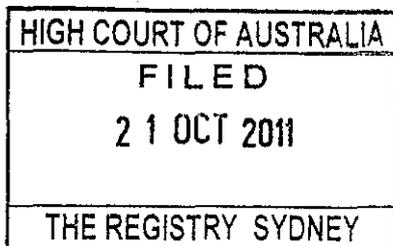


ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:



ROADSHOW FILMS PTY LTD
(ACN 100 746 870) AND THE OTHER
PARTIES IN SCHEDULE 1 Appellants

IIINET LIMITED (ACN 068 628 937)
Respondent

APPELLANTS' SUBMISSIONS IN REPLY ON NOTICE OF APPEAL AND IN
ANSWER ON NOTICE OF CONTENTION

1. The appellants certify that this submission is in a form suitable for publication on the internet.

Reply on Notice of Appeal

The statutory scheme

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2. The questions raised by this appeal must be considered against the overall scheme of the *Copyright Act 1968* (Cth) (the **Act**).¹ There is no doubt that the provisions of the Act governing liability for copyright infringement by authorization were intended by Parliament to apply, and do apply, to ISPs such as iiNet. Submissions made by iiNet and the interveners who support its case² that seek to curtail the application of those provisions in relation to ISPs, contrary to the statutory scheme, should not be accepted.
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3. The statutory scheme recognises the proximate role that ISPs have towards infringements of copyright taking place over their networks and the role they can have in preventing them from occurring. This is reflected in s 101(1A), which lies at the heart of the appeal. Sub para (c) of that provision directs an enquiry into steps taken to "prevent or avoid" infringement, including compliance with any industry code of practice.³ Since 2001, the scheme has provided rights holders with the exclusive right of communication to the public of copyright subject-matter by making it available online. It is significant that the acts of primary infringement in this case involved the infringement of that right; as submitted below, this has consequences for the assessment of iiNet's authorization of such acts which its submissions and those of the interveners do not confront.

¹ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 218 CLR 273 at [10].

² Submissions by iiNet (RS), Australian Digital Alliance (ADAS), Communications Alliance (CAS) and the Australian Privacy Foundation (APFS).

³ Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* (DA Bill) at 2-6; Second Reading speech for the DA Bill. As to steps taken to formulate an ISP industry code, see (2011) 275 ALR 1 at 63-64 [277]-[284].

4. The scheme includes defences introduced for the benefit of service providers such as ISPs, including s 112E (addressed separately below) and the “safe harbour” provisions of Div 2AA of Part V. The safe harbour provisions are significant; they provide a mechanism by which an ISP such as iiNet can limit its liability for infringement of the kind in issue here. This both confirms that Parliament envisaged that such liability might arise under s 101(1A) (and s 112E) and addresses the consequences iiNet and the interveners suggest would result from the application of the law of authorization as sought by the appellants. Further, the provisions indicate that Parliament envisaged termination of internet accounts as a sanction for infringing activity; one of the pre-conditions for protection is the adoption by the ISP of a policy that provides for termination of accounts of repeat infringers.⁴ iiNet failed to attract such protection in this case because it had no such policy; of course, that failure cannot support any raising of the threshold for authorization.⁵
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5. For similar reasons, the attempts by iiNet and the supporting interveners to diminish the significance of *Moorhouse*,⁶ either by treating it as being confined to particular facts (RS 37-38; ADAS 19) or by describing it as an extreme case or outlier (ADAS 20; CAS 12), should not be accepted. As submitted,⁷ the factors in s 101(1A) closely follow Gibbs J's statement of principle in *Moorhouse*. The adoption of those factors in the statutory scheme confirms the continued applicability of *Moorhouse* and emphasises that it is the general statements of principle laid out by the Court in that case (expressed in terms not limited to particular facts) that are significant.
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An objective assessment of iiNet's position

6. Authorization is determined objectively. The legislation does not require that the authorizer appreciate subjectively that it is engaging in conduct of authorization or that the act of primary infringement be undertaken by a person who subjectively appreciates that he or she is being authorized to infringe copyright (cf RS 31, 35, 39, 42, 46, 62). The terms of ss 101(1) and (1A) reflect an objective enquiry. The references in *Moorhouse* to circumstances from which it may be inferred or implied that acts of infringement were authorized, do not introduce any subjective element. Similarly, references in the authorities to the need for a causal connection between the conduct constituting authorization and the act of primary infringement,⁸ do not require that the primary infringer act in response to conduct specifically understood by that person to be an implied invitation or authorization to infringe (cf RS 42).
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7. iiNet's knowledge of or reason to suspect its users' acts of primary infringement of making available online copies of the appellants' films by using the very service controlled by iiNet, combined with iiNet's failure to take any steps to prevent further infringements, constituted authorization. Contrary to iiNet's submissions (RS 78), the quality of “knowledge” does not logically inform the question of authorization. Reason to suspect primary acts of infringement in breach of the terms of use in iiNet's Customer Relationship Agreement (CRA) and a failure to act to prevent the service it controlled
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⁴ Section 116AH(1) of the Act (condition 1 of item 1 in table).

⁵ (2011) 275 ALR 1 at 62 [272], 119 [524] and 176 [800].

⁶ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 (*Moorhouse*). See RS 13 as to iiNet's acceptance of the correctness of *Moorhouse*.

⁷ Appellants' Submissions dated 9 September 2011 (AS) 32.

⁸ See, eg, *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274 at 286-287 (*WEA*).

continuing to be so used, is sufficient for the objective implication of authorization.

8. iiNet's position in this appeal⁹ that, even if it had reason to suspect and control, there was no reasonable step it could take (RS 76), is plainly wrong. Its business involved providing a service for reward to customers on terms that the service not be used for infringing purposes and in circumstances where access to the service was controlled by iiNet. That fact, in combination with iiNet's reason to suspect that the service was being used to infringe copyright, contrary to the terms of use, cannot co-exist with a proposition that there was nothing iiNet could reasonably do to prevent further infringements occurring. The appeal by iiNet to the number of its users and the size of its business (RS 72, 84) is an appeal to the unattractive proposition that if one builds a big enough business with a large enough number of subscribers who are suspected of infringing copyright (in this case, on a very large scale¹⁰), one can more robustly assert that there are no reasonable steps that can be taken. It does not explain why no action was taken in relation to a smaller number of subscribers, or any subscriber, the publication of which action would be expected to dissuade others from engaging in similar activity.
9. iiNet's reliance on the asserted lack of quality of its knowledge suffers from a further difficulty as previously submitted. If the quality of knowledge was truly a factor in iiNet's conduct, it would have acted consistently with this, by, for example, requesting further information either from the appellants or its own subscribers. As submitted (AS 51, 61-62), it was not a factor because iiNet decided to pursue a course of action that rendered additional information irrelevant and which precluded any such dialogue. That decision objectively supports a finding of authorization. iiNet's appeal to the lack of reliability of other types of notices (RS 24) is equally illogical and cannot inform the reasonableness of steps in response to the AFACT notices.

