



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S16 of 2023

BETWEEN:

REAL ESTATE TOOL BOX PTY LTD ACN 614 827 379

First appellant

BIGGIN & SCOTT PTY LTD ACN 072 450 689

Second appellant

DREAM DESK PTY LTD ACN 604 719 735

Third appellant

10

JONATHAN MICHAEL MEISSNER

Fourth appellant

PAUL GEOFFREY STONER

Fifth appellant

MICHELLE BARTELS

Sixth appellant

AND:

CAMPAIGNTRACK PTY LTD ACN 142 537 988

First respondent

DAVID SEMMENS

20

Second respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Despite the issues framed in the notice of appeal—because of the findings made by the majority of the Full Court not challenged in this appeal, which are not inconsistent with the findings made by the primary judge—the appellants are unable to demonstrate appealable error or any demonstrable misapplication of long-standing principle.

Part III: No s 78B notice

- 30 3. The first respondent considers no notice needs to be given under s 78B.

Part IV: Material facts

4. There are important additional findings made by the primary judge and the Full Court that explain the context in which the question of copyright authorisation infringement came to be determined against the appellants.

5. The first respondent (**Campaigntrack**), an owner of copyright in works in **DreamDesk**, a real estate marketing software system, sued the other parties for their involvement in developing and exploiting a competing system, **Toolbox**: FC [162]-[164] CAB 219; PJ [1]-[2] CAB 13. The second respondent (**Mr Semmens**) was the author of the DreamDesk works: PJ [204] CAB 67, [215] CAB 71, [235] CAB 79. Mr Semmens and others under his supervision developed Toolbox by copying the DreamDesk works: FC [206] CAB 233-234; PJ [37] CAB 23, [280]-[282], [284]-[285] CAB 94-96. The appellants commissioned Toolbox; provided resources to develop it; entered into a joint venture with Mr Semmens to exploit it (**Toolbox venture**); and so exploited it: e.g., FC [177] CAB 222-223, [184]-[186] CAB 224-226, [213](1) CAB 236, [273] CAB 252, [297] CAB 258-259, [337]-[338] CAB 271; PJ [38] CAB 23, [78] CAB 34, [85]-[87] CAB 36-38, [91]-[93] CAB 39, [297](6) CAB 102, [305](1), [305](3) CAB 105. Campaigntrack otherwise agrees with AS [6]-[10].

6. Immediately before Toolbox, the second appellant (**B&SC**) used DreamDesk under licence from DDPL: PJ [17]-[19] CAB 17, [147]-[148] CAB 53-54. Mr Semmens was the developer and author of DreamDesk: PJ [235] CAB 79. The fifth appellant (**Mr Stoner**), B&SC's CEO and a director, knew Mr Semmens was DDPL's head developer: T 514.30-31 (ABFM 7).

7. On **3 August 2016**, Mr Semmens met with Mr Stoner to discuss creating a competing system, which became Toolbox: FC [177] CAB 222-223; PJ [38] CAB 23. Mr Stoner showed Mr Semmens a letter on B&SC letterhead (**3 Aug Letter**). The letter is quoted in FC [177] CAB 222-223 and PJ [38] CAB 23. The sixth appellant (**Ms Bartels**), another B&SC director, *knew* of the substance of the 3 August Letter: FC [38] CAB 185; PJ [44] CAB 25, [297](1) CAB 101.

8. By the 3 August meeting, Mr Stoner and Ms Bartels *knew* that Mr Semmens had admitted to using a third-party software system (**Process 55**) to develop DreamDesk, and this had caused problems: FC [34], [39] CAB 185, [117] CAB 200, [132], [134] CAB 206, [181] CAB 224, [277] CAB 253; PJ [41], [43], [45] CAB 24-25, [297](1). Mr Meissner also *knew*: FC 23 CAB 183, [173] CAB 221-222; PJ [24] CAB 18, [305](1) CAB 105, [305](6) CAB 106. This led to "the blunt statements of protection or insurance" in the 3 Aug Letter against "the *possible* conduct of Mr Semmens [about which] *Mr Stoner was concerned*": FC [117] CAB 200.

9. In cross-examination, when asked “At no time did you ask Mr Semmens for any assurance that he had complied with [the 3 Aug Letter]?”, Mr Stoner responded, “I probably asked him every two days ... I asked him constantly”: FC [285] CAB 255. Mr Stoner did not give evidence about what Mr Semmens said in response. Mr Stoner was not re-examined by his counsel: FC [286] CAB 255, [315] CAB 263. The appellants’ counsel did not cross-examine Mr Semmens: PJ [204] CAB 67 (The appellants “could have asked questions of Mr Semmens in cross-examination; they asked none”). *Cf.* AS [12].

10. From **9 August 2016**, Mr Semmens began to develop Toolbox at the offices of the third appellant (**DDPL**) and another company (**JGM**), both of which were controlled by the fourth appellant (**Mr Meissner**): PJ [3](d) CAB 13, [54]-[55] CAB 29. Mr Semmens was the “main developer” of Toolbox: FC [61](8) CAB 190, [206] CAB 233; PJ [280] CAB 94.

11. Mr Semmens developed Toolbox by “cop[y]ing the whole or substantial parts of the DreamDesk source code (and system) and then proceed[ing] to modify it or have [two DDPL/JGM] developers (**Mr Gallagher** and **Mr Zhang**) ... modify it under his supervision”: FC [61](9) CAB 190, [206] CAB 233, [274] S4 CAB 252; PJ [87] CAB 38, [281] CAB 94; *cf.* AS [15]. Mr Meissner *knew* that B&SC was not intending to use Campaigntrack’s system, and that DDPL and JGM staff were developing Toolbox for B&SC: FC [45] CAB 186; PJ [78] CAB 34, [136] CAB 50. Mr Stoner and Ms Bartels *knew* that Toolbox was being developed by Mr Semmens and other DDPL/JGM Advertising staff, in the same offices: PJ [143] CAB 52, [147] (“the same team”) CAB 53-54, [297](1) CAB 101.

12. During the period in which Toolbox was developed (August–October 2016), Mr Stoner and Ms Bartels *knew* Mr Semmens would be copying data from DreamDesk to Toolbox, including data other than B&SC’s data: PJ [67] CAB 31, [123](1), [125]-[126] CAB 47-48, [135]-[137] CAB 50-51, [147] (“get ... information across”) CAB 53. For that reason, Mr Stoner and Ms Bartels also *knew* Mr Semmens had unfettered access to DreamDesk while developing Toolbox. Mr Meissner also *knew* Mr Semmens had unfettered access because he left it to him to hand DreamDesk over to Campaigntrack: PJ [95] CAB 40.

