

Cooper v Universal Music Australia Pty Ltd [2006] FCAFC 187

FEDERAL COURT OF AUSTRALIA

FRENCH, BRANSON AND KENNY JJ

FRENCH J:

1 For the reasons given by Branson and Kenny JJ respectively, I agree that the appeals should be dismissed, save for the appeal by Mr Takoushis which should be allowed. I agree with the variations to the orders of the primary judge proposed by Branson J and with the costs orders which her Honour proposes.

BRANSON J:

2 Stephen Cooper was the registered owner of the domain name ‘mp3s4free.net’ and the originator, owner and operator of the now disabled ‘MP3s4FREE’ website. Although that website did not contain any music files, it was structured to allow internet users ready access to music files of numerous popular sound recordings via hyperlinks. When an internet user clicked on a particular hyperlink, the music file in question was transmitted directly to his or her computer from a remote server. It is admitted that the overwhelming majority of the sound recordings the subject of the music files were the subject of copyright.

3 E-Talk Communications Pty Limited (‘E-Talk’) and Com-Cen Pty Limited (‘Com-Cen’) together conducted an internet service provider business under the name Comcen which hosted Mr Cooper’s website. Liam Francis Bal is a director and, as the learned primary judge concluded, the controlling mind, of each of these companies. Chris Takoushis worked in the Comcen business. It seems that he is an employee of Com-Cen. Mr Takoushis was Mr Cooper’s primary contact at Comcen and he provided assistance from time to time in relation to the establishment and operation of Mr Cooper’s website.

4 A number of Australian record companies and other entities that own copyright in sound recordings, which I will together call the ‘Record Companies’, instituted a proceeding in the Court in which they sought declaratory, injunctive and other relief against Mr Cooper, the two companies and Messrs Bal and Takoushis in respect of infringements of the *Copyright Act 1968* (Cth) (‘the Act’), the *Trade Practices Act 1974* (Cth), the *Fair Trading*

Act 1987 (NSW) and the Fair Trading Act 1989 (Qld).

5 On 22 December 2005 the primary judge granted declaratory and injunctive relief against each of Messrs Cooper, Bal and Takoushis, and against E-Talk and Com-Cen with damages to be later assessed.

6 These appeals challenge the orders made by his Honour on 22 December 2005 to the extent that the orders are founded on his Honour's conclusion that each of Messrs Cooper, Bal and Takoushis and E-Talk infringed the Record Companies' copyright in sound recordings by authorizing the making of copies, and authorizing the communication by operators of remote websites to the public, of those sound recordings. Com-Cen has not appealed from the orders made by the primary judge.

STATUTORY CONTEXT

7 As mentioned above, these appeals concern copyright in sound recordings. A sound recording is not a 'work' within the meaning of the Act (s 10). Nonetheless, copyright may subsist in a sound recording (s 89).

8 Section 13 of the Act is concerned with the content of copyright generally. Subsection (1) provides that a reference in the Act to an act comprised in the copyright in a work or other subject-matter is a reference to any act that, under the Act, the owner of the copyright has the exclusive right to do. Subsection (2) relevantly provides that the exclusive right to do an act in relation to a work or any other subject-matter includes the exclusive right to authorize a person to do that act in relation to that work or other subject-matter.

9 Part IV of the Act is concerned with copyright in subject-matter other than works. It provides that copyright in a sound recording includes the exclusive right to make a copy of the sound recording (s 85(1)(a)) and the exclusive right to communicate the recording to the public (s 85(1)(c)). A recording is communicated within the meaning of s 85(1)(c) if it is made available online or electronically transmitted (s 10).

10 Section 101(1), which is in Part IV, provides as follows:

'Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of

the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.’ (emphases added)

11 It appears that at first instance the parties paid no particular attention to the words ‘*in Australia*’ which appear twice in s 101(1). The significance of those words is that they create a nexus between infringements of copyright under the Act and Australia. Section 101(1) is drawn to cover conduct done in Australia (ie. not being the owner, and without the licence of the owner, doing in Australia an act comprised in the copyright) and some conduct which, although not necessarily done in Australia, relates to conduct done in Australia (ie. the authorizing of the doing in Australia of an act comprised in the copyright). The subsection can thus be seen to create two classes of infringement; one class involving infringing conduct in Australia and the other class relating to infringing conduct in Australia.

12 If s 101(1) did not include the phrase ‘*or authorizes the doing in Australia of*’, it would be construed as applying only to conduct in Australia. That is, it would not reach to authorizations given outside Australia to do an act in Australia which the owner of the copyright has the exclusive right to do (*Jumbunna Coal Mine No Liability v Victorian Coal Miners’ Association* (1908) 6 CLR 309; s 21 of the *Acts Interpretation Act 1901* (Cth)). I think it likely that the only intended effect of the phrase ‘*or authorizes the doing in Australia of*’ in s 101(1) was to exclude the presumption that the section was concerned solely with conduct in Australia. I doubt that the phrase was intended, as the Record Companies contended, to create a cause of action of authorizing an authorizer. However, it is not necessary for the purposes of this appeal to reach a concluded view on this question. Nor is it necessary to determine the extent, if any, of the practical difference between authorizing and authorizing someone else to authorize. The primary judge found that Mr Cooper’s website attracted significant use in Australia. In any event, the Record Companies’ case at first instance was not defended on the basis that the conduct upon which they relied as constituting copyright infringement lacked the necessary nexus with Australia. The appellants are bound by their conduct in their respective cases at first instance. They are also bound by their respective notices of appeal (see [26], [53] and [66] below).

13 Section 101(1A) was inserted into the Act by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (‘the Digital Agenda Act’). It identifies certain matters that must be taken into account in determining, for the purposes of subsection (1), whether or not a person

has authorized the doing in Australia of any act comprised in a copyright subsisting by virtue of Part IV. The matters so identified are not the only matters that may be taken into account.

14 Section 101(1A) may be assumed to have particular relevance in circumstances in which it is alleged that the act of infringement occurred in the online environment. This is because one of the objects of the Digital Agenda Act was to amend the Act so as to ensure the efficient operation of relevant industries in the online environment (s 3).

15 Section 101(1A) of the Act recognises that an element of judgment is involved in determining whether one person has, for the purposes of s 101(1), authorized another to do an act. It provides that:

'the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;*
- (b) the nature of any relationship existing between the person and the person who did the act concerned;*
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.'*

16 Section 112E, which was also inserted into the Act by the Digital Agenda Act, provides:

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

17 It was the same amending Act which inserted into s 10 of the Act the definition of 'communicate' referred to above. That definition is relevantly in the following terms:

'communicate means make available online or electronically transmit ... a work or other subject-matter...'

18 Unless the contrary intention appears, 'communication' in s 112E will have a meaning that corresponds with the definition of 'communicate' (s 18A of the *Acts Interpretation Act 1901* (Cth)). No party suggests that a contrary intention does appear in s 112E. A sound recording is an audio-visual item within the meaning of s 112E (s 100A of the Act).

19 Section 112E thus qualifies the operation of s 101(1A) when it is necessary to determine whether a person authorized the copying in Australia of a sound recording in circumstances where the relevant copying involved the making available online, or the electronic transmission of, the sound recording via facilities provided by that person. The person is not taken to have authorized the infringement merely because another person used the facilities provided by that person to achieve the making of a copy.

20 Prior to the coming into operation of the Digital Agenda Act the word ‘authorizes’ in the context of copyright infringement had been held to mean sanctions, approves or countenances (*Australasian Performing Right Association Limited v Jain* (1990) 26 FCR 53 at 57-60). The Digital Agenda Act does not disclose a legislative intention to alter the meaning of the word ‘authorizes’ in the context of the Act. However, as mentioned above, s 101(1A) does disclose an intention to guide the process by which a judgment is reached as to whether a person authorized the doing in Australia of an act comprised in the copyright; the decision-maker must have regard to the matters identified in the subsection. As mentioned above, these matters may be understood to have particular relevance where the alleged act of infringement has occurred online.

ORDERS MADE BY THE PRIMARY JUDGE

21 The primary judge made six declaratory orders and six restraining orders in similar terms against each of the appellants and Com-Cen. Each declaratory and restraining order relates to a particular schedule of sound recordings annexed to the orders.

22 A schedule of definitions, which forms part of the orders, provides the link between the terms of the orders and the schedules of sound recordings and additionally gives meaning to certain terms in the orders such as, for example, ‘*Universal Catalogue*’ and ‘*Universal Recordings*’.

23 The form of each of the six declaratory orders can be illustrated by setting out the terms of the first of them:

‘1. *The first, second, third, fourth and fifth respondents have infringed the copyright in sound recordings in the Universal Recordings, by:*

- (a) authorising the making of copies of; and*
- (b) authorising the communication to the public of,*

the whole or a substantial part of those sound recordings without the licence of the first applicant or the owner of the copyright.'

24 The form of each of the six restraining orders can also be illustrated by setting out the terms of the first of them:

'13. *The first, second, third, fourth and fifth respondents, whether by themselves, their servants or agents or otherwise, be permanently restrained from:*

- (a) making a copy of;*
- (b) authorising the making of a copy of;*
- (c) communicating to the public; or*
- (d) authorising the communication to the public of,*

the whole or a substantial part of any of the sound recordings in the Universal Catalogue including the Universal Recordings without the licence of the first applicant or the owner of the copyright.'

25 Additionally the primary judge made orders permanently restraining the appellants and Com-Cen from operating or hosting the MP3s4FREE website and orders as to costs.

MR COOPER'S NOTICE OF APPEAL

26 Mr Cooper's appeal is brought on only two grounds, namely:

- 1. His Honour erred in finding and declaring that by providing a website with hypertext links (hyperlinks), the appellant authorised the making of copies of the whole or a substantial part of the alleged sound recordings without the licence of the owners or exclusive licensees of those sound recordings as in the circumstances providing hyperlinks does not amount to authorisation under the Copyright Act 1968.*
- 2. His Honour erred in finding and declaring that by providing a website with hypertext links (hyperlinks), the appellant authorised the communication to the public of the whole or a substantial part of the alleged sound recordings without the licence of the owners nor exclusive licensees of the copyright as in the circumstances providing hyperlinks does not amount to authorisation under the Copyright Act 1968.'*

27 As Mr Cooper's appeal was argued the sole issue for this Court's determination is the true meaning of the term 'authorize' in s 13(2) of the Act and the related term 'authorizes' in s 101(1) of the Act.

DID MR COOPER AUTHORIZE?

28 The issue of whether Mr Cooper authorized internet users in Australia to copy, and operators of remote websites to communicate to the public, music files constituting sound recordings in which the Record Companies hold copyright must be determined primarily by reference to s 101(1A) of the Act (see [15] above). The appropriate starting point is to have regard to the matters identified in pars (a)-(c) of s 101(1A).

POWER TO PREVENT (S 101(1A)(a))

29 Mr Cooper submitted that he did not have any power to prevent the doing of the acts comprised in the copyright of the sound recordings in issue because he did not have power to prevent:

- (a) a person from making an MP3 file from a sound recording in another format (eg from a compact disc);
- (b) a person from making an MP3 file generally accessible over the internet; and
- (c) a person from accessing an MP3 file that another person had made generally accessible over the internet.

30 The above submission appears to overlook that the copyright in a sound recording is infringed each time that it is copied without proper authority. The making of a particular unauthorized copy is no less an infringement of the owner's copyright because other unauthorized copies are also made or are likely to be made.

