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**Federal Court of Australia, Universal Music Australia Pty Ltd v Cooper [2005]
FCA 972, 14 July 2005**

UNIVERSAL MUSIC AUSTRALIA PTY LIMITED (ACN 000 158 592), EMI MUSIC AUSTRALIA PTY LIMITED (ACN 000 070 235), SONY MUSIC ENTERTAINMENT (AUSTRALIA) LIMITED (ACN 000 033 581), WARNER MUSIC AUSTRALIA PTY LIMITED (ACN 000 815 565), BMG AUSTRALIA LIMITED (ACN 004 157 564), FESTIVAL RECORDS PTY LIMITED (ACN 000 111 197) AND MUSHROOM RECORDS PTY LIMITED TRADING AS FESTIVAL MUSHROOM RECORDS (ACN 005 594 043) AND THE ADDITIONAL APPLICANTS LISTED IN THE ANNEXURE TO THE SECOND FURTHER AMENDED STATEMENT OF CLAIM FILED 7 MARCH 2005

V

STEPHEN COOPER, E-TALK COMMUNICATIONS PTY LIMITED TRADING AS COM-CEN INTERNET SERVICES (ACN 097 058 994), COM-CEN PTY LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 061 300 169), LIAM FRANCIS BAL AND CHRIS TAKOUSHIS

NSD 1551 OF 2003

TAMBERLIN J
14 JULY 2005
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NSD 1551 OF 2003

BETWEEN:

UNIVERSAL MUSIC AUSTRALIA PTY LIMITED (ACN 000 158 592)
FIRST APPLICANT

EMI MUSIC AUSTRALIA PTY LIMITED (ACN 000 070 235)
SECOND APPLICANT

SONY MUSIC ENTERTAINMENT (AUSTRALIA) LIMITED (ACN 000 033 581)
THIRD APPLICANT

WARNER MUSIC AUSTRALIA PTY LIMITED (ACN 000 815 565)
FOURTH APPLICANT

BMG AUSTRALIA LIMITED (ACN 004 157 564)
FIFTH APPLICANT

FESTIVAL RECORDS PTY LIMITED (ACN 000 111 197)
AND MUSHROOM RECORDS PTY LIMITED TRADING AS FESTIVAL MUSHROOM RECORDS (ACN 005 594 043)
SIXTH APPLICANT

THE ADDITIONAL APPLICANTS LISTED IN THE ANNEXURE TO THE SECOND FURTHER AMENDED STATEMENT OF CLAIM FILED 7 MARCH 2005
SEVENTH TO THIRTY-FIRST APPLICANTS
AND:

STEPHEN COOPER
FIRST RESPONDENT

E-TALK COMMUNICATIONS PTY LIMITED TRADING AS COM-CEN INTERNET SERVICES (ACN 097 058 994)
SECOND RESPONDENT

COM-CEN PTY LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 061 300 169)
THIRD RESPONDENT

LIAM FRANCIS BAL
FOURTH RESPONDENT

CHRIS TAKOUSHIS
FIFTH RESPONDENT
JUDGE:

TAMBERLIN J
DATE OF ORDER:

14 JULY 2005
WHERE MADE:

SYDNEY

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THE COURT ORDERS THAT:

The applicants are to file and serve, within fourteen days, appropriate Short Minutes of Orders to give effect to these Reasons for Judgment and as to costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NSD 1551 OF 2003

BETWEEN:

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(ACN 061 300 169)
THIRD RESPONDENT

LIAM FRANCIS BAL
FOURTH RESPONDENT

CHRIS TAKOUSHIS
FIFTH RESPONDENT

JUDGE:

TAMBERLIN J
DATE:

14 JULY 2005
PLACE:

SYDNEY

REASONS FOR JUDGMENT

1 These proceedings are brought by thirty-one applicants. The first to sixth applicants are Australian record companies that claim to be owners or exclusive licensees in Australia of the copyright in large catalogues of music sound recordings, some of which are identified in Schedules A to F to the Amended Statement of Claim. The remaining twenty-five applicants are foreign corporations or entities that own copyright in those specifically identified music sound recordings, in addition to other recordings within the catalogues of the first to sixth applicants.

2 The principal claims are based on infringement of copyright in the music sound recordings. In addition to the infringement of copyright, relief is sought under s 52 of the Trade Practices Act 1974 (Cth) ("the TPA"), s 38 of the Queensland Fair Trading Act 1989 ("the QFTA") and s 42 of the Fair Trading Act 1987 (NSW) ("the FTA") on the ground of misleading and deceptive conduct based on implied misrepresentations concerning the legality of downloading copies of the music sound recordings from the internet. The QFTA is

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said to apply because the respondents are resident in Queensland.

3 The relief sought in the Second Further Amended Application, filed on 7 March 2005, is in the form of declarations, permanent injunctions, damages pursuant to ss 115(2), 115(4) and 116(1) of the Copyright Act 1968 (Cth) ("the Act") and also under s 82 of the TPA, s 99 of the QFTA and s 68 of the FTA, delivery up of infringing copies pursuant to s 116(1) of the Act and transferral of the domain name mp3s4free.net to the first applicant or as the first applicant directs.

4 The matters to be determined on the hearing relate to liability only. The issue of the quantum of damages or compensation is left for determination at a later stage.

THE PARTIES

5 The first respondent, Stephen Cooper ("Cooper"), was the registered owner of the domain name mp3s4free.net ("the domain name") and the originator, owner and operator of the MP3s4FREE website ("the website"). The evidence indicates that Cooper did not charge visitors to the website any sum of money for the downloading of music sound recordings but that he derived income from the website through advertising arrangements.

6 The second and third respondents, E-Talk Communications Pty Limited and Com-Cen Pty Limited (referred to together as "E-Talk/Com-Cen"), conducted an Internet Service Provider ("ISP") business which hosted the website. The second and third respondents derived benefits from an advertising and traffic sharing arrangement with Cooper, whereby the Com-Cen logo was displayed on the website with a hyperlink to the Com-Cen website. In return for the display of the Com-Cen logo on the website, Cooper received free web hosting from Com-Cen.

7 The fourth respondent, Liam Francis Bal ("Bal"), and the fifth respondent, Chris Takoushis ("Takoushis"), are the principal and an employee respectively of E-Talk/Com-Cen. Bal is a director and the controlling mind of both companies and Takoushis was Cooper's primary contact at Com-Cen and provided assistance from time to time in relation to the establishment and operation of the website.

THE CLAIMS

8 In relation to the allegations of copyright infringement, the applicants allege that by means of or via or in the course of operating the website, Cooper has infringed the applicants' copyright in the music sound recordings. First, the applicants allege that Cooper has directly infringed the applicants' exclusive rights to make copies of the music sound recordings and to communicate the music sound recordings to the public. Secondly, the applicants allege that Cooper has authorised internet users, including those internet users who submitted MP3s to the website and who downloaded MP3s via the website, to make copies of the music sound recordings and has authorised both internet users and E-Talk/Com-Cen to communicate these music sound recordings to the public. Thirdly, the applicants allege that Cooper has infringed copyright as a joint tortfeasor by entering into a common design with internet users and E-Talk/Com-Cen to make copies of the music sound recordings or to communicate them to the public. Finally, the applicants make a claim of secondary infringement pursuant to s 103 of the Act arising from Cooper's alleged exhibition and distribution of infringing digital music files.

9 The applicants allege that E-Talk/Com-Cen directly infringed copyright in the music sound recordings by communicating them to the public and/or authorised Cooper and the internet users to make copies of the music sound recordings and to communicate them to the public. The applicants also allege that E-Talk/Com-Cen infringed copyright as a joint tortfeasor by entering into a common design with internet users and Coopers to engage in the above acts and, similarly to Cooper, infringed copyright by exhibiting and distributing the music sound recordings.

