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AFACT claim against Australian ISP iiNet: internet copyright infringement and service providers

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**310 Unlike some other jurisdictions, Australia has seen minimal litigation on the liability of ISPs for copyright infringement. The 2010 case of Roadshow Films Pty Ltd v iiNet Ltd (No.3) was the first test case to determine the scope of an internet service provider's liability under Australian copyright law for copyright infringement conducted by its users. In this landmark decision, Justice Cowdroy said that Australia's third largest ISP, iiNet, had not authorised its users to engage in copyright infringement and established that iiNet had done no more than to provide an internet service to its users. (iiNet's position was clearly different from that of the well-known cases of Moorhouse, Kazaa, and Cooper, in which the court held that copyright infringements had occurred as the defendants had provided the "means" of infringement. In comparison, Cowdroy J. held that "mere provision of facilities by which an infringement can occur will not necessarily constitute infringement", drawing an analogy with the use of a photocopier in a library. This clearly shows that the extent of the service provider's actual or apparent knowledge of infringing activity occurring via its services, and its ability to control infringing behaviour conducted using its services, will play an important role in deciding the service provider's liability in copyright infringements.) This article analyses this very important case, outlines the debate regarding legal liability issues associated with internet service providers and focuses on the potential risks, liabilities and obligations the service provider may face. It also offers an analysis of some of the legal challenges that occurred in the case which are likely to continue to occur under Australian copyright law. It then briefly addresses how recent court decisions have addressed ISPs' liability in international jurisdictions.*

Introduction

One of the contentious issues associated with the internet's facilitation of information distribution is the liability of service providers for the transmission of information by its customers.¹ An ISP, akin to a telecommunications company, offers its users access to the internet using a data transmission technology such as dial-up, DSL, cable modem or dedicated high-speed interconnects, allowing internet users to access and download their files in record time.² This revolution in digital technology has facilitated such widespread reproduction and dissemination of material that the exploitation of works authored by others is a common occurrence.³ This presents fundamental challenges to copyright law and the disputes between copyright owners and ISPs are enormous.

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The result has been an “Australian first” litigation on the liability of ISPs for copyright infringement, in which a group of television and movie studios sued the internet service provider iiNet, accusing it of authorising its users to illegally download copyrighted films. The facts of the case, and the complex issues it dealt with, raised a number of questions: should iiNet, as an internet service provider, be held liable for the material transmitted using its services? Was it reasonable for iiNet to be held liable for the actions of its users? Who should compensate copyright owners whose works are unquestionably being transmitted without permission across the internet? Internet service providers' liability for the copyright-infringing activities of their users has proved to be a challenging issue for the courts over recent years. Cowdroy J. held that iiNet had done no more than to provide an internet service to its users and the ISP was not liable for the copyright infringements. The reasons for this finding, which will be discussed in further detail below, were highly complex and resulted in a judgment almost 200 pages long.

This article examines ISPs' liability under Australian copyright law and briefly reviews a number of court decisions over similar issues. The purpose of this article is to provide a comparative analysis of prevailing judicial approaches towards the issue of online liability for copyright infringement. The court decisions that specify to what extent service providers are liable for the content created, delivered and utilised by the users of internet platforms in other jurisdictions will also be analysed to examine how these cases may decide the future of Australian ISPs.

***311 The role of the ISP provider and its liability**

An ISP primarily provides internet access as a service to its customers. An ISP may be a telephone or cable company which provides subscribers with internet access as well as providing network infrastructure; it may be a global or national access provider or a small independent company serving a local market.⁴ ISPs provide a variety of services to their users, either as access providers or as providers of specific information services such as application providers; content providers of data, documents or audio-visual works; and/or host providers.⁵

It should be noted here that not all ISPs play the same role, and their liability may depend on the types of services they deliver and what sector of customers they serve.⁶ In order to decide ISPs' liability for copyright infringement, it is necessary to examine the role played by the service provider and the scope and extent of the activities the service provider undertakes. Effectively, some service providers--like Telstra--simply offer the physical infrastructure that enables individuals or organisations to connect to the internet. Such an ISP's main role is to facilitate connectivity, or the transmission of information between end-users, in a technical and automatic process.⁷ These service providers are usually not content providers; rather, they provide only the infrastructure over which such content travels.⁸ In contrast, other service providers facilitate services beyond internet access, offering both the infrastructure and the web links that allow users to download from the internet and, often, to reproduce and store downloaded material. Those service providers who include shared user content in the services they often face significant exposure to copyright infringement, and pose many challenges and concerns for the law⁹ in relation to intellectual property ownership, especially copyright. Accordingly, an analysis of ISPs' liability must distinguish between the positions of these two quite different types of communication service providers.

It is important to note that the extent of an ISP's liability depends on whether it acts merely as a communications carrier or whether it does “something more” than merely providing facilities for its users, and the extent to which the service provider has control over the activities it facilitates. It has been fairly widely recognised that when acting purely as a communications carrier, the service provider will not be held to have authorised any copyright infringement “merely” because the communication facilities it provides are used by someone else to infringe copyright.¹⁰ However, the situation is not so clear for ISPs who retain some control over the activities conducted using their services. In fact, the extent of the service provider's actual or

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apparent knowledge of infringing activity occurring via its services, and its ability to control infringing behaviour conducted using its services, may play an important role in deciding the service provider's liability in copyright infringements.

AFACT's claim against Australian ISP iiNet

The case for copyright infringement was brought against the Western Australian ISP iiNet,¹¹ Australia's third-largest ISP behind Telstra and Optus, by a consortium of 34 film and television studios¹² led by the Australian Federation Against Copyright Theft (AFACT). This was the first case to determine the scope of an internet service provider's liability under Australian copyright law for copyright infringement conducted by its users. The plaintiffs claimed that iiNet users infringed the copyright of movies such as *Made of Honour*, *Ocean's 13*, *Happy Feet*, *Baby Mama* and *Mamma Mia*, and television episodes such as *Heroes*, *Gossip Girl*, *Prison Break* and *Bones*,¹³ by making them available, transmitting them and copying them--basically, by file-sharing without the licence of the relevant owners of the copyright.¹⁴ AFACT *312 is an organisation which aims to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia.¹⁵

Research completed by Robert Layton and Paul Watters on behalf of Internet Commerce Security Laboratory outlines that at least 89 per cent (but possibly up to 99.7 per cent) of BitTorrent is copyright infringement materials.¹⁶ In an attempt to decrease the amount of infringing material on the internet, AFACT commenced a five-month investigation into copyright infringement occurring through BitTorrent. This involved weekly notices sent to iiNet with AFACT identifying the IP addresses of the customers who had infringed the film companies' copyright.¹⁷ iiNet stated that they were unable to disconnect users who were committing copyright infringement. AFACT objected to iiNet not disconnecting these users as they claimed that iiNet knew substantial copyright infringement was occurring but were not taking reasonable steps to prevent it from occurring.¹⁸

In the weekly letters, AFACT requested that iiNet disconnect the accounts of people who were committing copyright infringement and block certain BitTorrent websites. iiNet did not do as requested and ignored the letters. In November 2008, AFACT (on behalf of 33 other parties, representing most of the major film studios and their exclusive licensees in Australia) filed an action against iiNet in the Federal Court. The applicants alleged that iiNet had authorised copyright infringements by its users and therefore was personally liable under the Copyright Act 1968.