31 Additionally, Mr Cooper submitted that to facilitate copying or communication is not to authorize it. He placed reliance on observations made by Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 and by Sackville J, with whom Jenkinson and Burchett JJ agreed, in *Nationwide News Pty Ltd v Copyright Agency Limited* (1996) 65 FCR 399 at 422. His Honour there observed that:

'a person does not authorise an infringement merely because he or she knows that another person might infringe the copyright and takes no step to prevent the infringement.'

For the reasons given below (see in particular [37] and [43]) I conclude that Mr Cooper did not merely facilitate the infringements of copyright upon which the case of the Record

Companies relied. He engaged in additional relevant conduct so as to take himself outside the purview of his Honour's observation.

32 Before considering the extent (if any) of Mr Cooper's power to prevent the copying or communication to the public of sound recordings in which the Record Companies hold copyright, it is necessary to determine what is meant by '*power to prevent*' in s 101(1A)(a). The appellants contended, in effect, that unless Mr Cooper had power, at the time of the making of an infringing copy of a sound recording, to prevent that copy being made, he had no power to prevent within the meaning of s 101(1A)(a). Unless s 112E of the Act, which is set out in paragraph [16] above, were enacted simply out of an abundance of caution, it presupposes that a person who merely provides facilities for making a communication might, absent the section, be taken to have authorized an infringement of copyright in an audio visual item effected by use of the facility. This presupposition is inconsistent with the submission of the appellants. However, in my view, it is consistent with the ordinary understanding of authorization. The following hypothetical situation may be considered. One person has a vial which contains active and highly infectious micro-organisms which are ordinarily passed from human to human by the coughing of an infected person. He or she authorizes another person to break the vial in a crowded room knowing that this will result in some people in the room becoming infected with the micro-organisms. Most people would, I think, regard the first person as having authorized the infection not only of those in the room, but also the wider group thereafter directly infected by them, notwithstanding that he or she had no power to prevent those who were in the room from coughing.

33 In determining what is meant by '*power to prevent*' in s 101(1A)(a) it is appropriate then to turn to relevant authorities concerning authorization in the context of copyright law, and in particular, to the Australian authorities as it is these to which the legislature may be presumed to have given particular attention when enacting s 101(1A)(a).

34 In *University of New South Wales v Moorhouse* (1975) 133 CLR 1 the High Court unanimously held that the University had infringed Mr Moorhouse's copyright in a book of short stories by authorizing the making of an infringing copy of one of the stories. The relevant circumstances were that a copy of Mr Moorhouse's book was held on open shelves in the University's library and the University placed a coin-operated photocopier in that library. Jacobs J, with whom McTiernan ACJ agreed, identified at 21 the real question to be

determined as whether there was in the circumstances an invitation to be implied that the person who made the infringing copy might, in common with other users of the library, make such use of the photocopying facilities as he thought fit. His Honour found that such an invitation was to be implied. He concluded that it was immaterial that the library was not open to all comers, that use of the photocopier was not intended to generate a profit to the University and that the University did not know that users of the photocopier were doing acts comprised in authors' copyrights - and may even have been entitled to assume that users would obey the law of copyright.

35 In a separate judgment Gibbs J, after noting at 12 that a person cannot be said to authorize an infringement of copyright unless he or she has some power to prevent it, said at 13 that:

'a person who has under his control the means by which an infringement of copyright may be committed — such as a photocopying machine — and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use.'

36 It seems to me that both Jacobs and Gibbs JJ concentrated on the behaviour of the University in making the photocopier available for use in the library rather than on the issue of the University's capacity to control the use of the photocopier once it had been made available to library users. The observation of Gibbs J that a person cannot be said to authorize an infringement unless he or she has some power to prevent it must be understood in this context. That is, the relevant power which the University had to prevent the copyright infringement must be understood to have been, or at least to have included, the power not to allow a coin-operated photocopier in the library.

37 Some support for this understanding of *Moorhouse* can be found in *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* (1993) 176 CLR 480. In that case at 498 Mason CJ and Brennan, Deane and Gaudron JJ identified a distinction between the mere sale of an article, such as a blank tape or a video recorder, where there is a likelihood that the article will be used for an infringing purpose and the circumstances of *Moorhouse*. Their Honours noted that in *Moorhouse* the University not only failed to take steps to prevent infringement; it provided potential infringers with both the copyright material

and the means by which it could be copied.

38 Some, albeit limited, support for understanding the reference in s 101(1A)(a) to *'the person's power to prevent the doing of the act concerned'* to include the person's power to avoid the means of infringement becoming available for use can, in my view, be found in *Australasian Performing Right Association Limited v Jain*. In that case the Full Court, which concluded that Mr Jain had authorized the infringement of copyright in question, said at 61:

'The judgment of the members of the High Court in the Moorhouse case establishes that one of the meanings of the word "authorize" in the context in which it is here used is "countenance". It may be that not every act which amounts to the countenancing of something is an authorisation. Every case will depend upon its own facts. Matters of degree are involved. But the evidence in the present case reveals ... a studied and deliberate course of action in which Mr Jain decided to ignore the appellant's rights and to allow a situation to develop and to continue in which he must have known that it was likely that the appellant's music would be played without any licence from it.'

39 Additionally, as mentioned in [32] above, the introduction of s 112E into the Act suggests that, absent that section, a mere provider of facilities for making communications could have been held to have authorized copyright infringements effected by the use of those facilities. I do not accept, as Mr Cooper contended, that s 112E was introduced into the Act simply out of an abundance of caution. The supplementary explanatory memorandum for the Copyright Amendment (Digital Agenda) Bill indicates otherwise by stating that the new s 112E:

'has the effect of expressly limiting the authorisation liability of persons who provide facilities for the making of, or facilitating the making of, communications.'

40 Mr Cooper placed considerable weight on a suggested analogy between his website and Google. Two things may be said in this regard. First, Mr Cooper's assumption that Google's activities in Australia do not result in infringements of the Act is untested. *Perfect 10 Inc v Google Inc* 416 F.Supp.2d 828 (C.D.Cal 2006) upon which Mr Cooper placed reliance is a decision under the law of the United States of America which includes the doctrine of 'fair use'. Secondly, Google is a general purpose search engine rather than a website designed to facilitate the downloading of music files. The suggested analogy is unhelpful in the context of Mr Cooper's appeal.

41 I therefore reject the contention that unless Mr Cooper had power, at the time of the doing of each relevant act comprised in a copyright subsisting by virtue of the Act, to prevent its being done, he had no relevant power within the meaning of s 101(1A)(a). I conclude that, within the meaning of the paragraph, a person's power to prevent the doing of an act comprised in a copyright includes the person's power not to facilitate the doing of that act by, for example, making available to the public a technical capacity calculated to lead to the doing of that act. The evidence leads to the inexorable inference that it was the deliberate choice of Mr Cooper to establish and maintain his website in a form which did not give him the power immediately to prevent, or immediately to restrict, internet users from using links on his website to access remote websites for the purpose of copying sound recordings in which copyright subsisted.

42 I conclude that, within the meaning of s 101(1A)(a), Mr Cooper had power to prevent the copying in Australia of copyright sound recordings via his website. He had that power because he was responsible for creating and maintaining his MP3s4FREE website. As stated above, the principal content of the website comprised links to other websites and files contained on other servers. Senior counsel for Mr Cooper conceded that, in effect, the overwhelming majority of the files listed on the website were the subject of copyright. The website was structured so that when a user clicked on a link to a specific music file a copy of that file was transmitted directly to the user's computer.

43 It is immaterial, in my view, that Mr Cooper's website operated automatically in the sense that, although he could edit links on the site, he did not control the usual way in which links were added to the site. The evidence also leads to the inexorable inference that it was the deliberate choice of Mr Cooper to establish his website in a way which allowed the automatic addition of hyperlinks.

44 I also conclude that, within the meaning of s 101(1A)(a), Mr Cooper had power to prevent the communication of copyright sound recordings to the public in Australia via his website. Again he had that power because he was responsible for creating and maintaining his MP3s4FREE website with the characteristics referred to above.

45 For the above reasons, I find that, within the meaning of s 101(1A)(a), the extent of Mr Cooper's power to prevent copyright infringements via his website was considerable.

NATURE OF RELATIONSHIP (S 101(1A)(b))

46 Mr Cooper submitted that he did not have any relationship with people who made MP3 files generally accessible over the internet or with people who downloaded such files from remote websites via hyperlinks on his website. The findings of the primary judge do not suggest any relationship between Mr Cooper and those who made MP3 files generally accessible over the internet. However, the same cannot be said of his Honour's findings concerning those who downloaded music files via Mr Cooper's website.

47 An aspect of the nature of the relationship existing between Mr Cooper and those users of the internet who obtained copyright sound recordings from the internet via his website is that the users were attracted to Mr Cooper's website and obtained the sound recordings by clicking on hyperlinks on that website. The primary judge found that Mr Cooper's website was user friendly and allowed internet users readily to select from a variety of catalogues of popular sound recordings.

48 His Honour also found that Mr Cooper benefited financially from sponsorship and advertisements on the website; that is, that the relationship between Mr Cooper and the users of his website had a commercial aspect. Mr Cooper's benefits from advertising and sponsorship may be assumed to have been related to the actual or expected exposure of the website to internet users. As a consequence Mr Cooper had a commercial interest in attracting users to his website for the purpose of copying digital music files.

OTHER REASONABLE STEPS INCLUDING COMPLIANCE WITH INDUSTRY CODES OF PRACTICE (S 101(1A)(c))

49 Mr Cooper did not suggest, other than by reference to disclaimers on his website, that he took any reasonable steps to avoid the infringements of copyright. As those disclaimers misstated Australian copyright law in a material way, the inclusion of them on the website did not constitute a reasonable step to prevent or avoid the infringement of copyright. In any event, I would have attributed little, if any, weight to them as, on his Honour's findings, their intended purpose was merely cosmetic.

50 The reasons for judgment of the primary judge make no reference to any relevant industry codes. It appears that the parties agreed at trial that there were no relevant industry codes to which his Honour could have regard.

51 I conclude that Mr Cooper did not establish that he took any reasonable steps to prevent or avoid the use of his website for copying copyright sound recordings or for communicating such recordings to the public.

MR COOPER AUTHORIZED

52 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.

NOTICE OF APPEAL OF E-TALK AND MR BAL

53 The amended notice of appeal of E-Talk and Mr Bal remained confusingly drawn notwithstanding the deletion of most of the original grounds of appeal. However, the appeal was argued without objection on the basis that the primary judge erred:

- (a) in failing to find that, by reason of s 112E of the Act, E-Talk and Mr Bal were to be taken not to have authorized any infringement of copyright in sound recordings by users of Mr Cooper's website; or alternatively
- (b) if s 112E had no relevant operation, in finding that E-Talk and Mr Bal had authorized any relevant infringing conduct.

54 Mr Bal did not challenge the conclusion of the primary judge that, as the controlling mind of E-Talk, he was liable for the infringing conduct of E-Talk. As a result, the discussion that follows dealing with the conduct of E-Talk similarly applies to Mr Bal.

SECTION 112E OF THE COPYRIGHT ACT

55 It is not in dispute that E-Talk is a *'person ... who provides facilities for making, or facilitating the making of, a communication'* within the meaning of s 112E of the Act. E-Talk and Mr Bal challenge the conclusion of the primary judge that E-Talk did more than merely provide facilities for the making of communications.

