

ISP Liability for Copyright Authorisation: The Trial Decision in *Roadshow Films v iiNet* Part One

This is Part One of a two part exploration of the contours of copyright authorisation liability as that liability relates to a case involving the Australian internet service provider iiNet and thirty-four film and television companies. In this part a primer on copyright authorisation liability is provided, together with an economic policy explanation for why such liability exists. In part two, to be published in the June edition of the Bulletin, a critique on the trial judge's decision in the case will be offered in light of this primer and policy exposition.

In late 2008 thirty-four film and television production companies initiated an action against the internet service provider (ISP) iiNet Ltd for the authorisation of acts of copyright infringement by users of iiNet subscribers' accounts (iiNet users).¹ The film company applicants were under the coordination of the Australian Federation Against Copyright Theft (AFACT). The action failed before Cowdroy J, who in *Roadshow Films v iiNet (Roadshow Films)* delivered a decision that has captured public attention and is currently the subject of appeal.² Part One of this article about the case will describe the relevant law, and the rationale for authorisation liability. Part Two – to be published in the June edition of the *Communication Law Bulletin* – will critically consider the position of iiNet and the trial judge's reasons.

Authorisation liability in Anglo copyright law

Pre-1911 law

Prior to 1911, UK copyright statutes described exclusive rights in terms of doing a nominated act or 'causing' the act to be done.³ Jurisprudence of the 19th and early 20th century gave a narrow interpretation of the circumstances in which a person might 'cause' an act to be done. No one could be considered to have 'caused' the doing of

1 David Brennan and Kimberlee Weatherall, "ISPs and the authorisation of their customers' copyright exploitations" (2009) 20 *Australian Intellectual Property Journal* 6

2 *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24.

3 The *Dramatic Copyright Act 1833* provided in section 1: 'The author of any tragedy, comedy, play, opera, farce or other dramatic piece ... shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment ... any such production as aforesaid'.

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Spectrum and Swiss Cheese: The Digital Dividend in Australia

The DBCDE Green Paper on the digital dividend was issued in January 2010. This paper looks at the background issues associated with delivering a digital dividend in Australia including what a digital dividend is, its value and some of the issues with delivering that value to the public purse.

Premium SMS Regulation: A necessary reform or over-regulation stifling innovation?

The first week of March 2010 saw the Australian Communications and Media Authority (ACMA) announce the next wave of regulation for the premium SMS market, with the release of a Determination under the Telecommunications Act 1997 (Cth) and a Consultation Paper for a proposed second Determination. In this paper Hamish Fraser reviews the effects of recent regulation and discusses whether the premium SMS market is now being stifled by heavy-handed regulation.

'Won't Somebody Please Think of the Children': Would a Mandatory ISP-level Filter of Internet Content Raise Freedom of Communication Issues?

Chris Govey considers whether Federal Government plans to impose mandatory ISP-level filtering could conflict with the implied freedom of political communication in the Australian Constitution.

From the 1920s the case law began to reflect a broader indirect liability regime

an act unless it was done by that person, the person's agent or servant. Thus, one case had found that the owner of a venue who had let it out for infringing musical performances was not 'causing' those performances even after the receipt of notice from copyright owners.⁴ Another case had found that supplying copies of a film to cinemas for public exhibition was not 'causing' those public exhibitions.⁵ In such cases the courts did not consider the defendants should be made responsible for what was done by those who put on the public entertainment, as the music performers and film cinemas were arm's length contracting parties, and were neither agent nor servant of the defendants. In the film case the trial judge, supported on appeal, provided this advice to the plaintiff copyright owner: "[the action] ought to have been brought, not against the defendants, but against the actual proprietors of the piratical performance impugned".⁶ These sentiments were echoed 101 years later by the Cowdroy J in *Roadshow Films*.⁷

The law from 1911-2001

Perhaps reflecting its assessment of this judicial advice, shortly after it was given the UK Parliament in the Copyright Act 1911

