

**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 NINE

CONCLUSION

**Filed on behalf of the
Respondent by:**
Herbert Geer
Lawyers
Level 12
77 King Street
SYDNEY NSW 2000

Solicitors Code: 174
DX 95 SYDNEY
Tel: 03 9641 8639
Fax: 03 9641 8990
e-mail: gphillips@herbertgeer.com.au
Ref: GXP:1331775(Graham Phillips)

9-A. AUTHORISATION OF INFRINGEMENT OF COPYRIGHT

- 9-1. On the proper application of the Act and the authorities to the facts, the Court should hold that iiNet has not authorised any primary infringements of copyright within the meaning of s 101 of the Act. Accordingly, iiNet has not infringed the applicants' copyright.
- 9-2. That conclusion can be reached by the Court independently of iiNet's construction of Part 13 of the Telco Act. However, the applicants' case for authorisation infringement depends entirely upon iiNet being able to use or disclose information available to it as an ISP, which use or disclosure is forbidden, on pain of commission of a crime. Since s 276 of the Telco Act applies, and the circumstances of this case providing no exception to that section that applies, the Telco Act is also a complete, separate reason why the applicants' case for authorisation infringement should fail.

9-B. SECTION 112E

- 9-3. But even were iiNet found liable for authorisation infringement within the meaning of s 101(1), s 112E is a complete answer to that finding and iiNet would again not be found to have infringed the applicants' copyright.

9-C. SAFE HARBOUR PROVISIONS

- 9-4. Furthermore, failing the s 112E defence, iiNet is entitled to the protection of the "safe harbour" provisions and the applicants are entitled only to the limited relief set out in s 116AG(3). It has been agreed that the question of whether, and if so what, relief should be granted to the applicants in those circumstances should be postponed for further consideration.

9-D. HOW THE ISSUES IDENTIFIED BY IINET SHOULD BE DECIDED

- 9-5. iiNet respectfully submits that the answers to the issues identified by it prior to the hearing, and annexed to its opening outline, should be along the lines set out in the attached document.

9-E. CONCLUSION & COSTS

- 9-6. The proceeding should be dismissed if the Court accepts iiNet's position on authorisation or s 112E. In either case iiNet should have its costs of the proceeding.
- 9-7. iiNet wishes to be heard in support of a special costs order in relation the direct copying case¹. However, the debate can conveniently be postponed until after judgment is given on the principal matters, unless the Court otherwise requires.

R. Cobden

R. P. L Lancaster

N. R. Murray

Counsel for the respondent

Herbert Geer

Solicitors for the respondent

18 November 2009

¹ Former para 67B of the Amended Statement of Claim.