Nature of the infringements

10. Attention must be directed to the nature of the acts of primary infringement and their connection with iiNet. As noted, the acts of primary infringement involved communication to the public of the appellants' films by making them available online using iiNet's internet service. Such an act occurred each time iiNet provided an internet connection to a BitTorrent user who had a copy of such a film on his or her computer; the operation of the BitTorrent system was such that files were automatically shared with other users from the time they could be accessed.¹¹ The films became available online, and thereafter were repeatedly made available online, only for as long as iiNet provided the internet service.¹² iiNet's conduct was the direct and proximate means by which each infringement occurred (and could be prevented).
11. This is the "degree of connection or control ... necessary between the alleged authorizer and the primary infringer" in respect of the infringement to which Gummow J referred in *WEA*,¹³ with approval of the Full Court in *Jain*¹⁴ (cf CAS 22-24). It is a level of control over the act of primary infringement at the time

⁹ Cf (2010) 263 ALR 215 at 227 [31] and (2011) 275 ALR 1 at 101-105 [431]-[449] (Jagot J).

¹⁰ (2011) 275 ALR 1 at 37 [155] and 110 [476(4)].

¹¹ (2011) 275 ALR 1 at 16 [63] and 67 [296].

¹² (2011) 275 ALR 1 at 6 [1], 36 [152]-[154], 92 [381]-[382] and 155 [697].

¹³ *WEA* at 286.

¹⁴ *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53 (*Jain*).

of the infringement that was absent in *ATMA*.¹⁵ iiNet had such control because it provided the internet connection; indeed, this constituted a part of the act of infringement itself (making available *online*). The same cannot be said for the supply of electricity (eg. for a photocopier) or the supply of postal services (eg. for dealing in infringing goods). Their proximity to the relevant acts of infringement far more remote (cf **CAS 41, 43, 45**).¹⁶

12. Against this background, it is irrelevant that iiNet did not provide the primary infringers with the copyright subject-matter in question. Here, the users were already in possession of infringing copies of the appellants' films and were making them available to the public by means of iiNet's internet service, as identified in the AFACT notices. iiNet (which knew of BitTorrent and its infringing uses¹⁷) authorized the continuation of those acts, and the repetition of such acts in relation to the same copyright subject-matter, by taking no action. For this reason, the submissions by iiNet and the interveners that seek to impose a requirement that the authorizer provide the copyright subject-matter, by reference to either *Moorhouse* (**RS 41; ADAS 23-26; CAS 34-42**) or the factors in s 101(1A) (**CAS 22-24**), should not be accepted. As submitted below, there are further reasons for rejecting those submissions.

Moorhouse

13. This case was fought below on the basis of the correctness of the authority of *Moorhouse*.¹⁸ The Full Court proceeded on that basis and there is no challenge to *Moorhouse* by any party before the High Court. To the extent that the interveners who support iiNet's case seek to disturb the authority of *Moorhouse* or to question its application, either explicitly or implicitly (**CAS 12-63; ADAS 8-13**), this should not be entertained.¹⁹
14. As submitted (**AS 30-32**), the continued applicability of *Moorhouse* and the statements of principle contained in it (as general statements of principle) are now enshrined in s 101(1A).²⁰ It is not to the point that there may be differences between the principles of authorization in Australia, epitomised by *Moorhouse*, and the principles of indirect liability for copyright applicable in jurisdictions such as the US, Canada and the UK (cf **RS 59; CAS 13-17; ADAS 19-31**). These differences were explained in *WEA*²¹ and the Act was amended effectively to maintain those differences. Consequently, there are differences between the statutory schemes. For example, no other jurisdiction has a provision akin to s 101(1A). The divergence of Australian law from other jurisdictions in other areas of intellectual property rights has been recognised by this Court.²²

¹⁵ *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480.

¹⁶ See (2011) 275 ALR 1 at 92 [384].

¹⁷ (2011) 275 ALR 1 at 96 [406], 105 [450]; (2010) 263 ALR 215 at 38 [95]; Malone XXN T 699.45-01.4 and T 804.41-43; Exhibit #A tab 51; Malone XXN T. 829.4-35, Exhibit #V; See other evidence at (2010) 263 ALR 215 at 238 [94]-[95], 317-318 [467]-[470]; see **AS** para 10; T. 212.25-27, T. 1132.14-23; Exhibit #T; (2011) 275 ALR 1 at 103 [434]. See also **RS 13** and Malone XXN T. 671.19-38.

¹⁸ (2011) 275 ALR 1 at 10 [23], [84 [357], 157-158 [704]-[708].

¹⁹ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

²⁰ Explanatory Memorandum to the DA Bill at 54.

²¹ *WEA* at 283-286.

²² *Aktiebolaget Hassle v Alphapharm Pty Ltd* (2002) 212 CLR 411 at [80]-[81]; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd (No 1)* (2004) 217 CLR 274 at [63]-[67].

15. iiNet and the supporting interveners also misstate the extent of divergence in other countries from *Moorhouse*. The principle in *Sony Corp*²³ does not apply where the service used for infringement maintains “an ongoing relationship” with its users (as it did here).²⁴ *Grokster*²⁵ did not address principles of contributory infringement or vicarious infringement as they apply to intermediaries.²⁶ In the *SOCAN* case, the Canadian Supreme Court recognised that there could be a finding of authorization against an ISP that fails to take remedial action once put on notice of infringing material on its system.²⁷ The authorization liability of intermediaries has not yet been considered by the Supreme Court in the United Kingdom.²⁸
16. *Moorhouse* is to be applied by reference to the statements of principle in the reasons of Gibbs J and Jacobs J,²⁹ not by mechanical application of its facts as appears in the submissions of iiNet (RS 41) and the interveners (CAS 21). While in the particular facts of *Moorhouse* the photocopier was provided in proximity to the library books, the statements of principle are not limited to that circumstance: see Gibbs J at 12-13 and Jacobs J at 21. The factors in s 101(1A) make no mention of an enquiry limited to whether the authorizer also supplied the copyright subject-matter (or the “means” of infringement).³⁰
17. Nevertheless, if one does compare facts between *Moorhouse* and this case, similarities emerge. Both the University and iiNet had control over the way the services were being used. Both could exercise that control in a way that was proximate to the infringements: they could prevent the next infringement occurring. They had general and specific knowledge of the likelihood of infringements³¹ by a class of persons they could identify.³² Each sought to rely on general warnings published prior to the infringements occurring, which were disregarded by the primary infringers. Each failed to take any step that would prevent a single act of future infringement, refused to communicate with the primary infringers or warn them at a point proximate to the infringement and asserted that it had no responsibility in relation to the infringements,³³ thereby permitting further infringements to occur.³⁴
18. Reference to the notices posted by the University adjacent to photocopiers does not assist iiNet (RS 52; CAS 56, 63). If such analogies are relevant, the notices in *Moorhouse* would correspond to a warning issued by iiNet to a subscriber whose identity was known to iiNet; a notice proximate with the