56 The effect of s 112E in the circumstances of this appeal is that E-Talk is not to be taken to have authorized any infringement of copyright in a sound recording just because internet users used Mr Cooper's website to download music files of sound recordings in which the Record Companies hold copyright.

57 E-Talk and Mr Bal submitted that, at its highest, the evidence before the primary judge demonstrated that the conduct of E-Talk was:

'the mere facilitation of the connection of the website to the Internet, without any knowledge of the operation of the website, beyond knowledge of its mere existence.'

58 The above submission is untenable. No challenge is made to the findings of the primary judge that:

- (a) E-Talk (which traded as Comcen Internet Services), together with Com-Cen, conducted an internet service provider business under the name Comcen;
- (b) The Comcen business hosted Mr Cooper's website;
- (c) E-Talk was aware of the high level of usage of Mr Cooper's website and of the copyright problems arising therefrom;
- (d) Mr Cooper received free web-hosting from Comcen in return for the display on his website of the Comcen logo with a hyperlink to the Comcen website, www.comcen.com.au; and
- (e) E-Talk took no steps to prevent the acts of infringement which took place via Mr Cooper's website.

59 The evidence before his Honour established that the registered owner of the domain name www.comcen.com.au was E-Talk.

60 In my view, the above findings of the primary judge were sufficient to support the primary judge's conclusion that E-Talk was unable to invoke the protection afforded by s 112E. His Honour did not find that E-Talk authorized an infringement of copyright in a sound recording just because another person used its facilities to do something the right to do which is included in the copyright.

DID E-TALK AUTHORIZE?

61 In determining whether E-Talk authorized the doing in Australia of any act comprised
in the Record Companies' copyrights it is necessary to take into account, together with other
relevant things, the matters identified in s 101(1A) of the Act (see [15] above).

62 As all of the relevant acts of copyright infringement took place via Mr Cooper's
website, I conclude that E-Talk had power to prevent the doing of the acts concerned
because, together with Com-Cen (of which Mr Bal was also the controlling mind), it had the
power to withdraw the hosting of Mr Cooper's website (s 101(1A)(a)).

63 I would place no weight on the, at best, remote relationships between E-Talk, on the
one hand, and the users of Mr Cooper's website and the remote providers of music files on
the other hand (s 101(1A)(b)).

64 E-Talk could have, but did not, take reasonable steps to prevent or avoid the doing of
the acts of infringement (s 101(1A)(c)). Rather than withdrawing hosting of Mr Cooper's
website, or otherwise placing pressure on Mr Cooper to stop his website being used for the
predominant purpose of copyright infringements, E-Talk sought to achieve a commercial
advantage from advertising on Mr Cooper's website.

65 In the circumstances, in my view, no error has been shown to affect the conclusion of
the primary judge that E-Talk and Mr Bal, its controlling mind, authorized the acts of
copyright infringement which resulted from the use of Mr Cooper's website. At the least, E-
Talk countenanced the acts of infringement (see *Australasian Performing Rights Association
Limited v Jain* and [20] above).

MR TAKOUSHIS' NOTICE OF APPEAL

66 Mr Takoushis' amended notice of appeal raised two issues; first, whether he was
entitled to invoke the protection of s 112E of the Act and secondly, whether his conduct as an
employee of Mr Cooper's internet service provider was capable of constituting conduct
which authorized the doing in Australia of any act comprised in the Record Companies'
copyrights in sound recordings.

DID MR TAKOUSHIS AUTHORIZE?

67 The precise basis upon which the primary judge concluded that Mr Takoushis infringed the Record Companies' copyright by authorizing the making of copies, and the communication to the public, of sound records is not clear.

68 His Honour may have concluded that Mr Takoushis infringed the Record Companies' copyright by personally authorizing acts of copyright infringement, or alternatively, that Mr Takoushis was liable in respect of the infringing conduct of either or both of Com-Cen and E-Talk. His Honour's reasons for judgment specifically record, however, that his Honour did not find that Mr Takoushis was liable as a joint tortfeasor with either or both of Com-Cen and E-Talk (see *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274 at 283).

69 Mr Takoushis had studied information technology at TAFE before becoming an employee of Com-Cen. He gave evidence that his position within that company was essentially a computing support role. His Honour found that Mr Takoushis was Mr Cooper's primary contact with Comcen and that he provided assistance from time to time in relation to the establishment and operation of Mr Cooper's website.

70 The evidence did not establish that Mr Takoushis had any personal power to prevent the doing of the acts of copyright infringement (s 101(1A)(a)). He was not Mr Cooper's internet service provider; he was merely an employee of the internet service provider – albeit an employee with skills in computer technology who undertook work in relation to Mr Cooper's website.

71 Nor did the evidence establish that there was any relevant relationship between Mr Takoushis and the users of Mr Cooper's website or between Mr Takoushis and the operators of the remote websites from which sound recordings were communicated (s 101(1A)(b)). Nor did the evidence suggest that there was any reasonable step open to be taken by Mr Takoushis personally to prevent or avoid the doing of the acts of copyright infringement. While it would have been a reasonable step for Mr Takoushis' employer to have terminated its hosting of Mr Cooper's website, either absolutely or unless he removed the hyperlinks on it which facilitated copyright infringement, the evidence did not establish that Mr Takoushis had the necessary authority to do so himself (s 101(1A)(c)). I do not

consider that it would have been a reasonable step for Mr Takoushis to approach his employer to compel them to do so.

72 It may be that Mr Takoushis can be understood to have ‘countenanced’ the acts of copyright infringement in the sense that he supported or showed favour to those acts (see *The Macquarie Dictionary*, 2nd edn). However, as the Full Court observed in *Australian Performing Right Association Ltd v Jain* at 61, every case in which the issue of whether a person authorized an act of copyright infringement arises will depend on its own facts and involve matters of degree. Mr Takoushis was not a director of either Com-Cen or E-Talk. Nor was he shown to be an executive or shareholder of either of those companies. His evidence that his position within Com-Cen was essentially a computing support role was not challenged.

73 In my view, the evidence before the primary judge was insufficient to establish that Mr Takoushis infringed the Record Companies’ copyright by personally authorizing the relevant acts of copyright infringement.

74 Further, for the reasons given above, the evidence before the primary judge was insufficient to demonstrate that Mr Takoushis held an executive or managerial role within either Com-Cen or E-Talk such that his involvement with their acts of copyright infringement rendered him personally liable for those acts of copyright infringement. I would reach the same conclusion whether I were to adopt the test which Lindgren J favoured in *Microsoft Corporation v Auschina Polaris Pty Ltd* (1996) 71 FCR 231 at 239-246 or the approach favoured by Finkelstein J in *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 177 ALR 231 at [113]-[149]. It is therefore unnecessary for me to express a preference for one view over the other.

NOTICES OF CONTENTION

GENERAL

75 In each appeal the Record Companies filed a notice of contention. The filing of a notice of contention is a practice for which O 52 r 22(3) of the Federal Court Rules provides. Order 52 r 22 is primarily concerned to authorize a respondent who wishes to appeal from part only of a judgment to file a cross-appeal rather than institute a substantive appeal.

However, O 52 r 22(3) relevantly provides:

'If the respondent proposes to contend that the judgment should be affirmed on grounds other than those relied on by the court below, but does not seek a discharge or variation of any part of the judgment, the respondent need not file a notice of cross-appeal, but must:

- (a) file a notice of the respondent's contention within 21 days after the service upon the respondent of the notice of appeal ...'*

76 As the terms of O 52 r 22(3) make clear, the purpose of a notice of contention is to place the appellant and the Court on notice that the respondent contends that the judgment below (ie the orders made below) can be supported on grounds other than those which the court below relied on when pronouncing the judgment. That is, that even if a ground of appeal is made out, it may not lead to the order the subject of the appeal being set aside or varied. The filing of a notice of contention is not a mechanism for challenging any order made below or for challenging the failure of the court below to make an order to which a party below claimed to be entitled.

NOTICE OF CONTENTION IN APPEAL OF MR COOPER

77 In Mr Cooper's appeal the Record Companies filed a notice of contention in the following terms:

'The first to thirty-fourth respondents will contend that the judgment below should be affirmed on the following grounds additional to those relied upon by the primary Judge:

1. The appellant:

- (a) authorised the acts of each of the thirty-fifth respondent (**E-Talk**) and the thirty-sixth respondent (**Com-Cen**) whereby the first to thirty-fourth respondents' copyright was infringed;*
- (b) was a joint tortfeasor in those acts in that he entered into a common design with or participated with each of E-Talk and Com-Cen to carry out those acts.'*

78 Contention 1(a) above is intended to raise the issue of whether, as discussed in [12] above, s 101(1) of the Act creates an act of infringement constituted by authorizing a person, not being the owner of the copyright, and without the licence of the owner of the copyright, to authorize in Australia a person to do an act comprised in the copyright.

79 Neither the terms of the second further amended application nor his Honour's reasons for judgment suggest that the Record Companies propounded a claim below on the basis that Mr Cooper had authorized E-Talk and Com-Cen to authorize the making in Australia of copies, or the communication in Australia to the public, of sound recordings in which the Record Companies hold copyright. The Record Companies did not attempt to demonstrate on appeal that it would be expedient in the interests of justice to allow them to raise this argument for the first time on appeal (*Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2006] FCAFC 48 at [54]). For this reason, even if the contention were otherwise appropriately advanced, I would not allow the Record Companies to rely on it.

80 However, in my view, the contention is not otherwise appropriately raised. No order made by the primary judge could be affirmed on the ground identified in contention 1(a) (see [76] above). As mentioned above, a notice of contention is not a mechanism for challenging the failure of the court below to make an order. Such a challenge must be made by the filing of a notice of appeal or notice of cross-appeal.

81 Contention 1(b) identifies a ground, not relied on by his Honour below, on which the six declaratory orders and six restraining orders referred to in [23]-[24] above could be affirmed as against Mr Cooper. His Honour was not satisfied that Mr Cooper was a joint tortfeasor with E-Talk and Com-Cen. However, as the appeals against those orders so far as they reach to Mr Cooper should, in my view, be dismissed, the merits of this contention need not be considered.

NOTICE OF CONTENTION IN APPEAL OF E-TALK AND MR BAL

82 This notice of contention also raises the issue of whether s 101(1) of the Act creates an act of infringement constituted by authorizing another to authorize in Australia a person to do an act comprised in a copyright. For the reasons given above, it is not expedient in the interests of justice to allow the Record Companies to raise this issue on appeal.

83 The notice additionally raises the contention that the declaratory and restraining orders from which E-Talk and Mr Bal appeal could be affirmed on the ground that E-Talk was a joint tortfeasor with Mr Cooper and Mr Bal was a joint tortfeasor with each of Mr Cooper, E-Talk and Com-Cen. As the appeals against those orders so far as they reach to E-Talk and Mr Bal should, in my view, be dismissed, the merits of this contention need not

be considered.

84 The notice of contention additionally asserts that Mr Bal directed or procured the acts of each of E-Talk and Com-Cen whereby the Record Companies' copyright was infringed or deliberately or recklessly directed the commission of those acts so as to make the conduct his own. For the reason given above the merits of this contention also need not be considered.

NOTICE OF CONTENTION IN APPEAL OF MR TAKOUSHIS

85 This notice of contention also raises the issue of the proper construction of s 101(1) of the Act. For the reasons given above in respect of the other two notices of contention, it is not expedient in the interests of justice to allow the Record Companies to raise this issue on appeal.

