

BETWEEN

ROADSHOW FILMS PTY LTD (ACN 100 746 870) AND OTHERS Appellants

IINET LIMITED (ACN 068 628 937) Respondent

10 AUSTRALIAN DIGITAL ALLIANCE LTD (ACN 095 986 879) Intervener

INTERVENER'S SUBMISSIONS BY AUSTRALIAN DIGITAL ALLIANCE LTD

PART I: Suitable for publication

1. Australian Digital Alliance Ltd (ADA) certifies that this submission is in a form suitable for publication on the internet.

PART II: Basis of intervention

- 20 2. ADA seeks leave to intervene in the appeal, or alternatively to be heard as *amicus curiae*,¹ and relies on the affidavit of Ellen Broad filed herewith. ADA supports the ultimate conclusion of the majority decision below, and thus generally supports the submissions of the respondent (iiNet) but also makes some further and different submissions. In doing so, ADA seeks to assist the Court on matters of principle by providing a larger view of the matter before it than that of the parties.² ADA also seeks an opportunity to be heard on the basis that its legal interests are likely to be substantially affected by the Court's judgment.³

¹ The Court similarly granted leave for ADA to appear as *amicus curiae* in *IceTV P/L v Nine Network Australia P/L* (2009) 239 CLR 458 at 461.7, 463.1-4, 482 [60], 516 [187]-[188].

² *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312.7-8 per French CJ. See also the comprehensive review of the role of *amicus curiae* in *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 533-9 per Davies, Wilcox and Gummow JJ.

³ *Levy v Victoria* (1997) 189 CLR 579 at 603.4 per Brennan CJ, citing *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 530.5 per Deane J; *J v Lieschke* (1987) 162 CLR 447 at 462.7 per Brennan J (Mason, Wilson, Deane and Dawson JJ agreeing). In this regard ADA's position mirrors ARIA's submission at [7].

Filed on behalf of: Australian Digital Alliance Ltd

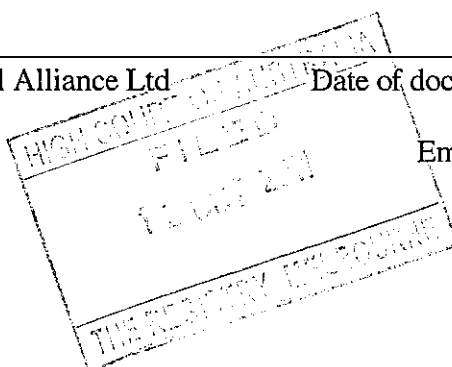
Ref: Ellen Broad

PO Box: E202 Kingston ACT 2604

Date of document: 12 October 2011

Tel: 02 6262 1273

Email: ebroad@nla.gov.au



PART III: Why leave to intervene should be granted

3. ADA is hosted by and based at the National Library of Australia. Its members include each of the National Library, Gallery, Museum and Archives of Australia, the Australian War Memorial, 22 Australian universities,⁴ the Council of Australian University Libraries, National and State Libraries Australia (which in turn represents libraries in each State and Territory) as well as information technology companies and individuals.
4. ADA members are both owners and users of copyright, and are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.⁵ Many ADA members are universities and libraries, and thus share the perspective of the central players in *University of New South Wales v Moorhouse*,⁶ the leading authority considered in the present case.
5. Unlike the appellants and iiNet, the great majority of ADA members are non-profit organisations. Their budgets might vary, but none are unlimited. Many of them are statutory bodies with various public objects and functions to fulfil. For example, libraries in Queensland have the statutory object of contributing to the cultural, social and intellectual development of all Queenslanders.⁷ The statutory object of the University of Adelaide is the advancement of learning and knowledge, including the provision of university education.⁸ The statutory object of the University of Sydney is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.⁹ The

⁴ Australian Catholic University, Australian National University, Central Queensland University, Charles Sturt University, Flinders University, Griffith University, James Cook University, La Trobe University, Macquarie University, Monash University, Queensland University of Technology, Southern Cross University, Swinburne University, University of Adelaide, University of Melbourne, University of Newcastle, University of South Australia, University of Sydney, University of Technology Sydney, University of the Sunshine Coast, University of Western Sydney and Victoria University of Technology.