13. On **6-7 September 2016**, Campaigntrack and New Litho completed their acquisition of the IP rights in DreamDesk from DDPL: PJ [33] (cl 1.4) CAB 21, [83] CAB 35. The transaction included a ‘**licence-back**’ of the IP rights to DDPL “for the restricted purpose of operating the DreamDesk business” until 3 October 2016: FC [27] CAB 184; PJ [34] (cl 2.1) CAB 21.

14. On **15 September 2016**, the first appellant (**RETB**) was incorporated with Mr Stoner and Ms Bartels as sole officers and shareholders: FC [49] CAB 187, [186]

CAB 226, [273] CAB 252; PJ [91]-[92] CAB 39. RETB became trustee of the trust for the Toolbox venture: *ibid.* B&SC and its partners had a majority stake; Mr Semmens and his partners a minority stake: FC [185] CAB 226, [273] CAB 252; PJ [86](2), [93] CAB 38-39; *cf.* AS [17].

10 **15.** On **21 September 2016**, Mr Stoner sought an extension from Campaigntrack for B&SC to use DreamDesk beyond 3 October 2016 (the end-date of the ‘licence-back’, para 13 above): PJ [98] CAB 40-41. In the email, Mr Stoner “was willing to convey an impression that he knew to be incorrect in order to suit the particular circumstances of the day”: FC [51]-[53] CAB 187-188; PJ [100](1), (3) CAB 42. He repeated his request for an extension on 26 and 27 September 2016: FC [56]-[57], [59] CAB 188-189, [188] CAB 226; PJ [107], [112] CAB 44-45; *cf.* AS [19].

20 **16.** On **29 September 2016**, Campaigntrack’s solicitor (**Ms McLean**) sent a letter to Mr Meissner and DDPL in response to B&SC’s requests for an extension (**29 Sep Letter**), in first respondent’s book of further materials (**RBFM**), 8-10 and set out in FC [189] CAB 226-227. It put the appellants unambiguously and clearly on notice that Campaigntrack had “become aware of improper access and duplication of code which is intellectual property now owned by our clients ... [and] the incorporation and involvement of [RETB]”: FC [189] CAB 227, [290] CAB 257, [330], [332] CAB 268-269. Relevantly, the letter required all relevant parties to provide undertakings not to use and to destroy “the intellectual property...
obtained or duplicated”: FC [189] CAB 227; *cf.* AS [20].

30 **17.** On **30 September 2016**, Mr Meissner replied to the 29 Sep Letter: RBFM, 11-12 and quoted in FC [190] CAB 228. Mr Meissner “disingenuously” claimed, “I do not understand your reference to [RETB], and your involvement statement”: FC [75] CAB 192, [190] CAB 228, [331] CAB 268-269; *cf.* para 11 S2 above. He asserted, “The IP purchased by [Campaigntrack] is being used solely by [DDPL] contractors (no one else) for its original function only ...”: FC [77] CAB 193, [190] CAB 228. He made these assertions without making any “specific inquiries of Mr Semmens in order to be satisfied that [Mr Semmens] had not copied, and was not intending to copy,” DreamDesk: FC [330] CAB 268. Mr Meissner was in contact with Mr Semmens at the time about the Dreamdesk handover: PJ [111] CAB 45, [325], last two sentences CAB 113.

18. By **3 October 2016**, B&SC, RETB, Mr Stoner and Ms Bartels had become aware of the allegations in the 29 Sep Letter: FC [191] S1 CAB 228, [332] CAB 269. On that day, their solicitors (**Mills Oakley**) sent an email to Ms McLean, which referred to the 29 Sep Letter and stated that B&SC was prepared to provide undertakings in return for an extension

to use DreamDesk: RBFM, 13; FC [78] CAB 193, [191] CAB 228, [290] CAB 257; PJ [121] CAB 47. Importantly, Mills Oakley did not respond to the allegations of “improper access [to] and duplication” of DreamDesk or to RETB’s incorporation: FC [191] CAB 228. B&SC, RETB, Mr Stoner and Ms Bartels made “no specific inquiries” before Mills Oakley’s email: FC [332] CAB 269; *cf.* AS [21].

19. No appellant in their response said the 29 Sep Letter was “unparticularised”, “bland”, or that they did not understand the allegations made therein: *cf.* AS [56], [58]. In any event, the FC majority found: the 29 Sep Letter was “unambiguously expressed” (FC [290] CAB 257); the appellants were “on notice” (FC [330] CAB 268); B&SC, RETB, Stoner and
10 Bartels were “clearly on notice” (FC [332] CAB 269); “notice had clearly been given” (FC [334] CAB 270).

20. On **5 October 2016**, Campaigntrack sought undertakings from DDPL, Mr Meissner and Mr Semmens (RBFM, 15-19) and from B&SC, RETB, Mr Stoner and Ms Bartels (RBFM, 22, 28-29), not to enable or facilitate the development of any system by making use of any of the intellectual property which comprises or relates to DreamDesk: FC [79] CAB 193, [191] CAB 228, [291] CAB 257; PJ [129], [131], [133] CAB 48-49.

21. On **5-6 October 2016**, the appellants gave the undertakings in FC [191] CAB 228: RBFM, 20, 31-32, 35; FC [83] CAB 194, [192], [194] CAB 228-230; PJ [130], [133] CAB 48-49, [351]-[352] CAB 120. In doing so, DDPL and Mr Meissner positively denied
20 any improper use of DreamDesk, without having made any inquiry of Mr Semmens: FC [80] CAB 193, [192] CAB 229, [330] CAB 268; PJ [130] CAB 48-49.

22. On **6 October 2016** at 9:43am, Mr Stoner sent Mr Semmens the undertakings that B&SC, RETB, Mr Stoner and Ms Bartels were about to give (RFBM, 22-27; FC [84] CAB 194), to ask him if Toolbox “was ready”, and to get him to “hurry up and get [Toolbox] completed” (RFBM, 28 at T 494.14-27). They “possibly ... discussed” the undertakings: FC [84] CAB 194, [193] CAB 229; PJ [134] CAB 50. Mr Semmens refused to sign the undertakings sought by Campaigntrack: FC [84] CAB 194; PJ [134] CAB 49-50. B&SC, RETB, Mr Stoner and Ms Bartels gave their undertakings that afternoon: FC [84] CAB 194; para 21 above.

