

**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 EIGHT**

**SAFE HARBOUR**

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## 8-A. INTRODUCTION

- 8-1. Part V, Division 2AA of the Act sets out a statutory regime, commonly known as the “safe harbour regime”, that limits the remedies available against carriage service providers.<sup>1</sup>
- 8-2. The purpose of the safe harbour regime is to limit the remedies that are available against carriage service providers for infringement of copyright<sup>2</sup> provided that the carriage service provider complies with relevant conditions.<sup>3</sup>
- 8-3. The safe harbour regime was established pursuant to the Australia-US Free Trade Agreement (AUSFTA) and as such, has many similarities to the US safe harbour<sup>4</sup> regime introduced under the US *Digital Millennium Copyright Act (DMCA)* in October 1998. However, there are also important differences between the two regimes.
- 8-4. Aside from *obiter* comments by Tamberlin J in *Cooper*,<sup>5</sup> the safe harbour regime has not received judicial consideration in Australia.

## 8-B. LEGISLATIVE BACKGROUND

- 8-5. The AUSFTA was signed by Australia on 18 May 2004. Article 17.11.29 of the AUSFTA sets out the basis of the safe harbour regime in Part V Division 2AA of the Act. Additionally, a series of side letters were exchanged between the Australian Minister for Trade and the US Trade Representative regarding certain aspects of the safe harbour regime, in particular, the take-down notice and counter notice regimes relating to hosting or information location activities.

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<sup>1</sup> Section 10 of the Act provides that the term “carriage service provider” has the same meaning as in the Telco Act. Section 7 of the Telco Act provides that the term “carriage service provider” has the meaning given by section 87 which provides: “*For the purposes of this Act, if a person supplies, or proposes to supply, a listed carriage service to the public using: (a) a network unit owned by one or more carriers; or (b) a network unit in relation to which a nominated carrier declaration is in force, the person is a carriage service provider.*”

<sup>2</sup> See s 116AA. Unlike s 112E, the safe harbour regime operates to limit the remedies that are available against carriage service providers for both direct and authorised infringements of copyright.

<sup>3</sup> See s 116AA.

<sup>4</sup> In the US, of course, spelt “harbor”. The Australian spelling will be used in this document except for direct quotations.

<sup>5</sup> *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 at [107] to [109].

- 8-6. The safe harbour regime was introduced by the *US Free Trade Agreement Implementation Act 2004* and the *Copyright Legislation Amendment Act 2004*, which both came into effect on 1 January 2005. It is also supplemented by amendments to the *Copyright Regulations 1969* which, among other things, set out the take-down notice and counter-notice regimes that apply to certain hosting and information linking related activities.
- 8-7. The Australian safe harbour regime is modelled on the US safe harbour regime set out in the DMCA. Section 512 of the DMCA (known as the *Online Copyright Liability Limitation Act (OCLLA)*), which was passed in October 1998 was, in part, a response to the World Intellectual Property Organization (**WIPO**) Copyright Treaty (**WCT**) and the WIPO Performances and Phonograms Treaty (**WPPT**). It also followed detailed and lengthy negotiations, consultations and hearings in the US between representatives of content owners<sup>6</sup> and service providers in attempt to formulate new standards in relation to online liability. When it was passed, the DMCA enjoyed widespread support from the motion picture, recording, software, and publishing industries, as well as the telephone companies, long distance carriers, online service providers and internet service providers.<sup>7</sup>

## **8-C. OVERVIEW OF THE AUSTRALIAN SAFE HARBOUR REGIME**

### **Purpose and effect**

- 8-8. The purpose of the safe harbour regime is to limit the remedies that are available against carriage service providers for infringement of copyright<sup>8</sup> provided that the carriage service provider complies with certain conditions.<sup>9</sup>

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<sup>6</sup> Including the Motion Picture Association of America. S Rep No 105-190 pp 3, 6, 9.

<sup>7</sup> S Rep No 105-190 p 9. The Senate Report goes on to state “It is also supported by the Information Technology Industry Council, which includes the leading computer hardware manufacturers, and by representatives of individual creators, such as the Writers Guild, the Directors Guild, the Screen Actors Guild, and the American Federation of Television and Radio Artists. The breadth of support for this bill is reflected in the unanimous roll call vote (18–0) by which the DMCA was reported out of Committee.”

<sup>8</sup> Being both direct and authorisation-based infringement.

<sup>9</sup> See s 116AA(1) of the Act.

- 8-9. Importantly, the safe harbour regime does not affect the operation of other provisions of the Act.<sup>10</sup> In this regard, the Explanatory Memorandum to the Australian *US Free Trade Agreement Implementation Bill 2004* provides:

*While actions taken by a carriage service provider in relation to the conditions set out in this Division may have some relevance to whether or not copyright infringement has occurred, the Division does not affect the way provisions in the Act in relation to the determination of liability should be interpreted or limit the application of the exceptions in the Act. Further, the failure of a carriage service provider to qualify for any limitations on remedies in this Division does not make the service provider liable for copyright infringement. A copyright owner must still establish that a carriage service provider has infringed copyright under the Act.*<sup>11</sup> [emphasis added]

- 8-10. The position is further reinforced by the US Senate Report on the DMCA (1998) (the precursor to the Australian safe harbour regime) which states:

*.... the Committee is sympathetic to the desire of such service providers to see the law clarified in this area. There have been several cases relevant to service provider liability for copyright infringement.<sup>12</sup> Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of "safe harbors," for certain common activities of service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.....As provided in subsection (k), Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.*<sup>13</sup> [emphasis added]

- 8-11. Therefore, the introduction of the safe harbour regime has not altered the scope or effect of the existing law of authorisation liability. The clear purpose of the regime is simply to "*limit the remedies that are available against carriage service providers*".<sup>14</sup>

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<sup>10</sup> See s 116AA(2) of the Act.

<sup>11</sup> Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill 2004* at [681].

<sup>12</sup> Citing, by way of example *Religious Technology Center v. Netcom On-line Communications Services*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. Fla 1993); and *Marobie-FL v. Nat. Assn. Of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D Ill. 1997).

<sup>13</sup> S. Rep. No. 105-190 p. 19.

<sup>14</sup> See s 116AA(1) of the Act.

## Scope of protection

8-12. The Australian safe harbour regime applies only to “carriage service providers”.<sup>15</sup> Section 10(1) of the Act provides that the term “carriage service provider” has the same meaning as in the Telco Act. Section 7 of the Telco Act provides that “carriage service provider” has the meaning given by s 87(1) which in turn provides:

*“For the purposes of this Act, if a person supplies, or proposes to supply, a listed carriage service to the public using:*

- (a) a network unit owned by one or more carriers; or*
- (b) a network unit in relation to which a nominated carrier declaration is in force, the person is a carriage service provider.”*

8-13. As there is no dispute between the parties as to whether the respondent is a carriage service provider within the meaning of the Telco Act,<sup>16</sup> the respondent is entitled to rely on the statutory protections afforded under the regime, subject to compliance with the relevant conditions.<sup>17</sup>

## Categories of safe harbours

8-14. As with the US safe harbour regime, the Australian safe harbour regime sets out four separate categories of activities undertaken by carriage service providers.<sup>18</sup> For the purposes of illustration, these categories are referred to and described as follows in Professor Lahore’s text<sup>19</sup> as:

- (a) Category A activity: also referred to as “transmission” or “mere conduit” activities;
- (b) Category B activity: also referred to as “caching” activities;

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<sup>15</sup> See ss 116AA and 116AG of the Act.

<sup>16</sup> See para 14(c) of the further amended statement of claim JCB Vol A1 tab 2 p 4 which pleads that the respondent is a carriage service provider within the meaning of the Telco Act and para 14 of the amended defence JCB Vol A1 tab 6 pp 2-3 which, among other things, admits the matters in para 14 of the further amended statement of claim JCB Vol A1 tab 6 p 4.

<sup>17</sup> See 116AG(1) of the Act.

<sup>18</sup> See ss 116AC to 116AF of the Act.

<sup>19</sup> Lahore, *Copyright and Designs*, Butterworth, looseleaf.

- (c) Category C activity: also referred to as “hosting” or “storage of material at direction of users”;
- (d) Category D activity: also referred to as “information location” activities or “using information location tools”.

These shorthand references<sup>20</sup> will be used in this submission interchangeably with the categories.

- 8-15. A determination of whether or not a carriage service provider qualifies for the limitation on remedies in relation to one category of activities does not affect the determination of whether or not the carriage service provider qualifies, or does not qualify, in relation to any of the other categories of activities.<sup>21</sup>

### **Category A activities**

- 8-16. In its amended defence, the respondent relies on the category A safe harbours.<sup>22</sup> Section 116AC of the Act relevantly provides:

*A carriage service provider carries out a Category A activity by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.*

- 8-17. The Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill* 2004 states:

*New s116AC provides that a carriage service provider will be undertaking a Category A activity where the carriage service provider acts as a conduit for internet activities through the provision of facilities for transmitting, routing or providing connections for copyright material. The activity also covers the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections. Examples of activities that fall within this category include where a carriage service provider provides internet access to a user, or where a carriage service provider acts as a conduit for the communication of material between online locations.*<sup>23</sup>

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<sup>20</sup> The terminology is taken from Lahore, *op cit* at [42,565].