Cowdroy J. held that iiNet had not authorised the copyright infringement of its users. There were three main reasons for this finding:

1. the copyright infringements occurred directly as a result of the use of the BitTorrent system, not the use of the internet, and iiNet did not create and does not control the BitTorrent system;
2. iiNet did not have a relevant power to prevent those infringements occurring; and
3. iiNet did not sanction, approve or countenance copyright infringement.¹⁹

Cowdroy J. distinguished the current facts from cases where the court held that copyright infringements had occurred as the authorisers provided the "means" of infringement (*Moorhouse*,²⁰*Kazaa*²¹ and *Cooper*²²). His Honour placed significant emphasis on the *Moorhouse* decision, stating that it was the "foundation of the contemporary law of authorisation in Australia".²³ Since that decision, the cases on authorisation can be divided into two categories--the "technology cases" (*Kazaa* and *Cooper*) and the "APRA cases" (*Jain* and *Metro*).²⁴

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iiNet largely conceded that its users had committed copyright infringement using BitTorrent. It did, however, dispute the evidence brought forward by the applicants. The applicants submitted that every time an iiNet user logs on to the BitTorrent network, a new “make available online” infringement under s.86(c) occurs.²⁵ This argument was rejected by Cowdroy J., who stated that:

“The act of ‘making available online’ ought not to focus upon the technical process by which the file is ‘made available online’: rather it should focus on the substantive acts of persons.”²⁶

The court therefore found that an iiNet user makes each film available online once.²⁷ Cowdroy J. held that it was the use of the BitTorrent system as a whole which was the “means” by which the copyright infringement occurred.²⁸ It provided one of the facilities that enabled copyright infringements to occur, but that is different from the “means” by which the copyright infringement occurred.²⁹ The respondent's internet service did not result in the copyright infringement and had no control over the *BitTorrent* system.³⁰ His Honour also pointed to a number of other factors in iiNet's favour--it had no dealings with any organisation that produces BitTorrent clients; it did not deal with any website that makes torrent files that relate to infringing material; it does not support any software that is a party of the system; there was no evidence of any relationship between the iiNet and the BitTorrent system.³¹

*³¹³ Even though the court held that iiNet did not have the means by which copyright occurred, the wording of the legislation still required it to consider the elements of s.101(1A).³² The applicants put forward four main submissions why iiNet had the power to prevent copyright infringement. First, iiNet's ability to do so under its customer relationship agreement; secondly, the fact iiNet does so in other circumstances; thirdly, the safe harbour provisions; and fourthly, the technical capability of the respondent to suspend and cancel accounts.³³ After considering these issues in depth, Cowdroy J. held that iiNet did not have the power to prevent copyright infringement. The ISP did not have the right to suspend or terminate the accounts of people on the basis of the AFACT investigation and subsequent letters.³⁴ His Honour outlined that:

“It is unfortunate that the outcome of the Court's finding is that the applicants will continue to have their copyright infringed. However, the fault lies with the applicants for choosing the wrong respondent. The current respondent does not stand in the way of the applicants pursuing those who have directly infringed their copyright nor in the way of the applicants pursuing any of the constituent parts of the BitTorrent system for authorisation. This decision in no way forecloses the applicants pursuing those other avenues to obtain a suitable remedy. The existence of infringement of copyright, however regrettably extensive, can never compel a finding of authorisation.”³⁵

The existence of infringement of copyright, however regrettably extensive, can never compel a finding of authorisation.³⁶ Cowdroy J. therefore clearly believed that the users of iiNet were the appropriate parties to pursue, not the ISP itself.

Cowdroy J. further stated that the second statutory consideration is “the nature of any relationship existing between the person [the alleged authoriser] and the person [the primary infringer] who did the act concerned”.³⁷ His Honour outlined that there was a direct and contractual relationship between iiNet and the subscribers who committed copyright infringements. There was also a non-contractual and more distant relationship between the ISP and those who used the account but were not the subscribers. His Honour commented that the *Australian Tape Manufacturers* case outlined that the mere existence of the contractual relationship was not sufficient to find authorisation of copyright infringement.³⁸ The court found that in the current circumstances, the relationship did not persuade a finding of authorisation.³⁹

Cowdroy J. outlined that:

“The final statutory consideration is whether the alleged authoriser took any other reasonable steps to pre-

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vent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.”⁴⁰

The only step that iiNet could have taken to prevent copyright infringement was to terminate and/or suspend subscriber accounts. His Honour held that this was not a “reasonable step” for the ISP to take.⁴¹ There was insufficient evidence before the court that there were other technical steps that could have been taken but were not.⁴² Cowdroy J. outlined that it has been held that the word “authorisation” has the *Oxford English Dictionary* meaning of “sanction, approve, countenance”, all of which have an element of approval of favour, whether it be explicit or to be implied.⁴³ His Honour held that no approval or favour could be found and therefore iiNet did not approve, sanction or countenance the copyright infringements of the iiNet users.⁴⁴

Cowdroy J. further held that if iiNet had been found to have authorised copyright infringements, it could have relied on the safe harbour provisions. For iiNet to rely on the safe harbour provisions, it must comply with Subdivision D of Division 2AA. It must:

“(a) adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers; and

(b) if there is a relevant industry code in force -- the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material.”⁴⁵

The safe harbour provisions were introduced as part of the US Free Trade Implementation Act 2004 (Cth). The provisions in the Copyright Act had their origin in US law, specifically s.512 of Title 17 of the United States Code. While there are some differences in legislation in the two countries, it is largely the same and Cowdroy J. relied heavily on the US authorities coming to its ***314** conclusion. Cowdroy J. held that the ISP had an informal “repeat infringer” policy that fulfilled all of the necessary requirements under the safe harbour provisions.⁴⁶ The policy was constituted from two iiNet documents and testimony provided by iiNet during the case. While the policy was informal, iiNet had a process where it could disconnect users who were found to have infringed on multiple occasions.⁴⁷ In line with the relevant US authorities, this was sufficient to allow them to use the safe harbour provisions under the Copyright Act.

