

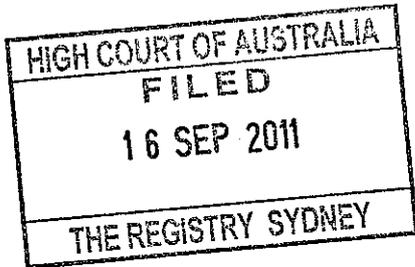
BETWEEN

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

Appellants

**IINET LIMITED
(ACN 068 628 937)**

Respondent



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INTERVENER'S SUBMISSIONS

Part I: Certification that submission is suitable for publication

1. This submission is in a form suitable for publication on the Internet.

Part II: Basis for intervention in support of Appellants

2. This intervention is sought to be made on the basis that the legal interests of Australian Recording Industry Association Limited (**ARIA**), which were previously protected by the line of decisions including *University of New South Wales v Moorhouse* (1975) 133 CLR 1 (**Moorhouse**), as well as *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289 (**Kazaa**), and *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 and *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 1 (**Cooper**) (*Kazaa* and *Cooper* being proceedings that were commenced by members of ARIA among others), are likely to be substantially affected by the decision of the High Court of Australia in this case.

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Filed on behalf of: Australian Recording Industry Association Limited

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3. This intervention is sought to be made in support of the Appellants.

Part III: Reasons why leave to intervene should be granted

4. Leave to intervene should be granted in this case, pursuant to the High Court of Australia's inherent jurisdiction, because important legal interests of ARIA and its members are likely to be substantially affected by the Court's decision. "Jurisdiction to grant leave to intervene to persons whose legal interests are likely to be substantially affected by a judgment exists in order to avoid a judicial affection of such a person's legal interests without that person being given an opportunity to be heard".¹
- 10 5. ARIA's members are all Australian businesses or corporations, or citizens or residents of Australia. They are also all the owners in Australia, or exclusive licensees for Australia, of the copyright in sound recordings.
6. As Cowdroy J noted in the first instance decision in this case: "[t]he evidence establishes that [online] copyright infringement of the applicants' films is occurring on a large scale".² There is similarly widespread online copyright infringement of sound recordings.
7. Prior to the first instance decision in this case, the copyright interests of ARIA and its members were protected by the line of decisions including this Court's decision in *Moorhouse*, as well as the Federal Court's decisions in *Kazaa* and
20 *Cooper*. These decisions and authorisation liability generally, are crucial to the effective enforcement of copyright infringement, particularly online infringement, in the digital environment. ARIA's members have relied on these decisions in their business dealings and in enforcing their copyright in the period since the decisions were handed down. Although the Full Court of the Federal Court of Australia's decision in this case overturned much of the primary judge's reasoning, ARIA submits that the Full Court's judgment in one

¹ *Levy v Victoria* (1997) 189 CLR 579 at 603.

² *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24, Summary of Judgment, [19].

important respect still represents a departure from settled principles of the law on authorisation of copyright infringement. Any decision by the High Court in this case, whether affirming or overturning the Full Court's judgment, will inevitably and substantially affect the legal interests of ARIA and its members, and their ability to enforce effectively their legal interests in their sound recordings.

Part IV: Relevant constitutional provisions, statutes, and regulations

8. Please see the Annexure to these submissions.

Part V: ARIA's submissions in the event leave to intervene is granted

- 10 9. ARIA submits, with respect, that the majority of the Full Court of the Federal Court of Australia erred in this case in its approach to the level of knowledge required for a person to be liable for authorising acts of copyright infringement.
10. The Full Court held that the AFACT notices were insufficient to give the Respondent specific knowledge. ARIA submits that, according to settled precedent, it is not necessary to prove that the Respondent had specific knowledge of each of its users' specific acts of infringement to establish that the Respondent authorised those acts of infringement.