30 23. On **6 October 2016** at 11:02am, Ms McLean pressed Mr Meissner for undertakings from Mr Semmens: RBFM, 33.

24. On **7 October 2016**, Ms McLean advised Mills Oakley that the DreamDesk licence would not be extended beyond 10 October 2016, including because Campaigntrack “ha[d]

not received an undertaking executed by David Semm[e]ns”: RBFM, 45; FC [86] CAB 195, [196] CAB 230, [291] CAB 257; PJ [145] CAB 52; *cf.* AS [22] lines 29-30.

25. On **9 October 2016**, Ms McLean *repeated* to Mills Oakley Mr Semmens’ failure to give undertakings and queried why he would resist giving undertakings (identical to those already given by the appellants) if there was “no questionable activity”: RBFM, 46; FC [88] CAB 195, [293] CAB 258, [333]-[334] CAB 269-270; *cf.* AS [22] lines 29-30.

26. In the circumstances (paras 20–25 above), the appellants *knew* Mr Semmens had failed to give the same undertakings: FC [333] CAB 269. They never directly addressed that failure or the other matters in Ms McLean’s 9 October correspondence: FC [334] CAB 270.

10 **27.** On **10 October 2016**, Ms McLean *again* pressed Mr Meissner and Mills Oakley for undertakings from Mr Semmens: RBFM, 51; FC [89]-[90] CAB 195, [294], [296] CAB 258. B&SC’s access to DreamDesk was ended on that day: FC [91] CAB 195, [197] CAB 230, [297] CAB 258-259; PJ [147] CAB 53. Toolbox went ‘live’ on the same day: FC [92] CAB 196, [198] CAB 231; PJ [148] CAB 54. Toolbox was then used by real estate agents, including those in B&SC’s franchisees: FC [117] CAB 200; PJ [289] CAB 97; *cf.* AS [23].

28. In **November 2016**, the parties agreed that an independent forensic IT expert, **Mr Geri**, would inspect Toolbox and report on whether it was copied from DreamDesk: FC [94] CAB 196, [199] CAB 231; PJ [152] CAB 54. Mr Stoner and B&SC “did not want there to be any argument that [Toolbox was based on DreamDesk intellectual property] or
20 references to DreamDesk from which such an argument could be made”: FC [95] CAB 196; PJ [155] CAB 55-56. “Mr Semmens realised that there was mention of DreamDesk...in [Toolbox]”, so he made changes to certain information requested by Mr Geri, which was provided by Mills Oakley to Ms McLean: FC [94]-[95] CAB 196; PJ [47]-[53] CAB 26-29, [153], [155], [157]-[158] CAB 54-56. Although Mr Stoner did not *ask* Mr Semmens to make these changes (PJ [156] CAB 56), Mr Stoner “gave clear instructions to [Mr Semmens] to *remove any mention* of Dream Desk”, and Mr Stoner *knew* “[Mr Semmens] had changed [the information requested by Mr Geri, provided to Ms McLean] because he had the email address in there of Dream Desk”: FC [94] CAB 196; PJ [154] CAB 55; *cf.* AS [24].

29. On **19 January 2017**, Mr Geri issued a preliminary report, which Ms McLean
30 provided to Mills Oakley that day: RBFM, 57-61; FC [200] CAB 231, [298] CAB 259, [335] CAB 270. Mr Geri observed “significant similarities [between DreamDesk and Toolbox] in tables, front end menu options and functionality”: FC [97] CAB 197; *cf.* AS [25]. Mr Geri wrote there was “high probability” that DreamDesk IP had been used in the development of Toolbox, given that both systems were developed by the same developer who had access to

both: FC [97] CAB 197, [202] CAB 232, [298] CAB 259. To confirm, he needed to conduct a “forensic examination of the servers...for hosting and managing [Toolbox]” and “any device used by Mr Semmens during the development”: FC [97] CAB 197, [202] CAB 232. In serving the report, Campaigntrack requested the appellants cease use of Toolbox: FC [98] CAB 197, [203] CAB 232, [299] CAB 259.

30. In the circumstances (paras 16–29 above), the FC majority found the appellants “had reason to suspect, [from 29 September 2016], that Mr Semmens had...infringed its intellectual property rights in the DreamDesk system by copying ... it in the development of Toolbox”: FC [336] last 3 lines CAB 271; FC [128] CAB 204.

10 **31.** On **20 January 2017**, Mills Oakley responded as quoted in FC [204] CAB 232, including that the appellants required: clarification of the intellectual property; proof of Campaigntrack’s ownership; and particulars of loss: RBFM, 62; FC [99]-[103] CAB 197-198, [204]-[205] CAB 232-233, [299] CAB 259.

32. *Contrary* to AS [63] (“active steps to cooperate”), the appellants’ correspondence from 20 January 2017 onwards “was **obstructive** and...**intended to delay** [Campaigntrack’s prosecuting] its claims”: FC [335] CAB 270. See also FC [100], [104] CAB 197-198, [119] CAB 201, [131] CAB 205 (“obfuscation and deflection”; asking for things they “well knew and ... understood”).

20 **33.** On **2 February 2017**, Mills Oakley sent an email, stating: Campaigntrack had not provided the information requested in para 31 above; the appellants inferred there was no evidence to support Campaigntrack’s allegations; the appellants denied Campaigntrack had the rights asserted and denied infringement: RBFM, 64; FC [300] CAB 259; also FC [104] CAB 198. However, the appellants had “no independent basis” for these contentions, which were shown at trial to be wrong: FC [113] CAB 200.

34. On **3 February 2017**, Ms McLean responded to Mills Oakley in detail: RBFM, 66-71; FC [105]-[109] CAB 198-199, [301]-[302] CAB 259-260. Again, she demanded the appellants cease use of Toolbox: FC [302] CAB 260.

30 **35.** On **9 February 2017**, Mills Oakley responded on behalf of the appellants. They denied Mr Geri further access to Toolbox for analysis. They said further access was ‘fishing’. The appellants *positively* asserted Toolbox “does not use the source code that is used in [DreamDesk]”: RBFM, 75-76; FC [110]-[111] CAB 199, [303] CAB 260. Again, they had “no independent basis” for that contention: FC [113] CAB 200.