86 Additionally this notice of contention asserts that Mr Takoushis:

- (a) was a joint tortfeasor with Mr Cooper, E-Talk and Com-Cen; and
- (b) directed or procured the acts of each of E-Talk and Com-Cen whereby the Record Companies' copyright was infringed or deliberately or recklessly directed the commission of those acts so as to make the conduct his own.

87 In *Thompson v Australian Capital Television Pty Limited* (1996) 186 CLR 574 at 580 Brennan CJ, Dawson and Toohey JJ approved the statement in *The Kursk* [1924] P 140 at 159-160 that for there to be joint tortfeasors '*there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage.*' Their Honours went on to say:

'Principal and agent may be joint tortfeasors where the agent commits a tort on behalf of the principal, as master and servant may be where the servant commits a tort in the course of employment. Persons who breach a joint duty may also be joint tortfeasors. Otherwise, to constitute joint tortfeasors two or more persons must act in concert in committing the tort.'

88 I have concluded above that Mr Takoushis did not authorize the acts of copyright infringement undertaken by the users of Mr Cooper's website or by the hosts of the remote websites. For this reason no issue arises of his being a joint tortfeasor with his employer because he committed a tort in the course of his employment; he did not commit the

suggested tort.

89 The Record Companies challenged the primary judge's rejection of their allegation that Mr Takoushis acted in concert with Mr Cooper, E-Talk and Com-Cen on the basis that his Honour took too narrow a view of what constitutes acting in concert. They pointed to Mr Takoushis' role in the establishment and maintenance of Mr Cooper's website, his knowledge of legal problems with the website and his ability to prevent Mr Cooper's copyright infringements by simply denying him web hosting.

90 As I have already indicated, I do not accept that Mr Takoushis had the authority to deny Mr Cooper web hosting. Having regard to the matters identified in [70]-[72] above, the other factors to which the Record Companies point are insufficient to establish that the primary judge erred in concluding that Mr Takoushis was not a joint tortfeasor with Mr Cooper, E-Talk or Com-Cen.

91 For the above reasons, the orders made against Mr Takoushis at first instance cannot be affirmed on the grounds identified in the Record Companies' notice of contention.

CONCLUSION

92 For the above reasons, I would dismiss the appeals of Mr Cooper, E-Talk and Mr Bal but allow the appeal of Mr Takoushis. The dismissal of the appeals of Mr Cooper, E-Talk and Mr Bal should, however, be subject to the amendment of each of the declarations and restraining orders made by the primary judge to clarify that the declarations and restraining orders relate to infringing conduct in Australia.

93 To reflect the allowing of Mr Takoushis' appeal, the orders made by the primary judge should additionally be varied by:

- (a) removing from orders 1-6 (inclusive), 13-18 (inclusive) and 26 the words '*fourth and fifth respondents*' and replacing them with the words '*and fourth respondent*';
- (b) varying order 29 as follows:
 - (i) by adding '*and*' at the end of par (a);
 - (ii) by replacing '*20%*' with '*30%*' in par (b);

(iii) by adding a full-stop after ‘respondents’ in par (b) and deleting everything thereafter.

94 Mr Cooper, E-Talk and Mr Bal should pay the Record Companies’ costs of their appeals. The Record Companies should pay Mr Takoushis’ costs at first instance and on appeal.

KENNY J:

95 On 14 July 2005, a judge of this Court found that Mr Stephen Cooper, who is an appellant in these appeals, contravened the *Copyright Act 1968* (Cth) (“the Act”) by authorizing infringements by internet users of copyright in popular music sound recordings. Internet users used his website “mp3s4free.net” (referred to below as “the website”) to download the recordings, which were stored on remote websites. These remote websites were neither owned nor operated by Mr Cooper nor any other party to the proceeding. The learned primary judge found that Mr Cooper also breached the Act by authorizing infringements of copyright in the sound recordings by the unnamed owners or operators of these sites.

96 In addition, the primary judge found that, by agreeing to host the website and assisting with its operation, the second to fifth respondents, E-Talk Communications Pty Limited (“E-Talk”), Com-Cen Pty Limited (subject to deed of company arrangement) (“Com-Cen”), and Messrs Liam Francis Bal and Chris Takoushis had also contravened the Act by authorizing infringements of copyright in the sound recordings: see *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 (“*Universal Music*”) at 23-24 [100] and 29 [131]. With the exception of Com-Cen, they too are appellants in these appeals.

97 For the reasons that follow, I would allow the appeal of Mr Takoushis and dismiss the appeals of Mr Cooper, E-Talk and Mr Bal.

THE FACTUAL BACKGROUND

98 The primary judge described the technological context in which Mr Cooper operated his website in some detail: see *Universal Music* at 8-11 [18]-[28]. Whilst it is unnecessary to repeat his Honour’s description here, concepts of linking and downloading from remote computers to an internet user are central to the appeals. It is also important to bear in mind

that his Honour found that hyperlinks were established on the website by software tools that the website itself made available to internet users; and that, in order for Mr Cooper to enable files to be automatically linked to the website by internet users, he must have given permission for this access: see *Universal Music* at 9 [22]. The following facts appear from his Honour's judgment.

99 Mr Cooper was the registered owner of the domain name "mp3s4free.net" and the owner and operator of the website. He derived income from his website through advertising arrangements: see *Universal Music* at 4 [5]. By clicking on a hypertext link ("hyperlink") on the website, internet users could download to their own computers copies of sound recordings directly from remote websites: see *Universal Music* at 7-8 [15]. On these remote websites, the sound recordings were mostly stored as MP3 digital music files.

100 Mr Cooper's website was "a highly structured and organised one", "with hyperlinks to many other pages" and was "user friendly and attractive": see *Universal Music* at 5 [13] and 7 [15]. The home page of the website, which contained numerous web pages, made statements about the availability of free songs. On one side of each webpage, the Com-Cen logo appeared under a reference to "Best Server": see *Universal Music* at 8 [16]. Each of the website's pages contained hyperlinks to the site's "Privacy Policy", "Terms and Conditions" and "Disclaimer". Of these matters, His Honour said at 11-12 [30]:

"The 'Terms and Conditions' contains the following statement which emphasises the linking function provided by the website:

'Set forth below are the terms and conditions ... governing the MP3s4FREE.NET website located at, or linked to through, the route url www.mp3s4free.net, which may expand or change from time to time (the "Website").

...

Sites **Linked** from the Website: Links to third-party websites from the Website are not necessarily under MP3s4FREE's control ... and MP3s4FREE does not intend any such **links** to third-party websites to imply MP3s4FREE's sponsorship or endorsement thereof.'

(Emphasis added)

The 'Disclaimer' acknowledges the linking function of the website in the following terms:

'... When you download a song, you take full responsibility for doing so. None of the files on this site are stored on our servers. **We are just**

providing links to remote files.’
(*Emphasis added*)

The linking function of the website is also acknowledged in the Privacy Policy in the following terms:

‘External Links: This site contains links to other sites.

...

Disclaimer: ...This site only provides links to the according sites and no songs are located on our servers. ... We are not responsible for any damage caused by downloading these files, or any content posted on this website or linked websites.’”

Referring to data, including statistics, obtained after the execution of Anton Piller orders (see *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55) in October 2003, the primary judge said at 11 [29]:

“The statistics confirm that the website was a very successful and active website which attracted internet users from around the world and a significant traffic from Australian internet users. The largest of the files copied from E-Talk/Com-Cen’s computer equipment was the log of transactions from the website for the past 12 days (the Access Log File). The Access Log File indicated that there were in excess of 5 million separate text entries occurring within a period of approximately 12 days. The Access Log File contained records of the IP address or host names used by the computers accessing the website. There were in excess of 214,000 unique hosts identified, a number of which had the suffixes “.com.au” (5,676 hosts), “.net.au” (5,738 hosts), “.edu.au” (207 hosts), “.gov” (64 hosts) and “.gov.au” (40 hosts). The records also indicated that requests for searches were made by over 61,000 of the unique hosts during the 12 day period, constituting in excess of 107,000 searches for names which matched the recording artists listed in the further amended application filed on 14 October 2004. The Access Log File also records the requesting by user computers of the Com-Cen logo that appeared on the website. There were 531,499 entries for the “comcen.gif” file in the Access Log File confirmed as downloaded to user computers.”

101 From 21 December 2000 until 21 June 2001, Mr Cooper purchased internet services from Com-Cen in order that it host the website. Around 21 June 2001, Mr Cooper made an arrangement with Com-Cen, pursuant to which Com-Cen hosted the website largely for free in return for the website’s advertising of Com-Cen’s internet services: see *Universal Music* at 12 [36].

102 In April 2002, Com-Cen entered into an agreement with E-Talk, pursuant to which Com-Cen transferred 3,000 of its 4,500 customers to E-Talk: see *Universal Music* at 13 [39].

Mr Cooper's custom was transferred to E-Talk. Mr Bal was a director and the controlling mind of both Com-Cen and E-Talk. Mr Takoushis, who was an employee of these companies, was Mr Cooper's primary point of contact and assisted him from time to time with the operation of the website.

103 On 17 October 2003, various Australian record companies and other entities that were the owners or exclusive licensees of copyright in sound recordings (referred to below as "the record companies") commenced a proceeding in the Court, amongst other things, in respect of alleged infringements of the Act in operating and hosting the website. They alleged, amongst other things, that Mr Cooper, E-Talk, Com-Cen, Mr Bal and Mr Takoushis authorized internet users to make copies of the sound recordings and the communication of these recordings to the public by the operators of remote websites. They also alleged these parties infringed copyright as joint tortfeasors by entering into a common design with internet users to make copies of the recordings.

104 On 22 December 2005, the primary judge granted declaratory and injunctive relief against Mr Cooper, E-Talk, Com-Cen and Messrs Bal and Takoushis. Damages are yet to be assessed: see *Universal Music Australia Pty Ltd Cooper* [2005] FCA 1878 ("*Universal Music (No 2)*"). I refer to Branson J's reasons for a more detailed description of these declarations and injunctions.

105 There are three appeals against some of his Honour's orders by (1) Mr Cooper; (2) E-Talk and Mr Bal; and (3) Mr Takoushis (referred to below as "the appellants"). In particular, the appellants challenged his Honour's orders 1 to 6, 13 to 18 and 25 to 30. The appeals were heard together on 7, 8 and 9 August 2006. Com-Cen did not appeal. All appellants filed amended notices of appeal at the hearing. With leave, the parties filed further written submissions after the hearing.

106 Mr Cooper appealed on the grounds that his Honour erred in finding that, by providing a website with hyperlinks, he authorized the making of copies of the sound recordings and the communication to the public of those recordings without the licence of the record companies. E-Talk, Mr Bal and Mr Takoushis also appealed on the ground that his Honour erred in declaring that, on the facts as found, they authorized the infringement of copyright in the sound recordings. In addition, they appealed on the grounds that his Honour

erred in holding that, on the facts as found, they did not fall within the protection of s 112E of the Act.

107 Broadly stated, the principal issue raised on the hearing of the appeal was whether or not the primary judge was correct in holding that the appellants infringed the record companies' copyright by authorizing the doing of acts comprised in the copyright referred to in s 85 of the Act. The appeal largely turns on the meaning of the word 'authorize' in s 101(1) of the Act.