⁵ See *IceTV P/L v Nine Network Australia P/L* (2009) 239 CLR 458 at 471 [24] – 473 [29] per French CJ, Crennan and Kiefel JJ.

⁶ (1975) 133 CLR 1 (*Moorhouse*).

⁷ Section 1A of the *Libraries Act 1988* (Qld).

⁸ Section 4A of the *University of Adelaide Act 1971* (SA).

⁹ Section 6(1) of the *University of Sydney Act 1989* (NSW). See, similarly, s 6(1) of the *University of New South Wales Act 1989* (NSW).

statutory functions of the National Library of Australia include maintaining and developing a national collection of library material, and making that material available to other persons and institutions with a view to the most advantageous use of that collection in the national interest.¹⁰

6. Consistent with their statutory objects and functions, such universities and libraries provide internet services for use by employees, students and other members of the public. In the case of a large university or a State library, the users of such services may number in tens of thousands. Some of those people may use the internet service provided by a university or library in ways infringing copyright in literary works, films, sound recordings or other copyright materials. Such infringing conduct might include, for example, the use of a BitTorrent system on a university's or library's internet service to download films illegally in the same way considered in the present case. The present case thus raises the important question of when such universities or libraries or other ADA members ought to be liable for "*authorising*" such infringements. Similar legal consequences might also apply to other common activities undertaken by staff and students using internet services provided by universities and libraries, such as the preparation of course materials and digitisation of library collections.

PART IV: Applicable provisions and regulations

7. ADA accepts Part VII and annexure A of the appellants' submissions.

20 PART V: Submissions

"Sanction, approve and countenance" – conjunctive not disjunctive definition

8. ADA supports iiNet's submission at [32]-[36]; the starting point is, of course, the terms of s 101(1) and (1A). Nonetheless, the statutory term "*authorize*" draws further meaning from judicial interpretation. In that regard, and further to iiNet's submissions at [59]-[60], the ADA submits that the correct and binding interpretation of *Moorhouse* and *Corporation of the City of Adelaide v APRA*¹¹ is that the definition of "*authorize*" is "*sanction, approve and countenance*" read conjunctively, not disjunctively. The

¹⁰ Section 6 of the *National Library Act 1960* (Cth). See, similarly, s 18 of the *Libraries Act 1988* (Vic)

¹¹ (1928) 40 CLR 481 (*Adelaide Corporation*).

appellants' submission at [29] is wrong on this point, and this error infects the appellants' submissions at [30] and [61]-[63].

9. A conjunctive definition of “*sanction, approve and countenance*” is consistent with the position made clear in the United Kingdom by the unanimous House of Lords decision of *CBS Songs Ltd v Amstrad Consumer Electronics Plc*¹² and in Canada by the unanimous Supreme Court of Canada decision of *CCH v. Law Society of Upper Canada*.¹³ The applicability of the conjunctive definition in Australia becomes clear upon a close reading of each of *Moorhouse* and *Adelaide Corporation*, and the authority upon which they rely, *Falcon v Famous Players Film Co.*¹⁴
10. The definition “*sanction, approve and countenance*” was clearly expressed in this conjunctive form in by Bankes LJ in *Falcon*.¹⁵
11. In *Adelaide Corporation*,¹⁶ Isaacs J cited *Falcon* and clearly expressed the definition as “*sanction, approve and countenance*”. Higgins J held that “*there is not the slightest evidence of any "sanction, approval or countenance" given by the Corporation to the performance of the song in question*”.¹⁷ As such, rather than creating a new disjunctive definition, his Honour was providing a negative answer to the conjunctive question raised by *Falcon*, which had been cited in argument.¹⁸
12. In *Moorhouse*, each of Gibbs J¹⁹ and Jacobs J²⁰ (McTiernan ACJ agreeing) expressed the definition as “*sanction, approve, countenance*”. In the absence of the word “*or*”, this should be read conjunctively. In any event, each of Gibbs and Jacobs JJ cited Bankes LJ in *Falcon*²¹ in support of that definition, and Gibbs J also cited Isaacs J in

¹² [1988] A.C. 1013 at 1054A-B per Lord Templeman, citing *Falcon v Famous Players Film Co* [1926] 2 KB 474 (*Falcon*) at 491 per Bankes LJ.