(which was essentially adopted by the Australian Copyright Act 1912) removed the 'causing' to be done expression that had been interpreted so narrowly by the courts. Substituted in its place was an exclusive rights structure which listed a bundle of acts, and added to them: "to authorize any such acts as aforesaid".⁸ Also inserted at this time was more specific secondary liability for a person who "permits" a place of entertainment to be used for an infringing public performance unless that person was legitimately unaware the infringement.⁹ From the 1920s the case law began to reflect the broader indirect liability regime enacted. Thus where a person had supplied a copy of a film to cinemas for public exhibition, liability was found for authorising the resultant exhibitions. The Court of Appeal stated: "it becomes fairly apparent that the object of introducing the word 'authorise' was to get rid of the effect of certain decisions".¹⁰ In place of the old law, the Oxford Dictionary definition of "to sanction, approve, countenance" was adopted for authorisation, which was given a scope of operation that encompassed the supply of copies of the film by the defendant to theatres.¹¹ With the creation of the more specific liability for the grant of permission for the use of entertainment venues, that liability was often pleaded in conjunction with general authorisation liability. This led to a judicial harmonisation of the meanings given to the terms 'to permit' and 'to authorise'. In 1923 Bankes LJ stated in a case in which both were pleaded:

4 *Russell v Briant* (1849) 8 CB 836; 137 ER 737.

5 *Karno v Pathé Frères* (1909) 100 LT 260.

6 *Karno v Pathé Frères* (1909) 100 LT 260, 262 (Vaughan Williams J quoting from the reasons of trial judge Jelf J with approval).

7 [2010] FCA 24, at [445]: 'It is unfortunate that the outcome of the Court's finding is that the applicants will continue to have their copyright infringed. However, the fault lies with the applicants for choosing the wrong respondent. The current respondent does not stand in the way of the applicants pursuing those who have directly infringed their copyright'.

8 *Copyright Act 1911* (UK), section 1(2), adopted by the *Copyright Act 1912* (Cth).

9 *Copyright Act 1911* (UK), section 2(3), adopted by the *Copyright Act 1912* (Cth).

10 *Falcon v Famous Players* [1926] 2 KB 474, 491 (Bankes LJ).

11 *Ibid*.

In order to succeed the [copyright owner] had to adduce evidence either of authority given by the appellant for the performance, or of permission to use the theatre for the performance, of these pieces. I agree with [counsel for the copyright owner] that the Court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of.¹²

Thus, under the new legislative regime the Anglo-Australian judicial interpretation was that one could 'authorise' another's action in two broad settings. One was to explicitly grant approval to do an infringing act, such as by purporting to grant a licence to do the act.¹³ The other was to implicitly suggest approval of the doing of an infringing act, such as by failing to take steps to prevent the doing of the act where one had power to prevent and ought to have known of its occurrence.¹⁴ It is useful to compare these with the two principles of indirect liability that emerged over the course of the 20th century in US copyright law; contributory and vicarious infringement – both of which have a purely common law provenance. Contributory infringement requires an intentional inducement or encouragement of the direct infringement; vicarious infringement requires profit from direct infringement where a right is held (and not exercised) to stop or limit that direct infringement.¹⁵ The explicit and implicit forms of authorisation liability identified early-on in Anglo-Australian jurisprudence find their counterparts in the US principles of contributory and vicarious infringement.

Throughout the middle part of the 20th century most authorisation cases involved an alleged authorisation of an infringing public performance. In the 1970s and 1980s the complexion of indirect liability case law changed insofar as the types of infringing activity alleged to have been authorised broadened to exercises of the reproduction right in private settings. This can be seen as a reflection of the altered technological environment as photocopying and magnetic tape recording technologies became more readily available to the public at large. Were suppliers who 'armed' the populace with products or services which could be used to infringe copyright liable for authorising the resulting infringement? In this period the highest appellate courts in Australia¹⁶ and the UK¹⁷ considered that issue, while the US Supreme Court¹⁸ also considered the application of contributory and vicarious liability in that setting.

