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## The “Safe Harbour” provisions of the Copyright Act 1968 - what lessons should we learn from the iiNet decision?

By Peter Knight

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On 4 February 2010, his Honour Justice Cowdroy of the Federal Court of Australia handed down his decision in *Roadshow Films Pty Limited v iiNet Limited (No 3)* (2010) FCA 24. In what should be regarded as a rigorous application of the principles of authorisation explored in *University of New South Wales v Moorhouse* (1975) 133 CLR 1; 49 ALJR 267; 6 ALR 193, his Honour concluded that iiNet Pty Limited (“iiNet”) did not authorise the infringement of the copyright in a number of films by providing internet access facilities to its customers and then taking no steps against those customers when notified of their infringing conduct. In brief, this was because the conduct of iiNet was more like that of the alleged authorisers in *Adelaide City Corporation v Australasian Performing Right*

*Association Ltd* (1928) 40 CLR 481; [1928] ALR 127; 9 LGR (NSW) 1; (1928) 2 ALJR 35, where the owner of a performance space had neither knowledge of nor control over the specific acts of infringement that occurred in the space,<sup>1</sup> than those in *Moorhouse*,<sup>2</sup> in which the authorisers had not merely provided an environment in which infringement occurred, but had done more that ensured that it did occur, whether by means of bringing the material to be copied to the infringer at the same time or by bringing in an audience expecting to be entertained with popular music performance rights in which was overwhelmingly likely to belong to the plaintiff. Furthermore, the Court found that iiNet had provided

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## **The “Safe Harbour” provisions of the Copyright Act 1968 - what lessons should we learn from the iiNet decision?**

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### **From the editors...**

The *iiNet* decision has led to a substantial amount of media coverage regarding the decision and what it will mean for the industry. In this journal's first article, Peter Knight takes a detailed look at the reasoning behind the decision with respect to the so-called 'safe-harbour' provisions for Carriage Service Providers in the *Copyright Act*. What do the provisions mean, how do they operate, what are they intended to prevent and how will the courts interpret them are all questions that are examined.

Recent changes to the *Telecommunications (Interception and Access) Act 1979* (Cth) have made it possible for network owners to protect their computer networks by intercepting non-voice communications. Anne Petterd reveals the key aspects of the new measures, the challenges faced and the requirements network operators will have to adhere to in order to maintain their network security.

On 30 October 2009, the Commonwealth Government announced plans to build Australia's own smart grid by inviting bids for its *Smart Grid, Smart City* project. John Gray and Vinod Sharma, in their article '*Smart Grids: what are they and what are the emerging legal issues?*', examine this new technology and give their thoughts on the opportunities available to the IT industry, the legal implications and the commercial benefits of adopting this new advance in green IT practices.

On 8 February 2010, her Honour Justice Gordon of the Federal Court of Australia found in *Telstra Corporation Limited v Phone Directories Company Pty Limited* (2010) FCA 44 that copyright does not subsist in White Pages or Yellow Pages directories. Rebecca White and Peter Knight offer their opinion regarding the decision and provide us with some insight into their thoughts of the reasoning in the case and the possibility of the findings being overturned on appeal.

The *Personal Property Securities Act 2009* will change the way securities in Australia are created, registered and enforced. There are also new rules for determining priority of interests with flow on effects to the IT industry. Andrea Beatty and Vinod Sharma in their article look at what the changes are, how the Act will affect the IT industry and give some advice on what you can do to prepare for the reforms.

And finally, the winner of the 2009 Student Prize competition, Maneela Bansal, gives us an insight into some of the key issues confronting not only India but the world from the threat of cyber-terrorism. Maneela provides an intriguing observation of what is a new and emerging form of modern day terrorism and suggests some approaches that can be undertaken to protect the IT industry from further attacks.

Entries for the 2010 Student Prize are now open. See page 19 for further details.