¹³ [2004] 1 S.C.R. 339; 236 D.L.R. (4th) 395; 60 IPR 650 at [38] per McLachlin CJC.

¹⁴ [1926] 2 KB 474 at 491.4.

¹⁵ [1926] 2 KB 474 at 491.4.

¹⁶ (1928) 40 CLR 481 at 489.5.

¹⁷ (1928) 40 CLR 481 at 497.4.

¹⁸ (1928) 40 CLR 481 at 486.8: *Falcon* was referred to by Owen Dixon KC, who appeared for the respondent.

¹⁹ (1975) 133 CLR 1 at 12.6.

²⁰ (1975) 133 CLR 1 at 20.10.

²¹ [1926] 2 KB 474 at 491.4.

Adelaide Corporation,²² thus clearly incorporating the conjunctive form of the definition.

13. It follows that a careful reading of the High Court's decisions in *Adelaide Corporation* and *Moorhouse* confirms that the relevant definition is conjunctive, not disjunctive.
14. It may be that an erroneous disjunctive reading of the definition stems from the headnote of *Moorhouse*, which states "*Per curiam: the word "authorize" in s 36(1) of the Act means sanction, approve or countenance and, per Gibbs J., also, permit.*"²³ This does not correctly state the Court's decision.
- 10 15. Gummow J did not express this definition in disjunctive form in *WEA International Inc v Hanimex*.²⁴ Rather, his Honour cited *Moorhouse* and *Adelaide Corporation* to say that "authorize" means "sanction, approve, countenance".²⁵ Having stated the proper test in conjunctive form, his Honour later stated his conclusion in negative terms, like Higgins J in *Adelaide Corporation*: "*there has not been the necessary sanction, approval or countenance of copyright infringement in the sense of the authorities*".²⁶ This does not make the test disjunctive unless Gummow J's conclusion is considered out of context, without reference to the conjunctive test earlier posited by his Honour by reference to *Moorhouse*.²⁷
- 20 16. Insofar as this definition was referred to or applied in disjunctive terms by the Full Federal Court in *APRA v Jain*,²⁸ *Nationwide News v Copyright Agency Ltd*²⁹ and *Cooper v Universal Music*³⁰ it is respectfully submitted that those Courts misconstrued the binding authority of this Court in *Adelaide Corporation* and *Moorhouse*. In the present

²² (1928) 40 CLR 481 at 489.5.

²³ (1975) 133 CLR 1 at 2.7.

²⁴ (1987) 17 FCR 274.

²⁵ (1987) 17 FCR 274 at 286.5.

²⁶ (1987) 17 FCR 274 at 288.9.

²⁷ This may explain the apparent misreading of Gummow J's decision by Nicholas J below: (2011) 275 ALR 1 at 156 [701].

²⁸ (1990) 26 FCR 53 at 61.7.

²⁹ (1996) 65 FCR 399 at 422.6.

³⁰ (2006) 156 FCR 380 at 385 [20].

case, Cowdroy J at trial correctly applied the definition conjunctively,³¹ but each member of the Full Federal Court took an erroneous disjunctive approach.³²

17. Unless convinced that *Adelaide Corporation* and *Moorhouse* were wrongly decided in this regard, this Court should continue to apply the definition “*sanction, approve and countenance*” conjunctively.

18. An important danger of the disjunctive approach is that “*countenance*” has various meanings. As held by the Supreme Court of Canada,³³ for the purposes of authorising copyright infringement, only the strongest dictionary meaning of “*countenance*” is relevant, namely “*give approval to, sanction, permit, favour, encourage*”. The danger of the disjunctive approach is that the decision maker may select one of the three alternative words, then select one of the available definitions of that word, and use it to find liability. Such an approach diverts the decision maker from the true question: did the defendant “*authorize*” the infringing act?