<sup>21</sup> Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill* 2004 at [698].

<sup>22</sup> See Amended Defence paras 81-89 JCB Vol A1 tab 6 pp 24-26.

<sup>23</sup> Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill* 2004 at [686].

8-18. In order to rely on the limitations of liability set out in s 116AG of the Act, a carriage service provider must satisfy the relevant conditions set out in s 116AH.<sup>24</sup> In the case of category A safe harbours, these conditions consist of 4 conditions set out in Items 1 and 2 of s 116AH(1). Unlike categories B, C and D activities, the category A conditions do not impose any obligations on carriage service providers that must be complied with if notified of alleged infringement in relation to category A activities; nor do the conditions or Regulations set out a prescribed form of notification.

### **Category A: General conditions**

8-19. The two general conditions in Item 1 of s 116AH(1) are:

*The carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers. (Condition 1)*

*If there is a relevant industry code in force-the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material. (Condition 2)*

8-20. In relation to Condition 1 of Item 1, the Explanatory Memorandum states that:

*This policy is to be determined by the carriage service provider.*<sup>25</sup>

8-21. It is common ground that as there is no relevant industry code in force, condition 2 of Item 1 is not applicable.<sup>26</sup>

### **Category A: Specific conditions**

8-22. The two conditions in Item 2 of s 116AH(1) are:

*Any transmission of copyright material in carrying out this activity must be initiated by or at the direction of a person other than the carriage service provider. (Condition 1)*

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<sup>24</sup> See s116AG(1) of the Act.

<sup>25</sup> Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill 2004* at [681].

<sup>26</sup> This issue is not in dispute between the parties: para 4 of the applicants' reply JCB Vol A1 tab 5 admits that there is no relevant industry code in force as pleaded in para 82(a) of the respondent's amended defence JCB Vol A1 tab 5.

*The carriage service provider must not make substantive modifications to copyright material transmitted. This does not apply to modifications made as part of a technical process. (Condition 2)*

8-23. In relation to Condition 1 of Item 2, the Explanatory Memorandum states:<sup>27</sup>

*“Any transmission, routing or provision of connections for copyright material must be initiated by or at the direction of another person. This may, for example, be a subscriber of the carriage service provider’s system or network, or another person using the system or network. To be deemed not to have initiated the transmission, a carriage service provider must not have manually selected the copyright material being transmitted, nor the recipients of the material.”*

8-24. In relation to Condition 2 of Item 2, the Explanatory Memorandum states:<sup>28</sup>

*The copyright material must be transmitted without any substantive modifications to its content. This condition does not apply to modifications made as part of a technical process, for example where ‘format shifting’ is necessary to provide access to copyright material via different technologies.*

### **No duty to monitor or seek facts**

8-25. Importantly, s 116AH(2) supplies an important requirement for the interpretation of the conditions, namely:

*Nothing in the conditions is to be taken to require a carriage service provider to monitor its service or to seek facts to indicate infringing activity except to the extent required by a standard technical measure mentioned in condition 2 in table item 1 in the table in subsection (1).[emphasis added]*

8-26. The exception in s116AH(2) relates to standard technical measures in an industry code (which is not in force). Therefore, until a relevant industry code comes into force, the rule that a carriage service provider is not required to monitor its service or seek facts to indicate infringing activity is unqualified.

### **Industry Code**

8-27. The Australian safe harbour regime sets out a prescribed procedure that must be followed before something is an “industry code” as defined for the purposes of the safe harbour provisions. It includes, among a range of other issues, consultation

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<sup>27</sup> US Free Trade Agreement Implementation Bill 2004 Explanatory Memorandum at [700].

<sup>28</sup> US Free Trade Agreement Implementation Bill 2004 Explanatory Memorandum at [700].



with key bodies such as the ACCC, TIO, Privacy Commissioner and consumer rights bodies, as discussed in the following paragraphs.

8-28. The wording of Condition 2 of Item 1 of s 116AH(1) makes it clear that an industry code is not limited to matters relating to standard technical matters used to protect and identify copyright material.<sup>29</sup>

8-29. Under s 116AB of the Act an “industry code” is (exclusively) defined as follows:

*"industry code" means:*

- (a) *an industry code that:*
  - (i) *meets any prescribed requirements; and*
  - (ii) *is registered under Part 6 of the Telecommunications Act 1997; or*
- (b) *an industry code developed in accordance with the regulations.*

8-30. Regulation 20B of the *Copyright Regulations 1969* (**the Regulations**) provides:

*For subparagraph (a) (i) of the definition of industry code in section 116AB of the Act, the following requirements are prescribed in relation to an industry code to which condition 2 of item 1 of the table in subsection 116AH (1) of the Act applies:*

- (a) *the industry code must be developed through an open voluntary process by a broad consensus of copyright owners and carriage service providers;*
- (b) *the industry code must include a provision to the effect that standard technical measures are technical measures that:*
  - (i) *are used to protect and identify copyright material; and*
  - (ii) *are accepted under the industry code or developed in accordance with a process set out in the industry code; and*
  - (iii) *are available on non-discriminatory terms; and*
  - (iv) *do not impose substantial costs on carriage service providers or substantial burdens on their systems or networks.*

8-31. It is clear from the above that the effect of the Regulations and Act is that an industry code must be registered by the Australian Communications and Media

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<sup>29</sup> Condition 2 of Item 1 states that the “...carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material”.

Authority (ACMA) under Part 6 of the Telco Act (ie. the Regulations do not prescribe some other form of industry code that might fall within s 116AB(b) of the Act). (While s 115(1) of the Telco Act provides that an industry code has no effect to the extent to which it requires a telecommunications network or facility to have particular design features, or to meet particular performance requirements, or to the extent to which it deals with the content of content services, s 115(4) of the Telco Act provides that these usual limitations do not apply to industry codes made for the purposes of the copyright safe harbour regime.)

8-32. Under s 117 of the Telco Act, the ACMA must register the Code if it is satisfied regarding a number of factors, including:

- (a) that the body or association that develops the code represents a section of the telecommunications industry;
- (b) if the code deals with matters of substantial relevance to the community, that the code provides appropriate community safeguards for the matters covered by the code;
- (c) that, before giving a copy of the code to the ACMA, the body or association published a draft code, invited participants in the section of the industry to make submissions, and gave consideration to any submissions received;
- (d) that, before giving a copy of the code to the ACMA, the body or association published a draft code, invited submissions from members of the public, and gave consideration to any submissions received;
- (e) that the ACMA has consulted the Privacy Commissioner about the code and consequently believes that he or she is satisfied with the code;
- (f) that the Australian Competition and Consumer Commission (ACCC) has been consulted about the development of the code;
- (g) that the Telecommunications Industry Ombudsman (TIO) has been consulted about the development of the code; and

- (h) that at least one body or association that represents the interests of consumers has been consulted about the development of the code.

8-33. Once the code is registered, the ACMA can direct a person to comply with the code<sup>30</sup> or may issue warnings in respect of non-compliance.<sup>31</sup>

### **Limitation of liability**

8-34. If the relevant conditions are satisfied, the carriage service provider may rely on the limitation of liability set out in s116AG.<sup>32</sup>

8-35. For category A activities, a Court must not grant relief against a carriage service provider that consists of:

- (a) damages or an account of profits; or
- (b) additional damages; or
- (c) other monetary relief.<sup>33</sup>

8-36. Instead, the relief that a Court may grant against a carriage service provider is limited to one or more of the following orders:

- (a) an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia;
- (b) an order requiring the carriage service provider to terminate a specified account.<sup>34</sup>

8-37. In deciding whether to make an order of the kind referred to in paragraph 8-36 above, the Court must have regard to:

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<sup>30</sup> Telco Act s 121.

<sup>31</sup> Telco Act s 122. As submitted below (8-92) this renders irrelevant Mr Malone's cross-examination about iiNet's agreement, or otherwise, to a code of the kind the applicants would impose.

<sup>32</sup> See s 116AG(1) of the Act.

<sup>33</sup> See s116AG(2) of the Act.

<sup>34</sup> See s116AG(3) of the Act.