10 The claims against Bal and Takoushis depend on the primary claims made against Cooper and E-Talk/Com-Cen. The applicants allege that Bal and Takoushis authorised the infringing acts of Cooper and E-Talk/Com-Cen and/or were liable as joint tortfeasors.

11 In addition to the breaches of the TPA referred to in [2] above, it is alleged that the domain name mp3s4free.net itself conveys a representation that is misleading or deceptive or

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likely to mislead or deceive in contravention of s 52 of the TPA, s 38 of the QFTA and s 42 of the FTA. It is alleged that the domain name represents that internet users may legitimately acquire MP3s or other digital music files free of charge and without liability from, via or through the website located at that domain name.

THE COOPER WEBSITE AND HYPERLINKING

12 The evidence does not pinpoint when the website first began to operate, however, I accept that this was in about 1998. This date coincides with other evidence concerning the adoption of MP3 technology. The evidence does not disclose the identity of Cooper's former internet service provider. However, on 21 December 2000, the domain name mp3s4free.net was re-delegated from its previous unknown host to Com-Cen.

13 The evidence of Mr Speck, an investigator for the applicants, indicates that the website was, at all relevant times, a highly structured and organised one. He first visited the website in December 2002 and then on multiple subsequent occasions. He says that he is familiar with the structure, scale and operation of the website.

14 Set out below is the home page of the website:

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MP3s 4 FREE: Free MP3 Music Free Downloads Free MP3 Downloads

Search for MP3s from the convenience of your Desktop! Free Download Here (Size only 10kbs). Give it a Try! More Info..



Bookmark This Site!

Charts :: Australien 40 :: Billboard 50 :: Dutch 20 :: European 20 :: German 20 :: MuchMusic 30 :: UK 20 :: USA 20

Search for Artist or Titles:

Tips: Enter Full Artists Name or Full Song Title..0 Size files may still work

Top 50 Downloads - Last 50 Additions - Popular Artists :: # A B C D E F G H I J K L M N O P Q R S T U V W X Y Z - Themes

-Main-

- Home/News
- Contact
- F.A.Q.
- What Are MP3s?
- Passwords
- Request/Report BL
- Link Exchange
- Submit An MP3

-More Music-

- MP3 Search
- Full Albums
- Music Videos
- Christmas Songs
- Song Lyrics

-Services-

- FREE Screen savers
- Music News
- Join Newsletter
- Subscrie (22 \$)
- Win MP3s (\$)
- Free Desktops

-MP3 Software-

- Encoders-Decoders
- MP3 Players
- Misc Tools
- MP3 Utilities v1

- Top MP3 Sites-
- Full MP3 Albums
- MP3 Xploader!
- Free Download A-Z
- MP3 TOP100 (Hot)
- Latest MP3s

- Download-
- Full Albums
- Full Downloads
- MP3 Downloads A-Z
- MP3 MusicWorld

- Free Mp3 Songs
- MP3 Archive A-Z
- Full Albums A-Z
- Top 25 Mp3s!
- New Mp3 Albums

- Newest Hit
- Music Lines
- Hiphop Music
- Dutch Top 40
- Your Site Here?

-Free Desktops-



-Best Server-

Site News

The Plug-In you saw when you entered the site, is a revolutionary way to Search for MP3s. It's completely FREE, and we recommend it to all our visitors. More info.. To avoid the Plug-In in the future, Bookmark Here

15.10.03

Updated Dutch, MuchMusic and UK Charts.

13.10.03

Updated Australian and Billboard Charts.

06.10.03

Updated Australian and UK Charts.

05.10.03

Updated Billboard and MuchMusic Charts.

29.09.03

Updated Australian, Dutch and UK Charts.

Popular Downloads

- P.L.M.P.
- by 50 Cent
- Black Ya
- by Outkast
- White Flag
- by Dido
- White Flag
- by Dido
- Songs4x

Latest Additions


- Last Talk About A Man
- by Prezioso Ft. Harryn
- Bonjour
- by Prezioso Ft. Harryn
- Bonjour
- by Prezioso Ft. Harryn
- I Will Be There For You
- by Jessica Andrews
- In Your Eyes (Acoustic)

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MP3s 4 FREE: Free MP3 Music Free Downloads Free MP3 Albums



by Nickelback
Im Lovin It
by Justin Timberlake ft. Pharrell
Mr. Adonis The Music (CD3)
by Enrique Iglesias Ft. Pitbull
Shout Me Your Soul
by P. Diddy ft. Pharrell
Numb
by Linkin Park
Baby Boy
by Beyonce ft. Sean Paul


50 Most Popular Downloads...



by Jeffrey Calines
Baby Blue
by George Strait
The Dance
by Garth Brooks
When You Come Back To Me
by Garth Brooks
To Make You Feel My Love
by Garth Brooks
Crazy For This Girl
by Evan & Jared

50 Newest Additions...

LIVING MARINE AQUARIUM SCREENSAVER




Enjoy the calm serenity of our new Living Marine Aquarium Screensaver. Watch as the beautiful tropical fish swim realistically around a beautiful aquarium on your screen, giving the illusion of actually having an aquarium in your monitor!

[Click Here](#)
Size: 4.52MB

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15 In addition to being highly structured, with hyperlinks to many other pages, the evidence is that the website was user friendly and attractive and that visitors could readily select from a variety of catalogues of popular sound recordings for download. The digital copies of the sound recordings were downloaded by way of hyperlinks on the website, most of which appear to have been associated with MP3 digital music files stored on remote websites that would automatically download to the visitor's computer upon activation of the link on the website by a mouse click. As a consequence of clicking on the hyperlink trigger on the website, music files were downloaded directly from the remote website on which they were stored to the computer of the internet user who had accessed the Cooper website.

16 The home page of the website is headed "MP3s4FREE". There are, of course, numerous other web pages on the Cooper website. The home page contains statements concerning the availability of free songs and albums on the website and numerous references to MP3 files and downloads. On the right hand side of each of the web pages on the website, the Com-Cen logo appears beneath a reference to "Best Server". The numerous pages of the website include thousands of music files organised by artist name and song title and hyperlinks are provided directly to those music files.

17 Mr Speck gave evidence that the music files on the website are accessible in three main ways. First, the lists of music files are organised on the website in the form of charts which reproduce current Australian and international recording industry music charts, which reflect commercially successful recorded music. These charts include the Australian Top 40, Billboard 50 and a number of European charts. The evidence is that the Australian Top 40 chart corresponds exactly to the first 40 singles that appear in the Aria Top 50 chart for each relevant week. The charts on the website replicate the order of the singles, the names of the artists and the titles of the singles. Secondly, there are search mechanisms such as "Popular Artists", "Top 50 Downloads" and "Latest 50 Additions" which reflect the most popular files which can be downloaded through the website and the latest music files that have been added to the website via hyperlink. Finally, website maintains an

archive of files arranged in alphabetical order by song title or artist name. These archived files can be located using the main search mechanism, entitled "Search for Artist or Title", at the top of each of the web pages on the website.

18 Hypertext links, often referred to as "links" or "hyperlinks", are a standard internet technology that is used to enable internet users to move between web pages, which are usually displayed in ".html" code, and other information. A hyperlink is a means by which an internet user is able to access files in which he or she is interested. Hyperlinks are frequently identified in a user's internet browser by coloured, usually blue, and underlined text. However, this is not always so. In some cases, hyperlinks may be different colours or otherwise identified. A hyperlink notifies an internet user that by using an electronic mouse to click on the link, they will be able to receive information that does not appear on the web page they are currently viewing.