Higher factual threshold for “*authorisation*” in the United Kingdom, Canada and the United States

19. In *Moorhouse* each of Jacobs and Gibbs JJ eschewed the notion that they were establishing a broad precedent by way of a test case.³⁴ Gibbs J made clear that the question of authorisation depended upon all the facts of the case so that a decision on a particular set of circumstances may be of no assistance in other cases.³⁵

20. ADA submits that the facts of *Moorhouse* ought to be considered a somewhat extreme case of authorisation limited to its peculiar circumstances, rather than a “*middle of the road*” example of a broad class of cases which would constitute authorisation. This interpretation is consistent with the somewhat higher factual threshold for “*authorisation*” required by courts in the United Kingdom and Canada.

³¹ (2010) 263 ALR 215 at 323 [494].

³² (2011) 275 ALR 1 at 40 [173] per Emmett J; at 106 [454] and 107 [463] per Jagot J; at 156 [701] per Nicholas J.

³³ *CCH v. Law Society of Upper Canada* [2004] 1 S.C.R. 339; 236 D.L.R. (4th) 395; 60 IPR 650 at [38] per McLachlin CJC, delivering the unanimous decision of the Court.

³⁴ (1975) 133 CLR 1 at 12.1 per Gibbs J; at 23.10-24.1 per Jacobs J.

³⁵ (1975) 133 CLR 1 at 12.5 per Gibbs J.

21. In *CBS Songs Ltd v Amstrad Consumer Electronics Plc*,³⁶ Lord Templeman, speaking on behalf of a unanimous House of Lords, held that “*an authorization means a grant or purported grant, which may be express or implied, of the right to do the act complained of.*” His Lordship also endorsed the following statement of principle:³⁷

“*Any ordinary person would, I think, assume that an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.*”

10 22. His Lordship held that Amstrad did not “*authorize*” copyright infringement by making and advertising a hi-fi system with facilities for recording at high speed from pre-recorded cassettes onto blank tapes, emphasizing the choice that the purchaser of the recorder has to determine whether he shall copy and what he shall copy.³⁸

23. Lord Templeman considered the central proposition put by Gibbs J in *Moorhouse* that a person would authorize infringement by making a photocopier available for use by others having reason to suspect that it is likely to be used for committing an infringement and omitting to take reasonable steps to limit its use to legitimate purposes.³⁹ Lord Templeman said “*Whatever may be said about this proposition, . . .*” before distinguishing the position of Amstrad on the basis that Amstrad had no control
20 over the use of its products once they were sold.⁴⁰ Certainly, Lord Templeman was not moved to endorse Gibbs J’s decision on the facts in *Moorhouse*.

24. In *CCH v. Law Society of Upper Canada*,⁴¹ the Supreme Court of Canada considered a factual and legal question very similar to that of *Moorhouse*: whether the Law Society “*authorized*” persons who used photocopiers in its library to copy law reports kept in that library. McLachlin CJC, delivering the judgment of all nine members of the

³⁶ [1988] A.C. 1013 (*CBS v Amstrad*) at 1054B-C.

³⁷ [1988] A.C. 1013 at 1054F-H, citing with approval the decision of Whitford J in *C.B.S. Inc v Ames Records & Tapes Ltd* [1982] Ch. 91 at 106.

³⁸ [1988] A.C. 1013 at 1053A-B.

³⁹ (1975) 133 CLR 1 at 12.3.

⁴⁰ [1988] A.C. 1013 at 1054E-F.

⁴¹ [2004] 1 S.C.R. 339; 236 D.L.R. (4th) 395; 60 IPR 650.

Supreme Court of Canada, explicitly rejected the *Moorhouse* approach as inconsistent with previous Canadian and British approaches and because it “*shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.*”⁴²

25. A recent trial decision in England in a context closer to the present case illustrates the higher factual threshold required to establish authorization under the authority of *CBS v Amstrad*.⁴³ In *Twentieth Century Fox Film Corp v Newzbin Ltd*,⁴⁴ Kitchin J considered a claim brought by film copyright owners against the operator of a website which located and categorised unlawful copies of films for its members to acquire. Having reviewed the House of Lords’ decision in *Amstrad* as well as the Full Federal Courts’ decision in *Cooper* and the trial decision of Cowdroy J below, Kitchin J found that the website operators authorised acts of infringement by its members on the following factual basis:⁴⁵

“... a reasonable member would deduce from the defendant’s activities that it purports to possess the authority to grant any required permission to copy any film that a member may choose from the Movies category on Newzbin and that the defendant has sanctioned, approved and countenanced the copying of the claimants’ films”

