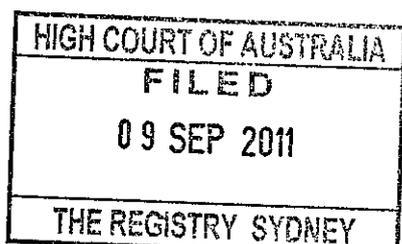


ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF
AUSTRALIA

BETWEEN:

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

IINET LIMITED (ACN 068 628 937)
Respondent



APPELLANTS' SUBMISSIONS

Part I: Suitable for publication

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

Part II: Issues that the appeal presents

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2. The issues in this appeal are:
 - (a) Whether, and if so, from what date, the respondent authorized the infringements of the appellants' copyright by users of the respondent's internet services; and
 - (b) What is the knowledge required for a person to be held to authorize the doing of an act comprised in the copyright in a cinematograph film, in terms of s101(1) of the *Copyright Act* 1968.

Part III: *Judiciary Act* 1903

3. The appellants have considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and in their view such notice is not necessary.

Part IV: Citations

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4. The reasons for judgment of the primary judge are reported in *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215; (2010) 83 IPR 430 and those of the Full Court in *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1; (2011) 89 IPR 1.

Part V: Relevant facts

5. The appellants are Australian and American companies that are the owners and exclusive licensees of copyright in thousands of commercially-released motion pictures and television programs which are “cinematograph films” under the Act, including a sample of 86 films considered below.¹ The appellants’ capacity to finance and create such films depends on copyright law, including the protections afforded to their films by the exclusive right to communicate them to the public, including via the internet.
6. The respondent (iiNet) is an internet service provider (ISP). At the time of the trial it was the third largest ISP in Australia.² Amongst other things it provided internet access and technical support to its customers in return for a monthly fee. When a customer of iiNet seeks to access the internet they are allocated an IP address. Where iiNet allocates IP addresses to its customers its systems enable iiNet to match the customers with the IP addresses.³
7. The provision of internet access by iiNet consisted of granting users permission to connect to the internet via iiNet’s physical infrastructure⁴ pursuant to a standard Customer Relationship Agreement (CRA). iiNet’s CRA contained terms requiring customers to comply with all laws, and not to use the service to infringe another person’s rights or allow others to do so, including by infringing copyright.
8. Pursuant to the CRA, iiNet was entitled to cancel, suspend or restrict the supply of the service for breach of those terms and it had the technical capacity to do so in relation to a given customer account. It also had the legal and technical capacity to issue warnings to customers whose accounts were being used to infringe copyright contrary to the terms of the CRA.⁵ From time to time iiNet suspended or terminated subscriber’s accounts on the basis of non-payment of fees, that is, for non-compliance with the CRA.⁶
9. Users of iiNet’s services made available and exchanged with other internet users unauthorized copies of the appellants’ films. They used a decentralised “peer-to-peer” (P2P) protocol called BitTorrent.⁷ BitTorrent was the most popular file sharing mechanism in use on the internet at the time.⁸ Unlike a website, in the case of the BitTorrent protocol all the

¹ (2010) 263 ALR 215 at 223 [2]-[3]; (2011) 275 ALR 1 at 122 [529]-[531].

² (2010) 263 ALR 215 at 223 [4]; (2011) 275 ALR 1 at 122 [529].

³ (2011) 275 ALR 1 at 66 [293].

⁴ (2010) 263 ALR 215 at 231 [52].

⁵ (2011) 275 ALR 1 at 18-19 [76]-[77]; at 42 [181]; at 90-91 [377]-[380], at 95 [400]; at 127 [556]; at 161-162 [720].

⁶ (2010) 263 ALR 215 at 307 [429].

⁷ (2010) 263 ALR 215 at 231 [56].

⁸ (2010) 263 ALR 215 at 238 [94]-[95].

computers seeking data participate in the distribution of the data.⁹ A group of computers using the BitTorrent protocol sharing a particular file is known as a swarm and each computer within a swarm is known as a peer.¹⁰

10. iiNet was aware of the BitTorrent protocol and its use in the unauthorized sharing of files. It made available to its staff materials about copyright infringement which stated: “[b]ecause of the recent implications with file sharing, it is very important to figure out what it is they [customers] are downloading. If it is illegal or even sounds like it, stay away”.¹¹ iiNet was also aware that half of all internet traffic on its system was BitTorrent traffic and that a substantial proportion of that traffic involved infringement of copyright.¹²
11. In 2007, the Australian Federation Against Copyright Theft (**AFACT**), acting on behalf of the appellants, launched an investigation of online infringement of the appellants’ copyrighted works over networks of Australian ISPs including iiNet. From August 2007 AFACT retained DtecNet Software APS (**DtecNet**), to deploy a computer program using the BitTorrent protocol to collect evidence of the making available of files of the appellants’ copyrighted works by users of iiNet’s internet services.¹³
12. In the period between September 2007 and June 2008, DtecNet investigated Australian ISPs in relation to four different types of file-sharing protocols, including BitTorrent. DtecNet then narrowed its investigations to only the BitTorrent protocol and targeted four Australian ISPs, one of which was iiNet.¹⁴
13. From 2 July 2008 and continuing for a period of 59 weeks until 18 August 2009 (41 weeks after the proceedings commenced), AFACT sent weekly notices to iiNet, addressed to iiNet’s managing director, containing allegations of acts of infringement.¹⁵ The AFACT notices requested that iiNet take some action (left to iiNet to determine) to prevent the continuation of the acts or other action under the terms of the CRA.¹⁶
14. The AFACT notices were delivered by email and by hand with a spreadsheet containing information that had been recorded by the DtecNet Agent. The DtecNet spreadsheets contained numerous entries referenced by “PeerID”, date and time, file name downloaded, hash, film/TV title, studio, percentage of file shared, MB [megabytes] downloaded, percentage of file downloaded, peer host name and

⁹ (2010) 263 ALR 215 at 231 [56].

¹⁰ (2011) 275 ALR 1 at 14 [46].

¹¹ (2011) 275 ALR 1 at 102 [432(10)].

¹² (2010) 263 ALR 215 at 238 [95], cf 266 [241]; (2011) 275 ALR 1 at 105 [450].

¹³ (2010) 263 ALR 215 at 238 [96].

¹⁴ (2010) 263 ALR 215 at 238 [96].