36. The proceeding before the primary judge was started in **May 2017**: FC [304] CAB 260. It was defended by the appellants to a trial beginning July 2020: CAB 8.

37. RETB, B&SC, Mr Stoner and Ms Bartels continued to exploit Toolbox until **June 2018**, 20 months after the 29 Sep Letter (para 16 above) and 16 months after Mr Geri's report (para 29 above): FC [115], [118] CAB 200-201, [129] CAB 205, [134] CAB 206-207, [205] CAB 233, [304] CAB 260; PJ [162] CAB 57.

Part V: Campaigntrack's argument

Authorisation

Basic propositions

- 10 38. The following basic propositions appear common ground. First, copyright, in relation to each work in suit, includes the exclusive rights to reproduce the work in a material form, and to communicate the work to the public: *Copyright Act 1968* (Cth) (CA), ss 31(1)(a)(i), 31(1)(a)(iv); AS [39] S3. Secondly, the phrase 'an act comprised in the copyright' in a work is a reference to any act which the copyright owner has the exclusive right to do: CA, s 13(1); AS [39] S1. In other words, 'an act comprised in the copyright' includes reproducing the work in a material form and communicating the work to the public: CA, ss 31(1)(a)(i), 31(1)(a)(iv). Thirdly, the exclusive right includes the exclusive right to authorize another person to do the act: CA, s 13(2); AS [39] S2. Fourthly, CA s 36(1) provides for infringement of copyright in works, and for other subject-matter, CA, s 101(1) is to the same effect.
- 20 39. Subsection 36(1) defines two kinds of infringement: primary infringement by doing 'an act comprised in the copyright' in Australia; **and** authorisation infringement by authorising the doing of 'an act comprised in the copyright' in Australia: *Roadshow Films v iiNet (No 2)* (2012) 248 CLR 42 at [8]; AS [38].
40. Authorisation is a question of fact, to be inferred from all the circumstances of the case: *iiNet* at [5], [63] (French CJ, Crennan and Kiefel JJ); *UNSW v Moorhouse* (1975) 133 CLR 1 at 12 (Gibbs J: "depends upon all the facts"), at 21 (Jacobs J, McTiernan ACJ agreeing: "a question of fact...what is the true inference"), at 24 ("a question of fact to be determined in all the circumstances"). The Full Court unanimously followed this principle: FC [5] CAB 178, [149] CAB 212, [340] CAB 272.
- 30 41. Since the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), the Court "must ... take[] into account" the (non-exhaustive) matters in CA, ss 36(1A)(a)-(c) (**(1A) Factors**) in determining authorisation: **(a)** the extent (if any) of the person's power to prevent the

doing of the act concerned; **(b)** the nature of any relationship existing between the person and the person who did the act concerned; and **(c)** whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice: AS [43], [44] S1. Thus, “attention is now directed in the first place to [the (1A) Factors, which are] intended to inform the drawing of an inference of authorisation by reference to the facts and circumstances there identified”: *iiNet* at [68]; AS [44] S3.

History, nature, and purpose

10 42. The history of authorisation was reviewed in detail in *iiNet* at [42]-[54] (French CJ, Crennan and Kiefel JJ), [104]-[106], [121]-[134] (Gummow and Hayne JJ) and in *WEA v Hanimex* (1987) 17 FCR 274 at 281-286 (Gummow J). The following points arise.

43. First, the introduction of authorisation in the *Copyright Act 1911* (Imp) (adopted by the *Copyright Act 1912* (Cth)) was intended to expand liability to persons beyond employers and principals of agents: *iiNet* at [42], [124]; *WEA* at 283. As Jacobs J wrote in *Moorhouse* at 20: “It is established that the word is not limited to the authorizing of an agent by a principal. ... [A]uthorization is wider than authority.” It is also implicit in s 36(1A)(b): ‘relationship’ there is not limited to employment or agency relationships.

20 44. Authorisation is a separate statutory tort, distinct from primary infringement and from common law principles of joint tortfeasance: *iiNet* at [42], [57]; *WEA* at 284; AS [40] S1-S2. A plaintiff can succeed on authorisation but fail on joint tortfeasance because of a lack of ‘concerted action’: see, e.g., *Universal Music v Cooper* (2005) 150 FCR 1 at [130], [137] (Tamberlin J).

45. There is a policy underlying authorisation; namely, cost-efficient enforcement of the rights given by the Act: *iiNet* at [55], [110]. Thus, the Court wrote in an early ‘dance hall’ case: “A band ... is often a migratory thing, and an action against it only might be of small avail to the plaintiffs”.¹ In the late 1980s, in a ‘tape-recorder’ case, Lord Templeman said: “The infringements of a home copier are almost impossible to detect and a successful action for infringement against one copier would have little deterrent effect”.²

30 46. Authorisation cases repeatedly arise in certain contexts in the case law: **(a)** ‘dance halls’ and other music venues (*APRA v Canterbury-Bankstown League Club* (1964) 5 FLR

¹ *Performing Right Society v Mitchell and Booker (Palais De Danse)* [1924] 1 KB 762 at 765 (McCardie J); cited in *Adelaide v APRA* (1928) 40 CLR 481 at 495 (Isaacs J)

² *CBS Songs v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1048B (Lord Templeman).

415; *APRA v Jain* (1990) 26 FCR 53); (b) jukeboxes (*Vigneux v Canadian Performing Right Society* [1945] AC 108; *Winstone v Wurlitzer* [1946] VLR 338); (c) photocopiers (*Moorhouse*; *CCH Canadian v Law Society of Upper Canada* [2004] 1 SCR 339); (d) cassette tapes and tape-recorders (*WEA*; *CBS v Amstrad*); (e) file-sharing websites and software (*Cooper*; *iiNet*).

“Synonyms”

47. Herring CJ’s warning in *Winstone* at 345, approved in *iiNet* at [125] and in *Jain* at 59 remains apposite (emphasis added): “...[A]s the acts that may be complained of as infringements of copyright are multifarious, so, too, the conduct that may justify an inference of authorisation may take on an infinite variety of differing forms. *In these circumstances any attempt to prescribe beforehand ready-made tests for determining on which side of the line a particular case will fall, would seem doomed to failure. ...*” To the same effect is *Moorhouse* at 12 (Gibbs J): “...[A] decision on a particular set of circumstances may be of no assistance in other cases.”