- (a) the harm that has been caused to the owner or exclusive licensee of the copyright; and
- (b) the burden that the making of the order will place on the carriage service provider; and
- (c) the technical feasibility of complying with the order; and
- (d) the effectiveness of the order;
- (e) whether some other comparably effective order would be less burdensome; and
- (f) other matters it considers relevant.<sup>35</sup>

## **8-D. US POSITION**

### **Overview**

8-38. Under the OCLLA, service providers are protected from monetary relief, and restrictions are imposed on injunctive relief, provided that the service provider complies with various conditions relating to each category of activity. Perhaps the four most notable differences between the Australian and US regimes are:

- (a) the US safe harbour regime applies to both carriage service providers and other online service providers such as search engines, websites hosting content, retail websites etc;<sup>36</sup>
- (b) the US safe harbour regime contains provisions allowing content providers to subpoena service providers in order to obtain the personal details of their subscribers engaging in caching, hosting and information linking activities (ie category B, C and D activities) but not transmission related activities (category A activities);

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<sup>35</sup> See s116AG(5) of the Act.

<sup>36</sup> The extension of the Australian Act to other online service providers in addition to the ISPs was one of the outcomes sought by the ISPs and others in the submissions to the government in March-April 2008: see Dalby Ex SJD-1 pp 130-190 JCB Vol B8 tab 91.

- (c) the Australian safe harbour regime provides for the development of a formal industry code, to be registered pursuant to Part 6 of the Telco Act;
- (d) the Australian safe harbour regime contains a take-down regime applying to category C and D activities where material has found to be infringing by a Court.

### **Transitory Digital Network Communications (category A activities)**

8-39. The relevant conditions for the US equivalent to category A activities, referred to as “transitory digital network communications” are set out in § 512(a) and § 512(i) of the OCLLA.

8-40. § 512(a) of the OCLLA provides:

*Transitory Digital Network Communications.* — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

8-41. In addition to the § 521(a) conditions, § 512(i) of the OCLLA provides:

*(i) Conditions for Eligibility.—*

*(1) Accommodation of technology.— The limitations on liability established by this section shall apply to a service provider only if the service provider:*

*(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers;*

*(B) accommodates and does not interfere with standard technical measures.*

*(2) Definition.— As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and—*

*(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;*

*(B) are available to any person on reasonable and nondiscriminatory terms; and*

*(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.*

8-42. Under the US safe harbour regime, transmission related activities are treated very differently from other activities (ie categories relating to caching, hosting and information location tools), namely:

- (a) these activities are referred to as "mere conduit" activities, due to the passive nature of provision of facilities or infrastructure;<sup>37</sup>
- (b) only certain types of transmission based service providers can rely on the "mere conduit" activities;<sup>38</sup>
- (c) there is no statutory take-down notice regime in relation to "mere conduit" activities;<sup>39</sup>

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<sup>37</sup> In re *Charter Communications, Inc Subpoena Enforcement matter*, 393 F.3d 771 (8<sup>th</sup> Cir. 2005) at 775 per Bye J: "The first safe harbor, under § 512(a), limits the liability of ISPs when they do nothing more than transmit, route, or provide connections for copyrighted material – that is, when the ISP is a mere conduit for the transmission." Also see Lahore at [42, 530].

<sup>38</sup> See 17 USC §512(k)(1)(A). This corresponds to a transmission based carriage service provider, such as the respondent, under the Australian safe harbour regime.

- (d) there is no requirement for a service provider to provide content owners with subscribers' personal information pursuant to the subpoena provisions under § 512(h).<sup>40</sup>

## **8-E. IINET'S EVIDENCE ON SAFE HARBOURS**

### **Introduction**

8-43. iiNet agrees with the applicants<sup>41</sup> that the key issue relevant to its ability to rely on the limitation of liability provided under Division 2AA, Part V of the Act will be:

- (a) whether it adopted a policy under Condition 1 or Item 1 of s 116AH(1); and
- (b) whether such policy was reasonably implemented.

8-44. As set out in the Explanatory Memorandum, the relevant policy is to be determined by iiNet,<sup>42</sup> not the applicants; indeed, the applicants have agreed with this.<sup>43</sup> Nevertheless, the applicants contend that if iiNet has not adopted the policy proposed by the applicants, iiNet cannot rely on the safe harbours and further, that such conduct evidences "indifference"<sup>44</sup> on the part of iiNet (presumably to be used as yet further "evidence" of authorisation). Perhaps unsurprisingly, the applicants' proposed repeat infringer policy is rather onerous; namely, the policy must:

- (a) be published to subscribers;<sup>45</sup>
- (b) contain detailed criteria, adopting the precise statutory language of the Act including reference to the words "repeat infringer"<sup>46</sup> and must "resemble" the applicants' repeat infringer policy;<sup>47</sup>

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<sup>39</sup> See 17 USC §512(a); Nimmer 12B-88.2 to 12B-90.

<sup>40</sup> See *Recording Industry Association of America v Verizon Internet Services* 351 F.3d 1229 (D.C. Cir. 2003); *In re Charter Communications, Inc Subpoena Enforcement matter*, 393 F.3d 771 (8<sup>th</sup> Cir. 2005).

<sup>41</sup> ACS 596-597, 604.

<sup>42</sup> Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill 2004* at [681].

<sup>43</sup> AOS T 1146.30-39.

<sup>44</sup> ACS 628.

<sup>45</sup> ACS 598(a), 607-608, 613; Malone XXN T 788.25-26, 33-34.

<sup>46</sup> ACS 607.

<sup>47</sup> ACS 607.

- (c) cannot leave any element of discretion to the carriage service provider to determine in which circumstances the policy will be triggered;<sup>48</sup> and
- (d) result in the termination of iiNet's account holders upon receipt by iiNet of multiple (ie more than one) emails or notices containing allegations of infringement of copyright in relation to those account holders.<sup>49</sup>

8-45. The above policy (referred to hereafter as the “**applicants’ policy**”) appears more like a form of relief than a policy adopted under the Act. In this regard, applicants’ approach to the construction of the Condition 1 of Item 1 of s 116AH(1) of the Act is generally consistent with their approach to the case in general. They seek to turn provisions with the stated intention of providing limitations of liability to carriage service providers into strict liability provisions deeming the carriage service provider responsible for authorising the infringement of its subscribers unless the carriage service provider terminates the account of subscribers upon receipt of two or more emails from copyright owners alleging infringement. Such a contention is not supportable on any proper basis of statutory construction, an examination of the legislative history or review of the relevant authorities.

8-46. The applicants make a great deal of commotion regarding the cross-examination of Mr Malone. However, in truth, all that the cross-examination of Mr Malone revealed was that Mr Malone, and iiNet, did not adopt or implement the applicants’ policy. Of course, this does not mean that iiNet has not complied with its obligations under the Act: only that its policy (which, under the legislation, it has the right to determine and then apply in “appropriate circumstances”) is different to the policy proposed by the applicants.

### **Preliminary issues**

8-47. As stated by the applicants<sup>50</sup> “*it is common ground that the activity engaged in by iiNet in this case is category A activity*” within the meaning of s 116AC of the

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<sup>48</sup> ACS 619.

<sup>49</sup> ACS 609, 610.

<sup>50</sup> AS para 268; ACS para 596.



Act.<sup>51</sup> Based on the applicants' pleadings,<sup>52</sup> iiNet's evidence,<sup>53</sup> and the evidence of the applicants' independent expert Mr Carson in the course of cross-examination,<sup>54</sup> iiNet's provision of listed carriage services to persons in Australia<sup>55</sup> amounts to "providing facilities or services for transmitting, routing or providing connections for copyright material" within the meaning of s116AC of the Act.<sup>56</sup>

8-48. In respect of Condition 1 of Item 2, it is clear that the transmission of copyright material in the course of iiNet carrying out the category A activity "is initiated by or at the direction of a person other than the carriage service provider".<sup>57</sup> This was confirmed by Mr Carson in the course of cross-examination.<sup>58</sup> Indeed, the entire basis of the applicants' claim rests on the alleged transmission of copyright material initiated by persons other than iiNet.

8-49. In respect of Condition 2 of Item 2, iiNet does not make substantive modifications to copyright material transmitted.<sup>59</sup> This was again confirmed by Mr Carson in the course of cross-examination.<sup>60</sup> Relevantly, iiNet is prohibited from intercepting or accessing communications travelling over its network.<sup>61</sup>

### **Written documents relied upon by iiNet**

8-50. The written documents on which iiNet relies on are:<sup>62</sup>

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<sup>51</sup> Providing facilities or services for transmitting, routing or providing connections for copyright material.

<sup>52</sup> In para 2 of the reply JCB Vol A1 tab 5 p 1 the applicants admit para 57(a) of the amended defence in respect of the provision of "listed carriage services" to persons in Australia. In para 14(c) of the further amended statement of claim JCB Vol A1 tab 2 p 4, the applicants plead that the respondent is a "carriage service provider" within the meaning of the Telco Act which is admitted by the respondent in para 14 of the amended defence.

<sup>53</sup> Malone #1 para 38 JCB Vol A2 tab 30 pp 12-11.