²³ *Sony Corp. of America v Universal City Studios Inc.* 464 U.S. 417 (1984). See CAS 16; ADAS 28.

²⁴ See *Arista Records Inc. v Flea World Inc.* CIV.A. 03-2670(JBS), 2006 WL 842883 (D.N.J. Mar. 31, 2006) 464 U.S. at 437; *Arista Records LLC v Usenet.com Inc.* 633 F. Supp. 2d 124 (S.D.N.Y. 2009).

²⁵ *MGM Studios Inc. v Grokster Ltd* 545 US 913 (2005). See CAS 17; ADAS 29-31.

²⁶ But see *A & M Records Inc. v Napster Inc.* 239 F. 3d 1004 (9th Cir. 2001) which did.

²⁷ *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] SCC 45 at 55-56 [120]-[128].

²⁸ But see *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd* [2010] EWHC 608 (Ch), *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch), *EMI Records (Ireland) Ltd & ors v Eircom Ltd* [2009] IEHC 411; [2010] IEHC 108 and *EMI Records (Ireland) Ltd & ors v UPC Communications Ireland Ltd* [2010] IEHC 377.

²⁹ See, for more detail, AS 28-34, 36, 38, 43, 44, 47, 59, 67.

³⁰ (2011) 275 ALR 1 at 30-31 [126], 32 [130]-[133], 88 [369], 92 [383], 95 [401] and 155 [697]-[699].

³¹ See AS 10; (2011) 275 ALR 1 at 96 [406], 105 [450]; (2010) 263 ALR 215 at 38 [95]; *Malone XXN T* 699.45-01.4, T 804.41-43 and T. 829.4-35; Exhibit #A tab 51; Exhibit #V; See other evidence at (2010) 263 ALR 215 at 238 [94]-[95], 317-318 [467]-[470]; (2011) 275 ALR 1 at 198 [467]-[470].

³² (2011) 275 ALR 1 at 99 [421]; (2010) 263 ALR 215 at 257 [192].

³³ (2011) 275 ALR 1 at 108 [468]-[469] and 20 [87].

³⁴ (2011) 275 ALR 1 at 51 [224] and 108 [468].

infringement conveyed the next time the user connected to the internet. This is one of the available steps that iiNet refused to take, contending that it had no responsibility to warn a user not to commit a further infringement. As with the University in *Moorhouse*, it is the failure of iiNet to issue such a warning that contributes to a finding of authorization. In any event, neither Gibbs J nor Jacobs J found that such notices, even if accurate, would have precluded a finding of authorization (cf **RS 52**; **CAS 56**), particularly if the University was aware that the notices were being disregarded.

- 10 19. To the appellants' knowledge, the words "sanction, approve, countenance" have been applied disjunctively in every recorded authorization case in Australia since *Moorhouse*.³⁵ Many cases have been decided on the basis of the meaning to be understood from the word "countenance" in the context of the statutory language.³⁶ Nicholas J purported to construe its meaning in this case (cf **RS 60**). The interveners' submissions misstate the meanings attributed to the three words of the phrase in the authorities (**ADAS 8-18**; **CAS 18-21**). Each word has a distinct, if related, meaning, and the significance of the inclusion of "countenance" is that it confirms that express sanction or official approval is not necessary (cf **CAS 20**). Beyond that, it is not necessary to construe the meaning of the phrase "sanction, approve, countenance" in order to resolve this appeal (cf **RS 59-60**; **ADAS 8-18**; **CAS 50-52**). The statutory expression is "authorize". In any event, even if iiNet's and the interveners' submissions on this point were accepted, iiNet's conduct involved "permitting" (the infringements to occur), which iiNet acknowledges is a synonym for authorizing (**RS 39, 46**).
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20. The attempt by iiNet (**RS 66-67**) and the interveners (**CAS 50-52**) to erect a principle of "legitimate indifference" in authorization should not be accepted. Evidently that principle would enshrine perpetual protection to an ISP in iiNet's position, regardless of the knowledge it had and the control it could exercise over infringements. This finds no support in the statute or the authorities. The enquiries under s 101(1A) would be irrelevant if such a principle applied, and s 112E and the safe harbour provisions would be redundant. If the principle existed, it could no doubt have been invoked by the University in *Moorhouse* and other authorizers since, including the ISP in *Cooper*. The purported principle skews the relevant enquiry, which is whether in all the circumstances the proper inference to be drawn (eg., from inactivity or indifference³⁷) is that iiNet authorized. The apparent source of the principle – the *obiter* comments of Higgins J in *Adelaide Corporation*³⁸ – was not relied on by the Full Court. Nicholas J expressly distinguished the case.³⁹ Higgins J's comments were not applied in *Moorhouse*, by either Gibbs J or Jacobs J, and, with one exception, have not been relied upon in any authorization case since.⁴⁰
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³⁵ *WEA* at 288; *Jain* at 61; *APRA v Metro on George Pty Ltd* (2004) 210 ALR 244 at 250-251, 258, 262, 264 (*Metro*); *Universal Music Australia Pty Ltd v Shaman License Holdings Ltd* (2005) 65 IPR 289 at 98; *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 at 20; *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at 392-393, 412-413 (*Cooper*).

³⁶ *Jain*; *Metro*; *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1; *Cooper*.

³⁷ *Moorhouse* at 12 (per Gibbs J).

³⁸ *Adelaide Corporation v APRA* (1928) 40 CLR 481 at 500 (*Adelaide Corporation*).

³⁹ (2011) 275 ALR 1 at 159 [712]-[713]; see also 100 [423]-[424] (Jagot J).