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neither the means of infringement (just the precursor to the means, the actual means being the BitTorrent system)<sup>3</sup> nor did it control the acts of infringement, in the sense required by *Moorhouse*.<sup>4</sup> In addition, any suggestion that iiNet 'sanctioned, approved, countenanced' the infringing conduct of its customers was simply unsustainable on the evidence.<sup>5</sup>

The *ratio decidendi* of this judgment have been reported elsewhere. However, of equal interest are the *obiter dicta* of the judgment in which the Court made a number of findings regarding the operation of the so-called 'safe harbour' provisions of the *Copyright Act 1968* (Cth) ("the Act") concerning carriage service providers ("CSPs"), namely s 112E (and, effectively, its equivalent in respect of works, s 39B)<sup>6</sup> and Part V Division 2AA (ss 116AA to 116AJ),<sup>7</sup> added in case his Honour's decision on authorisation is overturned on appeal. The judgment shows how ill-considered and poorly drafted these provisions are.

Ss 39B and 112E state that a person who provides facilities for making, or facilitating the making of, a communication is not to be taken to have infringed the

copyright in a work or other subject matter by *authorisation* "merely because another person uses the facilities so provided to do something the right to do which is included in the copyright."

Part V Division 2AA provides a somewhat bizarre hierarchy of behaviours, referred to as Categories A, B, C and D. Category A of Part V Division 2AA relates to "providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections." It was only this category which was relevant to iiNet in these proceedings. Categories B, C and D relate to the automatic caching of copyright material by the carriage service provider (for example, to speed access to commonly sought websites), the storage of such material for a customer and providing weblinks to online locations (presumably selected by the CSP). Division 2AA, supplemented by Part 3A of the *Copyright Regulations 1969*, goes on to provide a complex web of behaviours with which the CSP must comply in order to benefit from certain protections from remedies available under the Act.<sup>8</sup>

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### **Background**

These proceedings concerned a claim by film copyright owners (“the Producers”) that iiNet had infringed the copyright in their respective films by authorising its customers to use its network to communicate the films using the BitTorrent system. This system was offered by third parties entirely unconnected with iiNet.

The Producers had engaged investigators to study the conduct of iiNet customers in order to establish that they were using the iiNet service to exchange the Producers’ copyright material. This resulted in a succession of letters being sent by an organisation identifying itself as the Australian Federation Against Copyright Theft, or AFACT, which identified itself as in some way associated with the Motion Picture Association (whose members included the Producers). Each of the letters alleged that an attached spreadsheet showed that individual subscribers of iiNet, identified by a series of IP addresses issued by iiNet, including some identified as ‘repeat infringers’, were involved in multiple infringements of copyright of identified films of the Producers (as well as including other complex, but irrelevant, and even misleading data that made the spreadsheet difficult to understand). The letters stated that AFACT was ‘unaware of any action taken by iiNet to prevent infringements of copyright in movies and television shows’. The letters also attached extracts of iiNet’s Customer Relationship Agreement, which allowed iiNet to cancel or suspend the subscriber’s access to the Internet services provided by iiNet if the subscriber used the service to infringe copyright, amongst other things. The letter asserted that iiNet’s failure to take such action against any of the identified subscribers “may constitute authorisation of copyright and demanded that iiNet prevent the subscriber from using its service in this way or take ‘any other action available’ to it in respect of such subscribers”. However, his Honour observed, “the measures by which AFACT requested iiNet perform were never elucidated.”<sup>9</sup>

These letters were sent weekly via email to iiNet. Each letter was also served by hand at iiNet’s offices over an extended period, indeed far longer than would appear to have been necessary for any useful forensic purposes.

This conduct on the part of the Producers appears to have been intended to set up evidence in anticipation of iiNet claiming the protection of Division 2AA of Part V on the grounds that it had adopted and reasonably implemented “a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.”<sup>10</sup> The Producers set out to establish that, even if iiNet had such a policy, it was not reasonably implementing it by terminating the accounts of the iiNet customers the Producers alleged that they had identified as repeat infringers in the AFACT letters.