THE DECISION OF THE PRIMARY JUDGE

108 Concerning Mr Cooper and the website, the primary judge found that:

- (1) The website was a very successful and active one, which attracted internet users from within and without Australia. The traffic from Australian internet users was "significant": see *Universal Music* at 11 [29].
- (2) Each page of the website contained hyperlinks to "Privacy Policy", "Terms and Conditions" and "Disclaimer", which are set out above at [100]: see *Universal Music* at 11-12 [30].
- (3) Mr Cooper had infringed the record companies' copyright by making copies of the music sound recordings, which were stored as MP3 files on the hard drive of his computer, by downloading them from the website: see *Universal Music* at 15 [56]. On appeal, Mr Cooper did not challenge this finding.
- (4) There were no sound recordings on the website and there had not been any downloading or transmission of recordings from the website: see *Universal Music* at 15 [60]. Accordingly, Mr Cooper had not infringed the record companies' copyright in the recordings by communicating them to the public: see *Universal Music* at 16 [63] and 17 [66]-[67].
- (5) The remote websites made available online and electronically transmitted the music recordings to the public: see *Universal Music* at 16 [63].
- (6) For the purposes of s 22(6) of the Act, Mr Cooper did not "determine", "formulate" or "create" the content of the remote website from which such communications took place: see *Universal Music* at 20-21 [74].
- (7) The website was "carefully structured", "highly organised", and many web pages contained "numerous references to linking and downloading". The website

contained hyperlinks that enabled the internet user to access and download the files on the remote websites: see *Universal Music* at 20-21 [84]. His Honour continued:

“The website is clearly designed to - and does - facilitate and enable this infringing downloading. I am of the view that there is a reasonable inference available that Cooper, who sought advice as to the establishment and operation of his website, knowingly permitted or approved the use of his website in this manner and designed and organised it to achieve this result. In view of the absence of Cooper from the witness box, without any reasonable explanation apart from a tactical forensic suggestion that he was not a necessary or appropriate witness to be called in his own case, I am satisfied that the available inference of permission or approval by Cooper can more safely and confidently be drawn. Accordingly, I infer that Cooper has permitted or approved, and thereby authorised, the copyright infringement by internet users who access his website and also by the owners or operators of the remote websites from which the infringing recordings were downloaded.” (Emphasis added.)

(8) It was open to Mr Cooper to prevent these infringements by internet users by removing the hyperlinks from his website or by structuring the website in such a way that the operators of the remote websites could not automatically add hyperlinks to the website without his supervision or control: see *Universal Music* at 21 [85]. Mr Cooper had control regarding both the internet users accessing his website and the operators of the remote websites who sought to add hyperlinks to his website: see *Universal Music* at 21 [86].

(9) The disclaimers on the website (see above) did not amount to reasonable steps, within the meaning of s 101(1A)(c) of the Act, to prevent or avoid the doing of the infringing act: see *Universal Music* at 21 [87]. His Honour added:

“The disclaimers in fact indicate Cooper’s knowledge of the existence of illegal MP3s on the internet and the likelihood that at least some of the MP3s to which the website provided hyperlinks constituted infringing copies of copyright music and sound recordings. However, no attempt was made by Cooper, when hyperlinks were submitted to the website, to take any steps to ascertain the legality of the MP3s to which the hyperlinks related or the identity of the persons submitting the MP3s.”

(10) Mr Cooper had authorized the infringement of copyright in the sound recordings, both by the internet users who downloaded the recordings and by the operators of

the remote websites: see *Universal Music* at 22 [88]. At 23-24 [100], his Honour concluded that:

“...copyright subsisted in the sound recordings and...there was a breach of copyright as a consequence of the communication, both in the sense of electronic transmission and making available online, of the sound recordings from the remote websites to the internet users who activated one of the hyperlinks that had been set up on the website as a direct or indirect consequence of the activities undertaken by Cooper....Cooper...breached the Act by reason of authorising acts comprised in the copyright, in the sense of permitting or sanctioning and facilitating the infringements of the Act by the internet users who access[ed] the website and also by the owners or operators of the remote websites from which the infringing recordings were downloaded.”

- (11) Mr Cooper did not engage in trading in the digital music files and was not offering for sale the sound recordings: see *Universal Music* at 22 [90]-[91] and 24 [101]. He derived a collateral commercial benefit from the sponsorship and funding he received for the advertising material on his website. He used the hyperlinks on the website, and the high traffic of internet users which was generated by these hyperlinks, to procure sponsorship.
- (12) Mr Cooper offered encouragement to internet users to download infringing material, as evidenced by the numerous references to downloading on the website, and had specifically structured and arranged the website so as to facilitate this downloading. Accordingly, Mr Cooper could not rely on s 112E by way of defence: see *Universal Music* at 23 [99] and 24 [100].

109 As to E-Talk, Com-Cen, and Messrs Bal and Takoushis, the primary judge relevantly found that:

- (1) E-Talk and Com-Cen had not infringed copyright by communicating the sound recordings to the public: see *Universal Music* at 25 [110].
- (2) Mr Bal was the controlling mind of E-Talk and Com-Cen, which was a small, tightly-knit operation under his direction. There were about eight employees working at the same premises in close proximity to one another. Persons working in the office would have been aware of, and discussed, the offer made by Mr Cooper, its acceptance and implementation. Mr Bal would have been keen to ensure that his companies were receiving some benefit in return for hosting the website for free. The provision of these hosting services was a significant source

of revenue: see *Universal Music* at 26 [115]. Mr Bal visited the website prior to the execution of the *Anton Piller* orders: see *Universal Music* at 26-27 [116]-[118] and 28 [124]. Mr Bal was aware of the contents of the website and of the copyright problems that were said to arise from its operation. Whilst E-Talk and Com-Cen told Mr Cooper to take the website down to avoid these problems, Mr Bal and Mr Takoushis took no further steps on learning of these problems and the failure of Mr Cooper to address them: see *Universal Music* at 27 [119]-[120] and 29 [127]. Mr Bal and Mr Takoushis relied on an alleged assurance from Mr Cooper that there was no problem with the website because no music files were actually stored on it: see *Universal Music* at 29 [127].

- (3) E-Talk and Com-Cen were responsible for hosting the website and providing the necessary connection to the internet. They had the power to prevent the doing of the infringing acts. They could have taken the website down but they took no steps to prevent the infringing acts: see *Universal Music* at 27 [121].
- (4) Mr Takoushis, who was a student in information technology until September 1999, had no directorial or managerial function, but was instrumental in setting up the hosting of the website. He communicated with and gave assistance to Mr Cooper in maintaining and operating the site. Mr Takoushis visited the website and was aware of its contents and discussed the website with Mr Bal and Mr Georgiopoulos, who was an employee senior to him, prior to the execution of the *Anton Piller* orders. He was aware of the probability of legal problems associated with the website before the execution of the *Anton Piller* orders. Because “he was instrumental in the arrangements for the hosting of the web site and was a contact person with Cooper, who obtained approval from one of Georgiopoulos...or Bal for the free web hosting arrangement...he was more than a mere conduit for communication. He was the person at E-Talk/Com-Cen who was responsible for cooperating with Cooper”: see *Universal Music* at 28 [123]-[124], 28 [125], 29 [127] and 29 [128].
- (6) E-Talk was carrying on the hosting operation of the website during the relevant period. E-Talk and Com-Cen authorized the infringing communication of the sound recordings to the public by the remote websites and the copying of the sound recordings by the internet users who downloaded the files: see *Universal Music* at 29 [129]-[130].
- (7) E-Talk, Com-Cen, and Messrs Bal and Takoushis could not rely on s 112E: see

Universal Music at 29 [131].

- (8) The primary judge was not satisfied that there had been an entry into a common design or participation sufficient to amount to Mr Cooper being a joint tortfeasor “with either internet users and E-Talk/Com-Cen to make copies of the music sound recordings or to communicate them to the public”: see *Universal Music* at 30-31 [137]. Although, on the findings, Messrs Bal and Takoushis were aware that there was a problem in relation to the downloading of the sound recordings, it was not established that there was a sufficient degree of common design or concerted action to make them joint tortfeasors: see *Universal Music* at 30-31 [137]. His Honour also found that E-Talk and Com-Cen were not joint tortfeasors: see *Universal Music* at 30-31 [137].

110 The primary judge dismissed the record companies’ claims that statements on the website amounted to misleading or deceptive conduct: see *Universal Music* at 31-33 [138]-[145].

THE COPYRIGHT ACT

111 A sound recording, as defined in s 10, is not a “work” within the meaning of the Act. Part IV of the Act, which concerns copyright in subject-matters that are not works, relates to sound recordings: see ss 10, 84 and 97. Part IV consists of ss 84 to 113C. Section 85(1) provides that, for the purposes of the Act, unless the contrary intention appears, copyright in a sound recording is the exclusive right, amongst other things, to make a copy of the sound recording and to communicate the recording to the public: see s 85(1)(a) and (c). A recording is relevantly ‘communicated’ if it is made available online or electronically transmitted: see s 10. The expression ‘to the public’ means ‘to the public within or outside Australia’: see s 10.

112 Section 101 relevantly provides:

“(1) *Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.*

(1A) *In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a*

copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;*
 - (b) the nature of any relationship existing between the person and the person who did the act concerned;*
 - (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.*
- (2) The next two succeeding sections do not affect the generality of the last preceding subsection.*
- (3) Subsection (1) applies in relation to an act done in relation to a sound recording whether the act is done by directly or indirectly making use of a record embodying the recording.*
- (4)”*

113 Section 13(1), which falls within the interpretation provisions of Pt II, provides that a reference in the Act to an act comprised in the copyright in a work or other subject-matter is a reference to any act that, under the Act, the owner of the copyright has the exclusive right to do. Section 13(2) further provides that, for the purposes of the Act, the exclusive right to do an act in relation to a work or any other subject-matter includes the exclusive right to authorize a person to do that act in relation to that work or other subject matter.

114 Consideration of whether the appellants authorized copyright infringement by hosting Mr Cooper's website involves consideration of s 112E, which is in the following terms:

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

The term 'audio-visual item' includes a sound recording: see s 100A.

THE PARTIES' SUBMISSIONS

115 At the hearing of the appeals, senior counsel, who represented all the appellants, made four preliminary submissions: first, that the word 'authorizes' in s 101(1) must mean 'purports to authorize'; secondly, whether or not there has been an authorization is a question

of fact; thirdly, whilst the authorities note various synonyms for the word ‘authorize’, the synonyms do not resolve the question whether in this case there has been an authorization; and, fourthly, whilst the authorities state what is not authorization, these statements provide only peripheral guidance in this case.

116 Relying on *Falcon v Famous Players Film Company* [1926] 2 KB 474 at 499 per Atkin LJ, the appellants submitted that the word ‘authorize’ in s 101(1) must mean doing an act or acts that, if legally effective, would give lawful permission to do the thing. That is, an ‘authorization’ was more than facilitation and encouragement. The appellants relied on the fact that the primary judge dismissed the misleading and deceptive conduct claim against them in support of the proposition that they had not held themselves out as authorizing the infringing conduct.

117 The appellants also submitted that the primary judge made no finding that the infringements they had supposedly authorized were infringements in Australia and that, having regard to the terms of s 101(1), this was crucial to the case against them. Further, the declarations and injunctions to which his Honour’s judgment gave rise did not incorporate the territorial restriction in s 101(1).