In two of the three cases the basic conclusion that the courts arrived at was the same; no liability. Each of those cases involved chattels in the field of magnetic tape recording technology, in which the courts were asked essentially: did the supply of the chattels to householders who were likely to use them to infringe by copying at home create indirect liability in the supplier? In the UK case there was found to be no express authorisation liability because suppliers did not expressly purport to grant a licence to copy.¹⁹ The House of Lords also found that because suppliers had no control over the use of their chattels once they were sold, implicit authorisation liability could not exist.²⁰ In the US case there was no contributory infringement because the recording equipment was found to have a substantially non-infringing uses (which included recording for viewing at a more convenient time, found by the same court to fall within the scope of the US fair use exception), and thus its supply could not comprise encouragement to infringe.²¹ The US Supreme Court also rejected the possibility of vicarious liability because the supplier was not in a position of control the use of the chattels post-supply.²²

the Oxford Dictionary definition of "to sanction, approve, countenance" was adopted for authorisation

The one highest-court case which found liability in these three jurisdictions over this period was the Australian case of *The University of New South Wales v Moorhouse* (**Moorhouse**) which involved not merely the supply of chattels, but also the provision of a form of services to the direct infringer. In that case 'trap infringing copying' was undertaken in a university library, from a copy of book held in the library, on a coin-operated photocopier also situated in the library. The university, by the provision of the photocopier in the library and making available the book as a library holding, was said to have 'authorised' the subsequent trap copying. The High Court unanimously found this to be so. One judge (Gibbs J) emphasised in his reasoning a more control-based (vicarious infringement under US law) approach to justify liability: power to prevent the infringing act, objective knowledge, failure to take reasonable steps to prevent.²³ Two judges (Jacobs J with whom McTiernan ACJ agreed) emphasised a more approval-based (contributory infringement under US law) approach to justify liability: the conduct of the university effectively invited users to infringe.²⁴ The result was a victory for the copyright owner in the case, and the creation of a seemingly broad Australian authorisation principle.²⁵

12 *Performing Right Society v Caryl Theatrical Syndicate* [1924] 1 KB 1, 9. To similar effect see Isaacs J's discussion in *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, 489-492.

13 *Falcon v Famous Players* [1926] 2 KB 474, 499.

14 *Performing Right Society v Caryl Theatrical Syndicate* [1924] 1 KB 1, 9.

15 *MGM Studios v Grokster* 545 US 913, 930 (2005).

16 *The University of New South Wales v Moorhouse* (1975) CLR 1.

17 *CBS Songs v Amstrad* (1988) 11 IPR 1.

18 *Sony v Universal City Studios* 464 US 417 (1984).

19 *CBS Songs v Amstrad* (1988) 11 IPR 1, 10-11.

20 *CBS Songs v Amstrad* (1988) 11 IPR 1, 11-12.

21 *Sony v Universal City Studios* 464 US 417, 439-455 (1984).

22 *Sony v Universal City Studios* 464 US 417, 437-439 (1984).

23 *University of New South Wales v Moorhouse* (1975) CLR 1, 12-13.

24 *University of New South Wales v Moorhouse* (1975) CLR 1, 21.

25 However it also triggered a specific reform to the statute in 1980 to exclude such authorisation liability where a prescribed notice about copyright law is affixed in close proximity to a library photocopier: *Copyright Act 1968* (Cth), section 39A.