<sup>54</sup> Carson XXN T 418.30-35; T 419.20-27

<sup>55</sup> Admitted by the applicants in para 2 of the reply JCB Vol A1 tab 5 p 1

<sup>56</sup> In the provision of such services to its subscribers, iiNet is providing Internet access to users as per the example specifically referred to in the *Explanatory Memorandum to the US Free Trade Agreement Implementation Bill 2004* at [698].

<sup>57</sup> See Malone #1 para 228 JCB Vol A2 tab 30 p 56.

<sup>58</sup> Carson XXN T 418.37-39.

<sup>59</sup> See Malone #1 para 229 JCB Vol A2 tab 30 p 56.

<sup>60</sup> Carson XXN T 418.41-44.

<sup>61</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth).

<sup>62</sup> Amended Defence para 88 JCB Vol A1 tab 6 p 25.

- (a) a document entitled "Checklist for Opting into Safe Harbour Scheme";<sup>63</sup>
- (b) a document entitled "IIA ICH and Safe Harbour Guide";<sup>64</sup>
- (c) a notice on the iiNet website at [www.iinet.net.au/legal/copyright.html](http://www.iinet.net.au/legal/copyright.html):<sup>65</sup>

*NOTE: The hosting or posting of illegal or copyright material using an iiNet service constitutes a breach of iiNet contractual obligation under the Customer Relationship Agreement sec 4.1 & Sec 4.2. Such a breach of contract may result in the suspension or termination of service without notice to the subscriber.*

- (d) the CRA including but not limited to clauses 4.1, 4.2, 14.2 and 14.3.<sup>66</sup>

#### **iiNet's evidence Condition 1 of Item 1 (repeat infringer policy)**

8-51. iiNet's evidence shows that in 2005, at around the same time the safe harbours provisions were introduced into the Act, iiNet took a number of different steps in order to effect its safe harbour compliance policies. These included:

- (a) attendance by iiNet representatives at presentations by the IIA in respect of the safe harbour regime;<sup>67</sup>
- (b) review by iiNet representatives of safe harbour compliance checklist entitled "Checklist for Opting into Safe Harbour Scheme" provided to iiNet by the IIA (referred to in paragraph 8-50(a) above);<sup>68</sup>
- (c) obtaining advice from the IIA regarding the treatment of non-compliant notifications from the US;<sup>69</sup>
- (d) development of a document entitled "IIA ICH and Safe Harbour Guide" (referred to in paragraph 8-50(b) above) which was forwarded to the Managing Director, Mr Malone and approved;<sup>70</sup>

<sup>63</sup> Ex MMM-1 JCB Vol B7 tab 89 pp 665-671.

<sup>64</sup> Ex MMM-1 JCB Vol B7 tab 89 pp 678-683.

<sup>65</sup> Ex MMM-1 JCB Vol B7 tab 89 p 415.

<sup>66</sup> Ex MMM-1 JCB Vols B7 tab 89 pp 228-343.

<sup>67</sup> Malone #1 paras 206 to 207 JCB Vol A2 tab 30 p 52; Ex MMM-1 pp 639 to 653 JCB Vol B6 tab 89.

<sup>68</sup> Malone #1 para 208 JCB Vol A2 tab 30 ; Ex MMM-1 pp 654 to 671 JCB Vol B6 tab 89.

<sup>69</sup> Malone #1 para 222 JCB Vol A2 tab 30 pp 54-55.

- (e) publishing of a notice on iiNet's website setting out the contact details of the designated representative appointed pursuant to Reg 20C of the Regulations (referred to in paragraph 8-50(c) above);<sup>71</sup>
- (f) publishing a notice on iiNet's website to the effect that the hosting or posting of illegal or copyright material using an iiNet service constitutes a contractual breach of iiNet's Customer Relationship Agreement and that such a breach may result in the suspension or termination of service without notice (referred to in paragraph 8-50(c) above);<sup>72</sup>
- (g) instructing an external law firm to conduct a substantive review re-drafting of the Customer Relationship which included amendments to the sections regarding subscribers' use of iiNet's services, termination and suspension provisions (the very provisions, the applicants seek to rely on);<sup>73</sup>
- (h) discussion of implementation of the safe harbour compliance measures at internal meetings;<sup>74</sup> and
- (i) continued review of support related emails and correspondence by iiNet employees including in relation to copyright infringement issues.<sup>75</sup>

8-52. iiNet's evidence shows examples of iiNet's compliance with requests from copyright owners under the safe harbour regime, including taking action in relation to take-down notices in respect of categories other than category A activities.<sup>76</sup> It also shows the problems that iiNet faces in dealing with up to 350 non-compliant

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<sup>70</sup> Malone #1 para 210 JCB Vol A2 tab 30 p 53; Ex MMM-1 pp 677 to 683 JCB Vol B6 tab 89. Malone XXN T 815.1-6, Malone RXN T 925.1-29

<sup>71</sup> Malone #1 paras 200 to 208, 211 to 214 JCB Vol A2 tab 30 pp 51-52, 53; MMM-1 pp 415 and 693 to 695 JCB Vol B6 tab 89.

<sup>72</sup> Malone #1 paras 200 and 214 JCB Vol A2 tab 30 pp 51,53; Ex MMM-1 pp. 415 and 693 to 695 JCB Vol B6 tab 89. Malone XXN 868.35-42.

<sup>73</sup> Malone #1 paras 69 to 72 JCB Vol A2 tab 30 pp 20-21; Ex MMM-1 p 228 to 414 JCB Vol B6 tab 89.

<sup>74</sup> Malone #1 para 212 JCB Vol A2 tab 30 p 53.

<sup>75</sup> Malone #1 paras 215 to 217 JCB Vol A2 tab 30 pp 53-54; Confidential Ex MMM-2 pp 816 to 830 JCB Vol B6 tab 90.

<sup>76</sup> Malone #1 paras 215 to 217; Ex MMM-2 pp 816 to 830 JCB Vol B6 tab 89.

emails a day from content owners,<sup>77</sup> including some of the applicants in this proceeding, in circumstances where around 96% of emails received by iiNet are required to be filtered as spam.<sup>78</sup> The evidence shows a clear course of action by iiNet, with direction from, and personal involvement by, its highest officer, Mr Malone, to take steps to bring about compliance with the safe harbour regime.

8-53. Under cross-examination and re-examination, Mr Malone indicated that iiNet's policy:

- (a) was evidenced by the documents referred to above, namely the document entitled "IIA ICH and Safe Harbour Guide"<sup>79</sup>, the copyright notice on the website<sup>80</sup> and the Customer Relationship Agreement;<sup>81</sup>
- (b) was not a formal written document that set out the specific detail of the exact circumstances in which the policy would be triggered;<sup>82</sup>
- (c) would be triggered in the following scenarios:
  - (i) a court order in an action where iiNet was not a party;<sup>83</sup>
  - (ii) a finding of repeat infringement of copyright by a court in an action where iiNet was not a party;<sup>84</sup> and
  - (iii) an admission by an account holder that the account holder had repeatedly infringed copyright.<sup>85</sup>

8-54. Mr Malone also indicated that, to his knowledge, none of the above situations had occurred and therefore, the policy had not been triggered.<sup>86</sup>

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<sup>77</sup> Malone #1 paras 218 to 225; Ex MMM-1 pp 696 to 802 JCB Vol B6 tab 89; Ex MMM-5. Also see generally, Malone #2.

<sup>78</sup> Malone #1 paras 130 to 133; Ex MMM-1 p 458 JCB Vol B6 tab 89.

<sup>79</sup> Malone RXN T 925.1-29.

<sup>80</sup> Malone XXN T 868.35-42.

<sup>81</sup> Malone XXN T 789.34-45.

<sup>82</sup> Malone XXN T 789.24-25, 34-35; 790. 16-18, 791.4, 792.1-5.

<sup>83</sup> Malone XXN T 792.25-26, 793.28-30.

<sup>84</sup> Malone RXN T 922.30-923.11.

<sup>85</sup> Malone XXN T 792.1-793.2; Malone RXN T 924.4-17.

8-55. Further, Mr Malone consistently indicated that iiNet would also comply with legislative instruments or codes which required iiNet to take specific action:<sup>87</sup>

*Yes? So that we would have the legislative ability to do so if there was a code under category A.*

*But a code of conduct is a voluntary code of conduct, isn't it? Which though once registered has the effect of regulation.*

*You certainly haven't agreed to any code of conduct for category A activities, have you? No.*

*on behalf of iiNet? No. There is no – as far as I know, there is no proposed code in place at the moment.*

8-56. Further:<sup>88</sup>

*Well, on your view of the world, that's the only clause you need, isn't it, so far as the copyright-infringing activity is concerned? Unless there is, in the future, legislation that sets out what we should operate or if there's a code and, you know, it was envisaged, I guess, there would one day be a code to cover category A.*

### **Relevant policy adopted**

8-57. The applicants contend that the repeat infringer policy must be published or otherwise publicly available; in particular that *“a policy is not a state of mind. It must either be evidenced in a document or be able to be inferred from actions that are sufficiently consistent.”*<sup>89</sup>

8-58. The documents referred to in paragraphs 8-50 above clearly evidence actions taken by iiNet pursuant to a decision to adopt a policy. First, the notice published on the website in 2005<sup>90</sup> does two things:

- (a) it clearly informs and notifies iiNet's subscribers that if they infringe copyright, their service may suspended or terminated; and

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<sup>86</sup> Malone XXN T 735.10-14.