26. ADA does not contend that *Moorhouse* is wrong in principle. Rather, ADA submits that, consistently with the caution expressed by each of Gibbs and Jacobs JJ, one should be hesitant to reason from the facts rather than the principles set out in *Moorhouse*.
27. ADA respectfully submits that this Court should take into account the approach of the Courts in the United Kingdom and Canada in determining the overarching question of what is the appropriate balance between owners and users of copyright in Australia.
28. It may seem less straightforward to compare the Australian position to that in the United States, given the emphasis on “*contributory infringement*” in United States jurisprudence on secondary copyright infringement. Yet, after analysing *Sony*

⁴² [2004] 1 S.C.R. 339; 236 D.L.R. (4th) 395; 60 IPR 650 at [41]-[43] per McLachlin CJC.

⁴³ [1988] A.C. 1013 at 1054B-C.

⁴⁴ [2010] FSR 21.

⁴⁵ [2010] FSR 21 at [90]-[102].

*Corporation of America v Universal City Studios*⁴⁶ in *WEA v Hanimex*,⁴⁷ Gummow J concluded that the operation of “*authorisation*” and “*contributory infringement*” in the United States is no wider than that of “*authorisation*” in Australia and England.

29. On that basis, ADA submits that this Court may also draw assistance from the more recent decision of the United States Supreme Court in *Metro-Goldwyn-Mayer Studios Inc v Grokster*,⁴⁸ in which film and music copyright owners alleged “*contributory infringement*” against distributors of peer-to-peer file sharing software. For a detailed review of that decision and comparison to Australian law,⁴⁹ see the article by Professors Ginsburg⁵⁰ and Ricketson:⁵¹ *Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster decision and the Australian Federal Court’s KaZaa ruling*.⁵²
- 10
30. For present purposes, it is enough to note that the Court in *Grokster* confirmed that “*one infringes contributorily by intentionally inducing or encouraging direct infringement*”,⁵³ and (as summarised by Ginsburg and Ricketson), the Court identified three factual elements probative of an intent to induce infringement: (1) the defendant promoted the infringement-enabling virtues of its device; (2) the defendant failed to filter out infringing uses and (3) the defendant’s business plan depended on a high volume of infringement.⁵⁴
31. Insofar as the concept of “*contributory infringement*” in the United States may be considered no wider than that of “*authorisation*” in Australia,⁵⁵ then *Grokster* provides a further example of a higher factual threshold for authorisation than the facts presented by *Moorhouse*. The concurring judgment of Breyer J⁵⁶ (with whom Stevens and O’Connor JJ agreed) also provides a strong policy argument for maintaining a high
- 20

⁴⁶ 464 US 417 (1984).

⁴⁷ (1987) 17 FCR 274 at 285.2-8.

⁴⁸ 125 S.Ct. 2764; 545 US 912 (2005) (*Grokster*).

⁴⁹ In particular *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1.

⁵⁰ Columbia Law School.

⁵¹ University of Melbourne.

⁵² (2006) 11 *Media & Arts Law Review* 1.

⁵³ 125 S.Ct. 2764 at 2776 per Souter J, delivering the opinion of the Court.

⁵⁴ 125 S.Ct. 2764 at 2781-2782 per Souter J.

⁵⁵ *WEA v Hanimex* (1987) 17 FCR 274 at 285.2-8 per Gummow J.

⁵⁶ 125 S.Ct. 2764 at 2787-2796.

threshold for secondary infringement in the interests of promoting the development of new technologies.