⁴⁰ Cf *Nationwide News Pty Ltd v Copyright Agency Limited* (1995) 65 FCR 399 at 424 (Sackville J).

Section 101(1A)

21. The Full Court made findings in relation to the s 101(1A) factors which are relied upon by the appellants and are not challenged by iiNet by way of any notice of contention (AS 27-34). Submissions by the interveners that seek to challenge such findings (eg. CAS 48 as to iiNet's power to prevent and the notion of "relevant" power) should not be entertained. Although the s 101(1A) factors are not the totality of the enquiries that the Court would make, in this case they represent powerful factors, together with the factor of knowledge, in support of a finding of authorization (cf RS 35).
- 10 22. The unanimous finding that iiNet had the power to prevent the infringements⁴¹ was inescapable given the nature of the acts of primary infringement, by making the films available online, and iiNet's control over the relevant connections to the internet. iiNet's preparedness to exercise such control if ordered by a Court is a further recognition of its power to prevent; an order would have no utility without such power. Nothing in the purpose or context of s 101(1A)(a) supports the reading down of the phrase "power to prevent" in the manner contended for by iiNet (RS 69) or the interveners (eg, CAS 43). The context in which the phrase was used prior to its adoption in s 101(1A)(a), such as by Gibbs J in *Moorhouse*, was a broad one. The section does not distinguish between a "power to prevent" and a "relevant" (or "causative") power to prevent (cf CAS 45-48); the primary judge's attempt to find such a distinction was correctly rejected by the Full Court.⁴² Further, attempting to carve up the statutory phrase (RS 70) invites error; the phrase has a meaning which derives from the concepts of power and prevention combined. A narrower construction is inconsistent with *Moorhouse*, as acknowledged in RS 70. The Communications Alliance also misstates the power that the University in *Moorhouse* had to prevent the infringements on its premises (CAS 44). It was a power to prevent the acts of infringement that were otherwise taking place in the library, by use of the University's photocopiers.⁴³
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- 30 23. The "perspective" of the relationship under s 101(1A)(b) does not change because the conduct takes place in the "home or work environment" (cf RS 72). There was no evidence that iiNet treated its contractual relationships with customers differently based on the location of the services. "Freedom of usage" does not entitle iiNet users to infringe copyright in breach of the Act (or iiNet's CRA). The mechanistic approach to construction adopted in CAS 34-42 is not reflective of the statutory language and does not assist in the interpretation and application of s 101(1A)(b). A relationship need not "relate to the copyright material which has been infringed" (cf CAS 35); it is not the source of the material that is significant but rather the commission of the act of infringement ("the act concerned" in s 101(1A)(b)). Here, as submitted (AS 9), the acts of making available occurred through the internet connection provided by iiNet. The proper approach to s 101(1A)(b) is that adopted by the Full Court below (and the Full Court in *Cooper*⁴⁴). Jagot J's reasons on s 101(1A)(b), like those of Emmett J and Nicholas J, disclose no error (cf RS 73).⁴⁵
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⁴¹ (2011) 275 ALR 1 at 43 [183], 44 [193], 100 [426], and 161 [720].

⁴² (2011) 275 ALR 1 at 42 [179], 98 [415] and 159 [712]-[713].

⁴³ *Moorhouse* at 16-18.

⁴⁴ See *Cooper* at 390 [46]-[48], 412 [150] and 413 [156].

⁴⁵ (2011) 275 ALR 1 at 43-45 [181]-[194], 100-101 [428]-[430], 162-163 [726]-[728].

24. As to s 101(1A)(c), the appellants' case has never been that iiNet was obliged to take a prescribed set of steps in response to the AFACT notices (cf **RS 74**). The notices requested that iiNet take action to prevent or avoid infringements on its network, and left it to iiNet to determine what action was appropriate in circumstances where iiNet had contractual and technical ability to take steps. The appellants' particulars gave an example of steps that could be taken, namely a scheme of warnings, suspensions and termination;⁴⁶ they were not exhaustive or prescriptive. iiNet's criticisms over the presence (and absence) of detail in the appellants' requests for action are inconsistent (compare **RS 30, 74** with **RS 74, 80**). In any event, the judges in the Full Court found that there were steps that iiNet could have taken, including the issuing of warnings, the imposition of service restrictions – such as slowing (shaping) internet connections – and suspension and termination.⁴⁷
25. Neither iiNet (**RS 31, 53, 83**) nor the supporting interveners (**ADAS 32-43; CAS 53**) have advanced any cogent reason why it would be unreasonable for iiNet to communicate with account holders whose accounts were being used to infringe. All members of the Full Court accepted that issuing warnings to account holders could be a reasonable step.⁴⁸ This was inescapable given that iiNet communicated with its customers over a variety of issues, including possible breaches of the CRA,⁴⁹ without apparent difficulty or burden, and that iiNet's subsidiary Westnet had forwarded warnings to its customers.⁵⁰ Any suggestion that it is more reasonable and proportionate for proceedings to be commenced against subscribers than them being issued with warnings is unattractive. As Jagot J observed,⁵¹ many recipients of warnings are likely to be deterred from future infringements.
26. The submissions of iiNet (**RS 81**) and the interveners (**ADAS 32-43; CAS 60-61**) that proceed on the basis that the restriction or disconnection of internet services is *prima facie* unreasonable are contrary to the statutory scheme and the evidence. As noted, the safe harbour provisions (which were unavailable to iiNet) envisage that an ISP adopt and reasonably implement a policy that provides for the termination of accounts of repeat infringers.⁵² Even where an ISP does so, and is found to have the protection of the "safe harbour", the Court is empowered to order an ISP "to terminate a specified account" (s 116AG(3)(b)). As to the evidence, iiNet's objection to service restriction was limited to the case of copyright infringement. The CRA gave it control over the terms on which services were offered or withdrawn, and it exercised that control by restricting, suspending or terminating services when its interests were at stake.⁵³ Moreover, iiNet was prepared to terminate a subscriber if a subscriber was found by a Court to have infringed, or if a user admitted infringing.⁵⁴
27. The submissions of the Australian Digital Alliance as to suspension or termination (**ADAS 32-43**) seek to introduce considerations involving universities and libraries that do not reflect iiNet's position or the evidence in

⁴⁶ Appellants' particulars to the amended statement of claim (confidential) filed 18 March 2009, para 96.

⁴⁷ (2011) 275 ALR 1 at 42 [182], 45 [194]; 100 [426] 165 [740] and 167 [748], [751].

⁴⁸ (2011) 275 ALR 1 at 43 [188], 45 [194], 98 [415], and 167 [748].

