

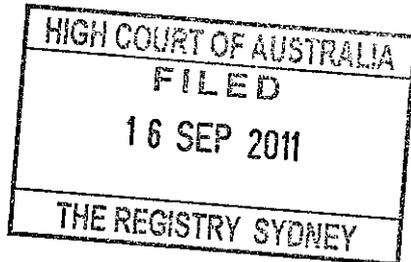
BETWEEN:

**ROADSHOW FILMS PTY LTD &
ORS**

Appellants

iiNET LTD

Respondent



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**SUBMISSIONS ON BEHALF OF APRA ON APPLICATION TO INTERVENE,
AND (IF LEAVE IS GRANTED) ON AUTHORISATION**

Part I: Suitable for publication

201 The Australasian Performing Right Association Limited (**APRA**) certifies that this submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2 APRA seeks leave to be heard in this appeal, in support of the appellants, on one issue, namely, the proper construction of the authorisation provisions in the Copyright Act 1968 (**Act**).

Part III: Why leave should be granted.

3 At the time of preparing these submissions, the appellants have advised that they do not object to APRA's application. The attitude of the respondent is not

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known, although it may be noted that it opposed (unsuccessfully) APRA's application to intervene in the Full Court.

- 4 APRA's interest is distinct from those of the parties. APRA is a not-for-profit collecting society, one of whose core functions is enforcing the copyrights assigned to it by its members. The Copyright Tribunal recently said, of the communication right relevant to this appeal, that:

10 APRA carries on the activities of a collecting society representing the interests of Australian and foreign composers, authors and publishers of musical works and literary works consisting of song lyrics (**the APRA Repertoire**). APRA owns or represents the owners of the exclusive right, under s 31(1)(a)(iv) of the Act, to communicate the APRA repertoire to the public throughout Australia. It owns, or represents the owner of, the relevant copyright in practically all musical works and literary works consisting of song lyrics communicated throughout Australia. It does so by way of assignment of the communication right from composers and music publishers and by reciprocal arrangements with overseas collecting societies. Approximately 55,000 Australian composers, authors and publishers of music are direct members of APRA: *References by APRA and AMCOS* [2009] ACopyT 2 at [4].

- 20 See the affidavit of APRA's Chief Executive Officer, Mr Cottle, in support of this application.

- 5 A decision on authorisation therefore affects APRA on a day to day basis – particularly if, consistently with Emmett J's reasons at [210]-[211], it has become necessary, before suit (rather than as the price of interlocutory relief), to provide cogent evidence of infringement and to offer to reimburse the costs of the alleged authoriser of verifying that claim and to pay for establishing and maintaining a monitoring system and to indemnify the alleged authoriser – all of that notwithstanding the statutory protection afforded by s202. Such a decision has a direct impact on enforcement proceedings brought by APRA (such as
- 30 *APRA v Metro on George Pty Ltd* (2004) 210 ALR 244), and an indirect impact through licensing schemes operated by it – see below.

- 6 Unlike the appellants, APRA is not only not-for-profit but also operates in a very different, and highly regulated market. For many years, its key activities have been authorised by the Australian Competition Tribunal: see *Re APRA Ltd* [1999] ACompT 3 and [2000] ACompT 2, and more recently the Australian Competition and Consumer Commission; the current authorisations (A91187-91194) are dated 16 April 2010 and extend until 31 October 2013. Further, the

various licence schemes operated by APRA are required (by s154(4) of the Act) to be reasonable, as determined by the Copyright Tribunal.

- 7 The ultimate question is whether the Court is satisfied that it will be assisted by APRA's submissions: *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 313. There is reason to think that the different interest of APRA may assist the Court in resolving the issues raised by the parties. The question of construction is complex, important, and will have an impact extending far beyond cinematograph films. In the court below, aspects of APRA's submissions were found to be of assistance (see in particular, [371]-[373] per Jagot J; Nicholas J also expressly rejected that aspect of the reasoning of the primary judge as to the "means" of infringement (see at [693]-[699]), and Emmett J described it as "unconventional" (see at [126]) and proceeded on a different basis).
- 10
- 8 APRA's submissions on construction are concise. There is little or no overlap with what has been put on behalf of the appellants. There is no reason to think that the proposed intervention might unreasonably interfere with the ability of the parties to conduct the appeal as they wish. There is no reason to think that any party will be put to any materially additional cost, or that the hearing will be materially extended. That was the position in the court below: see at [147]. If the Court is minded to grant leave to supplement what follows with oral submissions, no more than 15 minutes is sought (perhaps less; at the time of writing, the respondents' submissions have not been served).
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Part IV: Statutory provisions

- 9 Part VII and Annexure "A" of the appellant's submissions dated 9 September 2011 contain the statutory provisions as they existed at the relevant time, and at present.