19 Linking is a central feature of the World Wide Web. One way in which links are used is to direct internet users to another web page, whether that page is located on the same website or is part of a totally different website. Moving between web pages by activating hyperlinks on the website is a process typically known as "browsing". These other web pages may themselves contain hyperlinks to further web pages or to specific files or documents. The hyperlinks on the Cooper website are used to direct internet users to other pages of the website or to the remote websites from which the music files are downloaded. A further way in which hyperlinks are used is to enable internet users to download a specific file or document of interest. This type of hyperlink is used to activate a download of a discrete data file, such as a document or a music file, to the internet user's computer. The hyperlink sends a command to the remote computer on which the file is stored to release the file to the person who has activated the hyperlink on the website. Without this command to release the file, and the communication from the website's software, the file would not be available to the user who has requested it.

20 The above principles apply in the case of digital music files, with each file being a discrete set of data, usually with associated information

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such as file size, file title and other information, often described as metadata. This data can be transmitted to other computers and reproduced on the user's computer as an identical discrete set of data, usually with the same or virtually identical metadata. Therefore, when a link to a music file is activated, the remote computer on which the file is stored is directed to, and does automatically, transfer a copy of the file from the host server directly to the computer of the user activating the link. In the present case, the music file is not sent to, downloaded on or saved to the Cooper website or the host server of the Cooper website. The digital music files are stored on remote computers which are linked to the website and are accessed in the above way.

21 The ultimate location of the data file from which the download occurs is often arbitrary and frequently unknown to the internet user. It is possible that the file could be stored on the same computer server on which the webpage files are stored. But it could equally be stored on another computer with no physical proximity to the computer on which the webpage files are stored. The physical location of a data file can be, and often is, entirely independent from the location of the web pages visible to the internet user. In the case of some files, it is possible that the location of the data computer could be identified by the internet user running a mouse over the link, which would automatically display the full or the abbreviated URL address contained in the anchor tag in a panel at the bottom of the browser. Frequently, however, the location of the remote computer or the music file is not known to the internet user endeavouring to access the file by a link. Professor Sterling gave evidence that in his opinion, in the case of the Cooper website, the presence of Java script code meant that an internet user is unlikely to know where a digital music file that is listed on the website, and capable of being directly downloaded by an activating hyperlink, was located. For example, Professor Sterling said that there were no messages or signs to inform internet users that they were leaving one website and going to another.

22 In broad terms, there are two ways in which a hyperlink can be established on a website. They can be created by the operator of a website or, alternatively, the link can be created by software tools which are made available by the website to internet users to enable them to create hyperlinks that are visible on the website. The

latter is what occurred in the case of the Cooper website. Professor Sterling gave evidence that a person cannot create a hyperlink between a file and website without the permission of the operator of the website, because access to the code required to create the link must occur at the website. In order for Cooper to enable files to be automatically linked to his website by internet users, he must have given permission for that access to occur. This process of adding hyperlinks to the website could not have occurred without Cooper's permission.

23 In the case of hyperlinking, it is not the physical location of the computer that is relevant but rather the network address, internet provider address and the URL address associated with the computers. If Cooper did not know this information, he could have obtained it by relatively standard technical measures which are available to any operator of a website. This information must be incorporated into the website because without that information it would not have been possible for the links to work and internet users enabled to access the files. Cooper could, if he wanted to, have asked contributors of the hyperlinks to disclose their identity by adding an extra field in the form he used without any additional complex coding being required.

24 A proper understanding of the concept of linking to remote computers and the downloading of files from those remote computers to the user is essential to understanding the technical aspects of this case. There is an excellent description of this process in *Universal City Studios, Inc v Reimerdes* 111 F.Supp.2d 294 (SDNY 2000) at 324-325 and 339-341 (Reimerdes), where Kaplan J of the United States District Court (Southern District of New York) refers to an anti-linking injunction and doing no violence to the First Amendment. The following description is taken from the judgment of Kaplan J at 324:

"Most web pages are written in computer languages, chiefly "HTML", which allow the programmer to prescribe the appearance of the webpage on the computer screen and, in addition, to instruct the computer to perform an operation if the cursor is placed over a particular point on the screen and the mouse then clicked. Programming a particular point on a screen to transfer the user to another web page when the point, referred to as a hyperlink, is clicked is

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called linking. Web pages can be designed to link to other web pages on the same site or to web pages maintained by different sites."

25 In the present case, the hyperlinks on the website function in a variety of ways. There are hyperlinks which transfer the user to a web page on a remote website that contains information of various types. In such a case, the hyperlinks take the internet user directly, or via a series of other web pages, to another page on the same remote website that posts the software. It is up to the user to follow the hyperlink, or series of hyperlinks, on the remote site in order to arrive at the page that contains the hyperlink to the music recording and commence the download of the software. The download of the software takes place directly to the user. Other hyperlinks take the user to a page on a remote website on which there appears a direct link to the software, which may or may not contain links in addition to the music file. The user has only then to click on the link to the music file to commence the download. Finally, the hyperlinks may transfer the user to a music file on the remote website such that the download automatically commences without further user information being required.

26 In Reimerdes at 325, Kaplan J took the view that to the extent that the defendants had linked to sites that automatically commenced the process of downloading the music files upon the user being transferred by the defendants' hyperlinks, there was no doubt that they were engaged in the functional equivalent of transferring the music files to the users themselves. His Honour took the same view in relation to the defendants' hyperlinks to web pages that displayed nothing more than the music files or presented the user with the sole option of commencing a download of the music files. His Honour said that the only distinction was that the entity extending to the user the option of downloading the program was the transferee website and not the defendants' website, which his Honour considered to be a distinction without a difference.

27 In Reimerdes, after being enjoined from posting the music files themselves, the defendants urged others to download the material and to inform the website owners they were doing so. The defendants then linked their own website to those mirror sites. At 339, Kaplan J stated:

"Links bear a relationship to the information superhighway comparable to the relationship that roadway signs bear to roads but they are more functional. Like roadway signs, they point out the direction. Unlike roadway signs, they take one almost instantaneously to the desired destination with the mere click of an electronic mouse. Thus, like computer code in general, they have both expressive and functional elements."

28 Justice Kaplan continued at 340:

"Links are 'what unify the [World Wide] Web into a single body of knowledge, and what make the web unique.' They 'are the mainstay of the Internet and indispensable to its convenient access to the vast world of information.' They often are used in ways that do a great deal to promote the free exchange of ideas and information"

29 In October 2003, after the execution of the Anton Piller orders made by Emmett J on 17 October 2003, data, including statistics about the operation of the website, was captured from the E-Talk/Com-Cen premises at Camperdown, New South Wales. 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 with 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

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the Access Log File confirmed as downloaded to user computers.

30 At the bottom of each page of the website, there are hyperlinks to the website's "Privacy Policy", "Terms and Conditions" and "Disclaimer". 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 acknowledge 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."

FACTUAL BACKGROUND

31 Cooper first started operating the website in or about February 1998.

32 On 13 August 1993, Com-Cen was registered with the Australian Securities and Investment Commission. Com-Cen had previously traded as

PC Rentals (NSW) Pty Ltd from 11 August 1993. Mr Bal was, at all times, a director of Com-Cen and the majority shareholder of the company. In September 1999, Takoushis commenced work as an employee of Com-Cen.

33 On 17 October 2000, Cooper entered into an "Affiliation Agreement" with Internet Music Corporation to receive revenues derived from advertising and new services to the website. The following day, Cooper entered into another "Affiliation Agreement" with an entity known as eFront Media Inc by which he was entitled to receive revenues derived from advertising through advertising banners, badgers, buttons and text links on the website.