⁴⁹ Malone XXN T.667.5-667.31.

⁵⁰ See, eg, (2011) 275 ALR 1 at 96-97 [407]-[410]; Malone XXN T. 634.21-34 and T. 636.22-25.

⁵¹ (2011) 275 ALR 1 at 96-97 [408]- [411].

⁵² Section 116AH(1) of the Act (condition 1 of item 1 in table).

⁵³ (2011) 275 ALR 1 at 43 [183], 44 [190]-[193], and 105 [450].

⁵⁴ (2011) 275 ALR 1 at 58 [259], 102-103 [433]-[434], 109 [474], 118 [521], 130-131 [574] and 177 [805].

this case; they were not considered below and do not fall within the issues for determination on appeal. In any event, there is no evidence and no reason to think that a university or library would not be prepared to use its powers under relevant terms of use with students or invitees to prevent known or suspected infringement on its network. The assertions at ADAS 36-37 that the safe harbour provisions require the arbitration of an infringement allegation, or the making of a preliminary discovery application, are contrary to the unanimous findings of the Full Court⁵⁵ and outside the scope of the appeal. The recognition of a policy under s 116AH for termination of accounts of repeat infringements indicates that termination could be a reasonable step.

Cost and complexity of available reasonable steps

28. The cost and complexity of iiNet taking action in relation to the infringements is a false issue (cf RS 87; CAS 53-55).⁵⁶ There was no evidence of iiNet actually incurring any costs because it took no action. The submission at RS 87 that there “was substantial evidence” to support the primary judge’s findings as to the cost, effort and complexity of reviewing and dealing with the AFACT notices (a finding rejected by a majority of the Full Court⁵⁷) is not supported by the evidence cited by iiNet (the majority of which does not refer to costs or complexity at all⁵⁸) and is contrary to the evidence before the primary judge. All that iiNet was left with was Mr Malone’s speculation⁵⁹ as to the need to employ more staff or automate the process if iiNet acted on *every one* of the infringements notified each week, in circumstances where iiNet never acted on a single one; he never considered what would be required for iiNet to act on a smaller number. In any event, Mr Malone’s view was inconsistent with other evidence, such as Westnet’s response to notices,⁶⁰ and was either rejected or not relied on by the members of the Full Court.⁶¹
29. iiNet recognises that there was no evidence before the primary judge to reach the conclusion that there would be substantial costs in iiNet taking action (RS 85). Similarly, Emmett J’s conclusion that there was an “immense amount of work, cost and effort” to analyse the AFACT notices was not based on any identified evidence (RS 86; CAS 54). The conclusion of the primary judge at [430] does not assist either,⁶² as it was based on the effort his Honour went to in reviewing the AFACT notices; it is no guidance as to the effort required of iiNet. The evidence relating to Westnet does not assist iiNet (RS 84).
30. Plainly, it was for iiNet to establish the fact and nature of any costs or complexity should it seek to rely on such matters. It cannot now seek to turn that onus onto the appellants (see RS 75, 85). As Jagot J identified, iiNet had in place a range of business and technical processes that it deployed for undesirable network conduct and there was no reason to presume that the processes were unavailable here.⁶³ The appellants proved that iiNet took

⁵⁵ (2011) 275 ALR 1 at 60 [264]-[265], 118-119 [520]-[524], and 177 [804]-[806]

⁵⁶ See (2011) 275 ALR 1 at 47 [208].

⁵⁷ (2011) 275 ALR 1 at 98 [415] and 167 [749].

⁵⁸ Eg. the email which is discussed at (2010) 263 ALR 215 at 258 [199], (2011) 275 ALR 1 at 23 [100] (Emmett J) and 72 [311] (Jagot J); Dalby paras 26-27; Malone XXN T. 769.12-23 & T. 756.1-12; Exhibit A2, tab 123, pp 1-2,4 and Exhibit SJD-1 p 79.

⁵⁹ Malone #2 at para 11.

⁶⁰ See Malone XXN T. 650.11-15.

⁶¹ (2011) 275 ALR 1 at 98 [415], 99 [421] and 167 [749]; (Emmett J did not refer to it).

⁶² (2010) 263 ALR 215 at 307 [430].

⁶³ (2011) 275 ALR 1 at 100 [426].

these steps, without apparent cost or difficulty. iiNet did not meet that evidence (cf **RS 87**).⁶⁴ It cannot seriously be suggested that the then-third largest ISP in Australia (with approximately 925 employees, including approximately 600 customer service representatives⁶⁵) did not have the personnel even to consider any of the AFACT notices or contact any of the account holders in question.⁶⁶ The evidence showed that during the period of the particularised infringements iiNet repeatedly contacted account holders about a range of other matters, and yet the infringements were not mentioned. No sensible comparison can be made between the processes available to iiNet in 2008 and those available to a university in 1975.

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31. The authorities do not support Emmett J's approach to reimbursement and indemnity for acting on the AFACT notices (cf **RS 88**; **ADAS 40**). iiNet made no submission at trial or on appeal to the effect that it should be reimbursed and indemnified for acting on the notices, or that had this been offered it would have acted (cf **RS 88**). Emmett J does not refer to any such submission being put by iiNet. Rather, as submitted (**AS 45**), iiNet argued that it would only take action after a Court found infringement or where a user admitted infringement;⁶⁷ there was no suggestion that this would involve reimbursement or indemnity. Statutory schemes (**RS 88**) available only to law enforcement agencies, which empower an ISP to disclose subscriber information, are fundamentally different from this case, and are irrelevant. None of the considerations in **RS 88** were the subject of findings below.

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32. The two foreign legislative schemes identified by iiNet do not assist it (cf **RS 90**; **CAS 57-59**). They did not exist at the time of the trial. There are varying international approaches,⁶⁸ some contractual (the US MOU), others legislative. Some schemes involve costs being borne by the participants (the US MOU), some by the State and some by regulation. No single approach emerges. What is before the Court is the scheme of the Act. In Australia, ss 101(1) and (1A) make no reference to the cost of action by the alleged authorizer. The safe harbour scheme provides no mechanism for an ISP to recover any costs of responding to prescribed take down notices or adopting and reasonably implementing a repeat infringer policy. Nor does *Moorhouse* support the proposition that steps become unreasonable if they involve incurring costs.