Part V: Submissions

- 10 **Different meanings of "authorise"/"authorize"**. The Act deploys the verb "authorise" in multiple senses (as well as multiple spellings in s101 where it bears the same sense). For example, in Part XIA (Performers' Protection), "authorised" in relation to the recording of a performance by definition bears the meaning "made with the authority of the performer": see s248A and s248G. In s101(1) that same notion is conveyed by "without the *licence* of the owner of the copyright", leaving "authorizes" to perform a very different role.
- 30

- 11 In s101, “authorization is wider than authority”: *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 20 (Jacobs J). That has long been clear, although there were early views that “authorise” in s1 of the 1911 Imperial Act was superfluous: see *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274 at 284. In fact, the notion of “authorize” was central to the 1905 Commonwealth Act: see *WEA International* at 282-283, and there was a deliberate decision to discard “cause” which had been narrowly construed; see also *Adelaide Corporation v APRA* (1928) 40 CLR 481 at 489.
- 12 In s101, the verb is used in a converse sense to the phrase “without the licence”, in that it looks to the wrongdoer, rather than the copyright owner. It attaches liability to a person other than the person who in fact does an act comprised in the copyright. Its effect is to extend liability beyond that which would obtain at common law for a principal being liable for the authorised acts or his, her or its agent (if it were confined to cases of agency, it would have no work to do).
- 13 Against that context, subsection (1A) was inserted in 2000, drawing upon the reasons in *Moorhouse*. The terms of that subsection confirm that the inquiry is beyond ordinary notions of the authority conferred by a principal upon an agent. The appropriate starting point is the matters in paragraphs (a), (b) and (c) to which the Court is now required to have regard. Subsection (1A) amounts to a legislative confirmation of the substance of the reasoning in *Moorhouse*, albeit altered by making mandatory the inquiries in paragraphs (a), (b) and (c) and including a new matter (industry codes of practice).
- 14 **Section 39B and 112E.** Section 101 as amended is also to be read harmoniously with ss39B and 112E: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]. They amount to “reverse deeming” provisions: a carriage service provider such as an ISP will not authorise an infringement “merely” because another person uses the facilities provided by the ISP. (Perhaps this would have been more clearly expressed had “is not taken to have authorised” been worded “is taken not to have authorised”.) The critical inquiry arising under s112E (stemming from “merely”) is “what more” did the ISP do or fail to do beyond providing the facilities, and whether that conduct or omission, assessed together with the provision of the facility by the carriage service provider, amounts to authorisation. The provision

is consistent with a view that a carriage service provider would be authorising infringements, but for ss39B and 112E.

- 15 That in turn is difficult to reconcile with the approach of the majority, which seemingly starts with a presumption that iiNet, although a carriage service provider which provided facilities which enabled its subscribers to infringe copyright, is not an authoriser until and unless it declines to respond to cogently supported claims of infringement (and, perhaps, is reimbursed and indemnified): of the majority's reasons at [210]-[211] and [781]-[783].
- 16 **Innocent infringement.** Further, not lightly would s101 be construed such that
10 no authoriser could ever have occasion to deploy the partial defence in s115(3) (no damages but only an account of profits if the defendant was not aware and had no reasonable grounds for suspecting the infringement). The Act also provides for innocent infringement in s39(2), which deals with a cognate area. Against that background, compelling textual or contextual considerations would be required in order for the process of statutory construction to fix upon a legal meaning which denies that there can be an innocent authorisation.
- 17 Yet it is difficult, on the reasoning of the majority, to envisage a case of authorisation where that defence could be viable.
- 18 **A mandatory counterfactual inquiry.** Paragraphs (a) and (c) of s101 in terms
20 require the Court to undertake a counterfactual assessment. In the case of paragraph (a), *ex hypothesi*, there has not *in fact* been an effective exercise by the alleged authoriser of a power to prevent the doing of the act comprised in the copyright. It follows that the relevant inquiry is as to the existence of an unexercised power to prevent.
- 19 Likewise, paragraph (c) requires the Court to assess not merely what the alleged authoriser did in fact do, but also to determine what steps were available, whether it would have been reasonable to have taken those steps, and whether they would have prevented or avoided the doing of the act comprised in the copyright.
- 30 20 Further, the consideration of the nature of the relationship required to be taken into account implicitly requires an analysis of what might have been done, but was not done, within that relationship.