(a) The role of knowledge in authorisation proceedings

11. Under s 101 of the *Copyright Act 1968* (Cth), copyright:
- 20 is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, *or authorizes the doing in Australia of*, any act comprised in the copyright (emphasis added).
12. Factors which must be considered in determining whether or not a person has authorised the doing in Australia of any act comprised in the copyright in sound recordings, among other subject matter, are set out in s 101(1A) of the *Copyright Act 1968* (Cth). That list of factors is "not exhaustive and do[es] not

prevent the court from taking into account other factors, such as the respondent's knowledge...".³

13. Indeed, whether the Respondent knows of infringements occurring with the use of the Respondent's services is a highly relevant factor.⁴

(b) The relevant authorities on the question of requisite knowledge

14. It goes without saying, as Emmett J noted in the Full Court, that it is important to have regard to "the principles propounded in *Moorhouse*" ([23]), the leading High Court authority on authorisation of copyright infringement.

15. In *Moorhouse*, Gibbs J noted that:

10 the word "authorize" connotes a mental element and it could not be inferred that a person had, by mere inactivity, authorized something to be done if he neither knew nor *had reason to suspect* that the act might be done.⁵

16. Gibbs J also referred to Knox CJ's opinion in *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, without disagreeing, where his Honour wrote (in Gibbs J's words):

 that indifference or omission is "permission" where the party charged (amongst other things) "*knows or has reason to anticipate or suspect that the particular act is to be or is likely to be done*".⁶

- 20 17. Gibbs J then went on to make his Honour's often quoted statement that:

 a person who has under his control the means by which an infringement of copyright may be committed — such as a photocopying machine — and who makes it available to other persons, knowing, *or having reason to suspect*, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use.⁷

³ *Cooper*, [81].

⁴ See, for example, *Moorhouse*, p 13.

⁵ *Moorhouse*, pp 12 to 13.

⁶ *Moorhouse*, p 13.

⁷ *Moorhouse*, p 13.

18. Gibbs J further notes that:

[a]lthough in some of the authorities it is said that the person who authorizes an infringement must have knowledge or reason to suspect that the particular act of infringement is likely to be done, *it is clearly sufficient if there is knowledge or reason to suspect that any one of a number of particular acts is likely to be done...*⁸

19. In the same decision, Jacobs J, with whom McTiernan ACJ agreed, held:

[w]here a general permission or invitation may be implied it is clearly unnecessary that the authorizing party have knowledge that a particular act comprised in the copyright will be done.⁹

and that:

it was of little importance whether or not the University authorities knew in fact that users of the machines were doing acts comprised in the authors' copyrights. This knowledge or lack of it would not change the terms of the invitation extended by the supply of books and machines. Knowledge could become important if the invitation were qualified in such a way as to make it clear that the invitation did not extend to the doing of acts comprised in copyright and if nevertheless *it were known that the qualification to the invitation was being ignored* and yet the University allowed that state of things to continue.¹⁰

20. Jacobs J clearly considered that general knowledge, when a prohibition against doing acts comprised in the copyright with the aid of a person's services was being ignored, was sufficient to make a person liable for copyright authorisation; Gibbs J did not consider knowledge of specific acts of infringement necessary.
21. The relevance of a defendant's knowledge for a finding of authorisation of copyright infringement was also considered by the Federal Court, in the context of the authorisation of online infringement of copyright in sound recordings, in both *Kazaa* and *Cooper*. In those cases, the Federal Court addressed the question of the defendants' knowledge in broad terms. Although knowledge was not determinative, the defendants' general knowledge that infringements, made with the use of the defendants' services,

⁸ *Moorhouse*, p 13.

⁹ *Moorhouse*, p 21.

¹⁰ *Moorhouse*, p 22.

were rife, contributed to findings that the defendants had authorised those infringements.