This case was important for a number of reasons--it was the first case to consider the liability of ISPs for the copyright infringements of its users. It was also the first case to discuss the safe harbour provisions. The case ultimately came down on the side of the ISPs and held that “there is no legal obligation or duty on any person to protect the copyright of a third party”.⁴⁸ It created a precedent that ISPs are not liable for what their users do with the services provided. AFACT was obviously displeased with the outcome of the case and initially indicated that it would appeal the decision.⁴⁹ The AFACT executive director stated that the film companies were out of step with well established copyright law in Australia, indicating that:

“The court found large scale copyright infringements, that iiNet knew they were occurring, that iiNet had the contractual and technical capacity to stop them and iiNet did nothing about them ... In line with previous case law, this would have amounted to authorization of copyright infringement.”⁵⁰

AFACT filed a Notice of Appeal on February 25, 2010 that outlined 15 different grounds of appeal. Surprisingly, it dismissed the appeal before the matter was heard. It is likely that this case will have significant impacts on the music and film industry. The general manager for the anti-piracy arm of the music industry, MIPI, Sabiene Heindl, stated that “the finding of the case meant that MIPI had no choice but to sue individual copyright infringers directly”.⁵¹ The copyright industry has also indicated that it will place pressure on the Government to enact a legislative response to this issue.⁵²

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Authorisation of copyright infringement under Australian law

The Copyright Act states that copyright will subsist in any original literary, musical, dramatic and artistic works or other subject-matter including sound recordings, cinematographic films and radio broadcasts, and published editions of works.⁵³ An infringement of copyright occurs so long as a substantial portion of a work or subject-matter has been reproduced or other copyright use is made of it.⁵⁴ Section 13(2) of the Act states:

“The exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter includes the exclusive right to authorise a person to do that act in relation to that work, adaptation or other subject-matter.”⁵⁵

Australian copyright law thus deems that infringement of the exclusive rights of a copyrighted work may occur in one of two ways: either directly, through the express actions of the infringer; or indirectly, through the act of authorising another party (the direct infringer) to commit the infringing act.⁵⁶ Moreover, s.101 of the Act provides that authorising a person to infringe copyright is itself an infringement of copyright.

The Copyright Act was amended--as part of the Copyright (Digital Agenda) Amendment Act 2000--and the new ss.39B and 112E and Division 2AA of the Copyright Act⁵⁷ provide that a person, including a carrier or carriage service provider⁵⁸ (CSPs), will not be held to have authorised any copyright infringement “merely” because the facilities provided by them for making a communication are used by someone else to infringe copyright.⁵⁹ These provisions protect the messenger or ISPs, arguing that they are not content providers; rather they provide infrastructure or networks over which such *315 content travels.⁶⁰ This highlights the fact that ISPs who make available the infrastructure capable of transmitting infringing material will not be liable for copyright infringement “merely” because alleged infringers used their facilities.⁶¹

The issue of what constitutes authorisation was examined in detail in *Australasian Performing Right Association Ltd v Metro on George Pty Ltd*⁶² (*APRA v Metro on George*). Metro on George was a Sydney nightclub which was held liable for the infringing performances of the parties that hired those premises. The Australasian Performing Rights Association (APRA) has agreements with at least 57 affiliated bodies carrying on public performances to which APRA obtains its rights with respect to the public performance of works.⁶³ APRA membership comprises of Australian and New Zealand authors, composers, music publishers and other interested parties such as beneficiaries. Metro had a hire contract with the parties that hired those premises.⁶⁴ The hire contract stated that Metro had to be supplied with the current description of the event and that it was responsible for providing ticketing services.⁶⁵ There was also a warranty that the hirer would ensure that all performances would comply with the Copyright Act and the licence requirements of APRA.⁶⁶

The respondent, Metro on George, was held liable for authorising copyright infringement in certain literary and musical works performed at the venue without the appropriate APRA licence. Metro argued that it did not authorise copyright because it had “no control over the promoters and that they did not permit or countenance the infringing performances”.⁶⁷

However, Justice Bennett was of the view that the respondent did have control and could have prevented an infringing performance from occurring but failed to take any steps to ensure this.⁶⁸ Justice Bennett further confirmed that:

“Control is necessary to constitute authorisation to infringe copyright; mere facilitation of the infringing conduct is insufficient, as is knowledge that there is likelihood that there will be infringing use.”⁶⁹

Having made this finding, the court went on to conclude that Metro did have the requisite control. Bennett J.

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distinguished the current circumstances from *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia*, as in the latter case the infringements did not take place on the vendor's premises. In this case:

“Metro was in control of the premises, operated the box office, provided refreshments and provided and operated the electricity necessary for the performances to take place.”⁷⁰

Metro's contract with the hirers may not have given it direct control over the content of the performances but it gave a measure of control over the use of the premises in circumstances where Metro knew or had grounds to believe that unlicensed performances were to take place at Metro.⁷¹

Further, Bennett J. held that Metro on George could not make out any of the defences as it was clear that it did not take “reasonable steps to prevent or avoid the doing of the act”. Metro did not check whether the promoters were licensed and when it found out that unlicensed performances were being held on its premises, it did not prevent them from occurring. Correspondence from APRA confirms that Metro was aware (or at least had reasonable grounds for suspecting) that unlicensed performances might occur.⁷²

This case is very different from most of the other copyright cases, which involved internet file-sharing issues. It also provides very strong obligations on parties who may have the ability to control the copyright infringement actions of others and provides a potential precedent for defendants being held liable for authorisation without having any control of the third-party infringement. Bennett J., in particular, considered here that the extent to which a party would be obliged to use legal powers in a contract to take reasonable steps to prevent copyright infringement must depend on the facts of the particular case.⁷³ This implies that the issue of what conduct amounts to authorisation is ultimately a question of fact and degree.

*³¹⁶ *Universal Music Australia Pty Ltd v Cooper*⁷⁴ was another case that directly addresses the issue of liability for authorising copyright infringement. In this case, Stephen Cooper owned a website called *mp3s4free.net* (the Cooper website). This website allowed people to upload links to music files hosted on other websites that Mr Cooper did not own, which were listed as hyperlinks on the Cooper website. When parties selected the hyperlinks the music was downloaded directly on to the user's computer from a third-party website. There appear to be three types of hyperlinks on the Cooper website.⁷⁵ The first was a file which automatically commenced downloading to the internet browser's computer when the hyperlink was “clicked”. The second hyperlink may have taken the browser to a website page which contained a direct link to an infringing file, whether or not there were also links to other material. The third hyperlink might take the user to a web page from which an infringing file could be accessed only by clicking on several other links. Mr Cooper did not create the hyperlinks; however, the website was set up so that third parties could add hyperlinks from Cooper's website to their own websites or other infringing files.

Several record companies brought suit against Mr Cooper for authorisation of copyright of the music recordings that were hyperlinked on the Cooper website. They also brought a suit against a number of other individuals involved in the process. Evidence was obtained by an *Anton Piller* order showed that Cooper's website had been accessed five million times in 12 days with at least 107,000 searches initiated from the site for names matching the recording artists identified in the pleadings. At trial Tamberlin J. found that Mr Cooper (and all the other parties) had infringed the record companies' copyright. This decision was then appealed, challenging the trial judge's finding that they had infringed copyright in the sound recordings by authorising the making of copies, and authorising the communication of those sound recordings to the public.⁷⁶ In the Court of Appeal, French, Branson and Kenny JJ. held that mere activity or indifference in the face of knowledge that someone else was infringing was not sufficient to lead to a finding of authorisation, however it may lead to a finding when coupled with other factors.