48. That said, Courts have sought to conceptualise ‘authorisation’ using various definitions or “synonyms” (*iiNet* at [43]):

- (a) sanction, approve, countenance (*Moorhouse* at 12 (Gibbs J), 20 (Jacobs J));
- (b) control of the means, knowledge or reasonable suspicion, and failure to take reasonable steps (*Moorhouse* at 13 (Gibbs J)). It is common ground that the first and third of these became the first and third (1A) Factors (*iiNet* at [22], [52]).
- (c) express or implied permission or invitation, including of a general nature (*Moorhouse* at 21 (Jacobs J));
- (d) indifference, demonstrated by acts or omissions, to “a degree from which authorisation...may be inferred” (*Moorhouse* at 12 (Gibbs J), 21 (Jacobs J));
- (e) granting or purporting to grant a right to do the infringing act (*iiNet* [76], [126]-[127]).

49. These synonyms or indicia remain useful analytical tools to assist in drawing an inference of authorisation: *cf.* AS [42]. *Moorhouse* and *iiNet* demonstrate that they are not mutually exclusive. However, after the *Digital Agenda Act*, these synonyms or indicia should not be used to displace the mandatory consideration and application of the (1A) Factors: *iiNet* at [66]-[70]: *cf.* AS [44], last sentence.

The Full Court's decision

Appellants' arguments before the Full Court

50. Before the Full Court below, the appellants accepted that authorisation was “very fact dependent” and would “depend upon the totality of the facts in each case”. They argued: (a) the indifference case was new and there were contested questions of fact; and (b) the notice of appeal did not contend error that the primary judge overlooked material from 29 September 2016. These arguments were rejected by the FC majority for the reasons in FC [320]-[321] CAB 265. They relied on two fall-back matters: (c) the giving of undertakings and (d) the appointment of Mr Geri in November 2016 were reasonable steps within CA, s 36(1A)(c). These were rejected by the FC majority for the reasons in FC [333]-[334] CAB 269-270. The appellants did *not* argue that the trust findings and the 3 Aug Letter “precluded” a finding of authorisation in the period from 29 September 2016 to June 2018.

FC majority's finding of error by the primary judge

51. Each member of the Full Court agreed that Campaigntrack's authorisation case included one based on the appellants' ‘indifference’ from 29 September 2016 to June 2018: FC [3] CAB 177, [126] CAB 204, [140] CAB 208, [306] CAB 261. The appellants' submission to the contrary was rejected: FC [320] CAB 265.

52. The Full Court understood ‘indifference’ was a convenient *shorthand* for the authorisation case that the appellants “knew, or had reason to suspect, that Mr Semmens either had or would likely copy aspects of the DreamDesk data or source code and they took no or insufficient steps to prevent that conduct”: FC [306] CAB 261.

53. Each member of the Full Court agreed the applicable test for finding error: FC [12] CAB 180-181, [143] CAB 209-210, [322] CAB 265, citing *Beale v GIO* (NSW) (1997) 48 NSWLR 430 at 443 (Meagher JA).

54. The **FC majority** (Greenwood and McElwaine JJ) correctly held appellate review was appropriate because the primary judge erred in not referring to, making findings about, or weighing in the analysis the correspondence and events from 29 September 2016 to June 2018; notwithstanding his Honour dismissed the authorisation case for that period: FC [321]-[323] CAB 265-266; [127]-[128] CAB 204.

55. It was clear that the primary judge's findings on authorisation were focussed on the period before the launch of Toolbox in October 2016, and his Honour did not consider the whole of the period until June 2018: see PJ [297](4) CAB 102 (“lack of ready means to carry

out an independent audit *in the time frame which would have been required*”) and PJ [305](6) CAB 106 (“The circumstances...did not call for some active audit or investigation on [Mr Meissner’s] part *during the process of development of Toolbox*”). As Greenwood J observed, these observations could only have been references to the period before *October* 2016 because the appellants did facilitate Mr Geri’s preliminary examination of Toolbox in *November* 2016: FC [125](5) CAB 203.

56. Once those errors had been found, it was open for the FC majority to consider the totality of those circumstances.

FC majority correctly considered all circumstances from 29 September 2016 to June 2018

10 **57.** Before embarking on their consideration of authorisation, both judges in the FC majority carefully reviewed the facts up to 29 September 2016 (as found by the primary judge) and the facts from 29 September 2016 to June 2018 (as established by documentary evidence): McElwaine J, FC [170]-[205] CAB 221-233, [290]-[304] CAB 257-260; Greenwood J, FC [15]-[60], [62]-[116] CAB 181-200. Thus, the FC majority made careful and detailed factual findings on all of the events from 29 September 2016 to June 2018, summarised in paras 16–37 above: FC [189]-[205] CAB 226-233, [290]-[304] CAB 257-260; also FC [62]-[119] CAB 190-201.

58. The multiple factual indicia that led the FC majority to infer authorisation were the following (FC [330]-[341] CAB 268-272).

20 **59.** First, the 29 Sep Letter put the appellants clearly on notice that Campaigntrack: alleged infringement of its intellectual property rights in DreamDesk; expressed concern over RETB’s involvement in that infringement; and demanded undertakings to destroy and not use any copied IP: FC[330], [332] CAB 268-269. The appellants’ complaint that the 29 Sep Letter was ‘bland’ or ‘unparticularised’ (AS [56], [58]) should be rejected for the reasons in para 19 above. The appellants were and remain legally represented. They gave the undertakings sought, which tells against any misunderstanding of the position.

60. Secondly, Mr Meissner failed to make inquiries to be satisfied that Mr Semmens had not copied DreamDesk and was not intending to do so: FC [330]-[331] CAB 268-269. Mr Meissner was in contact with Mr Semmens at the time about DreamDesk handover: 30 PJ [111] CAB 45, [325] CAB 113. Instead of making inquiries, Mr Meissner “quite disingenuously” claimed not to understand the reference to RETB’s involvement: FC [331] CAB 268-269. It was disingenuous because Mr Meissner *knew* DDPL/JGM staff were developing Toolbox for B&SC: para 11 S2 above.

61. Thirdly, RETB, B&SC, Mr Stoner and Ms Bartels failed to make specific inquiries or investigate the situation, aside from Mr Stoner’s seeking unspecified assurances from Semmens. They were legally represented at the time: FC [332] CAB 269.