His Honour observed in relation to this provision:

“[i]t is impossible to fail to notice the complete vacuum of legislative guidance in relation to [these requirements] ... Neither the legislation, the Regulations nor extrinsic materials provide any guidance to the Court as to what the ‘*appropriate circumstances*’ for termination are, what ‘*repeat infringement*’ means or what the ‘*accounts of repeat infringers*’ means. The assumption must be that Parliament left latitude with the CSP to determine the policy, and left the meaning of those words to be determined by the courts. ... To add to the confusion, condition 1 of item 1 applies to all categories of activities, even though a ‘repeat infringer’ in relation to category A is likely to be different to a ‘repeat infringer’ in relation to category C (hosting), for example. This is likely to be important, given that the termination must occur only in ‘*appropriate circumstances*’. ... Presumably, given that condition 1 of item 1 is said to apply to all categories, implementing an appropriate repeat infringer policy in relation to one category will not necessarily suffice for compliance with another category.”<sup>11</sup>

### **Part V Division 2AA of the Copyright Act - what are “repeat infringers”?**

In this case, the Court noted that the relevant conduct of iiNet subscribers was to download and make a copy of a film the copyright in which belonged to one of the Producers and then to communicate the Producer’s copyright material, that is, to “make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise).”<sup>12</sup>

In the case of making a copy by download, the Producers argued that, in the normal course of events, after the first copy was made by download, further copies would be made. The Court was not satisfied that there was any probative evidence of this in the case of any iiNet customer.<sup>13</sup>

In respect of the communication of the Producers’ films, his Honour observed that it is in the nature of this type of infringement activity that it must occur over a period of time – it is not the same as making a copy, which focuses on the copy made irrespective of how long it took to make. Furthermore, his Honour observed that the infringing activity is that of a person and not the computer that person chooses to use. So, for example, the fact that that person turns the computer on, off and on again<sup>14</sup> would not signify that the person made the copyright material in his possession available online twice, or however many times this occurred. The practical effect of what the BitTorrent users were doing was that each was making each of the Producers’ films in his or her possession available online just *once* over the period of time that he or she possessed it. His Honour appears to be saying that it does not matter how many

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times a user allows a (or more than one) computer to contribute that material to other users.

As a consequence, it would appear, *none* of iiNet’s subscribers had been shown by the Producers to be “repeat infringers,” but only to have infringed once in respect of each film the subscriber dealt with.<sup>15</sup> It made absolutely no difference how many notices the Producers sent to iiNet, so far as concerns the defence in Division 2AA of Part V.

### **Part V Division 2AA of the Copyright Act - what is a “repeat infringer policy”?**

Just as the Act provides no guidance as to what a “repeat infringer” is for the purposes of Division 2AA, it is not clear what a “repeat infringer policy” is, or should be.

The Producers assumed that it must be a policy to provide a warning to the infringing user, upon receipt of notification of infringement such as the AFACT letters, and then to terminate that person’s access to the iiNet services if such infringing conduct continued, and cross-examined the iiNet witnesses “intemperately” and at length on this assumption, to the evident displeasure of the Court.<sup>16</sup>

On the other hand, the evidence of iiNet was that it had a policy, although not a written one. The Managing Director and Chief Regulatory Officer had, they said, discussed and agreed the outline of a procedure which was that, “if a Court found that a subscriber of the respondent infringed copyright or a subscriber admitted infringement, the respondent would terminate that subscriber’s account.”<sup>17</sup> They believed that they were not entitled to conclude, on their own, whether a person communicating with iiNet was or was not the owner of the relevant rights, or whether the conduct in question amounted to infringement or not.<sup>18</sup>

The Court reasoned that the assumption of the Producers must be incorrect.

The conduct of iiNet fell into Category A of Part V Division 2AA, that is the provision of transmission facilities, where any storage of copyright material is only “intermediate and transient.” In each of Categories B, C and D, the Court observed, the CSP has some level of access to the subject copyright material making the allegations in a notice in the form prescribed by the Regulations capable of some independent verification. Furthermore, in the case of the conduct of CSPs in Categories B, C and D, the CSP is entitled to rely on certain presumptions with respect to the allegations in the prescribed form of notice and the Regulations provide for a procedure of notification of the alleged infringer and counter-notification. In these cases, the Court observed, the prescribed form of notice required a statutory declaration by the copyright owner or its agent that identifies the copyright material allegedly infringed

and its location on the CSP’s system or network. The issuing of a notice including a misrepresentation may give rise to civil liability on the part of the person issuing it<sup>19</sup> and, in the case of knowingly false statements, a criminal offence.<sup>20</sup>