34 On or about 20 December 2000, Com-Cen agreed to host the website owned and operated by Stephen Cooper. On 21 December 2000, Cooper purchased internet services, including internet access, from Com-Cen for a three month period for a sum of approximately \$65.00. In March 2001, Cooper made arrangements with Com-Cen for the purchase of standard internet access for \$114.00 every three months. The evidence shows that invoices were issued by Com-Cen every three months for this amount. The final two invoices issued by Com-Cen for the provision of standard internet access are dated 2 and 21 September 2003 respectively.

35 On 5 February 2001, Cashsponsors.com approved Cooper's application to join their affiliate program and for payments to be sent to him.

36 On 27 March 2001, Cooper emailed Takoushis with an offer to advertise Com-Cen's internet services to visitors to the website in return for the possibility of free hosting of the website or free internet access or some other arrangement suitable to both parties. On 30 March 2001, Takoushis sent an email to Cooper indicating that Com-Cen was interested in Cooper's offer and proposing that the Com-Cen logo and/or a "Powered by Com-Cen" banner be displayed on the website in return for free hosting of the website. The invoices issued to Cooper by Com-Cen from 21 June 2001 onwards contain only a charge in relation to "standard internet access". The fee for "virtual site: MP3s4free.net" is "nil". During the period 27 December 2000 to the present, the only charge made by Com-Cen to Cooper was for internet access.

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37 It can be seen from the web pages which constitute the website that there are advertisements for "Play Casino". These appear to date from 6 June 2001, when Casinotrafic.com opened an account with Cooper for monthly payments for advertising on the website.

38 On 7 June 2001, E-Talk was registered with the Australian Securities and Investment Commission and Mr Bal was shown as a director. There was also another director, Mr Stevens, who was a pure nominee and who acted in accordance with the decisions made by Bal. Stevens owned the remaining 27 percent of shares in E-Talk that were not owned by Bal's company, LFB Investments Pty Ltd, and was also a former director of Com-Cen Pty Ltd.

39 In April 2002, Com-Cen entered into an agreement with E-Talk whereby 3000 of Com-Cen's approximately 4500 customers were transferred to E-Talk.

40 On 13 May 2002, Cooper commissioned an American based software programmer known as Thanesh to create a database to manage and search for files on the website.

41 On 17 June 2002, the name Com-Cen Internet Services was registered as a business name in New South Wales and E-Talk was identified as carrying on that business.

42 In early September 2002, E-Talk entered into a service agreement with a company known as Asia Global Crossing Australia Pty Limited. This agreement was authorised by Mr Bal as the managing director of E-Talk.

43 On 31 August 2002, an administrator was appointed to handle the affairs of Com-Cen. Soon afterwards, a series of complaints were made and investigations took place in relation to allegations of unauthorised use by Cooper of music recordings without a licence. These began when the Australian Society of Composers, Authors and Publishers issued a warning letter to Cooper in relation to his activities. Investigations of the website by MIPI began in December 2002. Various downloads from the site were made by Mr Beckett, in the course of writing and investigating his report, and by Mr Speck, a forensic investigator, qualified and experienced in the operation of the internet and

websites. Between 13 January 2003 and 8 July 2003, downloads were made from the website by Mr Speck in the course of his investigations on behalf of the applicants. On 11 July 2003, a printed record was made of the capture of the entire website by Mr Speck. Investigations in the form of downloads from the website continued up to October 2003.

44 On 17 October 2003, these proceedings were commenced and Anton Piller orders were executed at the premises of Cooper and at the business premises of E-Talk/Com-Cen.

45 On 24 October 2003, Cooper consented to injunctions against the further operation of the website and the website ceased to operate on that date.

EXCLUSIVE LICENSEES

46 The respondents conceded that the applicants included each of the legal persons who owned copyright in the 116 copyright music sound recordings. However, it was submitted on behalf of Cooper that because the applicants had tendered only expurgated copies of the documents said to amount to exclusive licence agreements, it was not possible in some instances to make a determination of fact in relation to the persons alleged to be exclusive licensees. In particular, it was said that it was not possible to ascertain that any form of exclusive licence had been granted by the licensor to the licensee, the extent of the exclusive rights granted by the licensor to the licensee and the period of operation of the agreement. It was submitted that it was therefore not possible for the Court to grant relief in favour of the applicants.

47 The applicants disputed this submission, stating that there was no basis for the proposition that the copyright owners' action must fail if the Court was not satisfied that the first to sixth applicants were exclusive licensees of the relevant copyright sound recordings. In any event, the applicants said that there was no suggestion that any party other than the first to sixth applicants is, or was, at any material time, the exclusive licensee of any of the copyright subject-matter the subject of these proceedings.

48 I am in agreement with the submissions of the applicants in this regard. Section 134A(1) of the Act, to which the applicants referred in their

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written submissions, expressly provides that evidence that copyright subsists in a work or that copyright was owned by, or exclusively licensed to, a particular person may be given by affidavit. In the present case, sworn evidence has been provided to the Court by executives of each of the first to sixth applicants that expressly proves their standing as exclusive licensees. Furthermore, I do not accept the submission made on behalf of Cooper that the copies of the exclusive licences provided by the applicants have been redacted to such a point that their nature and effect is unclear.

THE FIRST RESPONDENT

INFRINGEMENT OF COPYRIGHT

49 Section 85 of the Act provides that the owner of the copyright has the exclusive right to engage in certain acts. Pursuant to s 85(1), these acts include, first, "to make a copy of a sound recording" and, second, "to communicate the recording to the public". The applicants submit that both of these exclusive rights have been infringed in the present case.

50 The expression "sound recording" is defined in s 10(1) to be "the aggregate of the sounds embodied in a record". The expression "record" is defined as "a disc, tape, paper or other device in which records are embodied".

51 By s 10(3)(c), a reference in the Act to "a copy of a sound recording" is to be read as a reference to a record embodying a sound recording or a substantial part of a sound recording being a record derived directly or indirectly from a record produced upon the making of a sound recording. Section 10(3)(l) states that the expression "a record embodying a sound recording" is a reference to a record produced upon the making of a sound recording or another record embodying the sound recording derived directly or indirectly from a record so produced.

52 Section 21(6) states that a sound recording is copied if it is converted into or from a digital or other electronic machine-readable form, and any article embodying the recording or film in such form is taken to be a copy. Section 24 states that "sounds" are taken to have been embodied in an article or thing if the article or thing has been so treated in relation to those sounds that the sounds are capable, with or without the use of

some other device, of being reproduced from the article or thing.

53 In my view, it can be accepted that an MP3 file is a record from which an aggregate of sounds can be reproduced.

MAKING A COPY OF A SOUND RECORDING

54 The applicants submit that Cooper has directly infringed the applicants' copyright in the music sound recordings by making copies of these recordings.

55 The applicants say that a number of MP3 files constituting copies of the applicants' copyright sound recordings were located on the hard drive of Cooper's computer during the execution of the Anton Piller orders on 17 October 2003. In an affidavit sworn on 21 October 2003, Heather Tropman gave evidence that during the execution of the Anton Piller orders, she caused images of Cooper's hard drive to be printed. These print outs form Exhibit HAT-6 to the Second Affidavit of Heather Tropman sworn on 23 October 2003. Tropman said that Cooper's hard drive appeared to contain approximately 397 MP3 files or images of MP3 files. A number of these files have the Album Title of "MP3s 4 FREE".