Mr Cooper

118 Mr Cooper submitted that whether or not the provision of a hyperlink constituted authorization depended on the circumstances of the case. He likened the provision of hyperlinks to a road sign, which merely pointed the way to another site, from which downloading could be done. He submitted that the website was, in relevant respects, no different from other internet search engines, such as Google. Referring to the disclaimer on the website, he argued that he merely stood by, indifferent to what visitors to his site might choose to do. He contended that it made no difference that he knew that the hyperlinks on his website could and would be used unlawfully. He argued that the decision of a Full Court of this Court in *Australasian Performing Right Association v Jain* (1990) 26 FCR 53 (“*Jain*”) at 61 was wrong in so far as it pointed to a contrary conclusion.

119 Mr Cooper also argued that the MP3 files to which his website provided links were available independently of his website. He submitted that he did not have the power to prevent the downloading of these files; and that he had no relationship with the operators of

the remote sites or with the internet users who chose to download the sound recordings. Referring to the disclaimers on the website, he further submitted that he had taken reasonable steps to prevent or avoid copyright infringements. He relied on s 112E.

E-Talk and Mr Bal

120 E-Talk and Mr Bal also relied on s 112E and further contended that the provision was included in the Act out of an abundance of caution. They were not, so they said, to be taken to have authorized infringements of copyright in sound recordings simply because others misused the facilities they provided. They conceded that the primary judge found that they had some knowledge of what the website contained. They argued, however, that it was immaterial that they might have prevented Mr Cooper from displaying his website. They said that they had no power to prevent the infringements constituted by internet users' downloading of sound recordings stored as MP3 files on remote websites. There was, they said, no relationship between them and the internet users or operators of remote websites.

121 In detailed written submissions, E-Talk and Mr Bal contended, amongst other things, that there no sound evidentiary basis for the primary judge's finding that, as an internet service provider, E-Talk (and Mr Bal) had authorized the relevant copyright infringements. They said that there was no proper foundation for the primary judge's adverse view of Mr Bal's credit.

Mr Takoushis

122 Mr Takoushis relied heavily on the fact, as found by the primary judge, that he was merely an employee with responsibilities for technical matters. He submitted that his Honour erred in finding that a person in his position could be taken to authorize copyright infringements. He further submitted that, bearing in mind that he had no control or policy-making role, he did nothing more than provide technical support for the website and, when problems arose, took instruction from his superiors. He was, so he said, a mere functionary.

Record companies

123 The record companies commenced oral argument first by submitting that the website operated by Mr Cooper was not analogous to a general search engine because the only purpose of the website was to facilitate the downloading of sound recordings stored as MP3

files on remote computers. They submitted that Mr Cooper's appeal had a narrow focus and did not challenge the underlying findings of fact. They argued that the law in Australia attributed a wide meaning to the word 'authorize' in this context; and the appellants' attempt to narrow the concept of authorization was inconsistent with the decision of the High Court in *The University of New South Wales v Moorehouse* (1975) 133 CLR 1 ("*Moorehouse*").

124 According to the record companies, infringements occurred in Australia in consequence of the remote website operators transmitting and communicating the recordings in Australia. It was reasonably to be inferred from the nature of the popular songs that were catalogued on the website operated by Mr Cooper that most, if not all, were the subject of copyright. They submitted that, in the context of the case, including the structure of the site and its subject matter, there was an "inescapable inference...that every download...absent some other evidence...would infringe copyright".

125 The record companies argued that Mr Cooper authorized a specific transmission that occurred as a direct consequence of activating the hyperlink on the website. Mr Cooper was, so they said, in a position to ensure that the sound recordings stored in the MP3 files accessed by the hyperlinks on the website were not transmitted over this path. The record companies argued that Mr Cooper had a direct relationship with the operators of the remote websites and internet users. They contended that the findings of the primary judge as to the nature and structure of the website gave rise to a reasonable inference that Mr Cooper knowingly permitted the use of the website for infringing downloading. The primary judge was, so they said, entitled to have regard to the fact that Mr Cooper did not give evidence. The record companies also contended that Mr Cooper did not present any coherent statement of the rights of internet users in relation to the downloading of sound recordings.

126 The record companies also submitted that, by connecting the website to the internet, E-Talk authorized copyright infringements by internet users. Further, they relied on the fact that E-Talk and Com-Cen advertised internet services on the website, both on webpages and via hyperlink, and enjoyed the financial benefits of their association with the website. They referred to *Jain* and the primary judge's findings about Mr Bal and E-Talk, submitting that his Honour's ultimate conclusion about their liability was correct.

127 Similarly, the record companies contended that the primary judge's findings

supported his ultimate finding with respect to Mr Takoushis. Although they accepted that he did not have a managerial role in the business of E-Talk, they submitted that Mr Takoushis had a degree of discretion, the ear of Mr Bal, and was instrumental in setting up Mr Cooper's website. This was enough, so they said, to justify his Honour's ultimate finding with respect to Mr Takoushis.

128 Finally, the record companies contended that his Honour erred in not finding that each of E-Talk, Mr Bal and Mr Takoushis was party to a common design with Mr Cooper so as to render them liable as joint tortfeasors. They relied on the findings of fact made by the primary judge in relation to the knowing involvement of each of these appellants in Mr Cooper's infringements of copyright. They argued that his Honour took too narrow a view of what constitutes "common design or concerted action to make them joint tortfeasors". Each of the appellants refuted this contention.

The parties' supplementary submissions

129 In supplementary submissions filed on 16 August 2006 pursuant to leave granted on 9 August 2006, the record companies "object[ed] to [the appellants] being granted leave to raise issues as to proof of infringements in Australia (including the application of s 104) and the form of orders". The bases for their objection were that neither issue was the subject of any ground of appeal; the record companies deliberately confined their approach to the appeals because of their narrow ambit; and the new issues would require more extended consideration of material before the primary judge than had hitherto been necessary.

130 The record companies said:

"Mr Cooper did make a general submission before the primary Judge to the effect that there was no evidence of infringements in Australia; however, his assertions in this regard...were obviously wrong. There was evidence of infringements in Australia.

The fact that his Honour did not deal expressly with that general submission reflects the fundamental weakness in the argument as opposed to any weakness in the primary Judge's judgment."

131 The record companies stated that s 104, which was not raised as a ground of appeal, was also not raised before the primary judge. Had it been raised, it would have led to a factual inquiry that, as it happened, was never undertaken. Further, if leave were given to the

appellants, then the record companies sought leave to amend their notice of contention to agitate the question whether Mr Cooper was a joint tortfeasor in the acts of the operators of the remote servers to which his website had links. The record companies accepted that an amended form of orders might nonetheless be made.

132 In responsive submissions filed on 24 August 2006, the appellants argued that no leave was sought or required to raise issues as to proof of infringements in Australia, including s 104. They contended that “[i]f the Record Companies are to be permitted to salvage what they can of the orders made by the primary Judge – even by recasting those orders so as to provide a territorial limitation which is presently totally lacking – they can hardly deny the Appellants the opportunity to argue that the proposed amendments cannot be sustained without some evidentiary foundation that something (relevant) happened in Australia.” The appellants also stated that the contention that the record companies foreshadowed that they would wish to raise by amendment to their notice of contention was not pleaded nor otherwise explored at trial.

133 Notwithstanding the appellants’ opposition, the Court subsequently permitted the record companies to file further supplementary submissions. It also received the appellants’ further supplementary submissions in response.

CONSIDERATION

134 Section 101(1) creates two kinds of infringements: the first is the doing in Australia of any act comprised in the copyright by a person not being the owner of the copyright and without the licence of the owner of the copyright; and the second, the **authorizing** (again by a person not being the owner of the copyright and without the licence of the owner of the copyright) of the doing in Australia of any act comprised in the copyright. These appeals are primarily concerned with the meaning of ‘authorization’ in s 101. Each kind of infringement created by s 101(1) has a territorial connection to Australia. In the first case, there must be **the doing in Australia** of an act comprised in the copyright and, in the second case, there must be the authorizing of **the doing in Australia** of an act of the same description. Section 101(1) will be attracted in the latter case if the act of infringement that is authorized is done in Australia, though the ‘authorization’ took place outside Australia. That is, s 101 operates so as to exclude the ordinary presumption that a Commonwealth Act is concerned only with

conduct in Australia: see s 21 of the *Acts Interpretation Act 1901* (Cth). The question whether or not the primary judge adverted to the need for a relevant territorial connection and the extent of the evidence for it assumed additional significance in submissions filed after the hearing of the appeal. I return to this matter below at [175]-[176].

135 Section 101(1A) was introduced into the Act by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (“the Copyright Amendment Act”), an object of which was to provide “a practical enforcement regime for copyright owners” in the online environment: see s 3 of the Copyright Amendment Act. Presumably, the provision has particular significance in the context of alleged infringements of s 101(1) across the internet. Section 101(1A) requires that certain matters **must** be taken into account in determining whether a person has authorized the doing of an infringing act in Australia contrary to s 101(1). Section 101(1A) does not, however, prevent the Court from taking into account other relevant considerations. Whether one person has authorized another to commit an infringement will depend on the circumstances of the case: compare *Moorehouse* at 12 per Gibbs J and 17 per Jacobs J (with whom McTiernan ACJ agreed).

Authorization

136 Section 101(1A) was enacted at a time when *Moorehouse* represented the Australian law with respect to ‘authorization’. Before the introduction of s 101(1A) into the Act, any discussion of the concept of authorization began with *Moorehouse*. Today, reference to *Moorehouse* assists in construing s 101(1A) because, as the following discussion shows, s 101(1A) is premised on the concept of ‘authorization’ developed by the High Court in that case.

137 *Moorehouse* concerned the circumstances in which literary copyright was infringed by the making of photocopies in a library at the University. Jacobs J, with whom McTiernan J agreed, said, at 20:

“The question is whether in the circumstances of the case the appellant in supplying the book from its library and in providing a machine at the library which would enable copies to be made authorized the infringement. The answer depends upon the meaning of the word ‘authorize’ in s 36(1) of [the Act] and on a conclusion of fact once the meaning of the word is ascertained.”

Jacobs J drew a distinction between ‘authority’ and ‘authorization’. The latter was a broader

concept than the former. Like Gibbs J in his separate judgment, Jacobs J attributed to the word ‘authorization’ the meaning of ‘sanction, approve, countenance’. Jacobs J observed, at 20-21:

“It is established that the word is not limited to the authorizing of an agent by a principal. Where there is such an authority the act of the agent is the act of the principal and thus the principal himself may be said to do the act comprised in the copyright. But authorization is wider than authority. It has, in relation to a similar use in previous copyright legislation, been given the meaning, taken from the Oxford Dictionary, of ‘sanction, approve, countenance’...It is a wide meaning which in cases of permission or invitation is apt to apply both where an express permission or invitation is extended to do the act comprised in the copyright and where such a permission or invitation may be implied. Where a general permission or invitation may be implied it is clearly unnecessary that the authorizing party have knowledge that a particular act comprised in the copyright will be done.”

Jacobs J held that in the circumstances of the case the University had impliedly invited the users of the library to use the photocopiers as they thought fit, including committing copyright infringements.

138 Gibbs J also said, at 12, that, in legislation “of similar intendment”, the word ‘authorize’ had been held to mean ‘sanction, approve, countenance’ or even ‘permit’. His Honour added that “[a] person cannot be said to authorize an infringement of copyright unless he has some power to prevent it”: see *Moorehouse* at 12. Gibbs J continued, at 12-13, that:

“Express or formal permission or sanction, or active conduct indicating approval, is not essential to constitute an authorization...However, the word ‘authorize’ connotes a mental element and it could not be inferred that a person had, by mere inactivity, authorized something to be done if he neither knew nor had reason to suspect that the act might be done...[A] person who has under his control the means by which an infringement of copyright may be committed - such as a photocopying machine - and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use.”