¹⁵ (2010) 263 ALR 215 at 238 [97]-[104]; (2011) 275 ALR 1 at 68 [298].

¹⁶ (2010) 263 ALR 215 at 239 [97]-[99]; (2011) 275 ALR 1 at 21-23 [91]-[96]; at 68-71 [298]-[307]; at 126 [555].

country.¹⁷ Enclosed with the hand delivered AFACT Notices from the third week (16 July 2008) was a DVD containing all of the data underlying the DtecNet spreadsheets.¹⁸

15. iiNet was aware that allegations were being made that users of its services had infringed copyright, and iiNet was in a position to determine the identity of the customers whose accounts were involved in the infringements.¹⁹ However, iiNet took no action in relation to any of the customer accounts (other than to forward AFACT notices to the Western Australia police).²⁰ In particular, iiNet took no steps to notify customers that their services were being used to infringe copyright in films and to warn them of the consequences of such infringing use, or to limit, suspend or terminate any account in order to prevent or avoid subsequent infringements,²¹ despite having rights to do so under the CRA and the technical means available to do so.
16. In correspondence with AFACT, iiNet said that it understood how AFACT came to its allegations,²² and confirmed that it would not be taking any action in relation to the notices and that there was no additional information that would change its position.²³ iiNet did not request any additional information on the infringements or suggest that it would ever act on the notices if some additional information was provided to it by AFACT. Emmett J characterised iiNet's correspondence with AFACT as "dismissive" and "less than cooperative and less than frank".²⁴ iiNet characterised its own position thus: "it did not matter what additional information AFACT provided ... iiNet was not going to act on those notices".²⁵
17. At [448] Jagot J identified a number of factors indicative of iiNet's attitude towards the allegations of widespread infringement by its customers, including:²⁶
- (1) *The description of allegations of copyright infringement as "crap emails".*
- (2) *The communication that AFACT just did not "get it" – "it" being that iiNet was not "obligated to do squat on their allegation".*
- (3) *The description of AFACT's correspondence as almost constituting spam to iiNet (that is, a form of network abuse).*

¹⁷ (2011) 275 ALR 1 at 70 [305].

¹⁸ (2011) 275 ALR 1 at 71 [307].

¹⁹ (2011) 275 ALR 1 at 40-41 [174].

²⁰ (2011) 275 ALR 1 at 102 [433].

²¹ (2011) 275 ALR 1 at 40-41 [174].

²² (2011) 275 ALR 1 at 72 [311].

²³ (2011) 275 ALR 1 at 23-24 [97]-[102]; 71-73 [307]-[315]; 128 [559]-[561].

²⁴ (2011) 275 ALR 1 at 23 [97]; at 24 [103].

²⁵ Respondent's outline of closing submissions at first instance, para 2-143.

²⁶ (2011) 275 ALR 1 at 105 [448].

(4) Mr Malone's advice to [iiNet's subsidiary] Westnet that its actions (of notifying customers of copyright infringement allegations) were "doing damage to the industry and iiNet's position on this matter".

(5) Mr Malone's description of his general policy compared to that of Westnet as being: "... a little less umm proactive."

(6) The fact that iiNet's email address for notification of copyright infringements disappeared for an unknown period, the disappearance apparently only being discovered by chance by an iiNet network engineer.

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18. On 20 November 2008, the appellants commenced the proceeding, alleging authorization by iiNet of numerous infringements of the appellants' copyright. The statement of claim alleged past, continuing and threatened future infringement by authorization by iiNet. The application sought relief on that basis.²⁷

19. Also on 20 November 2008, by a press release which could be downloaded by BitTorrent, iiNet communicated to its customers, whose services were being used to infringe copyright, that their accounts would not be terminated absent a judicial determination of infringement.²⁸

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20. On 5 February 2009 the appellants served a report from DtecNet, with details of the evidence collection process undertaken for the purposes of the AFACT Notices. iiNet filed a defence on 5 February 2009 in which it did not admit the allegations of primary infringement by its users, and denied authorization.²⁹

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21. After receipt of the evidence, on 4 April 2009, iiNet filed a "Statement of the Nature of its Case" in which it conceded (as from April 2009) that the activities by users of its services, as reflected in the AFACT notices, involved infringements of the appellants' copyright, including by communication of the films to the public.³⁰ iiNet has never contended that the knowledge it had acquired from April 2009 was irrelevant to the question of authorization or that the evidence of continuing infringements ought to be rejected. iiNet relied on knowledge it had acquired during the course of the proceedings in support of its "Telco Act defence."³¹

22. An amended application and further amended statement of claim were filed on 8 May 2009. Supplementary particulars to the further amended statement of claim were filed on 18 September 2009 which particularised further infringements for the period 13 March 2009 to 6 September 2009.³²

²⁷ Amended application, paras 1-21; further amended statement of claim, paras 62-68.

²⁸ (2010) 263 ALR 215 at 110-111 [476]-[479]; (2011) 275 ALR 1 at 108 [469].

²⁹ Paragraphs 59 and 60 of the defence dated 5 February 2011.

³⁰ See s 86(a) and (c) and the definition of "communicate" in s 10(1) of the Act. Findings were made to that effect: (2010) 263 ALR 215 at 290 [356]; (2011) 275 ALR 1 at 35 [149]; at 65 [288]; at 134 [590]; at 148 [664].

³¹ See the respondent's Notice of Contention paras 3-5.

³² (2011) 275 ALR 1 at 23 [653].

The appellants served evidence of further infringements captured by DtecNet up to 6 September 2009. iiNet did not object to the case being conducted on this basis or to the tender of the evidence of further infringements committed after the proceedings were filed, and the trial proceeded on the basis of the infringement case as pleaded and particularised up to trial.