62. Fourthly, the appellants *knew* that: Mr Semmens had failed to give the undertakings (identical to the undertakings they gave); Ms McLean emphasised that this failure suggested “questionable activity”; the appellants had failed to make genuine and specific inquiry of Mr Semmens why he had not given undertakings and if it was because the copying allegations were true: FC [333]-[334] CAB 269-270; para 26; *cf.* AS [22] lines 29-30. In other words, the majority’s reasoning is *not* “built...upon the foundations” of the appellants’ giving undertakings (*cf.* AS [57]), but rather on *their knowledge* that Mr Semmens—the primary developer of Toolbox—had not done the same, and *their failure* to ask him why and whether it was because the allegations were true.

63. Fifthly, the appointment of Mr Geri in November 2016 was by itself insufficient. It is clear from the rest of FC [334] CAB 270 that the “too late” observation refers to lateness compared to: Campaigntrack’s repeated concerns in 7-10 October 2016 that Mr Semmens had failed to give the same undertakings, this suggested “questionable activity”; Mills Oakley’s non-engagement on these issues, and the appellants’ decision to launch and operate Toolbox from 10 October 2016, over objection: *cf.* AS [37] (“fourthly” etc). The observation does not imply that Mr Geri’s appointment or preliminary report (if done earlier) was exculpatory. That is clear from the FC majority’s finding of authorisation after the report.

64. Sixthly, the appellants knew that Mr Geri (an independent expert whose appointment they had agreed to) had given a preliminary report that there was a “high probability” of copying on 19 January 2017: FC [335] CAB 270; para 29 above. Cheeseman J (dissenting) erred in finding that Mr Geri’s report “appears to be based on the fact that the applications have been developed by the same developer”: FC [157] CAB 215. Rather, as Greenwood J observed, Mr Geri found “*significant similarities in tables, front end menu options and functionality*” (FC [97] CAB 197). Primary infringement of the Table Works was established: PJ [284], [289]-[290] CAB 96-97. As Jacobs J noted in *Moorhouse* at 21: “[t]he circumstances will include the likelihood that such an act will be done.” Here, Mr Geri’s opinion, conveyed to the appellants, was that copying was “high[ly]” likely.

65. Seventhly, instead of acceding to Mr Geri’s request for access to conduct a forensic examination of Toolbox, the appellants wrote “obstructive” and delaying correspondence from 20 January 2017: FC [335] CAB 270; paras 31–35.

66. The Eighth to Tenth matters are the **(1A) Factors**: FC [337]-[339] CAB 271-272. These are addressed in detail in paras 76–85 below.

67. Justice McElwaine took all these matters into account, including the (1A) Factors as interrelated questions: FC [341] CAB 272. See also Greenwood J’s additional reasons in FC [117]-[119] CAB 200-201, [128]-[136] CAB 204-207.

Appellants’ 7-day argument

68. Rather than consider all the circumstances from 29 September 2016 to June 2018, the appellants wrongly urge this Court to characterise the FC majority’s consideration as limited to the 7-day period between 29 September 2016 to 5/6 October 2016: AS [56] S2
10 (“*after* receipt of [the 29 Sep Letter]...*before* they [gave] undertakings”), AS [58] (“*between*...29 September 2016 and... 5/6 October 2016”).

69. With respect, the appellants mischaracterise the FC majority’s analysis, which included the following events *after* the appellants gave their undertakings: **(a)** their knowledge that Mr Semmens had failed to give the same undertakings and their failure to ask him why (para 62 above); **(b)** their failure to address that matter when confronted by Ms McLean (*ibid*); **(c)** their decision to launch Toolbox from 10 October 2016, over objection, after they had given undertakings and before Mr Geri’s appointment (para 63 above); **(d)** their knowledge of the “high probability” that DreamDesk IP had been used in Toolbox’s development (para 64 above); **(e)** their refusal to allow Mr Geri undertake the
20 forensic examination he requested (para 65 above; also FC [303] CAB 260); **(e)** after Mr Geri’s report, their correspondence which “was obstructive and ... intended to delay [Campaigntrack] in [prosecuting] its claims” (*ibid*); **(f)** their continued exploitation of Toolbox until June 2018 (FC [297] CAB 258-259; [304] CAB 260).

Appellants’ reliance on Cheeseman J’s reasons is misplaced

70. First, the dissenting member of the Full Court, Cheeseman J, did not undertake a “real review” to determine whether the primary judge erred: FC [147] CAB 211-212. That approach is flawed because it inverts the nature of appellate review: FC [11] CAB 180 (Greenwood J).

71. Secondly, the events from 29 September 2016 to 10 October 2016 cannot be said to
30 be immaterial (FC [160] CAB 217): they took place before Toolbox went ‘live’, a critical time in the primary judge’s findings of primary infringement: PJ [289] CAB 97.

72. Thirdly, Cheeseman J’s inference that the primary judge considered *all* the post-29 September 2016 material and found them to be immaterial (FC [160] CAB 217) cannot be reconciled with that fact that his Honour *only* made findings about primary infringement at the time Toolbox went ‘live’: PJ [289] CAB 97.

Indifference is an indicium from which authorisation may be inferred

73. That *indifference* is an indicium from which authorisation may be inferred is:

- (a) well-established in the authorities: for example (i) *Performing Rights Society v Caryl Theatrical Syndicate* [1924] 1 KB 1 at 9 (Bankes LJ); (ii) *Adelaide v APRA* at 488-489 (Knox CJ, minority), at 491 (Isaacs J, minority), at 504 (Gavan Duffy and Starke JJ, majority); (iii) *Moorhouse* at 12-13, 21; (iv) *Jain* at 61 (“Mr Jain decided to ignore the appellant’s rights and to allow a situation to develop...”); (v) *Cooper v Universal Music Australia* (2006) 156 FCR 380 at [145], [149];
- (b) implicit in CA, s 36(1A)(c). As *Adelaide* at 488: “[W]hether ... [the defendant] abstained from action which under the circumstances then existing it would have been reasonable to take, or, in other words, whether it exhibited a degree of indifference from which permission ought to be inferred.” That was the kind of indifference argued here: para 52 above. To determine whether (or not) the appellants took ‘reasonable steps’ within s 36(1A)(c), it is necessary to consider what steps were open to them in the circumstances; the FC majority did not “bec[o]me distracted” by considering these matters: cf. AS [61].
- (c) recognised in copyright law of overseas jurisdictions: (i) United Kingdom, *CBS v Ames* [1982] Ch 91 at 110-112 (Whitford J); (ii) Canada, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [2004] 2 SCR 427 at [126], [128] (SCC); (iii) United States, *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 US 913 (2005) at 930 (“profiting from direct infringement while declining to exercise a right to stop or limit it”), citing *Shapiro, Bernstein & Co v HL Green Co*, 316 F.2d 304 at 308 (2nd Cir, 1963).
- (d) recognised in other areas of law, such as ratification of an agent’s act by silence or acquiescence (see *National Australia Bank v Dionys* [2016] NSWCA 242 at [127]-[128] (Sackville AJA, Macfarlan JA agreeing), [163] (White J) and *Bowstead & Reynolds on Agency* (22nd ed) at [2-079]), and *Byrne v Deane*

continuing publication in defamation (see *Fairfax Media Publications v Voller* [2021] HCA 27; 95 ALJR 767 at [52]-[54], [157](b)).