Gibbs J held that the University did not adopt measures reasonably sufficient for the purpose of preventing infringements taking place and that in the circumstances an infringement resulting from the use of the University’s photocopier was relevantly authorized by the

University: see *Moorehouse* at 17.

139 In *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274 (“*WEA International Inc*”), which also concerned infringement of copyright in sound recordings, Gummow J considered the history of the concept of ‘authorization’ in Australian law. His Honour noted and concluded at 285-286:

“*The evolution of the meaning of ‘authorisation’ in [the Copyright Act 1911 (UK)] and [the Act] has pursued an even more tortuous course than the doctrine of contributory infringement in the United States. One view of the 1911 Act was that the expression ‘to authorise’ described a situation where the defendant purported to confer on a third party, for example as an agent or licensee, a right or authority to perform an activity which in truth would be, if carried out, an infringement of the plaintiff’s copyright: Transatlantic Film Co Ltd v Albion Cinema Supplies Co [1917-23] MacG CC 118 at 121; Finn v Pugliese (1918) 18 SR (NSW) 530 at 541; Evans v E Hulton and Co Ltd (1924) 131 LT 534; Falcon v Famous Players Film Co [1926] 2 KB 474 at 499. This would have given to ‘authorisation’ a conceptually distinct field of operation from that of principles of joint tortfeasance.*

...

But the course of authority has shown that the concept of ‘authorisation’ is not so confined. In Moorehouse’s case...the High Court, following Adelaide Corporation v Australasian Performing Right Association Ltd (1928) 40 CLR 481 at 489, accepted that the word ‘authorised’ as used in s 36 of [the Act] had the meaning of ‘sanction, approve, countenance’. This meant that express or formal permission or active conduct indicating approval was not essential to constitute authorisation.”

140 The appellants have contended for a narrow concept of ‘authorization’, which, as this passage from Gummow J’s judgment in *WEA International Inc* shows, was rejected by the High Court in *Moorehouse* and *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 (“*Adelaide Corporation*”). The proposition that the concept of ‘authorization’ is to be understood in the narrow way for which the appellants contended is incompatible with these authorities: see also *Jain* at 57 per Sheppard, Foster and Hill JJ. For this reason, I reject the appellants’ submissions in this regard.

Relevant considerations

141 Prior to the introduction of s 101(1A), the authorities identified various considerations as being relevant to the issue of ‘authorization’ as developed by the High Court. In *Moorehouse*, the High Court identified as relevant the degree of control over and the nature

of the relationship between the alleged authorizer and the person supposedly authorized to do the directly infringing act: see also *Adelaide Corporation* at 497 per Higgins J and 503 per Gavan Duffy and Starke JJ and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 (“*Australian Tape Manufacturers*”) at 497-498 per Mason CJ and Brennan, Deane and Gaudron JJ. Gibbs J in *Moorehouse* also identified as a relevant consideration the knowledge or reasonable suspicion of the authorizer that the infringing act would be done: see also *Adelaide Corporation* at 487 per Knox CJ in dissent. Building on this idea, the High Court in *Australian Tape Manufacturers* at 498 said that the “[m]anufacture and sale of articles such as blank tapes or video recorders, which have lawful uses, do not constitute authorization of infringement of copyright, even if the manufacturer or vendor knows that there is a likelihood that the articles will be used for an infringing purpose such as home taping of sound recordings, so long as the manufacturer or vendor has no control over the purchaser’s use of the article.”

142 The question what degree of control can constitute a sufficient basis for a finding of authorization does not admit of a straightforward answer. As the authorities show, it will be a question of fact and degree in each case.

143 In *Adelaide Corporation*, a majority of the High Court held that a lessor of a hall had not ‘permitted’ the lessee to perform songs in a concert in breach of copyright, notwithstanding that that the lessor was told that the proposed program would infringe copyright and did nothing to dissuade the lessees from performing the songs. In a passage referred to in *Moorehouse*, Gavan Duffy and Starke JJ at 504 cited *Performing Right Society v Caryl Theatrical Syndicate* [1924] 1 KB 1 at 9 per Bankes LJ in support of the proposition that:

“*Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity or ‘indifference, exhibited by acts of commission or omission, may reach a degree from which an authorization or permission may be inferred...’*”

144 *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 (“*Nationwide News*”) considered the relationship between control, knowledge and inactivity, albeit in *obiter dicta*. In a passage on which the appellants relied, Sackville J, with whom Jenkinson and Burchett JJ agreed, said at 422 that “a person does not authorise an infringement merely because he or she knows that another person might infringe the copyright and takes no step to

prevent infringement”. Referring, amongst other cases, to *Adelaide Corporation* and *Australian Tape Manufacturers*, his Honour added at 424 that “[k]nowledge that a breach of copyright is likely to occur does not necessarily amount to authorisation, even if the person having that knowledge could take steps to prevent the infringement”.

145 On the one hand, mere inactivity or indifference will be insufficient, especially where there is no knowledge or reason to suspect that the infringement might occur. On the other hand, inactivity or indifference, coupled with other factors, may support an inference of authorization. In *Jain*, the combination of inactivity, knowledge and control led the Full Court to uphold the finding at first instance that a company’s chief executive officer had authorized the infringement of copyright that occurred in the unlicensed performance of musical works in a hotel owned by the company. The chief executive officer, who was also a director, was not involved in the daily operations of the hotel. The company employed a manager to select and arrange performances. In upholding the finding below, the Full Court emphasised that the finding of authorization was one of fact. It said at 61-62:

“The judgment of the High Court in the Moorehouse case establishes that one of the meanings of the word ‘authorise’ in the context in which it is here used is ‘countenance’. It may be that not every act which amounts to the countenancing of something is an authorisation. Every case will depend on its own facts. Matters of degree are involved. But the evidence in the present case reveals, in our opinion, a studied and deliberate course of action in which Mr Jain decided to ignore the appellant’s rights and to allow a situation to develop and to continue in which he must have known that it was likely that the appellant’s music would be played without any licence from it. It was within his power to control what was occurring but he did nothing at all. In those circumstances we have reached the conclusion that the appellant established that Mr Jain authorised the infringement of copyright in question contrary to s 36 of the Act.”

For decisions to like effect, see *Australasian Performing Right Association Ltd v Canterbury-Bankstown League Club Ltd* [1964-5] NSWLR 138 (“*Canterbury-Bankstown*”) at 140 per Ferguson J with whom Heron CJ agreed and *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244 (“*Metro on George*”) at 252 per Bennett J.

146 As such cases as *Jain* and *Canterbury-Bankstown* emphasize, prior to s 101(1A), an alleged authorizer’s failure to take reasonable steps to prevent the infringing act that the person knows, or had reason to suspect, would be, or would be likely to be, done was also treated as a consideration relevant to a finding of authorization: see also *Metro on George* at

147 The Court is now required by s 101(1A) to consider three matters that the authorities had previously identified as relevant to the High Court's concept of 'authorization'. These factors are: (1) the extent (if any) of the person's power to prevent the doing of the infringing act; (2) the nature of the relationship between the alleged authorizer and the person who did the infringing act that was supposedly authorized; and (3) whether the alleged authorizer took reasonable steps to prevent or avoid that infringing act.

The extent (if any) of Mr Cooper's power to prevent the doing of the infringing act

148 Bearing in mind the findings of the primary judge that were not challenged on appeal, the hyperlinks on the website operated by Mr Cooper permitted an internet user to access the sound recordings stored in the MP3 files on remote computers. Every time an internet user activated a link on the website, which was effective to download a sound recording in Australia that was stored on a remote computer, there was an infringing act. Mr Cooper created and operated the website. He could have prevented these infringing acts, either by not establishing the link in the first place or, subsequently, by disabling or removing the link. The fact that internet users could make other online copies of the sound recordings by other means does not detract from the fact that there were infringements as a consequence of effective activations of the links on the website operated by Mr Cooper.

149 In the circumstances, it was not reasonably open to Mr Cooper to claim mere indifference to the use internet users made of the website. The findings at first instance as to the nature, the contents and structure of the website, which were not seriously contested, plainly supported the further finding that Mr Cooper deliberately designed the website to facilitate infringing downloading of sound recordings. Mr Cooper's position was, in this respect, entirely different from that of the manufacturers and vendors of blank tapes, which was considered in *Australian Tape Manufacturers*.

The nature of the relationship between Mr Cooper and the internet user and operators of remote websites

150 There was no error in the primary judge's finding that Mr Cooper established a relationship between him and the remote website operators when he created the facility for them to put links on the website that he operated. This was a relevant and direct relationship.

Mr Cooper also created relationships with relevant internet users when he provided facilities to initiate direct downloading of the sound recordings at these remote websites. The existence of a relevant relationship is also supported by the primary judge's finding that Mr Cooper derived financial advantage from it. That is, he was able to enter into commercial arrangements on account of internet users' patronage.

Whether Mr Cooper took reasonable steps to prevent or avoid that infringing act

151 The finding made by the primary judge entitled him to conclude that Mr Cooper did not take reasonable steps to prevent or avoid the infringements that occurred in the downloading of sound recordings. His Honour found, and it is not disputed, that the disclaimers did not accurately state the law and that Mr Cooper did not take any steps "to ascertain the legality of the MP3s to which the hyperlinks related or the identity of the persons submitting the MP3s": see *Universal Music* at 21 [87].

Conclusions with respect to Mr Cooper

152 So far as internet users and remote website operators were concerned, the website was in substance an invitation to use the hyperlinks provided and to add new links in order that sound recordings could be downloaded from remote websites, and a principal purpose of the website was to enable infringing copies of the downloaded sound recordings to be made. The fact that the website also carried a warning that some downloading could be illegal did not lessen the force of the invitation. Mr Cooper countenanced the specific infringing downloading and copying that occurred as a direct consequence of activating the hyperlink on the website operated by him. For the reasons stated below at [168]-[170], Mr Cooper's activities took him outside the protection of s 112E.

153 I agree with Branson J that Mr Cooper authorized the infringement in Australia of the record companies' copyright in sound recording by authorizing internet users to make copies of sound recordings in which copyright subsisted, and operators of remote websites to communicate these sound recordings to the public.

The extent (if any) of E-Talk's power to prevent the doing of the infringing act

154 I reject the submission made on behalf of E-Talk and Mr Bal that there was no proper foundation for the primary judge's adverse view of Mr Bal. His Honour's reasons for judgment reveal an adequate foundation. I also reject the submission that that there an

insufficient evidentiary basis for the primary judge's finding that E-Talk and Mr Bal authorized the relevant copyright infringements.

155 E-Talk connected the website operated by Mr Cooper to the internet. Had it declined to provide connection services, transmissions that led to infringing downloading by internet users from files available at remote websites would have been prevented, as well as the communication to the public of recordings by remote website operators without the licence of the record companies. Had Mr Cooper persuaded another service provider to connect the website to the internet, different transmissions would presumably have resulted in other infringements. This is not, however, to the point. The fact is that E-Talk could have prevented the infringements that actually occurred.