Post-2001 law

Authorisation liability

The salient factual distinction between US and UK cases on the one hand, and *Moorhouse* on the other, was that the alleged authoriser in *Moorhouse* remained in a service-provider relationship with the person doing the infringing acts said to be authorised at the very time of those acts were undertaken. In the US and UK cases the alleged authoriser was in no service relationship with the person doing the infringing acts said to be authorised because the chattels in each case had been alienated by the defendants. In short, at the relevant time of primary infringement the defendant had control over that act in *Moorhouse*, whereas in the US and UK cases the defendants had none. This critical role of control at the relevant time of primary infringement emerged strongly as an explicator of the result in *Moorhouse* in Australian jurisprudence over the 1980s and 1990s with a series of cases rejecting the possibility of authorisation liability in Australia after a defendant had alienated chattel property comprising a chattel capable of being used by the purchaser to infringe.²⁶ The centrality of control was reinforced in 2001 with a codification requiring courts to have regard to, in addition to any other matters, three particular matters: (i) the extent (if any) of the defendant's power to prevent the doing of the infringing act; (ii) the nature of any relationship existing between the defendant and the person who did the infringing act; (iii) whether the defendant took any reasonable steps to prevent or avoid the doing of the infringing act, including compliance with relevant industry codes.²⁷

one could 'authorise' another's action in two broad settings. One was to explicitly grant approval to do an infringing act...The other was to implicitly suggest approval ...such as by failing to take steps to prevent the act

After the codification it was the first of those factors – the power to prevent, or control – which remained most critical. Prior to *Roadshow Films* there had been two Australian authorisation cases involving internet intermediaries: *Universal Music v Sharman License Holdings (Sharman)* and *Universal Music v Cooper (Cooper)*.²⁸ Cooper had assembled on his mp3s4free.net webpage internet links resolving to mp3-format music files, being files uploaded by parties all around the world unrelated to Cooper and being files uploaded without the authority of rights holders. Visitors to Cooper's webpage were thus provided with a navigational means to copy those mp3 files. Hence 'mp3s4free' literally advertised that visitors to the website could use it to obtain copies of sound recordings and the works contained therein without the need for payment. In so obtaining, visitors would infringe copyright. Sharman had published the Kazaa peer-to-peer file-sharing software, and maintained some technical connection to

those using the resultant peer-to-peer file-sharing network so as to target advertising and apply certain filters. The network was notorious for the peer-to-peer distribution of content without rights holder authorisation. Whether Cooper or Sharman had the requisite control over the infringing activities of visitors to mp3s4free.net and users of the Kazaa peer-to-peer network was the central question in both cases. Also defending an authorisation action in *Universal Music v Cooper* was Cooper's internet service provider E-Talk which had hosted the mp3s4free.net webpage without requiring payment from Cooper, receiving instead in kind payment through advertising space on the webpage.

Were mp3s4free.net and the Kazaa network more like alienated chattels or on-going services? All Federal Court judges considering the cases concluded there was the requisite control. Coming through both cases was an acceptance that the post-*Moorhouse* case law establishes a broad concept of what can amount to authorisation. While some control is always required, the question of the degree or nature of that control may vary according to the circumstances. While a high level control coupled with indifference or wilful blindness might comprise authorisation (such as in *Moorhouse* itself), in other cases (such as in *Cooper* and *Sharman*) marginal control would suffice if coupled with active encouragement. In the Full Court's consideration of *Cooper*, Branson J considered that arming or facilitation conduct alone could comprise the relevant control: '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'.²⁹ Kenny J in *Cooper* made the same point: Cooper could have prevented the infringing acts by not establishing the links included on mp3s4free.net, and the fact that users could make online copies of the uploaded sound recordings by other means did not negate the authorisation of copying consequent upon using the links found on mp3s4free.net.³⁰ Also in *Cooper* E-Talk, the ISP both hosting mp3s4free.net and placing advertising on the site, was also found liable in authorisation given its active participation with, and knowledge about, the website.³¹

The 'mere use of facilities' exception

At the time of the 2001 codification an exception to authorisation liability was created which provided that a person who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright "merely because another person uses the facilities so provided to do something the right to do which is included in the copyright".³² This mere use of facilities exception was explained in these terms in the Second Reading Speech:

The amendments in the bill also respond to the concerns of carriers and carriage service providers, such as Internet service providers, about the uncertainty of the circumstances in which they could be liable for copyright infringements by their customers. The provisions in the bill limit and clarify

26 *RCA Corporation v John Fairfax* (1981) 52 FLR 71, 79-81, and in particular *Australian Tape Manufacturers Association v Commonwealth* (1993) 25 IPR 1, 5.