56 In view of the failure of Cooper to give any evidence from the witness box and to offer an alternative explanation for the existence of the MP3s on the hard drive of his computer, I am satisfied that the available inference that Cooper made these copies of the copyright sound recordings on the hard drive himself, most likely by downloading them from his website, can more safely and confidently be drawn. Accordingly, I find that Cooper has infringed the applicants' copyright by making copies of the music sound recordings.

THE COMMUNICATION RIGHT – "TO MAKE AVAILABLE ONLINE" AND/OR "ELECTRONICALLY TRANSMIT"

57 The applicants allege that Cooper has directly infringed the applicants' copyright in the music sound recordings by communicating these recordings to the public.

58 "Communicate" is defined in s 10(1) of the Act as including:

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"to make available on-line or electronically transmit ... a work or other subject matter."

This definition covers circumstances where the transmission is over a path, or a combination of paths, provided by a material substance or otherwise.

59 The applicants point to both of the limbs of the definition of "communicate", namely, "to make available on-line" and "to electronically transmit the subject matter."

60 It is further submitted by the applicants that the sound recordings have been made available by Cooper through the displaying of hyperlinks on the website, which, when activated by a user clicking an electronic mouse, produce the result that there is an automatic direct downloading of the sound recording to the user's computer from the remote computer of a third party on which the recording is stored. The evidence indicates that for present purposes there are no sound recordings located on the Cooper website. Therefore, there is not, and cannot, be any downloading or transmission of the recordings from the Cooper website.

61 The applicants point out that there is no statutory definition of the expression "to make available online". They say that in the absence of such a definition, the words should be given their ordinary and natural meaning. The applicants refer to the discrete individual definitions of the words "make", "available" and "online" in the Macquarie Dictionary to support their submission that Cooper, via his website, has made available the recordings to the public. I do not consider that such a literal analytical approach, namely, a word-by-word dissection of the dictionary meaning of the expression "make available online", is appropriate in this case. As Learned Hand J said in *Helvering v Gregory* (1934) 69 F.2d 809 at 810-811:

"... the meaning of a sentence may be more than that of separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."

62 The applicants also refer to extrinsic material, including a July 1997 Discussion Paper entitled "Copyright Reform in the Digital Agenda", in support of their submission that Cooper has made the sound recordings available online.

However, the references relied on by the applicants, in particular, the references at pars 1.12 and 4.14 to the legislature's intention that the "making available" aspect of the communication right would cover "interactive on-demand on-line" services and transmissions, do not advance their case. The three examples referred to by the applicants of situations in which it was envisaged by the legislature that the communication right would, or may be, infringed, namely, the uploading of a copy of a copyright work or other subject matter onto a publicly accessible internet site, the uploading of copyright material onto a server which is connected to the internet and the act of connecting a file server with a copyright work or other subject matter already on it to a public accessible network such as the internet, are of no assistance in the present case.

63 I am not satisfied that the Cooper website has "made available" the music sound recordings within the meaning of that expression. It is the remote websites which make available the sound recordings and from which the digital music files are downloaded as a result of a request transmitted to the remote website.

64 As discussed above, the evidence indicates that no music sound recordings are actually stored on the Cooper website. The music sound recordings have initially been made available to the public by being placed on the remote websites. The evidence given by Mr Beckett was to the effect that the digital music files to which links were provided on the Cooper website were also available to users through the internet generally. That is, internet users can access the music sound recordings via an alternative route by directly accessing the remote websites, either by typing that website's URL address into the address bar on the user's internet browser or by using a search engine such as Google or Yahoo, rather than by visiting the Cooper website: Michael Pendleton, "Reforming Copyright for the Digital Age – Everyone's Horse on the Wrong Course" (December 1997) 4(4) E Law (Murdoch), <<http://www3.murdoch.edu.au/elaw/issues/v4n4/pendle44.html>>; Michael Blakeney and Fiona Macmillan, "Bringing Australian Copyright Law into the Global Age" (March 1998) 5(1) E Law (Murdoch), <<http://www.murdoch.edu.au/elaw/issues/v5n1/blake51.html#n32>>.

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THE COMMUNICATION RIGHT – PERSON RESPONSIBLE FOR THE COMMUNICATION

65 The Cooper website contains hyperlinks to thousands of sound recordings which are located on remote websites and are downloaded directly from those websites to the computer of the internet user. When a visitor to the Cooper website clicked on a link on the website to an MP3 file hosted on another server, this caused the user's browser to send a "GET" request to that server, resulting in the MP3 file being transmitted directly across the internet from the host server to the user's computer. The MP3 file does not pass through or via or across the Cooper website. The Cooper website facilitates the easier location and selection of digital music files and specification to the remote website, from which the user can then download the files by clicking on the hyperlink on the Cooper website. However, the downloaded subject matter is not transmitted or made available from the Cooper website and nor does the downloading take place through the Cooper website. While the request that triggers the downloading is made from the Cooper website, it is the remote website which makes the music file available and not the Cooper website.

66 The applicants also submitted that Cooper, by establishing and operating the website, has "electronically transmitted" the sound recordings. I am of the view that Cooper cannot be said to have transmitted the sound recordings. In my view, the actual transmission of the music sound recording begins with the commencement of the downloading of the recording from the remote website on which the recording is located to the end user. I accept that the electronic transmission of the sound recording to a user who triggers the hyperlink on the Cooper website is a communication to a member of the public from the remote website, however, it is not a transmission from the Cooper website.

67 Accordingly, for these reasons, I do not consider that Cooper has "communicated" the sound recording to the public. That is, Cooper has not made the sound recording available to the public or electronically transmitted it to the public.

68 I do consider, however, that the remote websites have made available online and electronically transmitted the music sound recordings to the public.

69 Section 22(6) was introduced by the Copyright Amendment (Digital Agenda) Act 2000 (Cth) ("the 2000 Amendment") and is in the following terms:

"For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication."

70 The November 1999 Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999 at par 6.13 states that this section was specifically intended to address "the issue arising from the music on hold case", namely, *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140. That is, the section was intended to protect ISPs, carriers and carriage service providers from liability for direct infringement of the communication right where they were not responsible for determining the content of the infringing material: see "Digital Agenda Copyright Amendments: Exposure Draft and Commentary" (February 1999), par 116; "Copyright Reform and the Digital Agenda", Discussion Paper (July 1997), par 4.72; "Revised Explanatory Memorandum" to the Copyright Amendment (Digital Agenda) Bill 2000, par 41.

71 There is no statutory definition of the expression "person responsible for determining the content". Counsel for the applicants again resorts to the *Macquarie Dictionary*, which defines "responsible for" to mean "chargeable with being the author, cause or occasion of". The word "determine" is defined to mean "to decide upon." As discussed above, the approach of the applicants suffers from the difficulty that it is too literal and analytical and does not pay sufficient attention, in my view, to the collocation of the expressions used, as distinct from the individual words.

72 The applicants say that the focus of attention of s 22(6) of the Act is not on the person carrying out the technical processes involved in the communication but rather on the person bearing the responsibility for the content of the communication. They note, however, that the criteria for the Court to take into account in

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determining responsibility for a communication are not set out in the Act.

73 The applicants point out that statements in the extrinsic materials which they rely upon, namely, the "Revised Explanatory Memorandum" to the Copyright Amendment (Digital Agenda) Bill 2000 (Cth) and the "Digital Agenda Copyright Amendments: Exposure Draft and Commentary" (February 1999), generally speak of "the person" or "a person" who is responsible for determining the content of a communication. They note that there is no specific discussion in the extrinsic material of a situation in which two or more persons jointly determine the content of a communication. However, I accept the applicants' submission that there is no logical reason why more than one person could not be responsible for a communication and that it is open to read the reference to "the person" in s 22(6) in the plural where the context indicates.

