

# Roadshow Films v iiNet

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# The reform of 1911

- Pre-1911 statutes created liability in those exercising an exclusive right or those **causing** it to be exercised
  - *Karno v Pathé Frères* (1909)
  - *Russell v Briant* (1849)
- Consolidation of 1911 created liability for those who
  - **Authorise** the exercise of a right: *Falcon v Famous Players* (1926)
  - **Permit** a venue to be used for an infringing performance unless permitter was legitimately unaware of the infringement: *PRS v Cyril* (1923)
- This basic scheme is maintained in our 1968 statute

# Judicial harmonisation of ‘to authorise’ and ‘to permit’

- The Court may infer an authorization or permission from acts which fall short of being direct and positive; indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of – ‘his exact position must be considered’: Bankes LJ in *PRS v Cyril* (1923)

# From authorising public performances to authorising private reproductions

- From the 1970s advances in technology permitted private individuals to readily copy
  - *Moorhouse v UNSW* (1975 – Australia)
  - *Universal v Sony* (1983 – US)
  - *CBS v Amstrad* (1988 – UK)
- Only liability in the Australian case
  - At the time of copying UNSW was supplying a copying service by the provision of physical facilities
  - At the time of copying Sony and Amstrad had alienated the chattels which facilitated the copying

# The centrality of control

- Australian case law rejected liability for authorising private copying in the absence of control at the time of the copying
  - *RCA v Fairfax* (1981); *WEA v Hanimex* (1987);  
*Australian Tape Manufacturers v Cth* (1993)
- Digital Agenda 2001 codification required regard to
  1. The extent of any power in the alleged authoriser to prevent the primary infringer
  2. The nature of any relationship between the alleged authoriser and the primary infringer
  3. Whether the alleged authoriser took any reasonable steps to prevent the primary infringing act

# Internet intermediaries and control

- The 2001 (Digital Agenda) and 2004 (AUSFTA) reforms specifically addressed intermediaries:
  - 2001 reforms: Providers of communications facilities are taken not to authorise infringement merely because another person uses those facilities to infringe copyright
    - Intended as part of a package to overcome the *Telstra Music on Hold Case* (itself not an authorisation case) by requiring attention to be paid in all cases to the three codified factors
  - 2004 reforms: No monetary liability on the proviso (*inter alia*) that an ISP adopts and reasonably implements a policy for termination in appropriate circumstances of the accounts of repeat infringers (the ‘safe harbour’ regime)
    - AUSFTA policy intent was to provide legal incentive for ISPs to cooperate with rights holders in deterring infringement

# Universal v Sharman (Kazaa)

## Universal v Cooper (mp3s4free)

- Did the defendants have control over Kazaa peer-to-peer network users and mp3s4free.net visitors?
  - Strong control with objective knowledge (indifference or wilful blindness) might comprise authorisation, **or**
  - Marginal control [Sharman] or arming conduct [Cooper] with encouragement might comprise authorisation
- Did the mere use of facilities exception apply?
  - Encouragement and knowledge meant that authorisation arose from more than the provision of facilities
- Was Cooper's ISP in the safe harbour?
  - Awareness and indifference was not a qualifying policy

# What was iiNet's 'exact position'?

1. Sold internet access in gigabytes
2. Used supply terms that conferred on it broad discretion to cancel any service for illegal or unusual use
3. Provided advice to customers (obtained as trap evidence) who identified themselves BitTorrent file-sharers [Trap Q: *Kung Fu Panda* slow to download, is my uploading to blame? iiNet A: Uploads have only minimal effect]
4. Was in receipt of 59 weekly notices from rights holders which pseudonymously (by IP addresses) identified iiNet customers as infringing BitTorrent file-sharers
5. Passed on some notices to the police, announced that passing-on in press releases, and wrote back to rights holders advising them to send future notices directly to the police
6. Reported the specific activities of a trap evidence gatherer to the police \*\*
7. Required that a new subsidiary Westnet cease sending to Westnet subscribers rights holders warning notices
8. Unwritten policy: cancel service if iiNet customer confessed or iiNet was court-ordered \*\*

## iiNet: decision on authorisation

- **Regardless** of the three codified factors, no liability because iiNet did not supply the actual ‘means’ of infringement; it simply supplied a necessary precondition to infringement (the ‘means’ was the BitTorrent system)
- In considering the three factors
  - No power to prevent because cancellation was not reasonable
  - Being seller of internet access (gigabytes) did not lead to the conclusion it was in iiNet’s interests for customers to infringe
  - Because cancellation was unreasonable there were no reasonable steps that iiNet could have taken to prevent
- Knowledge? – April 2009 knows of infringing customers
  - Specific knowledge alone insufficient to establish liability
- Encouragement? – radio advertisement explaining gigabytes
  - ‘A Gig is about 500 hi-res photos or about 300 songs or about 5 episodes of the *Golden Girls*’\*\*

# Comment on authorisation

- The ‘actual means’ threshold criterion is a difficult concept
  - **Obscure:** Is purporting to grant a licence the supply of the ‘actual means’? Is there only one ‘means’ in a given case? How is the ‘actual means’ distinguished from other ‘necessary preconditions’?
  - **Difficult to reconcile with prior authorities:** Tends to a return to the pre-1911 law requiring a ‘causing’ of the infringement. A specific description of the nature of control in *Moorhouse* is converted into a statement of general principle never seen before. Compare *Cooper*: That users could make online copies by other means did not negate authorisation of copying a consequence of the links on mp3s4free.
  - **Difficult to reconcile with the logic of the Act:** How can the ‘actual means’ criterion trump the mandated three factors? Is not the safe-harbour based upon a legislative assumption of ISP liability arising from a power to prevent and the nature of relationship with customers?

## iiNet: *obiter* on limitations

- Mere use of facilities – would not have applied
  - If there had been a finding of authorisation, that finding would have arisen in part from iiNet’s knowledge
    - With some regret the court considered itself bound to apply the interpretation in *Cooper* that the exception had no application when authorisation arose from more than the ‘mere use of facilities provided’
- Safe harbour – would have applied
  - iiNet’s unwritten policy elicited during cross-examination: cancel a service if and only if a customer confessed repeat infringement or iiNet was court-ordered
    - The court considered that iiNet had adopted and reasonably implemented ‘a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers’

# Borrowed final observations

- D Lichtman & E Posner in *Holding Internet Service Providers Accountable* distinguish ISP liability for
  - Their customers' copyright infringements, **from**
  - Their customers' malicious distribution of viruses
    - The possibility of copyright infringement increases the average subscriber's willing to pay for broadband internet service. Piracy is in many ways the 'killer app' that is driving the deployment of broadband to the home.
    - The copyright dispute is in many ways a dispute about the propriety of the underlying property right, not a dispute about the proper contours of indirect liability per se. Many who oppose liability in the copyright setting also question copyright in more fundamental ways.