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iiNet's knowledge of the infringements

33. It is not clear from iiNet's submissions (**RS 61-65**) whether the ground of appeal contending that iiNet had sufficient knowledge to establish a finding of authorization is in dispute.⁶⁹ Knowledge could only be "the wrong question" and a "false issue on the appeal" (**RS 61**) if no dispute remains (cf **RS 31** which refers to "proved" infringements). There appears to be no dispute that the relevant test for knowledge derived from the reasons of Gibbs J and Jacobs J in *Moorhouse* is whether a person has "knowledge or a reason to

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⁶⁴ See also *Dalby XXN* T.639.14-24 and 640.27-31.

⁶⁵ (2010) 263 ALR 215 at 246 [130] and *Malone XXN* T. 646.10-15.

⁶⁶ See *Dalby XXN* T. 992.32; (2010) 263 ALR 215 at 318 [468].

⁶⁷ (2011) 275 ALR 1 at 59 [259], 102-103 [433]-[434], 109 [474] and 118 [521].

⁶⁸ See, eg., France's HADOPI, the UK's *Digital Economy Act 2010* (still awaiting the Ofcom regulatory code), New Zealand's *Copyright (Infringing File Sharing) Amendment Act 2011*, South Korea's July 2009 amendments to its Copyright Law, Taiwan's May 2009 amendments to its Copyright Law, and the New York Memorandum of Understanding (**US MOU**) accessible at:

<http://www.copyrightinformation.org/sites/default/files/Momorandum%20of%20Understanding.pdf>

⁶⁹ Notice of Appeal filed 26 August 2011 at para 2(a) & (3).

suspect" (e.g., RS 61-63). This highlights the error in the different, and higher, standards proposed by Emmett J and supported by iiNet and the interveners (RS 29; CAS 64).⁷⁰ The primary judge treated iiNet's knowledge from April 2009 as relevant to authorization.⁷¹ That finding was unchallenged in the Full Court.⁷² iiNet's attempt to direct a submission to that finding in the Full Court was impermissible (cf RS 78). One of iiNet's contentions under s 112E in the Full Court was predicated on the primary judge having found that iiNet had knowledge relevant to authorization (cf RS 19).⁷³

- 10 34. iiNet's submissions do not confront the findings that it had decided not to act, regardless of the information provided to it, unless and until it was ordered to so do by a Court.⁷⁴ As a result of that decision, iiNet's refusal to act on the AFACT notices of infringement had nothing to do with the perceived quality of the data.⁷⁵ The "text" of the AFACT Notices (cf RS 75) was clear in identifying both the infringements by the users and the potential for authorization by iiNet.⁷⁶ The AFACT notices were "manifestly different" from other notices received by iiNet (cf RS 9, 24).⁷⁷ The DVDs supplied to iiNet with the notices contained underlying data relating to the infringements in the notices and identified DtecNet as its source.⁷⁸ iiNet did not even review the DVDs and refused any meaningful engagement.⁷⁹ There is no error in Jagot J's finding of "tacit approval" (cf RS 83)⁸⁰ or in the finding of Emmett J that iiNet's attitude was "contumelious and dismissive" (cf RS 100).⁸¹ The evidence as to iiNet's internal documents, its communications with AFACT and its conduct in response to the infringements amply supports such findings.⁸²
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35. There is no suggestion (and no evidence) that iiNet had concerns about the reliability of the information provided which could not have been addressed by AFACT had they been raised. iiNet treated it as "compelling evidence" of infringement sufficiently serious (cf CAS 64) to warrant it being provided to the WA police.⁸³ In any event, the information was reliable.⁸⁴ iiNet did nothing in response to the notices because it had determined - by July 2008 - that it would take no action.⁸⁵ Although it later sought to justify its lack of action on the absence of reliable information on the infringements, further information was not required and was irrelevant to iiNet's response; it was no more than an "intellectual curiosity".⁸⁶ As the primary judge observed, whatever be the nature of iiNet's understanding of the notices, it was irrelevant after the
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⁷⁰ (2011) 275 ALR 1 at 48 [210] and 58 [257].

⁷¹ (2010) 263 ALR 215 at 318-319 [471] and 325 [505].

⁷² (2011) 275 ALR 1 at 64-65 [286].

⁷³ Notice of Contention 18 March 2010 (NOC) para 5 stated: "The primary judge erred *in finding* that as iiNet had knowledge of the infringements that were occurring on its facilities and as such factor is relevant to a finding of authorization, s 112E of the Act ceased to have operation)" (emphasis added).

⁷⁴ (2011) 275 ALR 1 at 59 [259], 102-103 [433]-[434], 109 [474] and 118 [521].

⁷⁵ (2011) 275 ALR 1 at 75-76 [318] and 109 [474].

⁷⁶ (2010) 263 ALR 215 at 317 [467]; (2011) 275 ALR 1 at 72 [311].

⁷⁷ (2011) 275 ALR 1 at 99 [418]; see also (2011) 275 ALR 1 at 104 [438].

⁷⁸ (2011) 275 ALR 1 at 71 [307] and 127 [557]; (2010) 263 ALR 215 at 240-241 [103].

⁷⁹ (2011) 275 ALR 1 at 75-76 [318] and 100 [421].

⁸⁰ (2011) 275 ALR 1 at 110 [477], see also 41 [176] (Emmett J).

⁸¹ (2011) 275 ALR 1 at 58 [257].

⁸² (2011) 275 ALR 1 at 68-76 [297]-[321].

⁸³ (2011) 275 ALR 1 at 73-75 [316]-[317].and 99 [418]-[419].

⁸⁴ (2011) 275 ALR 1 at 73-74 [316] and 129 [564]; (2010) 263 ALR 215 at 241 [107]-[108] and 242 [113].

⁸⁵ (2011) 275 ALR 1 at 59 [259], 102-103 [433]-[434], 109 [474] and 118 [521].

⁸⁶ (2011) 275 ALR 1 at 75 [318]; *Dalby XXN T.* 1006.17.

decision, made no later than 16 July 2008, not to act.⁸⁷ Submissions that iiNet sought to assess the reliability and authenticity of the data (RS 82) are not open, and are unsupported. Neither Emmett J nor Nicholas J explained how a party with no interest in further information (and which, consistently with this, never communicates a request or need for it) is nevertheless able to rely on its alleged absence. Nor does iiNet.