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In this case, the court considered two main issues: first, what amounts to authorisation under the terms of s.101, and secondly, the scope of the safe harbour protections under s.112E. The facts that the courts will consider when determining whether the party in question has been involved in an infringing act include:

“(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; and

(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.”⁷⁷

The court observed that Mr Cooper had the power to prevent the copyright infringement under the meaning of s.101(1A)(a). The lawyers for Mr Cooper argued that his client did not have the power to prevent individual users from using the Cooper website to access the copyrighted music files.⁷⁸ The court commented that whether a party has authorised copyright infringement is a question of fact and degree.⁷⁹ The court held that this was not relevant as Mr Cooper had specifically designed the Cooper website in a manner calculated to lead to infringement.⁸⁰ It was carefully structured and highly organised so that would facilitate and enable infringing downloading.⁸¹

In fact, the person authorising the infringing act must have a sufficient degree of connection, relationship or control over the primary infringer.⁸² The court found that Mr Cooper had a relationship with the users who downloaded the files through his website within the meaning of s.101(1A)(b). This was on two bases, first because users were attracted to the Cooper website owing to its user-friendly nature. Secondly, Mr Cooper gained a financial advantage from the website visits through sponsorship and advertisements.⁸³ The court also held that Mr Cooper had a relationship with the operators of the website hosting the files, as he had created the facility to allow them to access the site.⁸⁴

*³¹⁷ The court found that Mr Cooper had not taken reasonable steps to prevent copyright infringements.⁸⁵ That the website had a disclaimer warning users to download copyright material only with the copyright owner's permission was insufficient to constitute reasonable steps to prevent copyright infringement.⁸⁶ Even though there were disclaimers on the website, the court held that these were not only purely cosmetic--they were also an incorrect statement of the law.⁸⁷

Mr Cooper, through his lawyers, argued that he was entitled to claim protection from the safe harbour provisions under s.112E. This was on the basis that he provided the “mere facilities” for the infringement. This was unsuccessful and the court held that Mr Cooper had done significantly more than provide mere facilities.⁸⁸ He was aware of the nature of the usage of the website but did not take active steps to prevent the infringement from occurring, such as withdrawing from hosting the offending website.

This is the first case which indicates that hyperlinking, rather than just downloading, is a copyright infringement. The facts of the case are, however, very specific and the court noted that the infringement on the Cooper website was quite blatant and the website was designed to facilitate copyright infringement by its users. However, one commentator has argued that:

“The Cooper case, and the claim against iiNet, raises significant questions about the degree to which a service provider must be involved in copyright infringement in order to be taken to have ‘authorised’ that infringement within the meaning of the Copyright Act. By analogy, it might be said that iiNet has provided the means by which an infringement of copyright may be committed (i.e. Internet access), made it available to other persons (its users), and knows or has a reason to suspect that it will be used for the purpose of committing infringements of copyright. A great deal will therefore hinge on whether iiNet is found to have taken ‘reasonable steps’ to limit the use of the service to legitimate purposes.”⁸⁹

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However, again, it must be understood that the facts of the iiNet case were unique compared with BitTorrent, even though they are both peer-to-peer file-sharing services. BitTorrent is different from other peer-to-peer file-sharing services in a few ways, including that BitTorrent's maker has no control over what a user does with the software.⁹⁰ Therefore the exact limits of each case and each question of copyright authorisation will have to be tested case by case.

Another case in point is *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*.⁹¹ In this case, Wilcox J. found that Sharman was liable for copyright infringement because the suppliers of Kazaa software had authorised the copying and public communication of protected sound recordings without the license of the relevant copyright owner.⁹² The court found that the respondents were fully aware that substantial copying was being undertaken by users but failed to implement any of the available technical measures to reduce the incidence of copyright infringement.⁹³ The court said that Sharman was therefore held liable for authorisation of copyright infringement, as it did “something more” than merely providing the facilities required for the infringement to occur.⁹⁴ The court considered two important factors: (1) Sharman provided the facilities for infringement; and (2) Sharman had knowledge that Kazaa was being used predominantly to share copyright works.⁹⁵

The applicants sued Sharman (and a number of other parties) for a variety of actions including violation of Australian Trade Practices Act 1974 and the Fair Trading Act of 1987, conspiracy, and claims of copyright infringement under Australian Copyright Act 1968.⁹⁶ Justice Wilcox of the Federal Court of Australia found that Sharman had infringed copyright but rejected all the other claims. The Sharman case considered the following factors to find copyright infringement:

1. the defendant's financial interest in massive infringement;
2. the positive acts to encourage infringement through advertisements;
3. the defendant's knowledge that the majority of files were copyrighted; and
4. the defendant's control of infringement.⁹⁷

***318** Sharman and the other respondents had taken very limited steps to limit copyright infringement by users, when there were simple and viable options to do so. This could have included keyword filtering of filenames and the use of “gold files” (digital rights management protected files). This means that Sharman has the power to prevent or reduce infringement, but did not.⁹⁸ Justice Wilcox made this finding regardless of the fact that Kazaa had statements on its website admonishing users against infringing copyright and similar statements in the Kazaa software's end-user licence agreement.⁹⁹ Furthermore, Sharman did not control whether particular users engaged in file sharing or if they did, what they copied.

Justice Wilcox held that the Sharman parties qualified for the safe harbour provisions under s.112E. Regardless, his Honour determined that s.112E “does not confer general immunity against a finding of authorisation”. However, Justice Wilcox found that there was “something more” (in this case additional evidence of authorised infringement), therefore the safe harbour provisions did not exonerate the respondents from liability. However, in Sharman case, Wilcox J. in the Federal Court acknowledged that Parliament was only intending to “protect the messenger” by providing this exemption. The provision did not, he found, extend to carriers' authorisation of infringement by third parties.

The finding of the *Sharman* decision is based on the defendant's failure to adequately filter results when they had the ability to do so.¹⁰⁰ The *Sharman* case can be compared with the American case of *Grokster*.¹⁰¹ In general, both the *Sharman* and the *Grokster* cases were considered “wins” for the recording and music industry. However, the cases do not stop the issue of illegal file sharing and copyright infringement as file

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sharing can still occur from locations outside the United States and Australia. Therefore this type of litigation is useful but is not the solution to the international copyright infringement issue.

The above cases clearly established that the service provider had the ability to control the content posted by its users, yet took no action against customers who were engaging in copyright infringement.¹⁰² Even though s.112E of the Copyright Act was designed to give legal protection to service providers, the actual use of this defence remains mainly theoretical. The point here is whether the ISP in question acted as a more conventional type of information provider, akin to a telephone company, or whether its service provided more than that, more than purely a conduit for information. The question also arises whether the ISP had a certain degree of knowledge of the infringing activities or the ability to control infringing activities that were conducted by its users.

In light of previous cases and considerations it is therefore clear that the liability of the service provider depends on what service is being provided, the extent of the service provider's actual or apparent knowledge of the infringing activity occurring via its services and its ability to control infringing behaviour undertaken using its services.

When will ISPs be able to use the “safe harbour” defence?