In the circumstances of Category A activities, where the CSP has no access to the allegedly infringing material and is not protected by presumptions and a prescribed procedure, why should a lower standard of notification to the CSP be sufficient to justify the steps against its customers that the Producers argued iiNet should take? The AFACT letters were not in the least convincing. First, they stated that AFACT was “associated with” a body called the Motion Picture Association, the members of which were American corporations and included most, but not all, of the Producers. However, AFACT said in its letter, it represented *Australian producers and distributors* (not the copyright owners at all, although the letter said that those whom it represented might be *affiliates* of the copyright owners). Finally, the allegations made by AFACT were not in the form of declaration as to the truth of the statements made. This issue was further complicated by the fact that the technical information attached to the AFACT letters was very complex, burying what was strictly necessary in a great deal of information, which was never explained to iiNet prior to the commencement of proceedings. In fact, the Court observed, “[t]he tone of the letter is not so much that AFACT is an agent of copyright owners, but rather seeks to imply that AFACT is some form of quasi-statutory body whose requests required compliance.”<sup>21</sup>

In fact, iiNet received warnings of copyright infringement from other, equally unverified, sources and was not in a position to determine the authenticity or propriety of each. iiNet did not have the investigative resources that the Producers had and there is nothing in the legislation that it should do so.

On the other hand, the Court concluded that iiNet’s policy as described by its evidence was “sufficient to constitute a policy for the purposes of the Copyright Act. It is no less so merely because the respondent’s policy was one which was not envisaged by the applicants.”<sup>22</sup> In fact, the policy of iiNet to rely upon the decision of a Court as to infringing behaviour was very much consistent with the provisions relating to Categories B, C and D conduct.

### **Part V Division 2AA of the Copyright Act - what are “the accounts of repeat infringers”?**

A further curiosity in the language of s 116AH of the *Copyright Act* was noted by the Court. It is required of a CSP wishing to rely upon the safe harbour provisions that it have a policy “that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.” It is noted that in respect of other provisions of Part V Division 2AA that a Court may order the termination of a “specified account.” Cowdroy J

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observed that the required policy must therefore provide for termination of the account of the repeat infringer – but what if the repeat infringer were not, in fact, the specified owner of that account but someone else, in his or her family for example, whose infringing activity was unknown to the account holder? The Court concluded that the only sensible meaning that could be given to this provision is that the account may be terminated regardless of whether the named account holder was the repeat infringer or not.<sup>23</sup> One might suppose that this lends weight to another observation of the Court that the consequence of applying a repeat infringer policy to terminate an account in such circumstances is a severe one, justifying a rather higher standard of notification of the CSP than the patently inadequate effort of the Producers in this case.<sup>24</sup>

### **Was it in the ISP’s interests to encourage infringement?**

Finally, the judgment of Cowdroy J included a discussion dealing with further favourite assumptions of certain copyright owners, and one which is relevant. That is that there was a financial incentive to internet service providers such as iiNet to encourage their customers to download as much data as possible because, the more data downloaded, the higher the band of charges into which the customer will come. As a consequence, it was argued, iiNet had an interest in encouraging users to download large files, such as the Producers’ films, and hence benefited from the use of BitTorrent. Further, the Producers argued, perhaps somewhat perversely, that when iiNet offered access to and download from certain providers, such as Apple iTunes and ABC iView, without counting towards the user’s download limited, called the ‘Freezone’, it was encouraging its customers to download illegally films and other material that they were unable to obtain from these legitimate sources!

The Court found that the evidence of iiNet did not support these conclusions at all. In fact, the evidence of iiNet established that the profitability of accounts of iiNet depended on the customer’s use of the internet service provided, whether large or small. The high capacity customers who used all of their capacity were less profitable than a low capacity customer that used little of his or her download rights.<sup>25</sup> In any event, there was no substantial evidence that BitTorrent usage was a significant proportion of the identified customers usage, and in any event BitTorrent can be used for non-infringing purposes (World of Warcraft, television programs provided at no charge by their owners and downloads of software such as Linux, for example). So there was no real evidence that the majority of such usage related to the Producers’ films.<sup>26</sup>

### **Conclusion**

The Court found that ss 36(1A) and 101(1A) added nothing to *Moorhouse*. The Court described these provisions, introduced by the *Copyright Amendment (Digital Agenda) Act 2000*, to be an attempt at simplification of the law of authorisation<sup>27</sup> and, in effect, an attempt at codification of the principles stated in *Moorhouse*.<sup>28</sup> A more accurate observation might be that it lacks the subtlety of the jurisprudence developed around *Moorhouse* and, based upon the submissions of the Producers in these proceedings, was more than capable of misleading those not familiar with that jurisprudence.