<sup>87</sup> Malone XXN T 738.4-14.

<sup>88</sup> Malone XXN T 743.1-4.

<sup>89</sup> ACS 607.

<sup>90</sup> Malone #1 para 200 JCB Vol A2 tab 30 p 51; Ex MMM-1 p 415 JCB Vol B7 tab 89.

(b) sets out the required contact details under regulation 20C of the Regulations.<sup>91</sup>

8-59. Secondly, in respect of the Customer Relationship Agreement, prior to 2005 (the year the safe harbour regime was introduced) there was no contractual right under iiNet's agreement to terminate the accounts of repeat infringers.<sup>92</sup> The version of the Customer Relationship Agreement adopted in 2005<sup>93</sup> included, for the first time,<sup>94</sup> the right to terminate the account of repeat infringers of copyright and, as with the copyright notice on the website, acted to notify and warn iiNet subscribers that if they infringed copyright, their service may be suspended or terminated. These actions and documents do not appear merely by chance or mistake; they are evidence of compliance with the safe harbour regime as a result of the implementation of a decision; the evidence indicates it was a decision made by or under the direction of Mr Malone. Further, on the plain and ordinary meaning of the copyright notice and the Customer Relationship Agreement, the nature and effect of the repeat infringer policy, namely that subscribers may have their accounts terminated if they repeatedly infringe copyright, has been published.

8-60. Further, unlike the US safe harbour legislation, the Australian safe harbour regime contains no express requirement requiring the carriage service provider to notify its subscribers of the existence of such a policy. Nor does it, as the applicants suggest, require the carriage service provider to set out the specific details of a policy in a

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<sup>91</sup> Regulation 20C provides:

(1) *A carriage service provider must designate a person to be the representative of the carriage service provider (a designated representative) to receive notifications and notices issued under this Part for the carriage service provider.*

(2) *The carriage service provider must publish a notice in a reasonably prominent location on its website setting out the following information:*

(a) *the title of the position of the designated representative;*

(b) *sufficient information to allow a person to contact the designated representative, including:*

(i) *an electronic mail address; and*

(ii) *a postal address; and*

(iii) *if available, a telephone number or fax number, or both.*

<sup>92</sup> Malone #1 paras 68,71 JCB Vol A2 tab 30 p 20; Ex MMM-1 pp 344-348 JCB Vol B7 tab 89.

<sup>93</sup> Malone #1 paras 69,70 JCB Vol A2 tab 30 p 20; Ex MMM-1 pp 159-227 JCB Vol B6 tab 89.

<sup>94</sup> In other words, when compared to the earlier version of the Customer Relationship Agreement.

written document, referring to the statutory language, such as the phrase “repeat infringer”.<sup>95</sup>

8-61. By way of contrast, § 512(i) of the OCLLA relevantly provides:

*(i) Conditions for Eligibility.—*

*(1) Accommodation of technology.— The limitations on liability established by this section shall apply to a service provider only if the service provider:*

*(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers;...[emphasis added]*

8-62. However, the s 116AH(1) of the Act merely provides:

*The carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.*

8-63. It is clear that the Commonwealth Parliament, in importing much of the wording in the OCLLA into the Act pursuant to its obligations under the AUSFTA, made a decision not to include in the Act, the phrase from the US legislation “*inform subscribers and account holder of the service provider's system or network of, a policy...*”. Given the Australian legislature's obligations under the AUSFTA, the omission of these words can only have been a conscious decision. Therefore, in order to give effect to the intention of the legislature, the preferred construction of the provision should be that it does not impose an obligation on an Australian carriage service provider to publish or inform its subscribers or account holders of its repeat infringer policy; and yet iiNet has done just that.

8-64. In the same way, nothing in Condition 1 of Item 1 of s 116AH(1) requires the carriage service provider to refer to the terminology used in that section for it to be a valid policy. In fact, the broad wording is in contrast to the highly prescriptive notice and take-down regime applying to categories B, C and D where extremely

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<sup>95</sup> ACS 607.

detailed, specific actions and forms of notification are set out in the Act and the Regulations.<sup>96</sup>

8-65. In relation to both issues, a comparison with other Commonwealth legislation is also instructive. For example:

- (a) in the *Privacy Act* 1998, Schedule 3 provides “An organisation must set out in a document clearly expressed policies on its management of personal information. The organisation must make the document available to anyone who asks for it.”
- (b) in the *Future Fund Act* 2006, s 24(1) provides “The Board must formulate written policies to be complied with by it in relation to the following matters”; and s 24(6) “The Board must cause copies of policies formulated under subsection (1) to be published on the Internet.”;
- (c) in the *Safety, Rehabilitation and Compensation Act* 1988, s 73A provides “The Commission may prepare and issue to the Chief Executive Officer written general policy guidelines in relation to the operation of this Act.”.

Clearly, if the legislature wished to grant the limitations of liability to carriage service providers subject to compliance with specific requirements regarding the specific form, content and presentation of the policy, the legislature would have addressed such requirements in the Act or the Regulations (as it has done in relation to other parts of the safe harbour regime and in other Commonwealth legislation, including the examples set out above).

8-66. Based on the above matters, it is submitted that the “repeat infringer policy” under Condition 1 of Item 1 of s 116AH(1) neither needs to track the statutory language nor be published. If the Court finds that a repeat infringer policy must be published contrary to the submissions in paragraphs 8-57 to 8-65 above, it is submitted that iiNet’s publication of its CRA and copyright notice (informing subscribers that their accounts will be terminated if they repeatedly engage in infringing conduct) is

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<sup>96</sup> See Items 3 to 5 of s 116AH(1) and corresponding Part 3A of the Regulations, in particular Regs 20E to 20U.



sufficient; the plain wording of Condition 1 of Item 1 of s 116AH(1) demands no higher standard.

### Relevant policy implemented

- 8-67. To (again) clarify; the issue relevant to implementation is not whether iiNet has implemented the applicants' policy, but whether it has implemented its own policy. In this regard, it is important to understand the background to the introduction of the safe harbour provisions and the unique nature of category A activities.
- 8-68. In *Recording Industry Association of America v Verizon*<sup>97</sup> (US Court of Appeals, District of Columbia, 2003), a well known US case concerning the application of the subpoena provisions under the US safe harbour regime, Ginsburg J<sup>98</sup> on behalf of the Court of Appeals stated:<sup>99</sup>

*In any event, not only is the statute clear (albeit complex), the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; P2P software was "not even a glimmer in anyone's eye when the DMCA was enacted." In re Verizon I, 240 F. Supp. 2d at 38. Furthermore, such testimony as was available to the Congress prior to passage of the DMCA concerned "hackers"<sup>100</sup> who established unauthorized FTP<sup>101</sup> or BBS<sup>102</sup> sites on the servers of ISPs, see Balance of Responsibilities on the Internet and the Online Copyright Liability Limitation Act: Hearing on H.R. 2180 Before the House Subcomm. On Courts and Intellectual Property, Comm. On the Judiciary, 105<sup>th</sup> Cong. (1997) (statement of Ken Wasch, President, Software Publishers Ass'n); rogue ISPs that posted FTP sites on their servers, thereby making files of copyrighted musical works available for download, see Complaint, Geffen Records, Inc. v. Arizona Bizness Network, No. CIV. 98-0794, at ¶ 1 (D. Ariz. May 5, 1998) available at <http://www.riaa.com/news/newsletter/pdf/geffencomplaint.pdf>, (last visited*

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<sup>97</sup> 351 F.3d 1229.

<sup>98</sup> His Honour is Chief Judge of the US District Court, District of Columbia.

<sup>99</sup> *Record Industry Association of America Inc v Verizon Internet Services Inc* 351 F.3d 1229. (D.C.Cir., 2003) at 1238.

<sup>100</sup> "Hackers" is a term used to describe persons who use computers to gain unauthorised access to data and materials in the online environment (including websites, databases, records, systems etc).

<sup>101</sup> "FTP" is a reference to File Transfer Protocol, a standard network protocol used to exchange and manipulate files over a TCP/IP based network, such as the Internet.

<sup>102</sup> "BBS" is a reference to a Bulletin Board System, a computer system running software that allows users to connect and log in to the system, usually via the Internet. Once logged in, a user can perform functions such as uploading and downloading software and data, reading news and bulletins, and exchanging messages with other users, either through electronic mail or in public message boards.