The effect of the above cases and the uncertainties involved in existing copyright law place an increased burden on the technology provider, with potentially tremendous consequences for future innovations. However, the amendments passed late in 2004 as part of the US Free Trade Agreement with Australia have made some progress in addressing these uncertainties. The recent US Free Trade Agreement Implementation Act 2004 (Implementation Act) created a new Pt V, Division 2AA within the Copyright Act 1968 (Cth) to deal with safe harbour provisions, which will limit the remedies against an internet service provider who satisfies the conditions stated in the Act. The Act introduced provisions similar to those in s.512 of the US Copyright Act into Australian copyright law in order to provide a measure of protection to online service providers who had little or no control over the actions of their end-users.¹⁰³ This section of the article examines whether ISPs can rely on the safe harbour provision of the Copyright Act.

The safe harbour provisions are vitally important to any internet service provider--they ostensibly protect the provider from being liable for copyright infringement performed by users of its service.¹⁰⁴ In fact, they protect the service provider for any intermediate and transient storage of material in the course of conveying digital information; however, they do not automatically guarantee protection of certain activities that technically infringe.¹⁰⁵ It should therefore be noted that these new provisions do not create exclusions from copyright infringement; rather, they limit the remedies that are available against ISPs for copyright infringement that relate to carrying out certain *319 categories of online activities if those ISPs comply with certain specified conditions.¹⁰⁶ The qualification for safe harbour is subject to several conditions, including¹⁰⁷ :

“(a) Data transmission occurs through an automated technical process without selection of the material by the service provider.

(b) The service provider does not determine the recipients of the material.

(c) Intermediate or transient copies stored on the provider's system or network must not be accessible to anyone other than the designated recipients, and such copies must not be retained on the system longer than is reasonably necessary.

(d) The provider must not have modified the content of the transmitted material.”¹⁰⁸

In addition, to qualify for safe harbour protection, service providers must also fall within the technical and

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limited carriage service provider (CSP) definition contained in the Telecommunications Act 1977.¹⁰⁹ The reason is that carriage service provider is defined to have the same meaning as in the Telecommunications Act. The term “carriage service provider” is defined in s.87 of the Telecommunications Act 1997 to include:

“A person who supplies, or proposes to supply, a listed carriage service to the public using a network unit owned by one or more carriers or a network unit in relation to which a nominated carrier declaration is in force.”¹¹⁰

Section 87 of the Act does not apply to activities other than communication which gives a narrow definition to the term “ISPs” as service providers usually encompass a very large range of services other than telecommunications.

This clearly shows that ISPs will not be liable to copyright owners for merely routing internet traffic as long as they “adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers”.¹¹¹ To ensure safe harbour protection under the Copyright Act, internet service providers need to meet certain criteria defined in copyright law, such as:

“(a) Internet service provider must have terminated the account of repeat copyright infringers.

(b) It must have also taken ‘reasonable steps’ to remove or disable access to pirated material once it has become aware the material is infringing.”¹¹²

It is thus important to examine whether the ISP in question meets the requirements of the safe harbour provisions of the Copyright Act 1968 (Cth). In order to do so, the ISP must prove that it has adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers and that it has taken reasonable steps to remove or disable access to pirated material if it has become aware of the existence of such infringing material.¹¹³

In the current matter, AFACT asserts that it sent several letters to iiNet notifying the ISP of the infringements.¹¹⁴ It confirms that even though iiNet had “reasonable knowledge” of the presence of infringing material on its site, it had not acted expeditiously to remove or disable access to the material.¹¹⁵ AFACT argued that iiNet “authorised” a breach of copyright by failing to take steps to prevent its account holders from engaging in unlawful file sharing and, in particular, by refusing to forward AFACT's complaints to the relevant account holders.¹¹⁶ AFACT also argued that iiNet had neither attempted to detect infringement activity carried out by its users nor had it taken “reasonable steps” to remove or disable access to pirated material upon becoming aware of its existence.¹¹⁷ In their defence, iiNet claimed that:

- The allegations of copyright infringement in the AFACT notifications were not accompanied by sufficient information to demonstrate the veracity of the allegation.
- iiNet was, and is, legally bound to continue to provide relevant services to iiNet subscribers as per its contracts with those subscribers.

¹¹⁸ As such, it is not clear whether iiNet was legally able to remove or disable the user's access to the material without a court order. It is a matter of concern whether iiNet had the authority to disconnect the alleged infringers *320 when notified of the alleged infringements by the movie studios. Parliament provided ISPs with significant latitude on determining their repeat infringer policies. The words “reasonably” and “appropriate circumstances” provide scope for an objective element in the assessment of the policy as well as the ability for the court to consider the policy and its operation.¹¹⁹ Cowdroy J., drawing on considerable US authority on the topic, held that iiNet had adopted and reasonably implemented a repeat infringer policy and had therefore satisfied the requirements of the safe harbour provisions.¹²⁰ This finding was however

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largely irrelevant as his Honour held that iiNet had not authorised copyright infringements and therefore did not need to rely on the safe harbour provisions.

How do courts determine internet service providers' liability outside Australia?

In recent years, several court decisions have specified the extent to which service providers are liable for the content created, delivered and used by their customers. Internationally, many cases have established a trend towards exonerating ISPs from liability for users' actions.¹²¹ In particular, courts seem to have taken a very relaxed approach to ISP liability for third-party copyright infringements, and seem quite hesitant to find ISPs liable for offences committed by their users. This section of the article will examine the judicial approach in other jurisdictions to ISP liability for third-party copyright actions.

*The Religious Technology Center v Netcom On-Line Communications Services Inc*¹²² case was the original ISP copyright case in the United States. The Religious Technology Center (RTC) held copyright over published and unpublished works of the late founder of the Church of Scientology, L. Ron Hubbard.¹²³ Netcom On-Line Communications, Inc provided internet for Dennis Erlich, a former minister of Scientology turned critic of the church, who began an online forum for discussion and criticism of Scientology.¹²⁴ Within this forum Erlich posted portions of the Hubbard works, thereby breaching RTC's copyright. The Religious Technology Centre¹²⁵ brought a copyright infringement action against the defendant for posting a large portion of the church's copyrighted works on the internet.

The court held that neither the ISP providing internet access nor the bulletin board service storing the posted material was liable for direct copyright infringement when a subscriber posted copyrighted materials.¹²⁶ The court observed that:

“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to use a copy by a third party.”¹²⁷

In responding to the argument that, in rendering its service, the ISP's computers stored and thereby “copied” copyrighted material on its system for a period of days, the court stated¹²⁸ :

“Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that would lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from non-infringing bits. Because the court cannot see any meaningful distinction (without regard to knowledge) between what Netcom did and what every other Usenet server does, the court finds that Netcom cannot be held liable for direct infringement.”¹²⁹

Judge Whyte indicated that Netcom On-Line Communications was not to be held responsible for the wrongful acts of users--including copyright infringements by third parties--because Netcom, unlike other online providers such as CompuServe, America Online and Prodigy, neither creates nor controls the information retrievable by its subscribers.¹³⁰ It was also argued that *³²¹ Netcom did not monitor its postings.¹³¹ Even though this case was decided before the introduction of the current legislative regime with safe harbour provisions, it clearly shows that ISPs' liability will depend on the types of services the ISP delivers and what sector of customers the ISP serves.