23. During the trial, iiNet's managing director, Mr Malone, made it clear that iiNet's position was that it would do nothing in response to the AFACT notices of infringement absent a Court order.³³ At different points in his evidence he referred to a range of other circumstances that might change its view, such as a direction by "an appropriately empowered law enforcement agency", some "other legislative instrument", "other authority" or code of conduct dealing with the issue, of which there is none; and a customer admitting infringement, (which he ultimately accepted would be unlikely to occur).³⁴
24. In reasons delivered on 4 February 2010, the trial judge, Cowdroy J, held that iiNet had the legal and technical ability to prevent the acts of infringement; that it had a relationship with users of its services under the terms of the CRA and by the provision of services; and that it had steps available to it to prevent or avoid the acts, including suspending or terminating services, which it did not take.³⁵ The trial judge held, however, that iiNet had not authorized the widespread acts of infringement. His Honour decided the matter on a number of bases which were subsequently found by the Full Court to be in error, including that iiNet did not provide the "true means" of infringement and that suspension or termination was not a relevant "power to prevent".
25. The trial judge held that "... from some point after the commencement of the present litigation the respondent gained the relevant level of knowledge that enabled it to act, and it became aware of the manner in which the DtecNet evidence was gathered".³⁶ That finding of knowledge was not challenged by iiNet on appeal.³⁷ The trial judge dismissed a defence under s112E on the basis that iiNet's knowledge of the infringements disentitled it from invoking that defence.³⁸
26. The Full Court delivered judgment on 24 February 2011. While each of the members of the Full Court overturned key findings of the trial judge adverse to the appellants³⁹, in separate reasons Emmett J and Nicholas J held that iiNet had not authorized the infringements of the appellants'

³³ (2010) 263 ALR 215 at 348 [514]; (2011) 275 ALR 1 at 58-59 [259]; at 118 [521]; at 130-131 [574]; Malone XXN, T 897.1-3.

³⁴ Malone XXN, T 734.20-21, T 736.9-10, 738.44-739.5, 740.1-5, T 790.20-32, 792.7-793.14-26.

³⁵ (2010) 263 ALR 215 at 306-307 [426]; at 308 [433]; at 311-312 [447]-[448].

³⁶ (2010) 263 ALR 215 at 318-319 [471].

³⁷ See (2011) 275 ALR 1 at 25 [105], [109]; at 73-75 [316]-[317].

³⁸ (2010) 263 ALR 215 at 339 [579].

³⁹ (2011) 275 ALR 1 at 42-45 [181]-[197]; at 98 [415]; at 100-101 [426], [428]-[431]; at 161-163 [720], [727]-[728]; at 167 [748]-[751].

copyright; Jagot J dissented, holding that authorization was established. In the result, the appeal was dismissed.

Part VI: ARGUMENT

Authorization

27. Section 101(1) of the Act provides that the copyright in a cinematograph film is infringed by a person who, 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”. The expression “any act comprised in the copyright” also includes the concept of authorization, by ss 13 and 86.⁴⁰
 10 The exclusive right to authorize the doing of an act is separate from the right to do the act itself; the infringement of each is a distinct tort.
28. It was common ground at the trial and before the Full Court that the High Court’s decision in *University of New South Wales v Moorhouse*⁴¹ established the relevant test for authorization and that it ought to be applied in this case, along with the factors appearing in s101(1A). (Consistently with that approach, iiNet’s Notice of Contention, so far as it relates to authorization, only challenges findings of fact.)
29. In *Moorhouse*, the High Court held that “authorizes”, as used in the Act, means “sanction, approve, countenance”, considered disjunctively.⁴²
 20 “Authorize” can also mean “permit”.⁴³ Thus, express or formal permission or active conduct indicating approval is not essential to constitute an authorization. Accordingly, Gibbs J said that a person may authorize an act of infringement where “[i]nactivity or indifference, exhibited by acts of commission or omission ... reach a degree from which an authorization or permission may be inferred”.⁴⁴ See also Jacobs J at 21, that it is “a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized”.⁴⁵
30. *Moorhouse* has consistently been applied in authorization cases in Australia, and has given rise to a body of law in Australia that differs to some extent from the US and the UK,⁴⁶ as explained by Gummow J in *WEA International Inc v Hanimex Corporation Ltd*.⁴⁷ Since *Moorhouse*, the Act has been amended several times in light of the principles in that case, evidently on the faith of its continued application: see, for example, ss 39A, 39B and 112E, the last of which was considered by the Courts below. Relevantly for the present case, in 2001, s 101(1A) was introduced

⁴⁰ Section 101 deals with subject-matter other than works, which includes cinematograph films; see the corresponding provision for works in s 36. “Authorize” is spelt variously in the Act.

⁴¹ (1975) 133 CLR 1.

⁴² See the citations collected by Nicholas J at (2011) 275 ALR 1 at 156 [701].

⁴³ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12.

⁴⁴ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12.

⁴⁵ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 21.

⁴⁶ *Moorhouse* was, in effect, put aside by the House of Lords in *CBS Songs v Amstrad Consumer Electronics PLC* (1988) 1 AC 1013 at 1043, 1054 D-F.

⁴⁷ *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274 at 283-286.

to provide that in determining whether a person has authorized, “the matters that must be taken into account include”.⁴⁸

- (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;*
- (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.*

10 31. Section 101(1A) was introduced to provide certainty.⁴⁹ The Revised Explanatory Memorandum for the 2000 “Digital Agenda” Bill described the intention of s 101(1A) as follows:⁵⁰

20 *The inclusion of these factors in the Act essentially codifies the principles in relation to authorisation that currently exist in common law. ... It is intended to provide a degree of legislative certainty about the steps that should be taken in order to avoid liability for authorising infringements. Additional certainty in relation to third party liability is provided by new s 101(1A)(c). This section specifies that compliance with relevant industry codes of practices is a factor in determining whether the person took reasonable steps to prevent or avoid the doing of the act.*

32. The factors in s 101(1A) of the Act closely follow Gibbs J’s statement of principle from *Moorhouse*,⁵¹ which was largely distilled from the judgment of Knox CJ in *Adelaide Corporation v Australasian Performing Right Association Limited*.⁵² Gibbs J said,

30 *It seems to me to follow from these statements of principle 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 results from its use.*

33. The one element of the above statement of principle that is not reflected in the text of s 101(1A) is the requisite mental element required for a finding of authorization, namely knowledge or reason to suspect. This is the critical consideration in the present case. Gibbs J emphasised that it is

⁴⁸ It was common ground in this case that there was no relevant industry code of practice.

⁴⁹ See *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at 408 [136] per Kenny J, French J agreeing. Explanatory Memorandum to *Copyright Amendment (Digital Agenda) Bill 1999* (Cth), para 124.

⁵⁰ Revised Explanatory Memorandum to *Copyright Amendment (Digital Agenda) Bill 2000* (Cth), para 157.

⁵¹ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13.