- 21 Counterfactual evidence is commonly adduced and controverted by parties to litigation, and tested in cross-examination, and made the subject of curial findings. One example is the determination of the chance of a counterfactual event having taken place (see eg *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355); another is the effect a warning would have had had one been given (see eg *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934). Where there is an issue as to market or market power, there will invariably be counterfactual evidence. Examples could readily be multiplied.
- 10 22 The counterfactual inquiry mandated by s101(1A) is to be undertaken by the court on the basis of the evidence presented by the parties. There are, with respect, difficulties in sustaining the factual finding of Emmett J at [205] as to the “immense amount of work, cost and effort” in reviewing AFACT’s allegations (something with which Jagot J at [415] and Nicholas J at [749] disagreed). Likewise, the conclusionary and seemingly decisive findings by Emmett J in the second half of [210] as to the circumstances necessary absent which it would not be reasonable to suspend or terminate a customer require an evidentiary foundation.
- 20 23 **A qualitative, wide-ranging inquiry.** In relation to paragraph (a) of s101, a person’s *power* to prevent the act concerned naturally involves an inquiry which is qualitative (“the extent (if any)”) in two distinct ways.
- 30 a First, in cases where there are multiple infringing acts, what matters is the power to prevent *some or all* of the infringing acts, and by so doing to reduce the prevalence of the infringement. Hence the importance for Gibbs J in *Moorhouse* of a “clearly worded and accurate notice”, and for Wilcox J in *Kazaa* of his findings that by technical means (keyword filters and “gold file flood filters” in a new version of the software) infringement could be substantially curtailed: see *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [294] and [328]. That is to say, there is no warrant for the reference to “the act concerned” to be confined to the particular act of a particular primary infringer in a case of multiple infringing acts; there is no contrary intention to displace s23(b) of the Acts Interpretation Act 1901 applying so that the singular includes the plural.

b Secondly, it may in an appropriate case be important to have regard to how easy or difficult it would be to exercise such power as the person has. Some persons with power to prevent may exercise their power readily with no other adverse consequences; the position may be different for others (for example, Higgins J's "smashing the lease" example in *Adelaide Corporation*). The factual inquiry required by the *extent* of the person's power on a natural reading involves this qualitative assessment. Although the word "other" in paragraph (c) is problematic, an analysis of the extent of the power sits well with the *other* reasonable steps in paragraph (c).

10 24 Paragraph (c) is closely linked to (a). Paragraph (c) requires regard to be had to the reasonable *exercise* of such powers as the person has (as opposed to the *existence* of the power which is addressed in (a)) which may reduce the prevalence of infringements. That may be, in the case of modern technology, a complex question, especially where the alleged authoriser has the practical power to alter the conduct of the primary infringers. For example, following the final hearing before Wilcox J in *Kazaa* and pending appeal, the respondents fairly readily denied access to the Kazaa file-sharing technology to (most) new Australian users (by reference to their computers' IP addresses), and substantially altered the warnings given to *all* users: see *Universal Music Australia Pty Ltd v Sharman Networks Ltd* [2006] FCA 29 at [10]. Evidence of the capacity and relative ease with which a person can make changes to modern technology is apt to be highly relevant to the s101 inquiry.

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25 In relation to paragraph (b), the nature of the relationship is apt to be central in cases involving modern technology, where the question is not so much physical proximity (which in many cases has become irrelevant) or contractual entitlement (which has never been determinative: see eg *APRA v Metro on George Pty Ltd* (2004) 210 ALR 244 at [44]). Once the manufacturer of a cassette tape machine has parted with possession of it to a wholesaler, there is no relationship at all (save in respect perhaps of a claim on a warranty) between
30 manufacturer and ultimate purchaser. On the other hand, where the relationship between primary infringer and alleged authoriser is ongoing and involves non-tangible products or services which are dynamic and can readily be altered, there is much greater scope for authorisation to be made out.

- 26 That distinction is central to the reasoning in *CBS Songs Ltd v Amstrad Consumer Electronic plc* [1988] AC 1013 and its apparent endorsement in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 498. A manufacturer of a physical product with some non-infringing uses who has no relevant subsequent relationship with the ultimate user is in a very different position from, say, a supplier of software which also has some non-infringing uses which may be altered or upgraded from time to time either automatically or by a click of a button by the user, who may be in regular electronic communication with the supplier.
- 10 27 Jagot J in dissent made it clear that the conclusion of authorisation turned upon an assessment of all of the circumstances, including those mandated by s101(1A): see at [475]-[477]. In contrast, it seems that Emmett and Nicholas JJ regarded as decisive two particular matters. For Nicholas J, that was the conclusion that it was not unreasonable for iiNet to refuse to act on AFACT's allegations because of their lack of information: at [781]-[783]. For Emmett J, it was the lack of information coupled with the failure to offer reimbursement and indemnification: at [210]-[211]. With respect, the text and purpose of s101 requires a broader inquiry.
- 28 As to the application of those principles to the facts in these proceedings, APRA
20 does not seek to be heard.



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