*Verdict Scientology v Providers and Karen Spaink*¹³² was a Dutch case, similar to the *Religious Technology Center* case above, in which the defendant posted internal materials used by the Church of Scientology and

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was sued for copyright infringement along with the ISP whose server hosted the material, XS4ALL, and a number of other access providers.¹³³ In February 1996, the Dutch court rejected the Scientologists' claims, on the basis that the ISP did nothing more than provide the opportunity to publish.¹³⁴ The court held that ISPs were not to be held responsible for the wrongful acts of users--including copyright infringements--as the ISPs do nothing more than provide the opportunity to publish and that, in principle, they can exert no influence over, nor have knowledge of, what will be posted by their users.¹³⁵ *Bunt v Tilley*,¹³⁶ decided in the United Kingdom in 2006, dealt not with ISPs' copyright liability but with their liability for defamatory messages placed on a website by third parties. The claimant sued the respondent, and a number of other parties, for the posting of defamatory messages on the ISPs' websites. The ISPs did not post the messages but owned the websites on which the messages were posted. The ISPs then successfully sought a declaration that the claim against them be struck out as they were not the publishers of the messages. The court held that for a party to be liable for defamation, they had to knowingly be involved in the publication of the defamatory messages. It was not sufficient that the defendant merely played a passive role in the process.¹³⁷ The court refused to hold the ISPs liable for defamation because they had no knowledge or control over the information and, therefore, no liability was attached.¹³⁸

*Law to Promote Confidence in the Digital Economy, Re*¹³⁹ is a French court decision which challenged the French laws enacted in the Constitutional Council to promote confidence in the digital economy. The case questioned whether the imposition of both civil and criminal liability on internet service providers who had actual knowledge of the illegal nature of information stored on behalf of the recipients of their services, or to whom that illegal nature was made apparent, was compatible with the right to privacy; the rights of freedom of the press and of communication; the right of defence; and the right to a fair hearing.¹⁴⁰ Recent amendments to the Freedom of Communication Law in France propose that:

“ISPs cannot be made liable for content hosted by them, or to which they give public access, if they had no role in authoring the content and if they have taken appropriate measures to suppress public access to this content upon being informed of it.”¹⁴¹

The above cases highlight the fact that ISPs who make available the infrastructure necessary for transmitting infringing material will not be liable for copyright infringement committed using services in which the ISP has no control over the content, or could not reasonably be expected to have any control over the content.¹⁴² The above cases are also clear evidence that a service provider is under no obligation to actively seek evidence indicating infringing activity on its website if it does not have actual knowledge of infringing material or activity occurring on its network.

In contrast, the *Society of Composers Authors and Music Publishers of Canada v Canadian Association of Internet Providers*¹⁴³ also dealt with the complicated issue of who should be held liable for the copyright infringements of music downloaded in the host country (in this case, Canada) from a foreign country via the internet. In this case, the respondent, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), aimed to impose liability for royalties on various ISPs in Canada, irrespective of where the infringing transmission originated.¹⁴⁴ The appellants, a group of Canadian ISPs, argued that the Copyright Board had found that none of them regulated or was even aware of the content of internet communications which they transmitted.¹⁴⁵ They argued that they were like a telephone company in that they only provided the medium and could not control the message; and they challenged the imposition of royalties on this basis.¹⁴⁶ In addition, s.2.4(1)(b) of the Copyright Act provides that persons *322 who only supply “the means of telecommunication necessary for another person to so communicate” are not, themselves, to be considered parties to an infringing communication. In the first instance, the board held that a content provider is subject to a royalty approved by the board if, but only if, the content is posted on a server located in Canada.¹⁴⁷ The decision was then appealed in the Federal Court of Appeal, which held that:

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“As to the limited protection of s.2.4(1)(b), the majority opinion ruled that the Board erred in law when it held that an Internet Service Provider who caches material is thereby providing a means *necessary* for another to communicate it. The fact that the cache enhances the speed of transmission and reduces the cost to the Internet access provider does not render the cache a practical *necessity* for communication. To decide otherwise would further erode copyright holders' right to be compensated for the use of their works by others.”
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The court found that the operation of a cache is not protected by the exemption of s.2.4(1)(b), given that caching is not necessary for communication. Thus the exemption does not apply to ISPs that cache material to enhance transmission speed, and ISPs should therefore be required to pay a royalty appropriate to such activities.¹⁴⁹ It was held that AOL was infringing the copyright of the music files by providing a service that enabled the files to be downloaded without the consent of their copyright owner. If AOL provided illegal content on its sites, it would be liable for further infringements relating to that content, even if it had no knowledge of such infringements. The court held that even though the users were acting voluntarily, they were acting on AOL's behalf and for AOL's benefit, and therefore any knowledge held by the users would be imputed to AOL.

*Hit Bit Software GmbH v AOL Bertelsmann Online GmbH & Co KG*¹⁵⁰ is another case decided--this time in Germany--in favour of copyright owners. The ISP AOL hosted an online music forum in which files of various formats were stored and could be uploaded or downloaded by internet users.¹⁵¹ Hit Bit held the copyright of a number of the files that were downloaded from the website, and therefore sued for the breach. The court held that the ISP should have known, if it had applied the proper care and attention, that the site's content was infringing.¹⁵²

In the case of *CoStar Group Inc v LoopNet Inc*,¹⁵³ CoStar Group, Inc is a provider of commercial real estate information, with the most comprehensive database of real estate information in America. It includes a large collection of photographs of commercial properties, and CoStar owns the copyright to most of these photos.¹⁵⁴ LoopNet is an ISP whose website allows subscribers to post listings of commercial real estate on the internet.¹⁵⁵ LoopNet does not post real estate listings on its own account, but provides other users with a web hosting service.¹⁵⁶ When users enter details of properties they agree to terms and conditions which include verification that all photos have copyright authorisation.¹⁵⁷ Some of the photos on LoopNet were found to be infringing the copyright of CoStar Group, Inc. CoStar contacted LoopNet in early 1998 alleging copyright infringement.¹⁵⁸ On receipt of this information, LoopNet removed the photos and instituted a policy to stop copyright infringement from recurring. However, this did not stop all of the infringements and, in 1999, CoStar commenced proceedings against LoopNet. The court held that LoopNet had responded appropriately to CoStar's complaints about copyright violations and had removed the offending photograph. CoStar could not therefore seek to hold LoopNet liable as a direct infringer when LoopNet had complied with the request to prevent its users from infringing.¹⁵⁹ It was thus held that:

“LoopNet's perfunctory gatekeeping process, which furthers the goals of the Copyright Act, cannot be taken to create liability for LoopNet as a direct infringer when its conduct otherwise does not amount to direct infringement.”¹⁶⁰

This case centred upon the safe harbour provisions of the DCMA and its application to a *sui generis* situation.