⁵² (1928) 40 CLR 481 at 487, in relation to the predecessor of s 39.

sufficient for a finding of authorization if there is knowledge or reason to suspect that any one of a number of acts is likely to be done and that it is not necessary that the alleged authorizer have direct knowledge or reason to suspect that any particular act of infringement is likely to be done.⁵³ (Jacobs J considered that such knowledge might not be necessary at all in a case of a general invitation to use a facility for any purpose, which could include an infringing use, but might be significant if the invitation were qualified in some way⁵⁴).

- 10 34. The test for knowledge expressed by Gibbs J has been applied consistently since *Moorhouse*. Subsequent authorities on authorization have generally been decided based on the presence or absence of other factors, such as control over the acts of infringements or proximity to the primary infringers, rather than whether the alleged authorizer had the requisite degree of knowledge or reason to suspect that infringements would occur.⁵⁵

Errors in the judgments below

- 20 35. The common errors in the separate reasons of Emmett J and Nicholas J relate to the requisite degree of knowledge and their Honours' conflation of this issue with other issues, such as questions of the reasonableness of iiNet not acting on the allegations of infringement and the subjective "attitude" of iiNet towards the infringements.
36. Despite both Emmett J and Nicholas J having found that there were reasonable steps that iiNet could have taken to prevent or avoid the infringements by users of iiNet's networks (such as issuing warnings or suspension or termination of relevant accounts), each held that it was reasonable for iiNet not to take such steps because iiNet's knowledge fell short of the standard that their Honours variously articulate – a much higher standard than can be derived from *Moorhouse*.⁵⁶

Emmett J

- 30 37. Emmett J accepted that iiNet knew that its users were infringing copyright, making it appropriate to consider whether there were reasonable steps that iiNet could have taken to prevent or avoid those infringements (emphasis added).⁵⁷

iiNet accepted that it had general knowledge of copyright infringement committed by its customers or that infringement was likely to occur on its facilities. Mr Malone acknowledged that, after the material contained in the spreadsheets had been explained to

⁵³ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13.

⁵⁴ *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 22.

⁵⁵ *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53; *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289; *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380.

⁵⁶ See (2011) 275 ALR 1 at 43-44 [188]-[189]; at 167 [751].

⁵⁷ (2011) 275 ALR 1 at 25 [109]-[110].

him, he knew what was happening and had done so since, at latest, April 2009. The primary judge found that, sometime after the commencement of the proceeding, iiNet gained the relevant level of knowledge that enabled it to become aware of the manner in which the material contained in the spreadsheets had been gathered. There is no challenge to that finding. Mr Malone also accepted that the Infringement Notices were compelling evidence of infringement, sufficiently compelling for him to refer the matter to the police.

10 There can be no doubt that iiNet, whose business is concerned with the facilitation of communication in the online environment, understood that the Infringement Notices were allegations of infringements of copyright. The question, however, is whether given that knowledge, there were reasonable steps available to iiNet, once it received that knowledge, that would have prevented infringements occurring in the future.

38. His Honour held that there were reasonable steps available, including the provision of clearly worded and accurate warnings, and suspension or termination.⁵⁸ Given Emmett J's findings on the matters that must be taken
20 into account under s 101(1A), together with the trial judge's unchallenged finding on knowledge, a conventional application of *Moorhouse* ought to have led to a finding of authorization.

39. Emmett J held, however, that there was no authorization.⁵⁹ In support of this conclusion, his Honour returned to the topic of knowledge:⁶⁰

30 *It was not reasonable to require iiNet to undertake the immense amount of work, cost and effort required in order to set out, review and analyse the allegations in the information provided with the Infringement Notices. iiNet did not have the guidance, which was subsequently afforded to it in the course of the proceeding, to enable it to carry out that task. I do not consider that knowledge acquired by iiNet in the course of the proceeding can be relied upon to support the case of the Copyright Owners.*

40. His Honour did not rely on any specific finding of the trial judge or evidence to reach such a conclusion. A similar conclusion reached by the trial judge was erroneously based on a passage in an affidavit that had not been admitted as evidence.⁶¹ It was not supported by the evidence. Westnet (an ISP acquired by iiNet in 2008) had no such difficulty dealing with allegations of infringement.⁶² Jagot J and Nicholas J reached contrary conclusions to those of Emmett J as to the cost and complexity of iiNet
40 processing the AFACT notices.⁶³ iiNet would have had to implement a

⁵⁸ (2011) 275 ALR 1 at 43-44 [188]-[189], 45 [197], and 48 [210].

⁵⁹ (2011) 275 ALR 1 at 46-47 [204]-[205]; at 48-49 [210]-[211].

⁶⁰ (2011) 275 ALR 1 at 47 [205].

⁶¹ (2010) 263 ALR 215 at 308-308 [434] citing Malone #2 at para 17, which had been admitted as submission only.

⁶² (2011) 275 ALR 1 at 105 [450].

⁶³ (2011) 275 ALR 1 at 98 [415] and at 167 [749].

scheme of processing allegations and customer notifications to comply with the “safe harbour” provisions, at its cost, as Jagot J found. The “guidance” that iiNet claimed to have received from the DtecNet report (in February 2009) related to two matters that were already apparent from the spreadsheets and other information in the AFACT notices from as far back as July 2008, “had iiNet personnel bothered to analyse them”.⁶⁴ Emmett J’s approach is also inconsistent with his finding, in connection with iiNet’s safe harbour defence, that iiNet’s decision not to act was made regardless of the information provided to it.⁶⁵

- 10 41. In reaching his conclusion that iiNet did not authorize, Emmett J articulated a test, the relevant parts of which are as follows (emphasis added):⁶⁶

I consider that, before it would be reasonable for iiNet to take steps within the meaning of s 101(1A)(c) to suspend or terminate a customer’s account, at least the following circumstances should exist:

...

- 20 • *iiNet has been provided with unequivocal and cogent evidence of the alleged primary acts of infringement by use of the iiNet service in question. Mere assertion by an entity such as AFACT, with whatever particulars of the assertion that may be provided, would not, of itself, constitute unequivocal and cogent evidence of the doing of acts of infringement. Information as to the way in which the material supporting the allegations was derived, that was adequate to enable iiNet to verify the accuracy of the allegations, may suffice. Verification on oath as to the precise steps that were adopted in order to obtain or discern the relevant information may suffice but may not be necessary.*
- 30 • *The Copyright Owners have undertaken:*
- *to reimburse iiNet for the reasonable cost of verifying the particulars of the primary acts of infringement alleged and of establishing and maintaining a regime to monitor the use of the iiNet service to determine whether further acts of infringements occur, and*
 - *to indemnify iiNet in respect of any liability reasonably incurred by iiNet as a consequence of mistakenly suspending or terminating a service on the basis of allegations made by the Copyright Owner.*
- 40

42. A requirement that iiNet be provided with “unequivocal and cogent” evidence in order to have knowledge sufficient for it to act erects too high a test of the requisite knowledge for a finding of authorization, and is

⁶⁴ (2011) 275 ALR 1 at 96 [405] (Jagot J).