December 2, 2003); and BBS subscribers using dial-up technology to connect to a BBS hosted by an ISP. The Congress had no reason to foresee the application of § 512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along.

Had the Congress been aware of P2P technology, or anticipated its development, § 512(h) might have been drafted more generally. Be that as it may, contrary to the RIAA's claim, nothing in the legislative history supports the issuance of a § 512(h) subpoena to an ISP acting as a conduit for P2P file sharing. [emphasis added]

8-69. The Court of Appeals held that the subpoena provisions under § 512(h) did not permit copyright owners to obtain the personal details of subscribers of carriage service providers engaging in transmission (category A) activities.<sup>103</sup> The Court of Appeals held that § 512(h) only allowed copyright owners to obtain such details pursuant activities of subscribers relating to other categories (ie. categories B, C and D).<sup>104</sup>

8-70. Ginsburg J went on to state:

*Finally, the RIAA argues Verizon's interpretation of the statute "would defeat the core objectives" of the Act. More specifically, according to the RIAA there is no policy justification for limiting the reach of § 512(h) to situations in which the ISP stores infringing material on its system, considering that many more acts of copyright infringement are committed in the P2P realm, in which the ISP merely transmits the material for others, and that the burden upon an ISP required to identify an infringing subscriber is minimal.*

*We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress; only the "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).*

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<sup>103</sup> *Record Industry Association of America Inc v Verizon Internet Services Inc* 351 F.3d 1229. (D.C.Cir., 2003) at 1238-1239.

<sup>104</sup> *Record Industry Association of America Inc v Verizon Internet Services Inc* 351 F.3d 1229. (D.C.Cir., 2003) at 1237.

*The stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture. It is not surprising, therefore, that even as this case was being argued, committees of the Congress were considering how best to deal with the threat to copyrights posed by P2P file sharing schemes. See, e.g., *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the 16 Senate Comm. On Governmental Affairs, 108th Congress (Sept. 30, 2003); Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Senate Comm. on the Judiciary, 108th Congress (Sept. 9, 2003).*<sup>105</sup> [emphasis added]*

- 8-71. The decision in *Verizon* was agreed with by the United States Court of Appeals, Eighth Circuit in *In re: Charter Communications Inc. Subpoena Enforcement Matter* on 4 January 2005.<sup>106</sup> Bye J, on behalf of the majority of the Court of Appeals relevantly stated:

*The DMCA has been the principal legislative response to such activities; it was enacted, however, in 1998, prior to the emergence of P2P systems. The DMCA is designed to advance "two important priorities: promoting the continued growth and development of electronic commerce and protecting intellectual property rights." H. Rep. No. 105-551(II) at 23 (1998). Title II of the DMCA was the product of lengthy negotiations between copyright owners and internet service providers. It was designed to strike a balance between the interests of ISPs in avoiding liability for infringing use of their services and the interest of copyright owners in protecting their intellectual property and minimizing online piracy. [emphasis added]*

- 8-72. The statements by the US Court of Appeals, District of Columbia in *Verizon* and the US Court of Appeal, Eighth Circuit in *Charter Communications*, and the plain wording of the relevant provisions raise a number of issues. Ultimately, it will be shown that iiNet was never required to terminate any of its subscribers accounts in relation to either the AFACT notices or the robot notices and had implemented a relevant policy under s 116AH(1) of the Act.

- 8-73. First, there are a number of obvious parallels between *Verizon* and *Charter Communications* and the present case. In this proceeding, the applicants seek to expand the scope of the obligations of carriage service providers under the safe harbour regime in a manner that was clearly not intended by the US Congress when

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<sup>105</sup> *Record Industry Association of America Inc v Verizon Internet Services Inc* 351 F.3d 1229. (D.C.Cir., 2003) at 1238-1239.

<sup>106</sup> *In re: Charter Communications Inc. Subpoena Enforcement Matter* at 773-774.

it introduced the DMCA (incorporating the OCLLA). As the Australian legislature essentially adopted substantially the same regime pursuant to its obligations under the AUSFTA, there is nothing to suggest (without clear indications to the contrary) that the Australian legislature intended the Australian safe harbour regime to deal with P2P activity any differently to the US position (as set out above by the US Court of Appeals in *Verizon* and *Charter Communications*).<sup>107</sup> Further, there is little doubt that the *Verizon* judgment was in the forefront of the relevant parties' minds (ie legislature, ISPs, copyright owners) when the AUSFTA was signed and the *Free Trade Agreement Implementation Bill 2004* was introduced into Parliament, namely:

- (a) The judgment in *Verizon* (confirming the regime's non-application to P2P activity) was handed down on 19 December 2003, only some 4 months prior to the signing of the AUSFTA.
- (b) Ms Sarah Deutsche, the General Counsel of Verizon, discussed the case at an Australian symposium on the US-Australia Free Trade Agreement on 28 April 2004.<sup>108</sup>
- (c) Ms Deutsche's comments from the above symposium are quoted in Government's Department of Parliamentary Services "*Guide to copyright and patent law changes in the US Free Trade Agreement Implementation Bill 2004*" released on 3 August 2004.<sup>109</sup>
- (d) *Verizon* is referred to in the submissions from Village Roadshow (dated March 2006)<sup>110</sup> and AFACT (August 2006).<sup>111</sup>

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<sup>107</sup> There was no "*rigorous public consultation with stakeholders or experts*" Varghese J, Parliamentary Library Bills Digest No. 71 2004–05, commentary, 6 December 2004.

<sup>108</sup> Transcript available at: <http://www.bakercyberlawcentre.org/fta/transcript.htm>; this material can be taken into account as extrinsic material within s 15AB of the *Acts Interpretation Act 1901* by the reference to it described in para 8-73(c) below. Note that Mr Peter Coroneos of the IIA is also listed as a speaker.

<sup>109</sup> Varghese J, Current issues brief (Australia. Dept. of the Parliamentary Library. Information and Research Services); no. 3, 2004-05 "*Guide to copyright and patent law changes in the US Free Trade Agreement Implementation Bill 2004*" p 28.

<sup>110</sup> Village Roadshow Limited, Australian Digital Software Distributors Association and Publishing and Broadcasting Limited Submission: *Access to Details of ISP Customers suspected of infringing copyright*. 30 March 2006.

<sup>111</sup> AFACT submission, *Access to Details of ISP Customers suspected of infringing copyright*. August 2006.

- (e) Additionally, the Court of Appeals Eighth Circuit decision in *Charter Communications* was handed down on 4 January 2005, some three days after *US Free Trade Agreement Implementation Act 2004* and the *Copyright Legislation Amendment Act 2004* came into effect on 1 January 2005.

8-74. Secondly, the above proposition is further evidenced by the conduct of the copyright owners themselves in their promotion of a notice and disconnection regime in relation to P2P activity on category A services. In this case, the evidence makes it clear that discussion between copyright owners and ISPs have, since around 2005, taken place on the assumption that P2P activity on category A services is exactly what an industry code would contemplate.<sup>112</sup> Indeed, the applicants' position on this issue is entirely inconsistent; if it were clear under the safe harbour provisions that carriage service providers were required to take action to disconnect subscribers in relation to allegations of copyright infringement of P2P activity, there would have been no need for copyright owners to promote a notice and disconnection regime or for copyright owners and ISPs to hold discussions in relation to a new industry code. The absence of such a requirement under the Act has meant that copyright owners have needed to lobby the Government and organise discussions with the IIA regarding this exact issue.<sup>113</sup> Thus the applicants' present argument – that their construction of Condition 1 of Item 1 is somehow a construction they have always believed to be a natural consequence of the provisions of the Act – is belied by their actions over a number of years.

8-75. Thirdly, the above position is further supported by a number of matters that are appreciable from a consideration of the safe harbour regime overall:

- (a) in relation to Condition 1 of Item 1 of s 116AH(1), in notable contrast to the highly prescriptive regime set out in the Act and the Regulations, broad, undefined terminology has been used. The carriage service provider is not

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<sup>112</sup> See Ex SJD-1 pp 1-2 (Letter from MIPI to Westnet) referring to, among other things a notice and disconnection proposal in relation to transmission based activities. In relation to a Code of Conduct, the letter indicates that a disconnection regime should form part of a Code of Conduct. It also refers to previous discussions between rights holders and the IIA relating to a Code of Conduct that ended prior to the code being agreed. Similar correspondence appears at Ex SJD-1 pp 3-4, 6-16, 194.

<sup>113</sup> Indeed, this is part of a concerted effort by rights holders to promote such a scheme internationally, not just in Australia.

required to take any specific action upon receipt of notices in relation to category A activities (including the AFACT notices and robot notices), nor is any form of notice prescribed. Presumably, if the intention of the legislature had been to grant the limitation of liability subject to specific requirements in relation to category A activities, it would have set out a prescriptive termination regime similar to categories B, C and D.