74. There is a distinction between *sufficient* indifference and *mere* indifference; a question of ‘degree’. In *Ciryl* at 10 and in *CBS v Ames* [1982] Ch 91 at 112, approved in *iiNet* at [144], the Court asked, “Is this...a case of the indifference of somebody who did not consider it his business to interfere, who had no desire to see another person’s copyright infringed, but whose view was that copyright and infringement were matters in this case not for him, but for the owners of the copyright?” This appears to be a manifestation of “the general rule of the common law that in the absence of a special relationship one person has
10 no duty to control another person to prevent the doing of damage to a third”: *iiNet* at [109].

Circumstances constitute such indifference that authorisation should be inferred, as the FC majority found

75. In the present appeal, based on the findings made by the FC majority and the primary judge on ss 36(1A)(a)-(c) (paras 76–85 below), the appellants were not indifferent bystanders of the kind in *Ciryl* and *CBS v Ames*. Rather, the appellants, along with Mr Semmens, were the primary protagonists in the development and exploitation of Toolbox system. They did and could directly influence how Mr Semmens developed Toolbox: FC [338] CAB 271. They knew Mr Semmens had misused intellectual property in the past in developing these systems: para 8 above. After a preliminary examination, independent
20 expert Mr Geri told them there was “high probability” of copying, and he wanted to complete a forensic examination of Toolbox: para 29 above. They *denied* primary infringement and *positively asserted* there was none: paras 31–35 above. They denied Mr Geri further access to Toolbox for forensic examination to confirm the position: para 35 above. They continued to exploit Toolbox for 16 months: para 37 above. In these circumstances, the appellants went well beyond mere indifference, well beyond what Mr Ames did in *CBS v Ames* (102E-103B) and what *iiNet* did in *iiNet* ([36], [72]-[76], [96], [138]-[139], [141], [142], [146]).

In any event, the circumstances here constitute authorisation, having regard to s 36(1A) factors and the mental element

Appellants had power to prevent the primary acts (s 36(1A)(a))

30 76. Contrary to AS [41], last sentence, *Adelaide* and *iiNet* do not stand for a general proposition that ‘power to prevent’ in s 36(1A)(a) refers only to *direct* power and not to *indirect* power. The text of s 36(1A)(a) contains no such gloss. All *Adelaide* and *iiNet* stand

for are that it was *not reasonable* to exercise the *indirect* power (namely, contract termination) *in those circumstances*: *iiNet* at [78], [139], [146].

77. AS [58](e) conflates ‘power to prevent’ in s 36(1A)(a) and mental element (para 86 ff below). It may be accepted that whether a step to prevent or avoid infringement (s 36(1A)(c)) should taken is related to the mental element; but the mental element (or lack thereof) does not deny the existence of ‘power to prevent’.

78. ***B&SC, RETB, Mr Stoner and Ms Bartels***. These appellants had ample powers to prevent the infringing acts of development and ongoing use of Toolbox. B&SC could instruct Mr Semmens: FC [337] CAB 271. These appellants could (and did) directly influence how Mr Semmens went about the task of developing Toolbox: FC [338] CAB 271. They could investigate the allegations and stop Toolbox from going live and being used until the allegations had been properly addressed: FCJ [131] CAB 205. They had the power to enable access for Mr Geri to forensically examine Toolbox and prevent obfuscation: *ibid*. B&SC also had indirect power to terminate the contractual and joint venture arrangements with Mr Semmens, which would have significantly disrupted his primary infringements: FC [337] CAB 271.

79. ***DDPL and Mr Meissner***. DDPL and Mr Meissner also had the power to prevent the infringements, including by not engaging DDPL and JGM staff to develop Toolbox, by not paying for work and not paying for the AWS invoices used to host Toolbox: FC [273] CAB 252, FC [337] CAB 271; PJ [305](4) CAB 105.

Appellants had relevant relationships with the primary actors (s 36(1A)(b))

80. ***B&SC, RETB, Mr Stoner and Ms Bartels***. B&SC and Mr Semmens were in a contractual relationship and were joint venturers in the Toolbox venture: FC [337] CAB 271. The appellants stood to gain financially from the development and exploitation of Toolbox: FC [338] CAB 271.

81. B&SC and RETB had relevant relationships with Toolbox users, including real estate agents of Biggin & Scott franchisees (PJ [289] CAB 97). B&SC, Stoner and Bartels caused Biggin & Scott to move to Toolbox. Stoner and Bartels were available to persuade other customers to move to Toolbox: FC [274] CAB 252; PJ [86](4) CAB 38.

82. ***DDPL and Mr Meissner***. Mr Semmens was contracted by DDPL. DDPL and Mr Meissner could issue instructions to Mr Semmens: FC [338] CAB 271; PJ [305](5) CAB 105. Similarly, other Toolbox developers (Mr Gallagher and Mr Zhang) were

contracted to or employed by DDPL or JGM Advertising, another company controlled by Mr Meissner: FC [274] CAB 252; PJ [87] CAB 38.

Appellants took no steps to prevent or avoid the primary acts (s 36(1A)(c))

10 **83. *B&SC, RETB, Mr Stoner and Ms Bartels.*** These appellants did not conduct any independent audit or verification that Toolbox did not infringe another company’s intellectual property rights: FC [275] CAB 252. The only evidence of steps is the “general and unexplored evidence” of Mr Stoner’s seeking assurances from Mr Semmens: FC [285] CAB 255, [298] CAB 259. Mr Stoner did not volunteer what Mr Semmens said in response. Nor was there any re-examination of Mr Stoner or cross-examination of Mr Semmens by the appellants: para 9 above. Mr Stoner and Ms Bartels did not give any affidavit evidence regarding the *inter partes* correspondence from 29 September 2016, Mr Geri’s preliminary report or what steps they took in light of that correspondence and report: FC [310]-[311] CAB 262. In these circumstances, the FC majority held that these appellants did not take reasonable steps to prevent or avoid infringing acts by Mr Semmens after 29 September 2016: FC [339] CAB 272; see also FC [133] CAB 206 (users).