⁶⁵ (2011) 275 ALR 1 at 62 [272].

⁶⁶ (2011) 275 ALR 1 at 48-49 [210].

contrary to the principle as articulated by the High Court in *Moorhouse* (per Gibbs J at 13 and Jacobs J at 21) that reason to suspect is sufficient.

43. Irrespective, the AFACT notices met Emmett J's test, because they were "credible evidence of widespread infringements of copyright"⁶⁷ and they provided substantial supporting information which, on its face, indicated that considerable time, effort and money had been expended to provide iiNet with credible evidence of substantial and repeated copyright infringement.⁶⁸ From December 2008 Mr Malone considered them "compelling evidence".⁶⁹ By April 2009 iiNet had accepted that the infringements had been established. Even if Emmett J's more stringent test for knowledge was accepted, then iiNet had knowledge sufficient to require it to act, it failed to take reasonable steps to prevent the infringements, and should have been found liable for authorization.⁷⁰
44. The introduction of the preconditions of reimbursement and indemnification radically departs from Gibbs J's principle in *Moorhouse*. Both considerations are unsupported by authority and irrelevant to establishing whether there is knowledge or a reason to suspect. Emmett J's approach amounts to judicial legislation without any safeguards or guidance as to how costs or indemnification would work in practice. A concept of reasonable cost is redolent with ambiguity and ripe for dispute. Presumably while reimbursement is disputed, Emmett J's test would bar any finding of authorization. Such preconditions undermine the principles of authorization.
45. His Honour's approach to reimbursement and indemnification has the further undesirable aspect of never having been addressed at any stage of the case.⁷¹ iiNet never submitted below that, had it been compensated, it would have been prepared to act on the allegations of infringement. iiNet's direction to Westnet to cease processing infringement notices in November 2008 never raised reimbursement or indemnification. Its position depended on totally different considerations: viz, a belief that it was entitled to take no action until the infringements had been proved in a Court (or admitted by the relevant customer).⁷²

Nicholas J

46. After discussing iiNet's "ample" contractual power,⁷³ for s101(1A)(a), and its contractual relationship, for s101(1A)(b), his Honour held, for s101(1A)(c),⁷⁴

⁶⁷ (2011) 275 ALR 1 at 96 [405].

⁶⁸ (2011) 275 ALR 1 at 95 [402].

⁶⁹ (2011) 275 ALR 1 at 73-75 [316]-[317].

⁷⁰ See also (2011) 275 ALR 1 at 48 [209].

⁷¹ Cf (2011) 275 ALR 1 at 41-42 [177].

⁷² (2010) 263 ALR 215 at 348 [514]; (2011) 275 ALR 1 at 58-59 [259]; at 118 [521]; at 130-131 [574].

⁷³ (2011) 275 ALR 1 at 162 [724].

⁷⁴ (2011) 275 ALR 1 at 167 [751].

In my opinion it was open to the respondent to adopt a system providing for the issuing of warnings and, if appropriate, the termination or suspension of accounts where the respondent was satisfied that a subscriber's account had been used to infringe copyright. The respondent had no such system in place. It did not even have a system that provided for the giving of a warning to a subscriber who it was satisfied had knowingly and repeatedly engaged in copyright infringement on a widespread scale. The absence of such a system is a matter that is made relevant by s101(1A).

10

47. Despite these positive findings on s 101(1A), his Honour held that there was no authorization, for reasons appearing in the following sections of his judgment, under "knowledge of infringements"⁷⁵, "inactivity or indifference"⁷⁶ and (to abbreviate) "sanction, approve or countenance".⁷⁷ The theme that underlies these paragraphs is his Honour's consideration of whether it was reasonable for iiNet not to act on the material it had at various stages of the case.⁷⁸ The appellants respectfully submit that his Honour's addition of this consideration is also a departure from *Moorhouse* and s101(1A).

20 Knowledge

48. His Honour says,⁷⁹

As the primary judge pointed out, the respondent accepted that it had general knowledge of copyright infringement committed by iiNet users. But as he also observed, it would be difficult for the respondent to act on knowledge of such a general kind with a view to preventing or avoiding copyright infringements by people using its network. This is because the respondent would have no means of knowing who had used its facilities to infringe copyright unless that knowledge was provided to it by third parties.

- 30 49. In recognition of this difficulty, the appellants had commenced serving the AFACT notices four months before the commencement of the proceedings. His Honour puts these aside (emphasis added).⁸⁰

In my opinion, the AFACT notices were not sufficient to provide the respondent with knowledge that its network was being utilized by users of particular accounts to infringe the appellants' copyright in the identified films. I accept that they must have given the respondent reason to suspect that such infringement had occurred. However, knowing that specific acts of copyright infringement have occurred and merely suspecting that they have occurred are quite

⁷⁵ (2011) 275 ALR 1 at 169-171 [757]-[767].

⁷⁶ (2011) 275 ALR 1 at 171-172 [768]-[775].

⁷⁷ (2011) 275 ALR 1 at 172-173 [776]-[783].

⁷⁸ See, especially, (2011) 275 ALR 1 at 170 [764]; at 172 [775]; at 173 [781] and his Honour's conclusion at 173 [783].

⁷⁹ (2011) 275 ALR 1 at 169 [757].

⁸⁰ (2011) 275 ALR 1 at 170 [763]-[764].

different things. In the circumstances of the present case, the difference is of considerable significance.

It is important to recall, as the primary judge found, that the respondent has hundreds of thousands of customers and that each day it receives hundreds of notices issued by or on behalf of copyright owners. I do not think the respondent could reasonably be expected to issue warnings, or to terminate or suspend particular accounts, in reliance upon any such notice in circumstances where it has been told nothing at all about the methods used to obtain the information which lead to the issue of the notice. Nor should it be up to the respondent to seek out this information from a copyright owner who chooses not to provide it in the first place.