- (b) s 116AH(2) expressly (and conclusively) states that “nothing in the conditions requires a carriage service provider to monitor its service or to seek facts to indicate infringing activity.” Therefore, if a carriage service provider receives a notice, there is no requirement for the carriage service provider to monitor or seek facts in relation to the notice. The whole point of the take-down notice regimes for categories B, C and D is that receipt of a notice in prescribed form “deems” the carriage service provider to have a certain state of knowledge so that it can take action without seeking further facts or make further investigations while being protected from subsequent actions under regulation 20V (as referred to below). This is completely contrary to a situation where a carriage service provider receives thousands of robot notices and in the case of AFACT, thousands of entries in a spreadsheet with thousands of files on DVD which it in each case must review, analyse and conduct “secondary investigations” of the kind referred to by the applicants’ independent expert, Mr Carson in order to ascertain whether the account holder may or may not have infringed.<sup>114</sup> Further, the carriage service provider must consider and comply with the numerous other restrictions on its ability to investigate and monitor subscribers’ activities such as intercepting or accessing communications under the *Telecommunications (Interception and Access) Act* 1979 and using or disclosing certain information under Pt 13 of the Telco Act.<sup>115</sup>

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<sup>114</sup> Carson XXN T 414.12-16, 414.31-416.14.

<sup>115</sup> *Telecommunications (Interception and Access) Act* 1979 (Cth) ss 7 and 108. However, it is important to emphasise that this part of iiNet’s argument does not depend on the Court accepting iiNet’s view of the application of Part 13 of the Telco Act.

- (c) the position is made even clearer by regs 20V and 20X of the Regulations as discussed in the following paragraphs.

8-76. Regulation 20V provides:

***Action taken to comply with a condition***

*A carriage service provider is not liable for damages or any other civil remedy as a result of action taken in good faith by the carriage service provider to comply with any of the following conditions:*

- (a) condition 3 of item 3 (Category B activities) of the table in subsection 116AH (1) of the Act;*
- (b) condition 2, 2A or 3 of item 4 (Category C activities) of the table in subsection 116AH (1) of the Act;*
- (c) condition 2, 2A or 3 of item 5 (Category D activities) of the table in subsection 116AH (1) of the Act.*

*Note See also Divisions 3A.2, 3A.3, 3A.4, 3A.5 and 3A.6 of this Part in relation to these conditions.*

8-77. Regulation 20X provides:

***Misrepresentations in notifications and notices***

*(1) A person who issues a notification, notice or counter-notice under this Part, for the purpose of satisfying a condition in Subdivision D of Division 2AA of Part V of the Act, must not knowingly make a material misrepresentation in that notification, notice or counter-notice.*

*(2) For subregulation (1), a person knowingly makes a material misrepresentation in a notification, notice or counter-notice if the person does not take reasonable steps to ensure the accuracy of the information and statements included in the notification, notice or counter-notice.*

*(3) A person who suffers loss or damage because of a material misrepresentation made knowingly in a notification, notice or counter-notice may bring an action for a civil remedy against the person who issued the notification, notice or counter-notice.*

8-78. Notably absent is any reference to category A activities.<sup>116</sup> It would be extremely unlikely that the legislature would provide statutory protection to carriage service providers in relation to specific action required under categories B, C and D while

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<sup>116</sup> In the case of reg 20X, “notices issued under this part” relates to Part 3A of the regulations which only refers to notices in relation to category B, C and D activities.

depriving the same carriage service providers from statutory protection in relation to unspecified, non-prescribed activities in respect of category A activities. Equally, there is no good reason why the legislature would intend to preclude copyright owners from making a knowing misrepresentation under categories B, C and D but not category A activities. Therefore, the preferred construction of the Australian safe harbour regime (in particular, Condition 1 of Item 1) is that, without a formal industry code, carriage service providers are able to rely on the protections provided under the category A safe harbours without having to take specific actions in relation to P2P activity (in particular, notices forwarded by rights holders in relation to P2P activity such as the AFACT/robot notices) unless pursuant to a Court order or admission (see further discussion of this last point below).

8-79. Fourthly, the industry code (and corresponding prescribed process of development and registration under the Act, Regulations and Telco Act) referred to above in paragraphs 8-27 to 8-37(f) is unique to the Australian safe harbour regime. It must be developed by a broad consensus of copyright owners and carriage service providers and registered by the ACMA following a detailed consultation process with various parties including the ACCC, Telecommunications Industry Ombudsman, Privacy Commissioner and consumer bodies. It is submitted that the inclusion of this provision evinces a clear intention of the legislature for any issues not addressed by the US regime as at 2005 to be specifically addressed in an industry code negotiated by rights holders and ISPs and registered under Part 6 of the Telco Act. This would be consistent with the extensive process of negotiation and consultation that lead to the introduction of the original DMCA (incorporating the OCLLA) and the evidence of Mr Malone.<sup>117</sup>

8-80. Fifthly, Condition 1 of Item 1 refers to “the accounts of repeat infringers”, not, by way of example, to “the accounts of subscribers who are alleged repeatedly infringing” or “the accounts of subscribers who are likely to be repeat infringers”.<sup>118</sup> In circumstances in which the statute envisages conduct by carriage service providers that might amount to serious interference with the rights or interests of

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<sup>117</sup> Malone XXN T 739.4-14; 740.1-2, 743.1-4.

<sup>118</sup> See for example Condition 2A of Item 4 and Condition 2A of Item 5 of s 116AH(1) of the Act. Even less so do the provisions read “the accounts of subscribers allegedly used or likely to be used for repeat infringements”.



Internet users, and where another reasonable construction of the words is available, the Court would not construe the words to include persons against whom only allegations of infringement have been made. Consequently, based on the plain meaning of the words used in the provision, the construction of the term “repeat infringers” must import a higher standard than a “likelihood” of repeat infringement or allegation of “repeat infringement”.

8-81. Sixthly, accounts only are required to be terminated in “appropriate circumstances”. There is no guidance as to its construction in the context of the remainder of the provision; however, discretion is clearly inherent in the plain and ordinary meaning of the words “appropriate” and “circumstances” (an “appropriate circumstance” being a subset of every circumstance). Of course, this is completely contrary to the applicants’ contention that the policy cannot be discretionary at all.<sup>119</sup> It therefore follows that the “appropriate circumstances” may well be completely different for category A activities than other activities.<sup>120</sup> Surprisingly (or maybe unsurprisingly), rights holders have argued in the past that there is no distinction between terminating access (category A) and taking down material (category C). In answer to such an argument, the Court of Appeals in *Verizon* stated:<sup>121</sup>

*The RIAA contends an ISP can indeed “disable access” to infringing material by terminating the offending subscriber’s internet account. This argument is undone by the terms of the Act, however. As Verizon notes, the Congress considered disabling an individual’s access to infringing material and disabling access to the internet to be different remedies for the protection of copyright owners, the former blocking access to the infringing material on the offender’s computer and the latter more broadly blocking the offender’s access to the internet (at least via his chosen ISP). Compare 17 U.S.C. § 512(j)(1)(A)(i) (authorizing injunction restraining ISP “from providing access to infringing material”) with 17 U.S.C. § 512(j)(1)(A)(ii) (authorizing injunction restraining ISP “from providing access to a subscriber or account holder TTT who is engaging in infringing activity TTT by terminating the accounts of the subscriber or account holder”). “[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings.” Transbrasil S.A. Linhas Aereas v. Dep’t of Transp., 791 F.2d 202, 205 (D.C. Cir. 1986). These distinct*

<sup>119</sup> ACS 619.

<sup>120</sup> The reason being, category A activities relate to access to the Internet whereas category B, C and D activities relate to access to content or websites.

<sup>121</sup> *Record Industry Association of America Inc v Verizon Internet Services Inc* 351 F.3d 1229. (D.C.Cir., 2003) at 1235.

statutory remedies establish that terminating a subscriber's account is not the same as removing or disabling access by others to the infringing material resident on the subscriber's computer.

- 8-82. Taking the above statement and working backwards, if the remedies under s 116AG are different depending on the category of activity, it is also likely that the “appropriate circumstances” requiring the termination of an account of a repeat infringer under category A (access) activities are different from circumstances under category C (hosting) or D (information linking). iiNet submits this is especially so given the ramifications of terminating category A services. Such termination would remove all Internet access (legitimate and infringing) with no regard to innocent users of the service, dependency on telephony services such as VOIP<sup>122</sup>, loss of profits from businesses<sup>123</sup>, loss of Internet access to educational institutions<sup>124</sup> etc.
- 8-83. Seventhly, the nature of the implementation of the policy has to be reasonable under the particular circumstances of the particular carriage service provider (having regard to the relevant activity and the facts and circumstances of the case).
- 8-84. Eighthly, on the proper construction of s 116AH(1), the “repeat infringer” can only be the account-holder, because of the reference to the reference to the “accounts of repeat infringers”. A term of iiNet’s Customer Relationship Agreement that renders its account holders contractually liable for activities of other persons using the Internet access account cannot turn those account holders into infringers (or repeat infringers) of copyright under the Act. It follows that the policy has to involve the step that the account-holder himself or herself has in fact themselves infringed. Thus, there must be, in order to trigger the policy, the identification of repeated infringing acts by a particular person, namely, the account holder. In circumstances where such identification does not or has not occurred, the policy is not triggered. Therefore, not responding to AFACT notices or robot notices is not evidence that the relevant policy was not implemented by iiNet. That is the force of the

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<sup>122</sup> In particular, with Naked DSL services, VOIP is automatically included and there is no fixed land line. However, other ADSL services allow for VOIP telephony. Malone #2 para 14 JCB Vol A2 tab 33 p 5.