36. iiNet's submissions concerning the DtecNet report (RS 55-58) are irrelevant. The report could be used for the purposes of the case, including defending the claim of authorization (cf RS 14). iiNet was not precluded from forming the view, based on the report, that its users had infringed copyright; this did not require that iiNet be able to disclose the contents of the report (cf RS 14). iiNet had clearly formed such a view when it formally and publicly conceded on 4 April 2009 that the evidence filed by the appellants established infringement by iiNet users.⁸⁸ The appellants' case was based on all of the conduct engaged in by iiNet, before and after filing (including in relation to a representative set of accounts of 20 iiNet customers covering the period).⁸⁹ The pleadings and evidence referred to infringements that occurred after filing and the trial took place on that basis, as acknowledged in the Full Court.⁹⁰ The relief sought extended to existing and future infringements.⁹¹ Events arising in the course of proceedings can support the grant of relief.⁹² Disregarding iiNet's post-filing conduct amounts to a failure to resolve all matters in dispute as required by s 22 of the *Federal Court of Australia Act 1976* (Cth).

Privacy issues

37. No privacy issues arose on the facts of this case. The submissions of the Australian Privacy Foundation go beyond the boundaries of the matter between the parties. They raise additional legal issues and appear to reflect a desire to have the law declared in particular terms. The infringing activity in question, communication to the public, involved the public sharing of copyright files using IP addresses allocated by iiNet. There is no statutory recognition that an IP address is protected by privacy law. By its nature, an IP address is public and is controlled by an ISP (here, the IP addresses were controlled by iiNet and remained its property under the terms of the CRA⁹³). It does not follow that, even if privacy considerations applied, a person other than the subscriber to whom an IP address was allocated would have any interest in it (cf APFS 41). Moreover, the ability of iiNet to take steps in response to the AFACT notices was secured by the provisions of the CRA and the exceptions in Part 13 of the *Telecommunications Act 1997* (Cth) (the **Telco Act**); against that background, ss 303B and 303C of the Telco Act render any discussion of privacy law irrelevant. Steps were taken during the proceedings to avoid disclosure of any relevant information⁹⁴ and AFACT never requested the release of iiNet subscriber information.

⁸⁷ (2010) 263 ALR 215 at 261 [211].

⁸⁸ (2010) 263 ALR 215 at 226 [22].

⁸⁹ (2011) 275 ALR 1 at 25 [106]-[108].

⁹⁰ (2011) 275 ALR 1 at 26 [111] and 147 [653].

⁹¹ (2010) 263 ALR 215 at 224 [7].

⁹² See, eg, *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 1 FCR 549 at 561-562 (Fox J), 584 (Lockhart J) (this aspect was not affected on appeal: *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171) and, in a different context, *WEA* at 288.

⁹³ See Ex #A tab 54, CRA cl 12.5; (2011) 275 ALR 1 at 72 [309].

⁹⁴ (2010) 263 ALR 215 at 245 [124].

Answer on Notice of Contention

Factual findings (NOC 1)

- 10 38. The facts in iiNet's contentions 1(a), (c) and (e) did not play any part in the reasoning of the Full Court. Those facts are not necessary for the appellants' success on appeal. In any event, there was no error in the relevant findings, which were supported by the evidence. The facts the subject of contentions 1(b) (tacit approval), 1(d) (capacity to control) and 1(f) (iiNet's attitude) are dealt with in AS 58-60, 62 and 70-71. iiNet has not demonstrated error so as to meet the threshold to overturn those factual findings.⁹⁵ If these grounds are pursued, they will be addressed orally.

Section 112E (NOC 2)

- 20 39. No error has been shown in the Full Court's unanimous finding that s 112E would not have precluded a finding of authorization against iiNet.⁹⁶ Section 112E (like s 39B) is not engaged if an additional factor is present.⁹⁷ The appellants identified factors which took iiNet outside of the protection of s 112E, including iiNet's knowledge of the infringements and its decision not to take any steps available to it. All of the judges below found that there was an additional factor present and that s 112E did not apply, largely for the reasons summarised by Jagot J at [465].⁹⁸ The approach of the Full Court reflects a sensible interpretation of the provision having regard to its wording and context. As Emmett J observed, "[t]he nature and context of s 112E do not support the proposition that it should necessarily be construed in favour of the provider of facilities."⁹⁹ The extrinsic material indicates an intention to "limit and clarify" liability "in certain circumstances", not to provide a general immunity for ISPs in the conduct of their businesses.¹⁰⁰ This is consistent with the decision of the Full Court in *Cooper*.¹⁰¹
- 30 40. iiNet misconstrues s 112E. It starts from the result it seeks to achieve and impermissibly imports a concept of the "ordinary scope" of the provision of facilities into a section that makes no reference to such matters (RS 109). This was rightly rejected by the Full Court.¹⁰² Principles of statutory construction do not assist iiNet's construction; as explained by Emmett J, the provision has work to do on the construction adopted by the Full Court¹⁰³ (cf RS 107; ADAS 47). iiNet's construction gives the word "merely" no operation.¹⁰⁴

⁹⁵ See *Manley v Alexander* (2005) 223 ALR 228 at 231 [14]; *Liftronic Pty Limited v Unver* (2001) 179 ALR 321 at 336 [65.1]; and *Roads and Traffic Authority v Royal* (2008) 245 ALR 653 at 684 [125].

⁹⁶ (2011) 275 ALR 1 at 49-52 [212]-[228], 106-108 [452]-[465] and 173-176 [784]-[797].

⁹⁷ (2011) 275 ALR 1 at 50 [217], 107 [460]-[461], and 175 [795].

⁹⁸ (2011) 275 ALR 1 at 107-108 [465], see also 339 [578], 52 [228] and 176 [797].

⁹⁹ (2011) 275 ALR 1 at 50 [218].

¹⁰⁰ Second Reading speech for the DA Bill; see ADAS 46. Exposure Draft and Commentary of the DA Bill at p 31; see CAS 67. See, e.g., (2011) 275 ALR 1 at 50 [222].

¹⁰¹ *Cooper* at 391-392 [55]-[60] and 415-416 [168]-[170].

¹⁰² (2011) 275 ALR 1 at 51 [223], 58 [256], 107 [463]-[464] and 175 [792].

¹⁰³ (2011) 275 ALR 1 at 50 [217].

¹⁰⁴ (2011) 275 ALR 1 at 49-50 [216].

41. The constructions advanced by the interveners supporting iiNet are equally unavailable. The Australian Digital Alliance impermissibly seeks to read into the provision a text and meaning which do not appear on its face or by necessary implication from the statutory scheme (**ADAS 44**). Similarly, the construction urged by Communications Alliance (**CAS 71-72**) should not be accepted; it depends on a negative implication by reason of the absence of a reference to knowledge in s 101(1A). That convoluted process does not accord with ordinary principles of statutory construction.