50. The emphasised sentence accords with the requirement for knowledge set out by Gibbs J at 133 CLR 13.⁸¹ Neither Gibbs J nor Jacobs J required knowledge that specific acts of infringement have occurred. Nicholas J, however, held that the “reason to suspect” to which his Honour refers was not enough in these circumstances.

51. As Jagot J said, the AFACT Notices were “credible on their face”.⁸² They were “written in plain English [and] provided precise details of each alleged infringement in intelligible form”.⁸³ They were different from other forms of notice (such as the “robot notices”) and were treated differently by iiNet, prompting a series of communications between iiNet and AFACT and the forwarding of notices to the police, unlike any form of previous notice of infringement.⁸⁴ iiNet’s decision not to act on the AFACT Notices, as Jagot J said:⁸⁵

had nothing to do with the perceived quality of the data on which AFACT relied. iiNet, as noted, considered that it had no obligation to do anything in response to the notices and acted accordingly. In so doing, iiNet refused any meaningful engagement with AFACT (whether that be about the quality of the AFACT data, the reasonable steps that iiNet had available to it or the costs of so doing). In these circumstances, it is not clear why AFACT could have no reasonable expectation of iiNet taking action unless AFACT made clear that its data was reliable.

52. See also her Honour’s summary of iiNet’s response to the notices at [307]-[318].⁸⁶

53. As to reasonableness, her Honour’s summary shows, and the trial judge found, on the evidence of iiNet’s Chief Regulatory Officer, Mr Dalby, that iiNet had determined that it would not act on the AFACT Notices

⁸¹ Cf per Jacobs J at 21, an easier test in some circumstances.

⁸² (2011) 275 ALR 1 at 99 [421] (Jagot J). See also (2011) 275 ALR 1 at 98-99 [417]-[420].

⁸³ (2011) 275 ALR 1 at 99 [418] (Jagot J).

⁸⁴ (2011) 275 ALR 1 at 99 [418]-[419] (Jagot J).

⁸⁵ (2011) 275 ALR 1 at 99 [421].

⁸⁶ (2011) 275 ALR 1 at 71-75.

regardless of the information they contained and that from some point it had "gained the relevant level of knowledge that enabled it to act".⁸⁷ iiNet conducted the case on the basis that it would have made no difference if further information regarding the infringements or the means of collecting evidence of them had been provided. For example, iiNet submitted at trial.⁸⁸

10 *It is clear from Mr Parkinson's email to Mr Gane on 25 June 2008 ... that it did not matter what additional information AFACT provided, so far as Mr Dalby was concerned iiNet was not going to act on the notices. That letter, drafted jointly by Mr Dalby and Mr Parkinson, states in an unqualified fashion that iiNet is "unable to comply with AFACT's requirements in any way". The letter does not say that if further information is provided, action may be taken by iiNet in accordance with AFACT's wishes. The letter does not ask for further information to be sent to iiNet – rather, it directs AFACT to the appropriate authorities ...*

54. In any event, Nicholas J must be speaking of the period before April 2009, by which time, as the trial judge held, "the respondent gained the relevant level of knowledge that enabled it to act"⁸⁹ – because this is the very difficulty pointed to by his Honour in [757] and [764].
- 20
55. Nicholas J implicitly refers to the trial judge's finding in [765] but puts it aside on the incorrect basis that,⁹⁰

30 *The respondent was never told how DtecNet Agent operated until sometime after February 2009 when the appellants' experts' reports were served. Mr Malone's evidence suggests that he first became aware of how DtecNet operated in April 2009 after an expert engaged on behalf of the respondent had considered those reports. It is true that the appellants' amendments, to which I previously referred, were not made until May 2009. Nevertheless, I do not accept that knowledge acquired by the respondent by way of expert reports served prior to the trial could be used for the purpose of establishing that the respondent knew what the DtecNet's methods were, or that they were reliable, or likely to be reliable ...*

56. That cannot stand with the trial judge's finding as to knowledge nor the conduct of the proceedings below, where the material supporting that finding was particularised, tendered, and admitted without objection. Earlier, his Honour also erred in saying that this was not a case for *quia timet* relief.⁹¹

⁸⁷ (2010) 263 ALR 215 at 75 [318].

⁸⁸ Respondent's outline of closing submissions at first instance, para 2-143(a).

⁸⁹ (2011) 275 ALR 1 at 170 [765].

⁹⁰ At 170 [765].

⁹¹ (2011) 275 ALR 1 at 147 [654].

Inactivity or indifference

57. His Honour places weight on the plainly irrelevant finding by the trial judge that “the respondent did not approve of iiNet users infringing copyright”.⁹² This is repeated and expanded in [775] (emphases added):⁹³

10 *It follows from the findings of the primary judge that the position of the respondent did not reflect any intention or desire to see the appellants’ copyright infringed. Rather, it reflected a view, strongly held it would seem, that it was not the business of the respondent to be taking action against subscribers on the basis of allegations of copyright infringement contained in the AFACT notices. None of that is to say that the respondent’s view on the matter was necessarily correct. But it cannot be dismissed or discounted on the basis that it was either not genuinely held or not reasonably open.*

- 20 58. The suggestion that an alleged authorizer can, in effect, obtain a permanent exemption from authorization if it has the right subjective non-“approval”, or if it chooses that the question of infringement using its facilities by people whom it can control and with whom it is in a technical and legal relationship, be “not its business” – conflicts with Jacobs J at 133 CLR 21 and Gibbs J at 133 CLR 13. Consistently with Gibbs J’s statement, s101(1A)(c) provides that a relevant factor to a finding of authorization is a respondent’s failure to take steps. Essentially this amounts to indifference, exhibited by acts of omission.

- 30 59. Further, the concept of “not the business of the respondent” derives, via Higgins J’s judgment in *Adelaide Corporation v Australasian Performing Right Association* (1928) 40 CLR 481, 500, from Bankes LJ’s judgment in *Performing Right Society v Cyril Theatrical Syndicate* (1924) 1 KB 1 at 10.⁹⁴ That idea was not adopted by Gibbs J when his Honour distilled the statements of principle from *Adelaide Corporation*, in *Moorhouse* at 133 CLR 13. Nicholas J arrives at that point, however, via a reference to Bankes LJ’s dictum in *PRS v Cyril* by Whitford J in *CBS Inc v Ames Records and Tapes Ltd* [1982] Ch 91. It is true, as Nicholas J notes, that Gummow J referred to Whitford J’s judgment in *WEA Records v Hanimex*.⁹⁵ The very different proposition that Gummow J derived from *CBS v Ames*, however, is set out at [718],⁹⁶ stressing the significance of control over the alleged infringing activity.