(c) The Full Court's approach to the question of requisite knowledge

22. In the Full Court, Emmett J noted that the Respondent "accepts that it had general knowledge of copyright infringement by use of the services provided to its customers".¹¹
23. Emmett J held, however, that because the Respondent had only this "general knowledge" of infringements occurring on its network, it was not reasonable to expect the Respondent "to take steps within the meaning of s 101(1A)(c) to suspend or terminate a customer's account". The Respondent thus could not be liable for authorising the copyright infringements of its users until it was "provided with unequivocal and cogent evidence of the alleged primary acts of infringement".¹²
24. Nicholas J also acknowledged that, "[a]s the primary judge pointed out, the respondent accepted that it had general knowledge of copyright infringement committed by iiNet users".¹³ Nicholas J accepted that the AFACT notices "must have given the respondent reason to suspect that... infringements had occurred".¹⁴
25. Nonetheless, Nicholas J also found that such "general knowledge" of infringements was not sufficient to establish that the Respondent authorised its users' acts of copyright infringement: "[K]nowing that specific acts of copyright infringement have occurred and merely suspecting that they have occurred are quite different things... the difference is of considerable significance".¹⁵

¹¹ Full Court, [204].

¹² Full Court, [210].

¹³ Full Court, [757].

¹⁴ Full Court, [763].

¹⁵ Full Court, [763].

26. With respect, both Emmett and Nicholas JJ's approach overstate the level of knowledge required for a finding of authorisation of copyright infringement, as determined by the High Court in *Moorhouse*.¹⁶ Imposing this level of knowledge will make it significantly more difficult for ARIA's members to effectively enforce their copyright in an environment in which online piracy is rife.

(d) The correct approach to requisite knowledge in this case

10 27. ARIA submits that the correct approach to the level of knowledge required to establish an act of authorising copyright infringement is that taken by Jagot J in the Full Court. Following *Moorhouse*, it is clear that a Respondent may be found to have authorised copyright infringement even though it has only a general level of knowledge of the infringements.

28. In this case, the Respondent had more than the requisite general level of knowledge. The Respondent accepted at trial that it was aware of the infringements occurring on its network from possibly as early as 2005.¹⁷ The Respondent's customer service representatives clearly had actual knowledge at an early stage.¹⁸ Mr Malone, the Respondent's CEO and a witness in the case, gave newspaper interviews admitting the Respondent's knowledge in January 2006.¹⁹

20 29. Further, as Jagot J notes, the AFACT notices, which were sent to the Respondent for four months prior to the commencement of proceedings, "provided prima facie credible evidence... of extensive infringements of copyright by iiNet customers...".²⁰ Mr Malone himself considered the AFACT

¹⁶ See Part V(a) of these submissions.

¹⁷ First instance transcript, p 800.

¹⁸ See affidavit of Mr Herps, dated 9 September 2009, [28] and [29]; first instance transcript, p 800.

¹⁹ First instance transcript, pp 700, 800 and 829.

²⁰ Full Court, [467].

notices "compelling evidence" of infringement.²¹ Indeed, in the Full Court, both Emmett and Nicholas JJ, while holding that the Respondent did not authorise its users' acts of copyright infringement, acknowledged that the Respondent did have a general knowledge of its users' infringements.²²

30. ARIA submits that the Court should apply the test for knowledge set out in *Moorhouse* and not impose the higher degree of knowledge required by the majority in the Full Court.

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²¹ First instance transcript, p 705.

²² See [22] and [24] of these submissions, above.

Annexure

Part IV: Relevant constitutional provisions, statutes, and regulations

Copyright Act 1968 (Cth)

Section 101: Infringement by doing acts comprised in copyright [as section 101 existed at the relevant time]

(1) Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

10 (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:

(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;

20 (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

(2) The next two succeeding sections do not affect the generality of the last preceding subsection.

(3) Subsection (1) applies in relation to an act done in relation to a sound recording whether the act is done by directly or indirectly making use of a record embodying the recording.

(4) Subsection (1) applies in relation to an act done in relation to a television broadcast or a sound broadcast whether the act is done by the reception of the broadcast or by making use of any article or thing in which the visual images and sounds comprised in the broadcast have been embodied.

[These provisions are still in force, in the above form, at the date of making these submissions.]