It would rarely be a “reasonable step” required by s 101(1A)(c) to suspend or terminate internet access

- 10 32. ADA members are anxious not to suspend or terminate access to the internet for employees, students or other members of the public without very sound justification. Such suspension or termination has the potential to cause serious disruption to the educational and cultural ends that ADA members seek to achieve, and might conflict with their statutory objects and functions. Such suspension or termination also raises important questions as to the rights of the employees, students or other members of the public involved.
33. Consider, for example, if the University of Sydney were to suspend or terminate the internet accounts of its academic staff or enrolled students. Such action would drastically inhibit their ability to participate in research, course work and day to day academic life and would *prima facie* conflict with the University’s statutory object of the promotion, within the limits of the University’s resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.⁵⁷ Such action would also severely curtail the ability of academic staff and enrolled students to make other legitimate and necessary use of the internet, and may give rise to serious claims against the University.
- 20 34. Consider also libraries suspending or terminating internet service to their patrons. In the case of the National Library of Australia, for example, such action would be, *prima facie*, in conflict with its statutory function of maintaining and developing a national collection of library material, and making that material available to other persons and institutions.⁵⁸
35. It follows that suspension and termination of internet access should usually be considered a draconian and radical option of last resort.

⁵⁷ Section 6(1) of the *University of Sydney Act 1989* (NSW). See, similarly, s 6(1) of the *University of New South Wales Act 1989* (NSW).

⁵⁸ Section 6 of the *National Library Act 1960* (Cth). See, similarly, s 18 of the *Libraries Act 1988* (Vic).

36. Before a university or library ought to be required, to avoid liability under s 101(1A), to take the “*reasonable step*” of suspending or terminating the internet access of an employee or student, it would be appropriate that an independent court or tribunal consider the reliability and authenticity of the copyright owner’s allegations, and hear any evidence or submissions that the university, library, employee or student may wish to provide. Indeed, such arbitration by an independent court or tribunal would also be an “*appropriate circumstance*” for the purposes of termination under the safe harbor provisions, specifically s 116AH(1),⁵⁹ and is consistent also with the Court’s empowerment to order termination under s 116AG(3)(b).⁶⁰
- 10 37. ADA also sees merit in the alternative approach suggested (but apparently rejected) by the appellants’ submissions at [73]; that the appellants might avail themselves of the procedure for preliminary discovery under Division 7.3 of the *Federal Court Rules 2011*⁶¹ before insisting on such suspension or termination by the internet provider. That procedure allows the copyright owner to seek the information it needs: the identity of the ultimate copyright user against whom it may seek to take action. It also allows the Court to accommodate the particular statutory, contractual, equitable and other obligations of the intermediary internet provider. If the internet provider chooses to notify the user, this procedure would also allow the user an opportunity to be heard.
- 20 38. Certainly, no question of authorisation should arise at all where an ADA member is provided with anything less than “*unequivocal and cogent evidence of the alleged primary acts of infringement*”; mere assertions could never be sufficient.⁶² Further, any notice of copyright infringement must be insufficient if it says nothing at all about the methods used to obtain the information which lead to the issue of the notice. It should not be up to the intermediary to seek out this information from a copyright owner who chooses not to provide it in the first place.⁶³
39. It should also be considered reasonable for an ADA member, having received an allegation of infringement from a copyright owner, to request the sender to provide an

⁵⁹ Cf (2011) 275 ALR 1 at 98-99 [417] per Jagot J.

⁶⁰ Cf (2011) 275 ALR 1 at 44 [189] per Emmett J.

⁶¹ Formerly Order 15A of the Federal Court Rules.

⁶² (2011) 275 ALR 1 at 48 [210] per Emmett J.

⁶³ (2011) 275 ALR 1 at 170 [764] per Nicholas J.

independent third party verification of the reliability and authenticity of the allegations set out in the notice.⁶⁴

40. ADA also supports the view of Emmett J insofar as his Honour suggests that, before it would be reasonable for an intermediary like iiNet to take steps against a customer's account to avoid liability under s 101(1A)(c), the copyright owner should have undertaken to reimburse the intermediary's reasonable costs and indemnify it against liability for actions taken on the basis of the copyright owner's allegations.⁶⁵

41. This would be particularly appropriate if the appellants sought to enforce their rights against ADA members. Clearly it is convenient and advantageous for the appellants if more of the cost, time and administrative burden of policing their copyright falls on ADA members rather than the appellants themselves. Such policing might require ADA members to expend capital in developing, operating and maintaining systems at costs which cannot be predicted now.