- 40 60. The question of control, discussed in *WEA v Hanimex*, is now expressly dealt with in s101(1A)(a). It was precisely because the seller of blank tapes in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 177 CLR 480, like the lender of records in *CBS v Ames*, did not control the subsequent uses, which might or might not have infringed, that

⁹² (2011) 275 ALR 1 at 171 [771]-[772].

⁹³ (2011) 275 ALR 1 at 172.

⁹⁴ Quoted by Emmett J at (2011) 275 ALR 1 at 12 [33].

⁹⁵ (1987) 17 FCR 274.

⁹⁶ *WEA v Hanimex* at 17 FCR 286, set out at (2011) 275 ALR 1 at 160-161.

Mason CJ, Brennan, Deane and Gaudron JJ held there would have been no authorization.⁹⁷ In the present case, all members of the Full Court held that the control element (as expressed in s101(1A)(a), was present. It follows that Nicholas J's reliance on the "not its business" principle was in error. On the present facts, to adopt that stance was to countenance infringements.

Sanction, approve or countenance

- 10 61. Here, Nicholas J added a further consideration of "reasonableness", depending on the "nature and quality of the information".⁹⁸ This is an error here in light of the trial judge's unchallenged finding that the information was sufficient to give iiNet actual knowledge from April 2009 onwards; and in light of the fact that iiNet itself had decided that it would not act on the notices irrespective of their nature and quality.
- 20 62. His Honour returned to the latter decision at [783].⁹⁹ As Jagot J noted, however, iiNet's attitude precluded any circumstance in which, if additional information had been sought by iiNet, it could have been provided. Although his Honour recognised that iiNet's stance had nothing to do with the perceived quality of the data, his Honour said that this is "beside the point" because it was not unreasonable to act on the notices. As submitted, that is wrong, at least by April 2009. Further, if iiNet's stance had nothing to do with the perceived quality of the data then the difficulties referred to by his Honour, in for example [757]¹⁰⁰ are irrelevant.
63. In considering the phrase "sanction, approve, countenance" Nicholas J also returned to the question whether there was subjective "approval" by iiNet or iiNet's "intention".¹⁰¹ That is not what "countenance" means. The correct question is whether a permission or invitation can be inferred from iiNet's conduct, not its state of mind. Mr Malone's denial that he approved of the continuing infringement of copyright is irrelevant given his acceptance that iiNet permitted the infringements to continue.¹⁰²

30 ***Correct application of authorization principles***

64. Once the Full Court set aside the trial judge's approach to authorization, a finding of authorization should have followed from unchallenged findings of the trial judge and findings of the Full Court.
65. Users of iiNet's internet services had repeatedly and systematically infringed the appellants' copyright.¹⁰³ Thousands of infringements took place over a period of 59 weeks. Given the way that BitTorrent operated, it was likely that each of the users of the iiNet internet accounts identified as

⁹⁷ At 498.

⁹⁸ (2011) 275 ALR 1 at 173 [781].

⁹⁹ (2011) 275 ALR 1 at 173.

¹⁰⁰ Quoted above at para 50.

¹⁰¹ (2011) 275 ALR 1 at 171 [771]-[772] and at 172 [775].

¹⁰² (2010) 263 ALR 215 at 235 [77]; (2011) 275 ALR 1 at 36-37 [152]-[154]; at 78 [329].

¹⁰³ (2011) 275 ALR 1 per Emmett J at 35-37 [149]-[158]; Jagot J at 76-78 [322]-[330]; and Nicholas J at 148-150 [664]-[673].

having been involved in infringement would further infringe the appellants' copyright each time they re-connected to the internet.¹⁰⁴ Absent iiNet taking steps to prevent this, there was nothing to stop this infringement from continuing (as it did throughout the case below).

66. The evidence at trial, the uncontested finding of the trial judge, and findings of all three of the judges on the Full Court establish that, correctly viewed, iiNet's level of knowledge in this case is more than sufficient to meet the requisite test for authorization. iiNet had the requisite knowledge for authorization before the proceedings were commenced in November 2008. The AFACT Notices had been "examined [by iiNet] before the commencement of the proceedings"¹⁰⁵ and iiNet's correspondence to AFACT in August 2008 stated that iiNet "understood how AFACT had come to its allegations of copyright infringement based on an IP address, date and time."¹⁰⁶ From December 2008 (prior to service of the DtecNet report) Mr Malone, formed the view that the AFACT Notices were "compelling evidence" of copyright infringement.¹⁰⁷
67. The trial judge found that iiNet had the requisite knowledge to enable it to act from April 2009, and that finding was not challenged in the Full Court. Both Jagot J and Nicholas J found that iiNet knew, or had reason to suspect, that the infringing acts were occurring. iiNet's knowledge plainly went as far as Gibbs J's expression of the principle in *Moorhouse*. The trial judge found that iiNet would never have acted differently even if it had been provided with more knowledge. The DtecNet report was irrelevant to iiNet's decision not to act on the allegations of infringement; its position was unrelated to the credibility or reliability of the evidence presented by AFACT.¹⁰⁸ The case was pleaded and particularised and evidence was filed based on a claim for continuing (but different¹⁰⁹) acts of infringement of the appellants' copyright. No relevant distinction arose between allegations prior to filing the application and allegations in the period post commencement of the case; both support a finding of authorization.
68. The Full Court unanimously found that iiNet had the power to prevent the infringing acts within the meaning of s 101(1A)(a),¹¹⁰ that iiNet had a relationship with its users within the meaning of s 101(1A)(b) of the Act,¹¹¹ and that iiNet could have taken reasonable steps to prevent or avoid this widespread infringement within the meaning of s 101(1A)(c) of the Act.¹¹² These steps included issuing warnings to the account holders of the accounts identified as being connected with copyright infringement. If

¹⁰⁴ (2010) 263 ALR 215 at 235 [77]; (2011) 275 ALR 1 at 36-37 [152]-[154]; at 78 [329].

¹⁰⁵ Malone XXN, T705-39-706.26.

¹⁰⁶ Dalby 07.08.09, Ex SJD-1, p 294.

¹⁰⁷ (2010) 263 ALR 215 at 252-253 [172]-[175]; (2011) 275 ALR 1 at 74-75 [316]-[317].