74 On the natural and ordinary meaning of the words used in s 22(6), in the context of the present dispute, I do not think it can be said that a person who is the proprietor, manager or operator of a website which provides hyperlinks to other websites on which the sound recordings are hosted determines the content of the communication. It is artificial in the extreme to suggest that the person or body who facilitates access from the website to a remote site and provides a trigger which enables sound recordings to be downloaded from that remote site is responsible for the content of the communication from the remote website. The fact is that, on the evidence, Cooper does not "determine", "formulate" or "create" the content of the remote website from which the communication takes place.

75 The applicants point to Cooper's ability to control the links on his website, to determine precisely what files would be made available by means of the links created on his website and the manner in which the files were made available to internet users as indicative of his responsibility for determining the content of the communication. However, a power to remove a hyperlink to a remote website from the Cooper website is not a power or responsibility for determining the content of that remote website and the content of the communication to the internet user. The capacity to prevent hyperlinks from being added to the website and therefore to

prevent internet users from accessing sound recordings via the Cooper website, is not the same as the ability to determine the content of a communication from a remote website. In cross-examination, Mr Speck agreed that Cooper had no control over whether a music file remained available on a remote website. Mr Speck said that should a remote website become unavailable, a visitor to the Cooper website would be unable to access the music files listed on the Cooper website as being available from the hosting website and would receive an error message whenever he or she attempted to visit that site and recover files from it.

76 It is the entitlement and role of the designer, operator and owner of a remote website to determine what is placed on that website and therefore what is the "content" of that website. If the content includes infringing copyright material, then the responsibility for that lies with the person or persons who place that material on the remote website and thereby make it available for transmission to the public. This is consistent with the "Digital Agenda Copyright Amendments: Exposure Draft and Commentary" (February 1999).

AUTHORISATION OF COPYRIGHT INFRINGEMENT

77 Section 101(1) of the Act provides that copyright is infringed by a person who, not being the owner of the copyright, authorises the doing in Australia of any act that infringes the copyright. In *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 (Hanimex), Gummow J made it clear that the direct infringement of copyright and authorisation of copyright infringement are separate and distinct causes of action: see also *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53 at [18] per the Court.

78 The law on authorisation prior to the 2000 Amendment was expressed by Gibbs J in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 (Moorhouse). In this case, the High Court held that the University of New South Wales had authorised the making of infringing copies of a substantial part of a book in a material form as a consequence of the photocopying of a book of Frank Moorhouse's short stories using photocopying machines

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provided by the University library. At 12, Gibbs J stated:

"The word 'authorize', in legislation of similar intentment to s 36 of the Act, has been held judicially to have its dictionary meaning of 'sanction, approve, countenance, ...'. It can also mean 'permit', and ... 'authorize' and 'permit' appear to have been treated as synonymous.

This definition of the expression "authorise" was adopted by Jacobs J (McTiernan ACJ agreeing) at 20-21.

79 Justice Gibbs continued at 12-13:

"A person cannot be said to authorize an infringement of copyright unless he has some power to prevent it. 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."

The majority in Moorhouse stated at 21-2 that knowledge was not relevant where a general permission or invitation existed to perform the acts of infringement, however, it could become important if:

"... the invitation were qualified in such a way as to make it clear that the invitation did not extend to the doing of acts comprised in copyright and if nevertheless it were known that the qualification to the invitation was being ignored and yet the University allowed that state of things to continue."

80 In each case, the question of whether the person has authorised the infringement of copyright is a question of fact: Moorhouse at 21 per Jacobs J. Express or formal permission or sanction is not essential to constitute an authorisation, however, as Sackville J (Jenkinson and Burchett agreeing) said in Nationwide News Pty Ltd v Copyright Agency Limited (1996) FCR 399 at 422:

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

In Australasian Performing Right Association Ltd v Metro on George Pty Ltd (2004) 61 IPR 575 at [18] (Metro), Bennett J agreed that mere facilitation of infringing conduct and knowledge that there is a likelihood that there will be infringing use are insufficient to constitute authorisation. The element of control will be necessary to constitute authorisation to infringe copyright: see also Nominet UK v Diverse Internet Pty Ltd (2004) 63 IPR 543 at [129] per French J. However, as Gummow J stated in Hanimex at [48], the question remains open as to what degree of connection or control is necessary between the alleged authoriser and the primary infringer. Inactivity or indifference, exhibited by conduct, by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred. The likelihood of the occurrence of the infringing act, as well as evidence of the degree of indifference displayed, will be relevant to a determination of whether the infringement of copyright has been authorised: Metro at [19]-[20] per Bennett J.

81 Subsection 101(1A) was introduced into the Act by the 2000 Amendment. This provision states that in deciding whether a person has authorised the doing in Australia of any act comprised in the copyright, the matters that must be taken into account by the Court include:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (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."

These factors are not exhaustive and do not prevent the Court from taking into account other factors, such as the respondent's knowledge of the nature of the copyright infringement.

82 Among the objectives expressed in s 3 of the 2000 Amendment are to provide a practical enforcement regime for copyright owners and to promote access to copyright material online. These broadly expressed objectives conflict to some extent, however, in the present case, I consider that the reference to a practical enforcement regime is of some significance.

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83 Item 39 of the "Explanatory Memorandum" to the 2000 Amendment explains that the object of the Amendment was to "essentially codif[y] the principles in relation to authorisation that currently exist at common law". However, the applicants submit that the 2000 Amendment has strengthened and broadened the concept of infringement by authorisation. For example, the applicants refer to s 101(1A)(a), which they say contemplates that even a person with no power to "prevent" the doing of the act may nevertheless authorise infringement, and s 101(1A)(c), which requires that the Court take into account whether the person "took any other reasonable steps".

84 The Cooper website is carefully structured and highly organised and many of its pages contain numerous references to linking and downloading. The website also provides the hyperlinks that enable the user to directly access the files on, and activate the downloading from, the remote websites. 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 authorized, 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.

85 The words "sanction" and "approve" are expressions of wide import. Cooper, in my view, could have prevented the infringements by removing the hyperlinks from his website or by structuring the website in such a way that the operators of the remote websites from which MP3 files were downloaded could not automatically add hyperlinks to the website without some supervision or control by Cooper. The evidence of Professor Sterling, who was

called on behalf of the applicants, is unchallenged to the effect that a website operator is always able to control the hyperlinks on his or her website, either by removal of the links or by requiring measures to be taken by the remote website operator prior to adding a hyperlink. A person cannot create a hyperlink between a music file and a website without the permission of the operator of the website because access to the code that is required to create the link must occur at level of the website. The Cooper website employed a "CGI-BIN" script to accept hyperlink suggestions from visitors to the website. By virtue of this script, such suggestions were automatically added to the website without the intervention of Cooper. The evidence is that alternative software was in existence that would have enabled a third party to add a hyperlink to a website but which required the consent or approval of the website operator before such hyperlinks were added.

86 I note that Mr Speck, in cross-examination, agreed that Cooper could not control whether any particular sound recording remained on the internet or on a remote website, however, this is not the issue. The issue is whether Cooper had sufficient control of his own website to take steps to prevent the infringement. In my view, Cooper clearly did have sufficient control regarding both the user accessing his website and the remote operator placing hyperlinks on the website.

87 The Cooper website included a number of disclaimers indicating that MP3s could be both legal and illegal and that the downloading of MP3s would be legal only when the song's copyright owner had granted permission for the internet user to download and play the music sound recording. It is acknowledged by counsel for the first respondent that the disclaimers on the website inaccurately reflected copyright law in Australia. In my view, these statements do not, in the terms of s 101(1A)(c) of the Act, amount to reasonable steps to prevent or avoid the doing of the act. 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 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

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the MP3s. In the words of Knox CJ in *Adelaide Corporation v. Australasian Performing Right Association Ltd* (1920) 40 CLR 481 at 488, as approved by Gibbs CJ in *Moorhouse* at 13, Cooper "abstained from action which under the circumstances then existing it would have been reasonable to take, or ... exhibited a degree of indifference from which permission ought to be inferred."