The Court further considered s 112E (and, by implication, s 39B).<sup>29</sup> It would appear that these provisions have no function at all because the mere provision of communications facilities, without “something more,” could never constitute authorisation.<sup>30</sup> The notion of “something more,” other than the general considerations of authorisation, comes from the dubious authority of *Universal Music Australia Pty Ltd v Sharman Networks Ltd* (2005) 220 ALR 1; (2005) 65 IPR 289; (2005) AIPC 92-127; [2005] FCA 1242 and *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187; (2006) 156 FCR 380; (2006) 237 ALR 714; (2006) 71 IPR 1; (2007) AIPC 92-236,<sup>31</sup> and Cowdroy J tentatively concluded that this may be knowledge that the infringing activity was occurring.<sup>32</sup> If so, these provisions could only have the perverse outcome that they could not be relied upon by a CSP that had such knowledge even though, as his Honour found in this case, the CSP had no means of identifying the infringing traffic or stopping it.

Finally, in respect of Division 2AA of Part V, the Court would have had to have found infringement by authorisation by iiNet before this Part could have any effect. If that had been the case, the Court could have made orders in terms of s 116AG(3) for iiNet to take certain specific steps. However, because iiNet had a repeat infringer policy (which it had no reason to implement because the Court was not asked to make a finding of repeat infringement with respect to a particular iiNet customer account), the Court could not even make these orders. This seems an oddly perverse outcome. The Producers achieved nothing simply because the drafting of s 116AH was too simplistic, too deficient in meaning to have any realistic application in this, or any, case.

Were the statutory provisions introduced over the last 10 years of any use whatsoever to anyone? The *Copyright Act* is already too big, and too complicated, to be adding worthless ‘codifications’ of the kind of ss 36(1A), 39B, 110(1A) and 112E, which do more to confuse than help. The legislators seem not to be aware of, or not to care about, the enormous cost and inconvenience of litigation, so willing are they to delegate to the courts, and

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longsuffering litigants, their responsibilities of policy-making. Furthermore, why is it that, every time the legislators trumpet the ‘technological neutrality’ of some new amendment, we have come to expect a provision so technologically specific and narrow as to be outdated before it is enacted? We need considerably more thought and responsibility taken with our copyright legislation.

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<sup>1</sup> See also *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274; 77 ALR 456; 10 IPR 349; [1987] AIPC 90-428; [1987] ATPR 40-827 and *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91; [1981] 2 WLR 973; [1981] 2 All ER 812.

<sup>2</sup> See also *Australasian Performing Right Assn Ltd v Jain* (1990) 26 FCR 53; 96 ALR 619; 18 IPR 663; [1990] AIPC 90-718 (FC); *Australasian Performing Right Assn Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244; 61 IPR 575; [2004] AIPC 92-027; [2004] FCA 1123.

<sup>3</sup> [2010] FCA 24 at [400] – [414].

<sup>4</sup> [2010] FCA 24 at [417] – [442].

<sup>5</sup> [2010] FCA 24 at [493] – [504]. See also *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380; 237 ALR 714; 71 IPR 1; [2007] AIPC 92-236; [2006] FCAFC 187; *Universal Music Australia Pty Ltd v test akdjfSharman License Holdings Ltd* (2005) 220 ALR 1; 65 IPR 289; [2005] AIPC 92-127; [2005] FCA 1242

<sup>6</sup> Ss 39B and 112E were included in the Act by the *Copyright Amendment (Digital Agenda) Act 2000*, along with the new right of ‘communication’, largely replacing the broadcast and cable transmission rights

<sup>7</sup> Part V Division 2AA, added by Schedule 9 of the *US Free Trade Agreement Implementation Act 2004*, the terms of which were dictated by the *Australia–United States Free Trade Agreement [2005] ATS 1* resulting a near verbatim copy, with no apparent regard to existing concepts or definitions in Australia law, of the equivalent provisions of the *Online Copyright Infringement Liability Limitation Act* introduced into the United States *Copyright Act*, Title 17 USC 101 by the *Digital Millennium Copyright Act* 105–304 of October 28, 1998