¹⁰⁸ (2011) 275 ALR 1 at 76-78 [467]

¹⁰⁹ cf (2011) 275 ALR 1 at 147 [655] (Nicholas J).

¹¹⁰ (2011) 275 ALR 1 at 43 [183]; Jagot J at 100 [426]; at 161-162 [720].

¹¹¹ (2011) 275 ALR 1 at 42 [181], at 44 [192]; at 100-101 [428]-[430]; at 162-163 [727]-[728]).

¹¹² (2011) 275 ALR 1 at 43-45 [186]-[197]; at 98 [415], 100 [426], 101 [431]; at 167 [748]-[751]).

those warnings were not heeded, iiNet had the contractual and technical capacity to take reasonable steps such as suspension and termination.

69. There was ample evidence of indifference of a kind sufficient to support a finding of authorization against iiNet, as Jagot J identified:¹¹³

10 *Further, this is not a case of mere indifference. By its responses to AFACT iiNet made its position that it would not take action clear. By its press release of 20 November 2008 iiNet ensured that its customers knew that iiNet would not be disconnecting any services unless copyright infringement had been proven in court proceedings. By its communications with Westnet and other members of its industry organisation iiNet sought to have its position adopted by other internet service providers ...*

70. iiNet displayed an indifference which at least two judges in the Full Court saw as contumelious or dismissive.¹¹⁴ iiNet's attitude precluded any meaningful dialogue by which, if additional information had actually been sought by iiNet, it could have been provided by the appellants, who had no reason to assume it was necessary.¹¹⁵

- 20 71. iiNet did not remain neutral in the face of the infringements,¹¹⁶ particularly when its own interests were at stake.¹¹⁷ As disclosed in Mr Malone's response to Westnet's infringement policy¹¹⁸ (described by one officer as "acting with the conscience on the notices, assisting with fighting copyright infringement"), iiNet opposed dealing with allegations of infringement and sending warnings to customers; he described this as "pretty objectionable" and "doing damage to the industry and iiNet's position on this matter".¹¹⁹ iiNet also signalled its stance to users by issuing a press release that ensured that its customers knew that iiNet would not be disconnecting any services unless the infringements were proven in Court.¹²⁰ Its conduct constituted tacit approval of the continuing infringements.¹²¹ This is quintessentially conduct from which an inference of authorization is drawn.

- 30 72. At the least, such conduct amounted to countenancing the infringements of copyright for the purposes of authorisation. Despite its denials of authorisation, iiNet permitted the users of its internet service to infringe without interruption or consequence. It did so because it did not believe that it was required to act, because "it had no legal obligation to act".¹²² Mr Malone cited a variety of reasons why iiNet did not act, including his view that nothing short of a Court order or a legislative instrument would meet

¹¹³ (2011) 275 ALR 1 at 109 [474].

¹¹⁴ (2011) 275 ALR 1 at 23 [97]; at 58 [257]; at 109 [474]; see also at 171 [770].

¹¹⁵ See (2011) 275 ALR 1 at 99 [421].

¹¹⁶ (2011) 275 ALR 1 at 41 [176]; at 103 [434]; at 109 [469]; at 109 [474]; at 110 [476(6)].

¹¹⁷ (2011) 275 ALR 1 at 96 [406].

¹¹⁸ (2011) 275 ALR 1 at 96-98 [407]-[412];

¹¹⁹ Ex A2, tab 96.

¹²⁰ (2011) 275 ALR 1 at 109 [473].

¹²¹ (2011) 275 ALR 1 at 41 [176]; at 110 [477].

¹²² (2011) 275 ALR 1 at 105 [450].

the standard he had set for the company. His professed willingness to act if ordered by a Court to do so was circular; the conditions for a finding of authorization could never be met if a copyright owner was first required to obtain a finding of infringement from a Court.

- 10 73. Authorization has long been an important part of Australian copyright law and it has assumed great significance with the emergence of digital technologies, the online environment and the capacity to generate large-scale infringement of copyright in ways not previously possible. With many modern technologies – from photocopying to the internet – it is difficult and often undesirable for copyright owners to defend their rights against individual infringers. Beyond being able to identify the “IP addresses”, the appellants had no capacity, other than through an application to the Court, to identify the account holders of the accounts used to infringe. iiNet had no such disadvantage. It conceded the accuracy of the AFACT notices and it could have acted but determined that it would not do so even in relation to a single allegation of infringement.
74. The present case is one where the liability for the primary infringements held to have occurred should have been held to have been authorized by iiNet, if not before November 2008 then certainly from April 2009.

20 **Part VII: Statutory provisions**

75. The applicable constitutional provisions, statutes and regulations as they existed at the relevant time are set out in annexure “A”. Those provisions are still in force, in that form, at the date of making the submissions.

Part VIII: Orders sought

76. An order that the appeal be allowed.
77. An order that order 1 made by the Full Court of the Federal Court of Australia on 24 February 2011 be set aside and in lieu thereof the appeal to the Full Court be allowed and the matter be remitted to the Full Court for the making of further orders including declarations and injunctions.
- 30 78. An order that the respondent pay the appellants’ costs of and incidental to the proceedings in this Court and the Federal Court of Australia both at first instance and on appeal.
79. Such further or other orders or relief as the Court thinks fit.

DATED: 9 September 2011



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SCHEDULE 1

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ANNEXURE A

Relevant statutory provisions

Copyright Act 1968 (Cth)

36 Infringement by doing acts comprised in the copyright

- 10 (1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work 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. (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 the copyright in a work, 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;
 - (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.
- 20 (2) The next three succeeding sections do not affect the generality of this section.

39A Infringing copies made on machines installed in libraries and archives

Where:

- (a) a person makes an infringing copy of, or of part of, a work on a machine (including a computer), being a machine installed by or with the approval of the body administering a library or archives on the premises of the library or archives, or outside those premises for the convenience of persons using the library or archives; and
- 30 (b) there is affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a notice of the prescribed dimensions and in accordance with the prescribed form;

neither the body administering the library or archives nor the officer in charge of the library or archives shall be taken to have authorized the making of the infringing copy by reason only that the copy was made on that machine.

39B Communication by use of certain facilities

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.

101 Infringement by doing acts comprised in copyright

- 10 (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.
- (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.
- 30 (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.

112E Communication by use of certain facilities

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.