

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ

ROADSHOW FILMS PTY LTD & ORS

APPELLANTS

AND

IINET LIMITED

RESPONDENT

Roadshow Films Pty Ltd v iiNet Limited [2011] HCA 54
30 November 2011
S288/2011

ORDER

1. *The summons for intervention by the Australian Recording Industry Association Limited be dismissed.*
2. *The summons for leave to be heard as amicus curiae by the Media, Entertainment and Arts Alliance and the Screen Actors Guild be dismissed.*
3. *Leave be given to the Australasian Performing Right Association Limited to be heard as amicus curiae only to the extent that its submissions do not duplicate the submissions of a party.*
4. *The summons for leave to be heard as amicus curiae by the Australian Privacy Foundation be dismissed.*
5. *Leave be granted to the Communications Alliance Limited to be heard as amicus curiae only to the extent that its submissions do not duplicate the submissions of a party.*
6. *The summons for intervention and for leave to be heard as amicus curiae by the Australian Digital Alliance Ltd be dismissed.*

On appeal from the Federal Court of Australia

Representation

A J L Bannon SC with J M Hennessy SC and C Dimitriadis for the appellants (instructed by Gilbert + Tobin Lawyers)

R Cobden SC with R P L Lancaster SC and C J Burgess for the respondent (instructed by Herbert Geer Lawyers)

Interveners

M J Leeming SC seeking leave to appear as amicus curiae on behalf of the Australasian Performing Right Association Limited (instructed by Banki Haddock Fiora)

C A Moore SC seeking leave to intervene on behalf of the Australian Recording Industry Association Limited (instructed by Allens Arthur Robinson Lawyers)

M R Hall seeking leave to appear as amicus curiae on behalf of the Media, Entertainment and Arts Alliance and Screen Actors Guild (instructed by Banki Haddock Fiora)

E J C Heerey seeking leave to intervene or to appear as amicus curiae on behalf of the Australian Digital Alliance Ltd (instructed by Australian Digital Alliance Ltd)

P W Flynn seeking leave to intervene or to appear as amicus curiae on behalf of the Communications Alliance Limited (instructed by Carwardine Legal Solicitors)

No appearance for the Australian Privacy Foundation seeking leave to appear as amicus curiae

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Roadshow Films Pty Ltd v iiNet Limited

High Court of Australia – Appellate jurisdiction – Procedure – Interveners and amicus curiae – Whether leave should be granted.

Words and phrases – "Court significantly assisted", "interests directly affected".

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ. There are before the Court six summonses. The Australian Recording Industry Association Limited ("ARIA") seeks leave to intervene to make submissions to the Court in support of the appeal. The Media, Entertainment and Arts Alliance, jointly with the Screen Actors Guild ("the Guild"), applies for leave to intervene as an amicus curiae. So, too, do the Australasian Performing Right Association Limited ("APRA") and the Australian Privacy Foundation ("the Privacy Foundation"). The Communications Alliance Limited ("the Communications Alliance") and the Australian Digital Alliance Ltd ("the Digital Alliance") each seeks leave to be heard as amicus curiae and, alternatively, leave to intervene.

2 In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*¹, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.

3 Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.

4 The grant of leave for a person to be heard as an amicus curiae is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The Court will need to be satisfied, however, that it will be significantly assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance.

1 (1997) 189 CLR 579 at 600-605; [1997] HCA 31.

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Crennan J
Kiefel J

2.

5 None of the applicants for leave to intervene demonstrates that any identified legal interest of that applicant will be directly affected by the outcome of this case. It follows that none of those applicants shows that it has a right to intervene in these proceedings.

6 In considering whether any applicant should have leave to intervene in order to make submissions or to make submissions as *amicus curiae*, it is necessary to consider not only whether some legal interests of the applicant may be indirectly affected but also, and in this case critically, whether the applicant will make submissions which the Court should have to assist it to reach a correct determination. Ordinarily then, in cases like the present where the parties are large organisations represented by experienced lawyers, applications for leave to intervene or to make submissions as *amicus curiae* should seldom be necessary or appropriate and if such applications are made it would ordinarily be expected that the applicant will identify with some particularity what it is that the applicant seeks to add to the arguments that the parties will advance.

7 In this case, the Court is of the opinion that:

1. The summons for intervention by ARIA should be dismissed on the basis that its legal interests and those of its non-party members are not directly affected by these proceedings and that the matters it seeks to raise in these proceedings are unlikely to add to the submissions made by the parties.
2. The summons for leave to be heard as *amicus curiae* filed by the Media, Entertainment and Arts Alliance and the Guild should be dismissed on the basis that the matters they seek to raise are unlikely to add to the submissions made by the parties.
3. Leave should be given to APRA to be heard as an *amicus curiae* on the basis that its submissions may assist the Court in respect of matters not fully argued in the parties' submissions.
4. The summons for leave to be heard as an *amicus curiae* by the Privacy Foundation should be dismissed on the basis that its submissions are not sufficiently relevant to the matters which the Court has to decide.
5. Leave should be given to the Communications Alliance to be heard as an *amicus curiae* on the basis that its submissions may assist the Court in respect of matters not fully covered in the parties' submissions.

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Kiefel J

3.

6. The summons for intervention and for leave to be heard as amicus curiae by the Digital Alliance should be dismissed on the basis that its legal interests and those of its non-party members are not directly affected by these proceedings and that the matters it seeks to raise in these proceedings are unlikely to add to the submissions made by the parties.

The applicants that have leave to be heard have leave only to the extent that the submissions of the applicant do not duplicate the submissions of a party.