<sup>123</sup> Such as Malone #3 para 19 Confidential Ex MMM-6 pp4-5, 9-10; Malone #2 paras 14, 15, 17, 35 JCB Vol A2 tab 33 pp 5, 11.

<sup>124</sup> Such as Malone #3 para 23; Confidential Ex MMM-6 pp 22-25.

“Identified User” debate in the July-August 2008 letters between iiNet and AFACT.<sup>125</sup>

- 8-85. Ninthly, a construction of Condition 1 of Item 1 that would result in a carriage service provider having to terminate the accounts of its subscribers in the case of allegations of infringement (ie. the applicants’ policy) would put it at conflict with the specific provisions set out in Items 2 to 5 of s 116AH(1), in particular, Condition 2 of Item 4 and Condition 2 of Item 5. Under those conditions, a carriage service provider must expeditiously remove or disable access to copyright material residing on its system or network upon receipt of a notice in the prescribed form that the material has been found to be infringing by a Court. It is notable that these take-down procedures have no parallel in the US safe harbour regime and are unique to the Australian safe harbour regime.
- 8-86. On the applicants’ construction, copyright owners would not need to obtain orders from a Court in relation to infringing material, they would merely need to send more than one allegation of infringement to the carriage service provider, who would be then required to terminate the account of the “repeat infringer”.<sup>126</sup> Condition 2 of Item 4 and Condition 2 of Item 5 would be rendered impotent. Further, copyright owners could send category A notices containing allegations in any form in order to completely bypass the notice and take-down procedures under category C and D.
- 8-87. The legislature did not provide for a prescribed take-down notice regime or termination regime in respect of category A activities. A construction of Condition 1 of Item 1 that imports a quasi-take down notice regime undermines the intention of the legislature and is at conflict with the other conditions in s 116AH of the Act.

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<sup>125</sup> Ex 16 pp195-272, 276-279.

<sup>126</sup> By way of example, copyright owners could conduct a “whois” search regarding the owner of the domain in order to ascertain the identity of the account holder (see Williams #8 JCB Vol A2 tab 37). Armed with this information, the copyright owner could then send one notice per instance of alleged infringement to the relevant carriage service provider, thus “making” that account holder a “repeat infringer”. Of course, Malone #3 indicates how dangerous it would be for an ISP to rely on any allegations of copyright infringement from a third party.

8-88. Tenthly, Mr Malone gave evidence that iiNet would comply with a Court order, other legislative instrument or code<sup>127</sup>. It is possible under the Act, that such a code could be developed without the consent of a carriage service provider (ie iiNet) and registered under Part 6 of the Telco Act. Under this hypothesis, iiNet could potentially face additional liability if it failed to comply with the code developed under the Act (particularly if it had been directed by the ACMA to comply). But this is not the position; no industry code has been agreed, developed or registered. Thus the questions put to Mr Malone in cross-examination about whether iiNet would ever agree to a code that included notifications and terminations<sup>128</sup> were not to the point. iiNet has simply not been faced with a situation where – contrary to its firm position maintained so long as it was giving input into the ISP side of the drafting of a code – an “industry code” as defined was put into force, in which event iiNet would be required to consider what it would do going forward against that background.

8-89. Eleventhly, the applicants’ evidence of other ISP’s websites is evidence in iiNet’s, not the applicants, favour. Such evidence merely points to 5 ISPs out of 450 or so<sup>129</sup> Australian ISPs (being 1.1%<sup>130</sup>) having a written policy, the majority of which are tiny.<sup>131</sup> In this regard, comparing Beagle Internet to iiNet is like comparing a stall in Paddy’s markets to Woolworths; it is not evidence of anything relevant to iiNet. Tellingly, the applicants have not submitted any evidence whatsoever of actual implementation of these policies.<sup>132</sup> Nor have the applicants submitted any evidence from the other 98.9% of Australian ISPs (including iiNet’s competitors such as BigPond (Telstra), Optus, Internode and Unwired (Channel 7’s wholly owned subsidiary<sup>133</sup>) having any sort of relevant policy (and accordingly, no evidence of implementation).

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<sup>127</sup> Malone XXN T 897.1-7.

<sup>128</sup> Malone XXN T 818.14-17, 819.14-17

<sup>129</sup> People Telecom, Primus, Beagle Internet, Netscape, Exetel; see Malone XXN T 766-775.

<sup>130</sup>  $5/450 \times 100 = 1.1\%$ .

<sup>131</sup> Ex MMM-3 pp 11-43 JCB Vol B8 tab 94.

<sup>132</sup> Malone XXN T 766-775.

<sup>133</sup> Seven Network (Operations) Limited is of course the 34th applicant in the present proceeding. To say that it runs with the hares and hunts with the hounds would be charitable at the very least.

## Conclusion regarding implementation

8-90. Based on the above matters, iiNet's response to the AFACT notifications was consistent with its policy implemented under, and adopted pursuant to, Condition 1 of Item 1 of s 116AH(1) of the Act. As AFACT and the Robot notices never identified an individual responsible for the infringement (let alone whether it was the account holder) the policy was not triggered. Further (or alternatively), based on iiNet's evidence, the legislative history and statutory construction of the Australian safe harbour regime and the US Court of Appeals decisions in *Verizon* and *Charter Communications* iiNet, under the policy it had adopted and implemented, was not under an obligation to terminate the accounts of subscribers notified by AFACT/robots unless pursuant to a Court order<sup>134</sup> or admission. This is consistent with the evidence of Mr Malone.

## 8-F. CONCLUSION ON SAFE HARBOUR REGIME

8-91. As iiNet has complied with the relevant conditions under Items 1 and 2 of s 116AH(1) of the Act, iiNet is able rely on the limitations of liability provided under s 116AG. However, two more points need to be made on the safe harbours.

8-92. First, in relation to the cross-examination of Mr Malone and the various derogatory references by the applicants to his evidence,<sup>135</sup> it is clear, once the safe harbour regime is properly understood, that the applicants were not cross-examining Mr Malone on Condition 1 of Item 1 of s 116AH(1) of the Act but on whether iiNet had adopted the applicants' policy. Mr Malone was never taken to the specific wording of the Act; he was, however, taken to example of policies he had never seen before<sup>136</sup> and subjected to lengthy and repetitive cross-examination on issues that simply do not arise on the proper construction of the relevant provisions such as publication (not required by the Act), the absence of a formal, detailed written policy document referring to the statutory language (not required by the Act) and the "failure" to act on the AFACT notifications and robot notices (not required by

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<sup>134</sup> In circumstances where iiNet is, and is not, party to an action.

<sup>135</sup> ACS 611, 615, 626; ACS Schedule A 33-36.

<sup>136</sup> Malone XXN T 772-774.2, 774.17-25, 775.4-11.

the Act) etc. All the cross-examination revealed was that Mr Malone, and iiNet, did not adopt or implement the applicants' policy. This does not mean that iiNet has not complied with its obligations under the Act, only that its policy (which, under the legislation, it has the right to determine and trigger in appropriate circumstances) is different to the policy proposed by the applicants. Nor does it reflect on Mr Malone's credit, contrary to ACS Schedule A.<sup>137</sup>

8-93. Second, the applicants state that iiNet's evidence "*boils down to a submission that iiNet satisfies the condition because it says it does.*"<sup>138</sup> This is far more characteristic of the applicants' position. It is the applicants who ask the Court to make a leap of faith by construing provisions with the stated intention of providing limitations of liability to carriage service providers so narrowly that they become strict liability provisions deeming the carriage service provider responsible for authorising the infringement of its subscribers unless the carriage service provider complies with a whole range of obligations that are simply not set out in the legislation. This is typical of the overreaching case brought by the applicants in this proceeding generally.

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<sup>137</sup> In particular, paras 33 to 36. In relation to para 36 of ACS Schedule A, Mr Malone clearly stated that he was referring in the Whirlpool post to the document "IIA ICH Safe Harbour Guide"(Malone RXN T 925.1-29). This is hardly consistent with the applicants' contention that he had "embellished" the situation - the position was clarified in re-examination (of course, the applicants do not refer to re-examination in paras 33 to 36 of Schedule A).

<sup>138</sup> ACS 600.