Telecommunications Act (NOC 3-5)

- 10 42. It was iiNet's case that the restrictions on use or disclosure of information in Part 13 of the Telco Act prevented it from taking action in response to the AFACT notices. As Jagot J observed, there was a threshold issue, in that this was not the reason iiNet refused to act on the AFACT notices.¹⁰⁵ In any event, in order for iiNet to succeed in its contention, the information supplied by AFACT, together with the information from iiNet's own "score" and "rumba" databases (the **iiNet information**), both had to fall within the prohibition in s 276, and each of the exceptions under ss 279, 280, 289 and 290 had to be inapplicable. The Full Court unanimously held that s 276 did not apply to the AFACT information, and each member of the Court held that at least one exception applied to the iiNet information.¹⁰⁶ For the reasons outlined briefly below, the appellants support the findings regarding the inapplicability of s 276 to the AFACT information, and the applicability of each of the four exceptions to the iiNet information. The same exceptions would equally apply to the AFACT information if, contrary to the findings made below, it was within the s 276 prohibition.¹⁰⁷
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43. Section 276 did not apply to AFACT information because the information did not come into iiNet's possession or knowledge in connection with its business (cf the requirement in s 276(1)(b)). The phrase "in connection with" requires reference to the context and the purpose for which the information came into existence, and the non-confidential AFACT information did not become confidential merely because it was received by an ISP.¹⁰⁸ iiNet's construction of s 276 would preclude it from using publicly-sourced information at the request of the party providing such information.¹⁰⁹
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44. Emmett J (and the primary judge) correctly found that the use or disclosure of the iiNet information fell within s 279.¹¹⁰ For the reasons given by his Honour, the section provides an exception for the act of use or disclosure, and not merely an exemption from liability for the individual employee.¹¹¹ This is further supported by the context and structure of Part 13 of the Telco Act. A contrary interpretation would render s 279 ineffective.¹¹²

¹⁰⁵ (2011) 275 ALR 1 at 94 [398].

¹⁰⁶ (2011) 275 ALR 1 at 53-55 [236]-[243], 113-114 [478] [492]-[497], 116 [510], 117 [513] and 176 [799].

¹⁰⁷ (2011) 275 ALR 1 at 115 [502].

¹⁰⁸ (2011) 275 ALR 1 at 53 [235], 112-113 [485]-[486] and 176 [799] (Nicholas J agreeing with Jagot J).

¹⁰⁹ (2011) 275 ALR 1 at 112-113 [486].

¹¹⁰ (2010) 263 ALR 215 at 329-330 [531]-[532] and 333 [555]; (2011) 275 ALR 1 at 53-54 [236]-[241]. Jagot J found that the exception did not apply (see (2011) 275 ALR 1 at 113 [489]-[490]).

¹¹¹ (2011) 275 ALR 1 at 54 [238]; see further 54 [237]-[241].

¹¹² (2011) 275 ALR 1 at 54 [238]; see also *Canadian Pacific Tobacco Limited v Stapleton* (1952) 86 CLR 1 at 6. The exception was described in the Explanatory Memorandum to the *Telecommunications Bill 1996*, vol 2, 6 as covering the "myriad of day-to-day communications between employees about connecting, disconnecting and billing customers".

45. Section 280 provides an exception where the use or disclosure of information is required or authorized by law. The findings of Emmett J and Jagot J that the "safe harbour" provisions operated to authorize disclosure of the iiNet information, such that the s 280 exception applied,¹¹³ were correct. Further, the appellants submit that s 101(1A)(c) similarly operates to authorize disclosure for purpose of taking reasonable steps; significantly, one of the factors to be taken into account under that provision is whether an alleged authorizer has complied with any industry code of practice. The contrary proposition put forward by iiNet would mean that an ISP could not, for example, take any steps in compliance with an industry code of practice if this involved the use of s 276 information.
46. The exception under s 289 also applied for the reasons given by Jagot J and Nicholas J (and the primary judge).¹¹⁴ The iiNet information related to the affairs or personal particulars of another person, satisfying the requirement under s 289(a).¹¹⁵ Section 289(b)(ii) also applied because of the subscriber's consent to the use and disclosure of information pursuant to the terms of the CRA.¹¹⁶ Administration and management of the account plainly included compliance with the CRA.¹¹⁷ iiNet was authorized to monitor communications, collect information and use confidential information to ensure compliance. Further, the exception under s 289(b)(i) also applied, as a person downloading material on the internet must be reasonably likely to have been aware that his or her ISP, in the ordinary course of managing the service, would use information enabling the ISP to take any action it was authorized to take under the applicable terms and conditions.¹¹⁸ The appellants further submit that, in any event, even if the terms and conditions of iiNet's CRA were inadequate to secure the consent of its subscribers to the use of the iiNet information for these purposes, this could provide no answer to a finding of authorization because iiNet itself had determined and had the ability to amend those terms and conditions in order to address this.¹¹⁹
47. Finally, as Jagot J found, iiNet's subscribers could also be taken to have consented to the use of the iiNet information, so as to engage the exception under s 290.¹²⁰ The subscribers engaged in public sharing and transmission of infringing files over the internet, with no confidentiality restrictions governing what took place during that process. They were aware that the terms of the CRA entitled iiNet to monitor and administer its network for these and other circumstances. These circumstances are consistent with consent of the kind envisioned to be covered by s 290.

DATED: 21 October 2011


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¹¹³ (2011) 275 ALR 1 at 55 [242]-[243] and 113-114 [492]-[497].

¹¹⁴ (2011) 275 ALR 1 at 116 [510] and 176 [799]; (2010) 263 ALR 215 at 333 [555].

¹¹⁵ (2011) 275 ALR 1 at 115 [502] and 176 [799]; (2010) 263 ALR 215 at 331 [541] and 332 [544]-[545].

¹¹⁶ (2011) 275 ALR 1 at 115-116 [503]-[508] and 176 [799]; (2010) 263 ALR 215 at 332-333 [546]-[554].

¹¹⁷ (2011) 275 ALR 1 at 115-116 [504]-[507], 176 [799] (Nicholas J agreeing). See also (2010) 263 ALR 215 at 333 [553].

¹¹⁸ (2011) 275 ALR 1 at 116 [509], and 176 [799] (Nicholas J agreeing).

¹¹⁹ Ex #MMM1 at 229-230, CRA cl 1.3-1.4; (2011) 275 ALR 1 at 18 [75]; Malone XXN T. 740.41-741.8.

¹²⁰ (2011) 275 ALR 1 at 117 [513].

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