88 Accordingly, I find that Cooper has authorised the infringement of copyright in the music sound recordings, both by the internet users who downloaded the recordings and the operators of the remote websites.

INFRINGEMENT BY SALE

89 Section 103 provides that copyright is infringed by a person who sells, lets for hire, or by way of trade offers, or exposes for sale, an article or exhibits an article in public. The applicant submits that Cooper has both sold or exposed for sale and exhibited by way of trade the music files on his website.

90 The evidence is that Cooper benefited financially from sponsorship and advertisements on the website and the attraction to users of accessing the site to obtain downloads from remote sites. I am therefore satisfied that the operation of the website occurred within a trading or commercial context and as part of trade and commerce, however, I do not consider that Cooper can be said to have been engaged in trading in relation to the digital music files themselves. The commercial benefit to Cooper was a collateral one, arising from the sponsorship and funding he received as a result of the exposure of the advertising material on his website. I consider that he used the hyperlinks on his website, and the high traffic of internet users which was generated by these hyperlinks, to procure such sponsorship.

91 The issue is whether Cooper was selling, or exposing for sale, an article. I do not consider that he was exposing or offering for sale the sound recordings. There is no sale or trade between Cooper and the user or the owners or operators of the remote websites.

92 There was some debate regarding whether the packet of electronic data which is activated by clicking on the hyperlink on the website to produce a download of the sound recording from

the remote website can be described as an "article". In plain and ordinary English usage, it could clearly not be so considered. The essential notation of an "article" in the Oxford English Dictionary is that of a material thing or tangible object.

93 The applicants submit that the website is analogous to a "shop" for the online distribution of MP3 files. However, so far as the evidence discloses, neither the user nor the remote website operator purchase anything from the website or sell anything to it. The concept of sale can, of course, include goods or services. However, the context of s 103, in which reference is made to "sale", "trade", "exposes" and "article" cumulatively, indicates to me that the ordinary English meaning should be applied to these terms and that the sound recording or bundle of electronic impulses in the form of an electronic hyperlink is not within even the most extensive definition of the expression "article". In substance, what is being offered is a trigger mechanism for the activation of the free transmission of a packet of electronic data from the remote website to the user's website. This does not fall within s 103. If an extended definition had been intended for the term "article", as opposed to its ordinary English meaning, it would have been a simple matter for the draftsman to draft the provision in such terms.

94 The applicants were unable to direct me to any authority where the meaning of the term "article" had been considered and no relevant definition is included in the Act for the purposes of s 103. The expression "article" is defined in the Act specifically and solely for the purpose of s 132(9) in the following terms:

"'Article' includes a reproduction or copy of a work or other subject-matter, being a reproduction or copy in electronic form."

95 This specific definition does not assist the applicants' case in this civil proceeding. Indeed, the fact that it was considered necessary to give a specific and extensive definition of the concept of "article" in s 132(9) without amending or defining the reference to "article" in other sections supports the respondents' case that "article" does not include the facilitating service provided by the Cooper website in the present case.

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96 Even on the most beneficial interpretation, the word "article" is not apposite to include the service or facility provided by the Cooper website. Accordingly, s 103 has no application in the present case in relation to any of the respondents.

SECTION 112E DEFENCE

97 The 2000 Amendment provided for the protection of persons who make, or facilitate the making of, a communication. Section 39B applies to infringement of copyright in works and s 112E, which is in substantially similar terms, applies to infringement of copyright in subject matter other than works. Section 112E provides that 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.

98 It is important to note that this provision has no application in relation to the applicants' claims of direct infringement pursuant to s 101 of the Act or the claims of secondary infringement pursuant to s 103 of the Act. The defence under s 112E applies only to infringement by authorisation. The "Explanatory Memorandum" to the 2000 Amendment states that the:

"... new clause 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." (Emphasis added)

99 The applicants emphasise the reference to the word "merely" and say that the section has no application in the present case because the circumstances indicate that Cooper has been far more involved than just providing the facility that has been used to make the communication. In my opinion, the circumstances of this case are taken outside the protection afforded by s 112E of the Act because Cooper has offered encouragement to users to download offending material, as evidenced by the numerous references to downloading material on the website, and has specifically structured and arranged the website so as to facilitate this downloading.

CONCLUSIONS IN RELATION TO COOPER

100 I am satisfied that copyright subsisted in the sound recordings and that 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. I consider that Cooper has 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 the website and also by the owners or operators of the remote websites from which the infringing recordings were downloaded. In my view, Cooper does not attract the protection of the defence under s 112E of the Act.

101 I do not find that Cooper has infringed copyright by reason of sale or dealings in an article within the meaning of s 103.

102 For these reasons, I am satisfied that Cooper is liable for breach of copyright in relation to the relevant sound recordings. I consider that it is necessary for further and more detailed investigations to be undertaken into the precise number of infringements that have taken place in order for a more specific declaration to be made.

THE SECOND TO FIFTH RESPONDENTS

THE US FREE TRADE AGREEMENT IMPLEMENTATION ACT 2004 (CTH)

103 The second to fifth respondents seek to rely on the amendments to the Act effected by the US Free Trade Agreement Implementation Act 2004 (Cth) ("the FTA Act"), which came into effect on 1 January 2005 after the initial hearing of this matter had taken place.

104 The FTA Act inserted Div 2AA into Part V of the Act. The effect of these amendments was, broadly speaking, to provide a defence for internet service providers which excluded liability for damages for copyright infringement upon certain conditions.

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105 The applicants submit that these amendments constitute substantive amendments to the law, as opposed to procedural amendments, and therefore the Act should not, unless clearly indicated otherwise, be read to operate retrospectively. The applicants refer to the statement of Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267:

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

106 I agree with the applicants' submission. In the present case, the amendments are substantive and accordingly the provisions do not apply to the present case.

107 However, independently of that consideration, in order for the respondents to avail themselves of the protection, it is necessary under s 116AG(1) of the FTA Act for the respondents to satisfy the Court of the conditions set out in s 116AH, including that the carriage service provider has adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeated infringers. The evidence indicates that despite the respondents' awareness that copyright material was likely to be infringed, they have not taken any steps to implement such a policy. As counsel for the applicants points out, Bal and Takoushis emphasised that they were indifferent to the use that Cooper made of the facilities provided by E-Talk/Com-Cen. This falls far short of demonstrating that they had adopted a policy to sanction infringers.

108 Section 116AH imposes further conditions depending on the specific category of activity that was engaged in by the carriage service provider. The category of activity engaged in by E-Talk/Com-Cen was what is referred to in s 116AF as a "Category D activity", that is, "referring users to an online location using information location tools or technology." In the present case, the second to fifth respondents have not satisfied the particular conditions that apply to Category D activities under s 116AH. These conditions include that the provider must

not have received a financial benefit directly attributable to the infringing activity if the service provider has the right and ability to control the activity. As I have found that the infringing activity is the triggering, and consequential downloading, of the music files from the website, I am satisfied that E-Talk/Com-Cen received a financial benefit from the infringing activity on the website because it obtained free advertising on the website. Further, the second to fifth respondents did not act expeditiously to remove or disable access from the hyperlinks and facilities hosted on its network notwithstanding that the circumstances made it apparent that copyright material was likely to be infringed.