27 *Copyright Act 1968*, sections 36(1A) and 101(1A).

28 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (Wilcox J); *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (Tamberlin J); *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

29 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [41].

30 *Ibid* [148].

31 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [111]-[130].

32 *Copyright Act 1968* (Cth), sections 39B and 112E.

the liability of carriers and Internet service providers in relation to both direct and authorisation liability. The amendments also overcome the 1997 High Court decision of APRA v Telstra in which Telstra, as a carrier, was held to be liable for the playing of music-on-hold by its subscribers to their clients, even though Telstra exercised no control in determining the content of the music played.

Typically, the person responsible for determining the content of copyright material online would be a web site proprietor, not a carrier or Internet service provider. Under the amendments, therefore, carriers and Internet service providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material. The reforms provide that a carrier or Internet service provider will not be taken to have authorised an infringement of copyright merely through the provision of facilities on which the infringement occurs. Further, the bill provides an inclusive list of factors to assist in determining whether the authorisation of an infringement has occurred.³³

Relevant to understanding the above passage is the High Court holding in *APRA v Telstra* (the so-called *Music on hold case*) and the effect of the insertion of section 22(6) into the Copyright Act 1968 (Cth) (the **Copyright Act**). In the *Music on hold case* liability was found in a then monopoly telecommunication company Telstra in respect of (*inter alia*) the transmission of on-hold music generated from the telephone systems of (typically business) customers of Telstra, in which Telstra merely supplied the transmission facilities such as telephony wiring and exchanges.³⁴ In that setting, liability was not argued-for in respect of authorisation, but rather for the primary exploitation of the then exclusive rights of broadcasting to the public and transmitting to subscribers to a diffusion service. At the time of the 2001 reforms, those two exclusive rights were replaced by a broad-based communication to the public right, and inserted into the Act to explain that right was a new section 22(6). It provided that in general a communication "is taken to have been made by the person responsible for determining the content of the communication".

Viewed in this light, the intention underlying the 'mere use of facilities' exception was to deal with situations where (for example) a company's liability might be said to arise purely from its ownership or control of telecommunication facilities used by a customer to infringe third-party copyright by communicating that subject matter. Section 22(6) and the mere use of facilities exception provided doubled-barrelled protection for the company in such a case. Section 22(6) made clear that the primary exploitation of copyright was undertaken by the customer and not the telecommunications company. The mere use of facilities exception made clear that – notwithstanding the centrality of control in authorisation law – allowing the customer to avail itself of the telecommunications facilities could not in and of itself comprise authorisation; more was required having regard to the newly codified factors.

Since enactment of the mere use of facilities exception, it has been unsuccessfully relied upon by defendants in the *KaZaa* and *Cooper* litigation. The reason for rejecting its application in both

cases was the same: the defendants' alleged authorisation arose from more than merely providing facilities insofar as they had either actual knowledge of or indeed encouraged the primary infringing acts. In those cases the interpretation of the provision was that once a defendant's alleged authorisation arose from defendant conduct beyond the 'mere use' of its facilities by primary infringers, the exception had no operation.³⁵ This construction of the provision seems faithful to the purpose underlying its enactment. Cooper's ISP E-Talk sought leave to appeal to the High Court in relation to the Full Federal Court's denial to it of the mere use of facilities exception. That application was unsuccessful. Having regard to the findings of fact about E-Talk's involvement in and knowledge of the [mp3s4free.net](#) website, the High Court leave panel (Gummow and Callinan JJ) considered E-Talk's prospects of success insufficient to warrant special leave.³⁶

Providing incentives for non-litigious, cooperative schemes between carriage service providers and rights holders to achieve such desiderata is the express reason for the safe-harbour.