42. The obvious questions arise: is this good public policy, and is it consistent with ADA members' statutory objects and functions? Taking again the example of the University of Sydney, it is difficult to see how devoting significant resources to policing copyright infringement on behalf of commercial film studios would be consistent with the University's statutory object of the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.⁶⁶

43. ADA submits that it should rarely be appropriate for commercial copyright owners to avoid such costs and transfer them to intermediaries, including public educational and cultural institutions. After all, it is a fundamental principle that the copyright owner bears the onus to prove infringement.

⁶⁴ (2010) 263 ALR 215 at 318 [469] per Cowdroy J.

⁶⁵ (2011) 275 ALR 1 at 48 [210].

⁶⁶ Section 6(1) of the *University of Sydney Act 1989* (NSW). See, similarly, s 6(1) of the *University of New South Wales Act 1989* (NSW).

Purposive interpretation of s 112E

44. Further to iiNet's submissions at [104]-[110], ADA concurs that s 112E must have some work to do.⁶⁷ The supplementary explanatory memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* states that the new s 112E: "*has the effect of expressly limiting the authorisation liability of persons who provide facilities for the making of, or facilitating the making of, communications*".⁶⁸ In *Cooper*,⁶⁹ Branson J (with whom French J agreed) rejected the notion that this provision was introduced into the Act simply out of an abundance of caution.⁷⁰
45. Emmett and Nicholas JJ below⁷¹ justified a limited reading of s 112E was justified by reference to the Agreed Statement to Article 8 of the *1996 WIPO Copyright Treaty*⁷² which states, "[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention". However, this statement is not useful in understanding s 112E, because it is aimed solely at clarifying the scope of the communication right and not at the liability of service providers more generally.
46. Somewhat more informative is the Second Reading Speech in which the minister responsible for introducing the legislation into the House stated that "[t]he provisions in the bill limit and clarify the liability of carriers and Internet service providers in relation to both direct and authorisation liability".⁷³ This ought to support a purposive interpretation of s 112E beneficial to providers of internet services.
47. ADA respectfully submits that the best reading of "*merely because*", which gives s 112E some work to do, is a reading which recognises that the taking of "*reasonable steps*" is part of the test of authorisation, and that therefore s 112E must be designed to

⁶⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 per McHugh, Gummow, Kirby and Hayne JJ, citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

⁶⁸ *Supplementary Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth)*, at [64]. See also *Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth)*, at [138] (similar wording for previous version which was confined to carriage service providers only).

⁶⁹ *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at 389 [39] per Branson J; 382 [1] per French J.

⁷⁰ Cf (2011) 275 ALR 1 at 107 [464] per Jagot J.

⁷¹ (2011) 275 ALR 1 at 50-51 [222] per Emmett J; at 175 [791] per Nicholas J.

⁷² *WIPO Copyright Treaty*, opened for signature 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002).

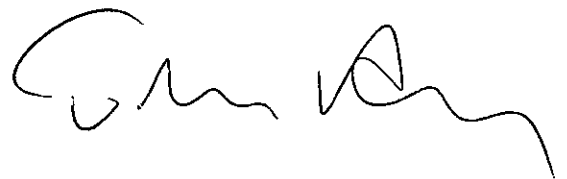
⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1999, 9750 (Daryl Williams, Attorney-General).

protect a person who has failed to take reasonable steps. On this reading, for a person providing internet service to fall outside of the section, the plaintiff would need to establish some more active involvement in the underlying infringement, as opposed to a mere failure to take reasonable steps. Thus, for example, s 112E would provide no protection to a person who encourages infringing use or who also supplied the copyright material that is infringed.⁷⁴ By contrast a person that merely fails to act to prevent infringement would be entitled to the protection of s 112E.

Conclusion

10 48. There is no doubt that the law of copyright infringement by “*authorisation*” of other parties’ infringing acts has an important role to play in protecting the rights of copyright owners. However, an over-zealous application of liability for “*authorisation*” risks a chilling effect on the way that universities, libraries and other educational and cultural institutions can use the internet to fulfil their legitimate and necessary functions and objects, thus reducing public access to information and learning. ADA respectfully asks this Court to keep this concern firmly in mind in striking the appropriate balance.

Dated: 12 October 2011

20 

E J C Heerey

Chancery Chambers, Melbourne

(03) 8600 1714

heerey@chancery.com.au

⁷⁴ (2011) 275 ALR 1 at 175 [793] per Nicholas J.