<sup>8</sup> The Court repeatedly made clear that the mere fact that Division 2AA prescribes certain conduct which will bring the CSP in the safe harbour provisions, such as termination of subscriber accounts, does not result in a corollary that *failure* by a CSP to do one of these things is a factor in favour of finding infringement: “Such submission is not only circular; it is misconceived in its understanding of the safe harbour provisions found in Div 2AA of Pt V of the Copyright Act. ... Suffice to say, ... failure to comply with the safe harbour provisions is not a factor which can be used for the purposes of supporting a finding of authorisation, given that they are optional.” [2010] FCA 24 at [431]; see also [586] to [589] in which his Honour observed that, since the safe harbour provisions do not come into play at all until a finding of infringement, or a finding of infringement but for the safe harbour provisions, has been made, they cannot be relevant to the infringement finding itself.

<sup>9</sup> [2010] FCA 24, Summary at para. 7.

<sup>10</sup> Item 1 also provides that, “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.” Five years after the passage

of the amendment, no such industry code is in sight, for the simple reason that, at the time of passing the legislation, nobody has any idea of what such “standard technical measures” might be that, in the words of Regulation 20B of the *Copyright Regulations 1969* (Cth), would “protect and identify copyright material” and that would be “non-discriminatory” and “not impose substantial costs on carriage service providers or substantial burdens on their systems or networks.”

<sup>11</sup> [2010] FCA 24 at [593] – [594]. The Court referred to US authorities to seek clarification of these provisions noting, for example, that the requirement to inform subscribers of the policy, found in the equivalent provision in §512(i)(1)(A) US *Copyright Act*, was omitted.

<sup>12</sup> See definition of “communication” in *Copyright Act 1968* (Cth) s. 10

<sup>13</sup> [2010] FCA 24 at [346] – [356].

<sup>14</sup> This, for domestic subscribers, would mean that a new IP address could be allocated to that computer. Indeed, this reallocation of IP address could occur in the course of a single session of use, rendering the Producers’ AFACT notices even more difficult to interpret.

<sup>15</sup> [2010] FCA 24 at [285] – [300].

<sup>16</sup> Id at [158].

<sup>17</sup> Id at [157].

<sup>18</sup> Id at [158] and [435]. iiNet was also concerned that Division 1 of Pt 13 of the *Telecommunications Act 1995* (Cth) operated so as to prevent it from using the information it possessed regarding its customers to notify them of alleged infringement and suspend or terminate a subscriber’s account who did not cease such conduct. iiNet argued, accordingly, that this was a defence to the demand by the Producers that it do so to prevent continuing copyright infringements. The Court found that s 270 of the *Telecommunications Act 1995* did not have the effect claimed by iiNet. [2010] FCA 24 at [508] – [555].

<sup>19</sup> *Copyright Regulations 1969* (Cth) reg 20X

<sup>20</sup> s 137.2 of the *Criminal Code 1995* (Cth); see [2010] FCA 24 at [623] – [631].

<sup>21</sup> [2010] FCA 24 at [629].

<sup>22</sup> Id at [158]

<sup>23</sup> Id at [633].

<sup>24</sup> Id at [630]

<sup>25</sup> Id at [224]-[238].

<sup>26</sup> Id at [239]-[250].

<sup>27</sup> Id at [358].

<sup>28</sup> Id at [367]; see also [461] – [462].

<sup>29</sup> Id at [556] – [579].

<sup>30</sup> Id at [570] - [576].

<sup>31</sup> Cowdroy J, Id at [562], says of the judgment of Wilcox J in *Sharman* “Unfortunately his Honour never elucidated precisely what it was that made Sharman “more than a messenger” aside from the general factors that his Honour considered were relevant to his finding that Sharman had authorised copyright infringement. Thus although it is clear that, pursuant to his Honour’s reasons, “something more” than mere provision of facilities can cause s 112E to lose its effect, it is not clear from his reasons what that “something more” specifically was in that proceeding, aside from general authorisation considerations.”

<sup>32</sup> [2010] FCA 24 at [577]