The safe-harbour

In 2004 another round of copyright law reform was (rather hurriedly) enacted to comply with an array of obligations in the Australia-US Free Trade Agreement (AUSFTA). One aspect of those obligations was a requirement on Australia to enact a regime modelled on an aspect of US copyright law; the so-called safe-harbour.³⁷ As explained in the AUSFTA purposes of the regime were:

- (a) *to provide legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials, and*
- (b) *to place limitations upon the scope of remedies (and in particular monetary awards) available against service providers for copyright infringements that they did not control, initiate, or direct, and that take place through their systems or networks.*

The Australian regime is found in Part V, Division 2AA of the Copyright Act and has a complexity which descends to the realm of industry-specific regulation. For present purposes, for transmission and connection services of carriage service providers ('carriage service provider' is itself a complex definition inscribed from communications law, but includes commercial telecommunications companies and internet service providers) the regime limits civil remedies for a qualifying carriage service provider to two mandatory injunctions: an order that it takes reasonable steps to disable access to online locations outside Australia and an order that it terminates a specified customer account. To qualify for this limitation upon remedies the carriage service provider must (*inter alia*) "adopt and reasonably implement a policy that

33 House of Representatives, Chamber Hansard, Copyright Amendment (Digital Agenda) Bill 1999 Second Reading Speech, Daryl Williams MP, 2 September 1999, 9750.

34 *Telstra Corporation v Australasian Performing Right Association* (1997) 38 IPR 294.

35 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [399]; *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [168]-[170].

36 *E-Talk Communications v Universal Music* [2007] HCATrans 313.

37 AUSFTA article 17.11(29).

provides for termination, in appropriate circumstances, of the accounts of repeat infringers".³⁸

This conditional limitation upon remedies represented by the safe-harbour regime overlaps somewhat with the mere use of facilities exception, but is both broader and narrower than that exception. It is broader in so far as it applies to all the economic exclusive rights (not merely communication to the public) and to both primary and authorisation liability (not merely authorisation). It is narrower in so far as it applies only to carriage service providers as defined (rather than providers of communications facilities), it is simply a limitation upon liability (rather than an exception to liability), and it requires infringement-deterrence policies and action from the carriage service for it to qualify for the limitation (whereas the exception requires neither).

Prior to *Roadshow Films* the Australian safe-harbour regime had been pleaded in *Cooper* by Cooper's ISP, E-Talk which had hosted the mp3s4free.net website. In that case the Australian regime was found not to have come into effect at the relevant time, and the matter was not explored on appeal. However the trial judge Tamberlin J observed in *obiter* that the attitude of internet service providers to the infringing acts of its customer was simply one of indifference, and that indifference falls 'far short' of demonstrating that it had adopted a policy to deter infringers.³⁹

For reasons perhaps best explained by the tight time constraints placed by the Australian government upon the Commonwealth public service and interested circles in the 2004 law reform process, no obvious attention was paid to the relationship that the new safe-harbour regime has with the existing mere use of facilities exception. Arguably that issue has been resolved indirectly by the courts' purposive construction of the mere use exception. Assuming that construction is correct, it confines the exception to a narrow field of operation and elevates the importance of the safe-harbour to an ISP defending an authorisation action.