The nature of the relationship between E-Talk and the internet user and operators of remote computers

156 There was no immediate relationship between E-Talk and the internet users who visited the website operated by Mr Cooper, although E-Talk advertised its services on the website and thereby sought to attract these users' custom. The opportunity to so advertise conferred a financial advantage, as is evident from the fact that E-Talk hosted the website largely for free in return for the opportunity to advertise. I differ from Branson J in that I would place some weight on this factor, whilst her Honour would place none. I would not place much weight on it, however.

Whether E-Talk took reasonable steps to prevent or avoid infringing acts

157 E-Talk could have taken down the website itself. It could have declined to provide its host facilities. E-Talk did not, however, take any further steps to prevent the infringing acts after Mr Cooper failed to comply with its request to take the website down, even though it, through Mr Bal, knew the contents of the website and the copyright problems that arose from its operation.

Conclusions with respect to E-Talk

158 In the circumstances of this case, E-Talk countenanced the infringing downloadings by internet users who visited the website that it hosted and Mr Cooper operated. For the reasons stated below at [168]-[170], its activities were outside the protection of s 112E.

The position of Mr Bal

159 In *WEA International Inc* Gummow J said at 283:

“Where the infringer is a corporation questions frequently arise as to the degree of involvement on the part of directors necessary for them to be rendered personally liable. Those questions are not immediately answered by principles dealing with ‘authorisation’ or joint tortfeasance. Rather, recourse is to be had to the body of authority which explains the circumstances in which an officer of a corporation is personally liable for the torts of the corporation”.

160 The law concerning the liability of directors and other officers for corporate wrongdoings is unclear: see *Allen Manufacturing Co Pty Ltd v McCallum & Co Pty Ltd* (2001) 53 IPR 400 (“*Allen Manufacturing*”) at 409-411 per Wilcox, French and Dowsett JJ. There are two relevant lines of authority, each supportive of a different test. As the Full Court said in *Allen Manufacturing* at 409:

“One line supported...the ‘Performing Right Society test’: whether the director had ‘directed or procured’ the company’s infringement. The other line supported ‘the Mentmore test’: whether the director had engaged in ‘the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it’.”

161 No Full Court of this Court has settled which of these two tests is to be preferred: see *Allen Manufacturing* at 410-411 and *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 (“*Sydneywide*”) at [160]-[161] per Weinberg and Dowsett JJ. In *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 177 ALR 231 (“*Root Quality*”), Finkelstein J discussed both tests and concluded at 268 [46] that “[t]he director’s conduct must be such that it can be said of him that he was so personally involved in the commission of the unlawful act that it is just that he should be rendered liable.” I tend to agree with his Honour’s approach: compare also *Universal Music* at [134].

162 As we have seen, however, counsel for the record companies did not confine their case against Mr Bal to his role as director, and contended that his conduct was such as to make him personally liable for infringement by authorization for the purposes of s 101(1). They made the same contention with respect to Mr Takoushis.

163 Mr Bal was plainly liable for the wrongdoing of the company, whether the *Performing Right Society* test or the *Mentmore* test (*Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (Ed) 195) is adopted, or,

indeed, the approach in *Root Quality* is preferred. Mr Bal directed and procured E-Talk's authorization, in circumstances where he knew about the contents of the website and the copyright difficulties to which the website gave rise. He knew that, by hosting the site, E-Talk was permitting internet users to download and copy sound recordings in which copyright subsisted. He consented to the arrangement entered into between his companies and Mr Cooper, whereby they advertised on the website in return for largely free hosting. Through his companies, he sought to derive financial benefit from the internet users' use of the website. Mr Bal took no steps to prevent the infringing acts after Mr Cooper failed to comply with E-Talk's request to take the website down, although, as the controlling mind of E-Talk, he could have caused E-Talk itself to take the website down or decline to continue to host the site.

164 Furthermore, the Full Court in *Jain* accepted that the liability of a director or other officer does not solely depend on the principles referred to in *Allen Manufacturing, Sydneywide* and *Root Quality*: that is, a director procuring an infringement may also be liable on the basis that his or her conduct amounts to an 'authorization' for the purposes of s 101(1). Upon this basis, Mr Bal also authorized infringements by internet users in the same way as E-Talk did. The fact is that Mr Bal could have prevented the infringements that actually occurred by causing E-Talk not to host the website operated by Mr Cooper. Mr Bal had no immediate relationship with the internet users who visited the website but, through his companies, he derived a commercial advantage from the opportunity to advertise on the website. Mr Bal took no steps to prevent the infringements after Mr Cooper failed to comply with the request to take his website down, even though he knew the contents of the website and the copyright problems that arose from its operation.

165 For the reasons stated below at [168]-[170], his activities were outside the protection of s 112E.

The position of Mr Takoushis

166 E-Talk employed Mr Takoushis to provide technical support. He did little more than this. He had no control over the company's affairs and no policy-making role in the company. When problems arose or a decision affecting the company needed to be made, he went to his superiors.

167 Plainly enough, Mr Takoushis could not be held liable for the wrongdoing of the company on the *Performing Right Society* test or the *Mentmore* test, or, indeed, on the *Root Quality* approach. Further, he could not, on the facts found by the primary judge, be liable as a person who ‘authorized’ either the infringing downloading of sound recordings by internet users or the communication of these recordings to the public by the operators of the remote websites. Let it be accepted that Mr Takoushis knew the contents of the website operated by Mr Cooper and that it was likely to give rise to infringements of copyright in the recordings to which it was providing links. Such knowledge was insufficient to attract liability. Mr Takoushis was unable to cause E-Talk to take down the website and discontinue its hosting arrangements with Mr Cooper. Mr Takoushis had no relationship of his own with internet users or operators of remote websites. His superiors, such as Mr Bal, already knew about the website operated by Mr Cooper and the copyright difficulties to which it was likely to give rise; and there was no other reasonable step that he could take to prevent the infringements. In these circumstances, Mr Takoushis cannot be said to have relevantly ‘authorized’ the doing in Australia of acts infringing the record companies’ copyright.

The protection of s 112E not available to the appellants

168 In order for s 112E to apply, there must be a person providing facilities “for making, or facilitating the making of, a communication”. The appellants fall within this description. By force of s 112E, such a person is not to be taken to have authorized an infringement “merely because” another person uses the facilities in such a way as to infringe copyright. That is, if the most that can be said is that they have provided the facilities another person has used to infringe copyright, they are not to be taken to have authorized the infringement. As Wilcox J said in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [396], “[s]o understood, s 112E operates as a legislative reversal of the High Court’s decision in *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140”. As his Honour noted at [399], s 112E “does not preclude the possibility that a person who falls within the section may be held, for other reasons, to be an authoriser”. Whether there are “other reasons” depends on the matters identified in s 101(1A) and any other relevant matters.

169 As already stated, the website constituted an invitation by Mr Cooper to internet users to use the hyperlinks that it provided and to add new links, in order that sound recordings could be downloaded from remote computers and thereby copied. Having regard to the

matters already mentioned with respect to Mr Cooper, it cannot be said that he did no more than provide the facilities that were used to infringe the record companies' copyright.

170 Nor can it be said that E-Talk and Mr Bal did no more than provide the facilities that were used to infringe the record companies' copyright. E-Talk, and, through E-Talk, Mr Bal, derived a commercial advantage from the website operated by Mr Cooper that was over and above payment for hosting services. Mr Bal, and through him, E-Talk knew about the website and the infringements of copyright that were likely to be committed through its operation. In that knowledge, neither took reasonable steps to prevent the infringements.

NOTICES OF CONTENTION

171 In each appeal, the record companies have filed notices of contention. I have had the benefit of reading in draft the reasons for judgment of Branson J. I agree with her Honour, for the reasons she gives, that the contentions sought to be raised in the appeals of Mr Cooper and E-Talk and Mr Bal should not be further considered.

172 I also agree with her Honour that only two of the contentions sought to be raised in the appeal of Mr Takoushis are appropriately raised. The first is the contention that Mr Takoushis was a joint tortfeasor with Mr Cooper, E-Talk and Com-Cen; and the second is that Mr Takoushis directed or procured the acts of E-Talk and Com-Cen whereby the record companies' copyright was infringed or deliberately or recklessly directed the commission of those acts so as to make the conduct his own. I have already considered this latter contention at [167].

173 The circumstance that two or more persons assisted in or contributed to a tortious act causing damage is insufficient to attract liability as joint tortfeasors. There must also be some common design: see *Morton-Norwich Products Inc v Intercen Ltd* [1978] RPC 501 at 515-516 per Graham J; also *WEA International Inc* at 283 per Gummow J. As Brennan CJ, Dawson and Toohey JJ said in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, after considering the position of principal and agent and persons who breach joint duties, "to constitute joint tortfeasors two or more persons must act in concert in committing the tort".

174 In the circumstances previously discussed with reference to Mr Takoushis, I can

discern no error in the primary judge's finding that there was insufficient evidence of common design. As already noted, within E-Talk, Mr Takoushis was employed to provide little more than technical support. I reject the proposition that he had authority to terminate the hosting arrangement that existed between E-Talk and Mr Cooper. His role in providing technical support in establishing and maintaining the website, and his knowledge of the website and the copyright infringements to which it was likely to give rise, are insufficient to amount, in the circumstances, to common design.

The doing in Australia of acts comprised in the copyright

175 An authorization infringement under s 101(1) is not complete unless there is an act of infringement of the kind allegedly authorized (that is, the doing in Australia of any act comprised in the copyright): see *Nationwide News* at 421 per Sackville J, with whom Jenkinson and Burchett JJ agreed, and the authorities there cited. The Court may, however, enjoin a defendant in an appropriate case in respect of an authorization where the act of infringement that is the subject of the authorization is apprehended *quia timet*: see *WEA International Inc* at 288. There was no basis in this case for *quia timet* injunctive relief.

176 The primary judge found that the website operated by Mr Cooper “attracted internet users from around the world and a significant traffic from Australian internet users”: see *Universal Music* at 11 [29]. His Honour expanded on this finding by reference to what he termed the ‘Access Log File’. It is implicit in his Honour’s reasons that he regarded this as tantamount to a finding that acts had been done in Australia that were comprised in the record companies’ copyright and that these acts were the subject of the relevant authorizations. In the circumstances of the case, the primary judge was not required to deal with this point in any greater detail than he did: see *Kovan Engineering (Aust) Pty Ltd v Gold Peg International Pty Ltd* [2006] FCAFC 117 at [45]-[48] per Heerey and Weinberg JJ, with whom Allsop J substantially agreed and *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242 at 244 per Kirby P and 256-258 per Mahoney JA. None of the notices of appeal challenged his Honour’s judgment and orders on the ground that there was no evidence to support such a finding. Nor did they contest his Honour’s judgment on the ground that it depended this finding, and that his Honour did not make it and was unable do so. The appellants have said that they do not seek leave to raise any issue as to proof of infringements in Australia (including the application of s 104 of the Act). It follows that no issue as to proof of infringements in Australia properly arises in these

appeals.

DISPOSITION OF THE APPEALS

177 For the reasons stated, I would allow the appeal of Mr Takoushis and dismiss the appeals of Mr Cooper, E-Talk and Mr Bal, although in the case of Mr Cooper, E-Talk and Mr Bal I would vary the declarations and injunctions that the primary judge has made in the manner proposed by Branson J.

178 I agree with her Honour that Mr Cooper, E-Talk Communications and Mr Bal should pay the record companies' costs of their appeals. The record companies should pay Mr Takoushis costs at first instance and on appeal.