. At paragraph 31 of his first affidavit, Mr Malone set out a number of examples of iiNet's investment in innovation:

(a) iiNet was one of the first non-Telstra ISPs to install Digital Subscriber Line Access Multiplexers (referred to as **DSLAMs**) in Telstra's telephone exchanges for the purpose of setting up iiNet's own telecommunication network. It commenced installation in 2004. iiNet currently has DSLAMs operational in more than 300 exchanges across the country. iiNet's Australian ADSL2+ coverage extends to over 4,000,000 households.

(b) iiNet was the first ISP in Australia to provide a Voice Over Internet Protocol (**VOIP**) service that was of a quality comparable to a standard or Public Switched Telephone Network service. VOIP is a form of technology that enables subscribers to make calls via the Internet instead of over the traditional copper telephone network.

(c) iiNet was the first ISP in Australia to offer a national "Naked" DSL Internet access service. Naked DSL services allow users to access the Internet using existing copper telephone lines. However, unlike ADSL services, the subscriber does not need to pay an additional fee for line rental.

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[46] Buckingham #1 paras 53(1), 54, 70 JCB Vol A2 tab 29 pp 12, 13, 17; Malone #1 para 32(d) JCB Vol A2 tab 30 p 10.

[47] Malone #1 paras 24-30 JCB Vol A2 tab 30 pp 8-9.

6-46. iiNet has spent significant amounts of money in creating or leasing the infrastructure that is used by Australian households and businesses to access the Internet and estimates of this expenditure are in confidential schedules in the evidence.[48]

6-47. One of iiNet's significant long-term investments has been building its own telecommunications structure. iiNet has spent tens of millions of dollars building its fibre and DSLAM network; and tens of millions of dollars on renting backhaul fibre from other operators to support that network.[49]

6-48. One of the significant variable costs to iiNet in running its business is the cost of acquiring bandwidth from telecommunications carriers so that iiNet can provide Internet access and other services to its customers.[50] The total annual cost of iiNet's bandwidth (excluding Westnet) is in the tens of millions of dollars.[51]

6-49. iiNet has also invested in its Freezone service. The costs of providing this service include the costs of acquiring the rights to provide access to content and technical and infrastructure costs (including staff time to manage the Freezone from a technical perspective and the cost of staff time to procure the content and manage the relationships with the content providers).[52] The cost of acquisition of rights to provide access to such content is in the high hundreds of thousands of dollars per year.[53]

6-50. Based on the above, iiNet is clearly a carriage service provider that:

(a) contributes to the efficient operation of relevant industries in the online environment;[54]

(b) is a fundamental part of the information technology industry investing in and providing online access to copyright material;[55] and

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[48] Buckingham #1 para 79 JCB Vol A2 tab 29 p 17.

[49] Buckingham Conf Ex DB-2, paras 10, 11 JCB Vol B6 tab 88 pp 2-3.

[50] Buckingham #1 para 80 JCB Vol A2 tab 29 p 17.

[51] Buckingham Conf Ex DB-2, para 15 JCB Vol B6 tab 88 p 6.

[52] Buckingham #1 para 78 JCB Vol A2 tab 29 p 17.

[53] Buckingham Conf Ex DB-2, para 9, JCB Vol B6 tab 88 p 2.

[54] *Copyright Amendment (Digital Agenda) Act* 2000 s 3(a).

(c) is involved in the promotion of new technologies.[56]

As such, having regard to the objects of the Digital Agenda Act, iiNet is exactly the kind of entity the Digital Agenda Act was introduced to promote and protect. Further, it is clear that the legislature considered that s 112E should apply to carriage service providers exactly like iiNet, in exactly the circumstances of this proceeding.

6-F. CONCLUSION

6-51. Having regard to the legislative history, extrinsic materials, authorities and the evidence, s 112E provides iiNet with a complete defence to the applicants' case for the following reasons:

(a) The purpose of s 112E is to provide a defence to authorisation; accordingly, there must be circumstances where a person, having found to have authorised an infringement of copyright, is able to rely on the defence set out in s 112E.

(b) The above construction is strongly supported by the legislative history, extrinsic materials and objects of the Digital Agenda Act.

(c) The above construction is consistent with the relevant authorities, namely, *Sharman* and *Cooper*.

(d) As a carriage service provider, iiNet is exactly the kind of entity that the legislature introduced s 112E specifically to protect. Further, the objects of the Digital Agenda Act and extrinsic materials make it clear that the legislature intended the defence to provide "reasonable certainty" to carriage service providers in exactly the circumstances facing iiNet in this proceeding.

(e) The word "facilities" should be construed broadly to include the provision of both infrastructure and technology used to provide the services to subscribers, including all related technology associated in the provision of such services.

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[55] *Copyright Amendment (Digital Agenda) Act* 2000 s.3(b).

[56] *Copyright Amendment (Digital Agenda) Act* 2000 s 3(a)(i) and s 3(e).

(f) The facts in the current case are completely different from the circumstances where reliance on s 112E was previously rejected by the Courts, namely in *Cooper* and *Sharman*.

(g) There is no "additional matter" of the kind identified by the Full Court in *Cooper* that would prevent iiNet from relying on s 112E.

6-52. Section 112E provides a complete answer to the applicants' claims against iiNet.