Economic policy justification for authorisation liability

In concluding this part, it is useful to explore the economic aims which inform the creation of indirect liability in copyright. As explained in an *amicus* brief of economists to the US Supreme Court in *MGM v Grokster*, the creation of all indirect civil liability involves two stages of policy analysis.⁴⁰ The first is the identification of appropriate actors in whom liability might be created. The second is a cost-benefit assessment of whether such liability is preferable to direct liability alone. In the identification stage there are two categories of parties – categories which are not mutually exclusive – who are appropriate to be considered for indirect liability. One category is those indirectly involved in infringing conduct may be in a good position to deter that conduct; the other category is those who encourage or facilitate that conduct.⁴¹ This division maps loosely to the two varieties of copyright defendants seen to exist in Anglo-Australian and US law: implicit control-based authorisers (vicarious infringement in the US) and explicit approval-based authorisers (contributory infringement in the US). If such actors exist, the policy analysis then moves to the second stage and becomes a cost-benefit question in deciding

whether indirect liability ought to be created and if so its scope. Weighing costs against benefits make taking into account several factors including: (i) whether it is plausible that direct liability alone would be effective; (ii) would the creation of indirect liability deter the infringing conduct at a lower cost than direct liability alone; (iii) would the creation of indirect liability assist the party incurring the liability in making efficient decision to avoid that liability; and (iv) would the creation of indirect liability interfere unreasonably with legitimate activity.⁴²

In Australian law, the mere use of facilities exception can be seen to be particularly directed to the fourth factor. A particularly beneficial activity, the provision of communications facilities, should not be unduly inhibited by the creation of indirect copyright liability arising from mere provision. The more detailed safe-harbour provisions can be seen to be directed to not only the fourth factor, but also to factors two and three. This is because it not only protects carriage service providers from liability arising from their customers' infringing acts, but it does so by seeking to minimise the prevalence of those infringing acts in a way that imposes least litigation cost on all concerned. Providing incentives for non-litigious, cooperative schemes between carriage service providers and rights holders to achieve such desiderata is the express reason for the safe-harbour.

It is important to bear in mind that the policy choices spoken of here are directed to the proper scope of indirect liability and not to the underlying rights which determine direct liability. This distinction was well illustrated in an article by Lichtman and Posner in which they compare ISPs' indirect liability for their customers' copyright infringements, with ISPs' indirect liability for their customers' malicious distribution of computer viruses.⁴³ The authors make two observations. First, unlike 'demand' for internet access from distributors of computer viruses, the possibility of copyright infringement increases the average subscriber's willingness to pay for broadband internet services. Indeed they describe householders' casual internet piracy as "in many ways the killer app" that is driving the deployment of broadband to the home. Second the authors make the point that malicious distribution of computer viruses is almost universally condemned; the same could not be said about householders engaging in peer-to-peer online copyright infringement. Thus, the copyright dispute is in many ways more a dispute about the propriety of the underlying right, and not so much a dispute about the proper contours of indirect liability *per se*. The authors observe that many who oppose indirect liability for ISPs in the copyright setting also question copyright in more fundamental ways. Those who argue against the imposition of authorisation liability in copyright are really more concerned about the scope of copyright in colouring certain activities as a primary infringement. Although these points are not raised squarely in the *Roadshow Films* litigation, and might in a purely doctrinal sense be regarded as red herrings to the legal questions, they represent undeniable, unspoken *realpolitik* factors that should be kept in mind.

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38 *Copyright Act 1968* (Cth), section 116AH (1), Item 1.

39 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [107]. As will be explained in part two, the approach to the requirement by Tamberlin J was vastly different to that adopted by Cowdroy J in *Roadshow Films*.

40 Economists Kenneth J. Arrow, Ian Ayres, Gary Becker, William M. Landes, Steven Levitt, Douglas Lichtman, Kevin Murphy, Randal Picker, Andrew Rosenfield, and Steven Shavell filed a Brief of *Amici Curiae* in support of the petitioners in *MGM Studios v Grokster* 545 US 913, 930 (2005).

41 Arrow et al Brief of *Amici Curiae*, above n 40, 5-6.

42 Arrow et al Brief of *Amici Curiae*, above n 40, 6-7.

43 Doug Lichtman and Eric Posner, "Holding Internet Service Providers Accountable" (2006) 14 *Supreme Court Economic Review* 221, 258.