Analysis of recent reported decisions related to service providers' copyright liability shows that courts have encountered a certain degree of difficulty in addressing such a technologically complex issue. Certainly, the courts have come to inconsistent conclusions in relation to service providers' liability. However, the majority of the above cases demonstrate that the service provider may be found liable if it had a “certain degree of

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knowledge” of the third party's infringing activities. It appears that the degree of an ISP's liability correlates to the degree of control it exerts, its knowledge of infringing activity and *323 the extent to which the ISP provides access to the network and any content contained therein. The intention and the knowledge of infringement are relevant in assessing liability, and it is important to look at each transaction individually to determine whether an ISP acts merely as a conduit for communications for other persons, or whether it acts as something more. When viewed in this context, the principles of the above cases may be instrumental in deciding future cases on ISP liability.

Conclusion

This article has illustrated the uncertainties to be faced by the courts in Australia in interpreting the law and regulations related to ISPs' liability for copyright infringement--uncertainties that still exist after the decision in *Roadshow Films v iiNet*. The author therefore contends that legislatures and policy-makers need to alter the law in response to the emerging technology, benefiting both ISPs and copyright holders. On the one hand, ISPs play a crucial role in cyberspace and are critical to the growth and expansion of the internet. On the other hand, copyright owners' rights must also be protected against unfair commercial exploitation of their work. A proper balance must be achieved between taking account of the legitimate interests of internet service providers and simultaneously considering the equally significant interests and rights of copyright holders. The law requires updating either through amendment of existing legislations or the introduction of a new self-contained statutory framework dealing exclusively with ISPs' liability in Australia. This problem will only be solved by a co-operative approach which aligns laws with ISPs and right holders, similar to what has happened in France.

In November 2007, the French Government disclosed a historic accord reached between the film and music industries and that country's most prominent ISPs.¹⁶¹ According to the French ISP Anti-Piracy Accord:

“The action to be taken by the ISP adheres to a three strikes' policy whereby the first message to the end user comprises a warning to cease the infringing activity; the second message threatens or can result in suspension of service; and in the event of a third infringement by the end user, termination of service will occur.”¹⁶²

These types of laws need to be introduced in Australia so that internet service providers will be legally liable for content carried via their services unless they comply with demands to remove material from their networks upon receipt of a complaint issued by a third party that claims the content violates their copyright. There should also be some regulations under the Australian Copyright Act involving the new inducement theory of contributory, vicarious and secondary liability. This article argues that laws need to be changed to make ISPs more responsible for illegal activity generated and perpetuated by their users. In fact, ISPs must actively monitor their sites in order to meet their duty of care to prevent any illegal practices from occurring there.

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13. The complete list of the allegedly infringed material is in *Roadshow Films Pty Ltd v iiNet Ltd (No.3)* [2010] FCA 24 at Sch.II.

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19. *Roadshow Films v iiNet* [2010] FCA 24, Cowdroy J.'s summary at [21].
20. *University of New South Wales v Moorhouse* (1975) 133 C.L.R. 1.
21. *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.
22. *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.
23. See the judgment in *Roadshow Films v iiNet* [2010] FCA 24.
24. *Roadshow Films v iiNet* [2010] FCA 24 at [384].
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28. *Roadshow Films v iiNet* [2010] FCA 24 at [240]-[250].
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58. A CSP is person that supplies a carriage service to the public using a telecommunications network unit. CSPs can include organisations that resell time on a carrier network for phone calls, provide access to the internet (internet service providers) or provide telephone services over the internet (VoIP service providers). CSPs are not required to obtain a licence from ACMA to supply a carriage service to the public; see http://www.acma.gov.au/WEB/STANDARD/pc=PC_310722 [Accessed December 8, 2010].
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74. *Universal Music Australia Pty Ltd v Cooper* [2005] 65 I.P.R. 409. Here is Branson J.: "Having taken into account the matters identified above, and the name of his website, I conclude that Mr. Cooper infringed the Record Companies respective copyrights in sound recordings by in Australia authorizing internet users to do acts comprised in those copyrights, namely make copies of the sound recordings. I also conclude that Mr. Cooper infringed the Record Companies respective copyright in sound recordings by authorizing operators of remote websites to communicate those sound recordings to the public in Australia."
75. *Cooper v Universal Music Australia Pty Ltd* (2006) 156 F.C.R. 380 at [25].
76. *Cooper v Universal Music* (2006) 156 F.C.R. 380 at [25]; see also, Law News Update, "Cooper and Universal Music: Authorisation Liability and Safe Harbour Defences Considered", at <http://www.lawyerlink.com.au/news/display/118> [Accessed February 24, 2011].
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78. *Cooper v Universal Music* [2006] FCAFC 187 at [36].

79. *Cooper v Universal Music* (2006) 156 F.C.R. 380 at [15].

80. *Cooper v Universal Music* [2006] FCAFC 187 at [41].

81. *Cooper v Universal Music* [2006] FCAFC 187 at [41].

82. *Cooper v Universal Music* (2006) 156 F.C.R. 380 at [135].

83. *Cooper v Universal Music* (2006) 156 F.C.R. 380 at [135].

84. *Cooper v Universal Music* (2006) 156 F.C.R. 380 at [87] (Tamberlin J.).

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89. "iiNet Film Piracy case" (November 21, 2008), at <http://www.intelligentdesign.com.au/blog/2008/11/21/188/> [Accessed February 24, 2011].

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92. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49]; see also, J.C.J. Lee, "The Ongoing Design Duty in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* -- Casting the Scope of Copyright Infringement Even Wider" (2007) 15(3) *Int. J. Law Info. Tech.* 275.

93. M. Jackson, "Black Hats and White Hats: Authorisation of Copyright Infringement in Australia and the United States" (2006) 14(1) *International Journal of Law and Information Technology* 28.

94. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49]; see also, K. Weatherall, "Part V Division 2AA of the Copyright Act 1968 (Cth) Limitation on Remedies Available against Carriage Service Providers Does the Scheme need to be Expanded?" (2005), at <http://www.ipria.org/publications/submissions/KWeatherallSubmission1safeharbour.pdf> [Accessed February 24, 2011].

95. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49], [98]; see also, Lee, "The Ongoing Design Duty in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*" (2007) 15(3) *International Journal of Law and Information Technology* 275.

96. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49].

97. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49]; see also, A. Allen, "What's in a Copyright? The Forgotten Right 'To Authorize'" (2007-08) 9 *Columbia Science and Technology Law Review* 87.

98. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49].

99. *Universal Music v Sharman* [2005] 220 A.L.R. 1 at [49].

100. Allen, "What's in a Copyright?" (2007-08) 9 *Columbia Science and Technology Law Review* 87.

101. In the American case the court considered the following factors: (1) the system being almost entirely devoted to infringing uses; (2) the defendant's targeting of known infringers; (3) the active steps taken to prevent detection of illegal file sharing; (4) the business model depending on massive infringement; and (5) the lack of meaningful, affirmative steps to prevent infringement, either through acoustic fingerprinting, or metadata filtering.