20 **84. *DDPL and Mr Meissner.*** The FC majority and the primary judge found that DDPL and Meissner took no steps to prevent or avoid the infringements in developing Toolbox or in moving data from DreamDesk to Toolbox: FC [275] CAB 252; PJ [305](6) CAB 105. In these circumstances, the FC majority held that these appellants did not take reasonable steps to prevent or avoid infringing acts by Mr Semmens after 29 September 2016: FC [339] CAB 272.

30 **85. *“It wouldn’t’ve made a difference!” argument.*** The appellants argue any inquiries they might have made of *Mr Semmens* would not have made a difference: AS [58](c). That presupposes that the only powers the appellants had were to hear from Mr Semmens. *They were not so constrained.* Mr Geri had begun an independent inquiry. The appellants prevented Mr Geri from completing his inquiry by denying him forensic access to Toolbox: para 35 above. Nor was Mr Semmens the sole source of information about Toolbox development: the other developers (Mr Gallagher and Mr Zhang) and Ms Neal also had knowledge of its development: PJ [275] CAB 90. Mr Gallagher, Mr Zhang and Ms Neal were DDPL or JGM Advertising staff: PJ [35] CAB 22, [87] CAB 38. Mr Gallagher knew about Mr Semmens’ deletion of development records: PJ [113]-[118] CAB 45-46. The appellants adduced no evidence that they made inquiries of any independent expert, Mr Gallagher, Mr Zhang or Ms Neal; notwithstanding they were legally represented.

Mental element: appellants had reasons to suspect

86. Having considered the authorities in detail (FC [236]-[264] CAB 241-250), the Full Court was unanimous that a mental element—knowledge or reason to suspect the doing of the infringing act—was “critical” or “necessary” to authorisation: FC [257] CAB 248 (McElwaine J, Greenwood J agreeing at FC [1] CAB 177 and Cheeseman J agreeing at FC [138] CAB 208). The appellants do not appear to challenge that aspect of the Full Court’s reasoning; they positively rely on it: AS [47], last sentence.

87. The Full Court held, that the mental element was plainly relevant to ss 36(1A)(a) and 36(1A)(c) because “persons cannot be expected to have taken reasonable steps ‘to prevent or avoid the doing of the act’ ... unless each had knowledge of the particular acts, *or a reasonable person with knowledge of the circumstances at the time would have had such knowledge*”: FC [269] CAB 251.

88. In the circumstances described in paras 8, 11, 16, 24-27 above—that is, the appellants *knew* Mr Semmens had previously misused intellectual property; Campaigntrack alleged there had been copying of Dreamdesk in developing Toolbox; they *knew* Mr Semmens had access to Dreamdesk during that development; they *knew* Mr Semmens had refused to give the undertakings they had given; Campaigntrack alleged this was evidence of ‘questionable activity’—a reasonable person in each appellant’s position would reasonably have suspected Mr Semmens had engaged or were likely to engage in infringing acts: FC [334] CAB 270. Moreover, that mental state is reinforced once the appellants had actual notice of Mr Geri’s preliminary report that there was a “high probability” of copying: FC [335] CAB 270. For these reasons, the FC majority expressly overturned the primary judge’s finding that the appellants had no reason to suspect infringement: FC [334]-[335] CAB 270; FC [128] CAB 204; *cf.* PJ [300] CAB 103.

89. The appellants seek to elevate the trust findings, to “preclude” the possibility of any reason to suspect: AS [58](c). That argument should be rejected because that would have the effect of making an authoriser’s *subjective* mental state entirely dispositive to the question of authorisation (FC [323] CAB 266), when the inference must be drawn from all of the circumstances (para 40 above). It is in effect a challenge to *Moorhouse* at 13 and the Full Court’s holding at FC [257] CAB 248, but no such challenge has been foreshadowed.

90. Similarly, the appellants rely on their ‘stipulations’ (by which they mean, presumably, the 3 Aug Letter (para 7 above) and Mr Stoner’s seeking (*but no evidence of receiving*) assurances (para 9 above). Those too cannot be dispositive because: (a) Where the invitation is qualified, if it were known (and it is submitted, reasonably suspected) that the invitation

was being ignored, and the situation were allowed to continue, authorisation is an available inference: *Moorhouse* at 22; *APRA v Metro on George* (2004) 61 IPR 575 at [56] (“once Metro knew that its contract was ineffective ..., it could have asked to see the promoter’s licence or sought to enforce the warranty”), [58]-[59] (Bennett J). **(b)** More generally, if authorisation liability can be avoided by ‘stipulations’ not to infringe, parties can ‘contract out’ of copyright infringement and shift the allocation of infringement risk, even where they have not allocated risk using contractual mechanisms: *cf. Metro* at [13]-[15], [54].

Appellants pressed on and continued to exploit Toolbox for 20 months

10 91. In the result, the appellants participated in the development and exploitation of the Toolbox system. They had reason to suspect infringement, including because of their knowledge that Mr Semmens had refused to give the undertakings and Mr Geri’s preliminary report. They refused to give Mr Geri forensic access to Toolbox to confirm. They denied infringement. They continued to exploit Toolbox until June 2018, a total of some 20 months. They obtained commercial advantage from that continuing exploitation: *Cooper v Universal Music Australia* (2006) 156 FCR 380 at [64], [164]. The appellants thus showed “a studied and deliberate course of action” in which they decided to ignore Campaigntrack’s rights and “to allow an [infringing] situation to develop and to continue”: *Jain* at 61.

Conclusion

20 92. For these reasons, the FC majority was correct to conclude the appellants authorised the reproductions and communications of the works in the development and use of Toolbox. This appeal should be dismissed, with costs.

Part VII: Time estimate

93. Campaigntrack estimates that it requires two hours for the presentation of its oral argument.

Dated: 9 May 2023



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ANNEXURE – LIST OF LEGISLATION

Sections 13, 31 and 36 of the *Copyright Act 1968* (Cth) (compilation no. 54, 22/12/2017).