102. J. Coates et al., "Legal Aspects of Web 2.0 Activities: Management of Legal Risk Associated with Use of YouTube, MySpace and Second Life", Paper prepared for Smart Service Queensland (2007).

103. J.C. Ginsburg, "User-Generated Content Sites and Section 512 of the US Copyright Act" in Irini A. Stamoudi (ed.), *Copyright Enforcement and the Internet* (Kluwer Law International, 2010); Columbia Public Law Research Paper No.10-255 at <http://ssrn.com/abstract=1711924> [Accessed February 24, 2011].

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105. Copyright Act s.116AA is to limit the remedies that are available against CSPs for infringements of copyright that relate to the carrying out of certain online activities by CSPs.
106. G.L. Middleton, “Copyright Conundrum -- Liability of ISPs for Online Copyright Infringement”, at <http://crpit.com/confpapers/CRPITV44Middleton.pdf> [Accessed February 24, 2011].
107. 17 USC § 512(a); see also, B.T. Yeh and R. Jeweler, “Safe Harbor for Service Providers Under the Digital Millennium Copyright Act” (2005), at http://www.ipmall.info/hosted_resources/crs/RL32037_051104.pdf [Accessed February 24, 2011].
108. 17 USC § 512(a); see also, Yeh and Jeweler, “Safe Harbor for Service Providers Under the Digital Millennium Copyright Act” (2005), at http://www.ipmall.info/hosted_resources/crs/RL32037_051104.pdf [Accessed February 24, 2011].
109. An example of such a person is a carriage service provider (CSP), which includes internet service providers (ISPs).
110. Telecommunications Act 1997 s.87.
111. Copyright Act 1968 (Cth) s.116AH.
112. Copyright Act 1968 (Cth) s.116AH.
113. See Copyright Act 1968 s.116AH; See also, *Roadshow Films v iiNet* [2010] FCA 24; see also, C.S. Tobin, “Suspension of Internet Service as a Sanction for Copyright Violations: A New Remedy for Peer-to-Peer Infringement” (2010), at <http://paxsonpc.com/10-1222'TOBIN--SuspensionofInternetService.pdf> [Accessed February 24, 2011].
114. *Roadshow Films v iiNet* [2010] FCA 24.
115. *Roadshow Films v iiNet* [2010] FCA 24.
116. *Roadshow Films v iiNet* [2010] FCA 24.
117. *Roadshow Films v iiNet* [2010] FCA 24.
118. *Roadshow Films v iiNet* [2010] FCA 24.
119. *Roadshow Films v iiNet* [2010] FCA 24 at [620].
120. *Roadshow Films v iiNet* [2010] FCA 24 at [620].
121. T. Cohen, “Advisory 5: ISP Liability for Content” (2000), at <http://old.ispa.org.za/regcom/advisories/advisory5.shtml> [Accessed February 24, 2011].
122. *Religious Technology Center v Netcom On-Line Communications Services Inc* 907 F. Supp. 1361 (1995).
123. *RTC v Netcom* 907 F. Supp. 1361, 1365-1366 (1995).
124. *RTC v Netcom* 907 F. Supp. 1361, 1369 (1995).
125. Religious Technology Center (RTC) is a non-profit organisation formed by Scientologists and is affiliated with the Church of Scientology; quoted in M. Martin, “Copyright Law: The Relevance of Bad Faith to a Fair Use Analysis” (2004) 19(2) *Journal of Technology Law and Policy* 221, at http://grove.ufl.edu/%EBtechlaw/vol9/issue2/martin.html#_ednref31 [Accessed December 22, 2010].
126. *RTC v Netcom* 907 F. Supp. 1361 (1995).
127. *RTC v Netcom* 907 F. Supp. 1361, 1370 (1995).
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129. *RTC v Netcom* 907 F. Supp. 1361, 1372-1373 (1995).
130. Eugene A. Burcher and Anna M. Hughes, “Casenote, Religious Tech. Ctr. v. Netcome On-Line Communications, Inc.: Internet Service Providers: The Knowledge Standard for Contributory Copyright Infringement and The Fair Use Defense” (1997) 3 Rich. J.L. Tech. 5, at <http://jolt.richmond.edu/v3i1/burhugh.html> [Accessed February 24, 2011]; see also, W.M. Melone, “Contributory Liability for Access Providers: Solving the Conundrum Digitalization Has Placed on Copyright Laws”, at <http://jolt.unc.edu/blog/2009/01/09/dmcas-safe-harbor-provisions-just-got-little-bit-safer>

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[tp://www.law.indiana.edu/fclj/pubs/v49/no2/melone.html](http://www.law.indiana.edu/fclj/pubs/v49/no2/melone.html) [Accessed February 24, 2011].

131. Hubbard's works were posted worldwide within a few hours of Ehrlich's initial posting. David J. Loundy, "Internet Case Shows Copyright Act Needs Revision", 141 *Chicago Daily L. Bull.* 244, December 14, 1995, p.6; see also, M.N. Shulman, "Internet Copyright Infringement Liability: Is an Online Access Provider More like a Landlord or a Dance Hall Operator?" (1997) 27(3) *Golden Gate University Law Review* 555, 578.

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138. X. Amadei, "Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content" (2001-02) 35 *Cornell Int. L.J.* 189.

139. *Law to Promote Confidence in the Digital Economy, Re* [2005] 1 C.M.L.R. 14.

140. *Law to Promote Confidence in the Digital Economy, Re* [2005] 1 C.M.L.R. 14.

141. Cohen, "Advisory 5: ISP Liability Content", at <http://old.ispa.org.za/regcom/advisories/advisory5.shtml> [Accessed February 24, 2011].

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143. *Society of Composers Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 S.C.R. 427.

144. *SOCAN v Canadian Association of Internet Providers* [2004] 2 S.C.R. 427.

145. *SOCAN v Canadian Association of Internet Providers* [2004] 2 S.C.R. 427.

146. *SOCAN v Canadian Association of Internet Providers* [2004] 2 S.C.R. 427.

147. *SOCAN v Canadian Association of Internet Providers* [2004] 2 S.C.R. 427; see <http://www.ipsufactoj.com/international/2005/Part10/int2005...10%29-011.htm> [Accessed February 24, 2011].

148. *SOCAN v Canadian Association of Internet Providers* [2004] 2 S.C.R. 427; 2004 SCC 45.

149. The court held that the knowledge of an internet service provider that someone might be using content-neutral technology to violate copyright is not necessarily sufficient to constitute authorisation which requires a demonstration that the defendant did give approval to, sanction, permit, favour or encourage the infringing conduct. Authorisation can be inferred.

150. *Hit Bit Software GmbH v AOL Bertelsmann Online GmbH & Co KG* [2001] E.C.D.R. 18.

151. *Hit Bit Software* [2001] E.C.D.R. 18.

152. *Hit Bit Software* [2001] E.C.D.R. 18.

153. *CoStar Group Inc v LoopNet Inc* 373 F. 3d 544 (2004).

154. *CoStar Group* 373 F. 3d 544 (2004).

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