109 Accordingly, I do not accept the submissions of the second to fifth respondents that their liability for damages is excluded pursuant to the FTA Act.

COMMUNICATION, AUTHORISATION AND EXHIBITION OR DISTRIBUTION FOR SALE

110 Given my finding that Cooper did not "make available online" or "electronically transmit" the sound recordings, the applicants must also fail in their submission that E-Talk/Com-Cen directly infringed copyright by communicating the music sound recordings to the public.

111 It is common ground that Bal was the controlling mind of Com-Cen and E-Talk at all material times. Bal contends that he was not aware of the contents of the website prior to 17 October 2003, when Anton Piller orders were executed at the premises of E-Talk/Com-Cen Camperdown.

112 Mr Williams, solicitor for the applicant, gave evidence that upon arriving at the E-Talk/Com-Cen premises on 17 October 2003, he was met by Mr Georgiopoulos, an employee of E-Talk, at the counter of the office. Williams gave evidence that Georgiopoulos said to him, in the absence of Bal, words to the following effect: "Is this about MP3 files?" ("the first conversation"). In an affidavit sworn on 28 November 2003, Bal gave conflicting evidence to that of Williams, namely, that he had been present at the first conversation and that Georgiopoulos had not said the words that were attributed to him by Williams. Williams also gave further evidence that during a subsequent meeting in the conference room at the premises of E-Talk/Com-Cen, which was attended by Bal, Georgiopoulos

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made further statements that suggested that Georgiopoulos and E-Talk/Com-Cen were aware of problems concerning the website and had told Cooper to take down the website, but that no steps had been taken by Cooper to achieve this result ("the second conversation"). Williams says that at this meeting Georgiopoulos said words to the effect: "We know the site, we have been telling them to take it down but they say that because they are not hosting the files that there is no problem." In an affidavit sworn on 28 November 2003, Bal did not deny that the second conversation had taken place.

113 In relation to the conflict between the evidence of Bal and Williams as to the circumstances and terms of the conversation with Georgiopoulos, I prefer the evidence of Williams where it conflicts with that of Bal. This is because the credit of Williams was not shaken in cross-examination on this topic. I consider that the evidence of Bal and the failure of the respondents to call Georgiopoulos to meet this evidence support the probability that Williams' evidence is correct. My acceptance of Williams' evidence also reflects adversely on the credit of Bal. As counsel for the applicants points out, it was never put to Williams that Bal was present at the time that the first conversation occurred and nor was it put to Williams that the statement attributed by him to Georgiopoulos during the second conversation did not occur. Georgiopoulos was also not called by the respondents to deny that he had made this statement. The uncontradicted evidence is that Georgiopoulos is still employed by E-Talk/Com-Cen and there is nothing in the evidence to suggest that he was unavailable to give evidence for any reason: *Jones v Dunkel* (1959) 101 CLR 298 at 308 per Kitto J. Accordingly, I agree that Georgiopoulos made the statements that were attributed to him by Williams.

114 In cross-examination, Takoushis agreed that he would probably have approached either Georgiopoulos or Bal in order to get a decision as to whether the arrangement offered by Cooper in the email of 27 March 2001, namely, free hosting of the website in return for placing a reference to Com-Cen on the website, would be accepted. It therefore appears that Georgiopoulos held a position of some seniority to that of Takoushis. Mr Takoushis said that it was beyond his responsibilities to make the decision to whether to accept the advertising proposal. In cross-examination, Bal said that he

could not remember being approached by Takoushis in relation to the arrangement offered by Cooper. He said that he had given his authority to Takoushis to enter into arrangements of this kind without reverting to Bal beforehand. He said that he was not aware in the first half of 2001 that an arrangement had been made with Cooper whereby Com-Cen would advertise on his website or that this advertising actually began to appear on the website in March or April 2001.

115 The evidence is that E-Talk/Com-Cen was, at all relevant times, a small, tightly-knit operation under the direction of Bal, employing in the order of eight persons working out of the same premises at Camperdown in close physical proximity to each other. In these circumstances, it is likely that the persons working in that office would have been aware of, and discussed, the offer made by Cooper, its subsequent acceptance and implementation. Moreover, it is in accordance with reasonable expectations as to the behaviour and experience of Bal in hosting as a commercial operator that he would have been keen to ensure that E-Talk/Com-Cen was receiving some benefit in return for hosting the website for free. The provision of these hosting services was a significant source of the revenue for Com-Cen Internet Services. It is noteworthy that Bal is named as the "Sales Person" in a series of Tax Invoices issued by Com-Cen to Cooper during the relevant period.

116 Bal's evidence was that Com-Cen and E-Talk currently host approximately 2000 websites. Bal believed the Cooper website to be among the top 30 per cent of these websites in terms of traffic generated. Yet Bal says that he did not visit the website prior to the execution of the Anton Piller orders. As the applicants point out, and I accept, this assertion is unlikely to be true for two reasons.

117 The first reason is that the evidence discloses that Cooper claimed he had a high traffic website. In deciding whether Cooper's request for free hosting should be accepted, the obvious commercial course would have been for the decision-maker at E-Talk/Com-Cen to visit or investigate the website in order to ascertain whether it would, or was likely to, attract high traffic to the Com-Cen site and therefore determine the extent of the likely advantage to Com-Cen arising from the display of the

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reference to Com-Cen and the hyper-link to Com-Cen's website on the Cooper website. There is, after all, not much point in giving free web hosting to an operation that does not generate a significant number of visits. Notwithstanding this, both Bal and Takoushis strongly maintain that they did not visit the website. On their version of the events, no estimates or inquiries were made as to the prospective traffic of the website and nor was the layout or attractiveness of the website assessed in order to appraise the likely benefit to E-Talk/Com-Cen of the additional traffic that might be generated in return for providing free hosting.

118 In addition, the evidence of Takoushis and Bal is that no steps were taken by them or E-Talk/Com-Cen to check, by visiting the website or otherwise, whether the Com-Cen logo and "Powered-by Com-Cen" banner had been added to the website. However, in cross-examination, Bal agreed that some person in accounts would have "initially" checked the website to make sure that Cooper was honouring the agreement. Bal said that it was not the responsibility of Takoushis to check the website, as he was in sales and not accounts. This failure to check the website to see if it was displaying the Com-Cen logo and banner is not a course which one would expect a reasonable, astute and experienced internet host such as Bal to have taken.

119 I do not accept that Bal and Takoushis were unaware of the contents of the site or that they failed to take any steps to inform themselves as to the volume of traffic that the website would be likely to attract.

120 The statement of Georgiopoulos at the time of the execution of the Anton Piller orders indicates that he had an earlier appreciation of the problems associated with the website. Indeed, Georgiopoulos said that E-Talk/Com-Cen had been telling Cooper to take down the website to avoid these problems. In such a tight-knit operation as E-Talk/Com-Cen, it is unlikely, in my view, that Bal and Takoushis were unaware of the copyright problems that were said to arise from the operation of the website. However, no further steps were apparently taken by Bal or Takoushis on learning of these possible problems and the failure of Cooper to address these problems.

121 Pursuant to s 101(1A) of the Act, in determining whether a person has authorised an infringement of copyright, the Court must take into account the extent of that person's power to prevent the doing of the act concerned and whether that person took any other reasonable steps to prevent or avoid the doing of the act. E-Talk/Com-Cen were responsible for hosting the website and providing the necessary connection to the internet and therefore had the power to prevent the doing of the infringing acts. They could have taken the step of taking down the website. Instead, they took no steps to prevent the acts of infringement.

122 The email correspondence indicates that Takoushis was instrumental in setting up the hosting of the website and that he communicated with, and gave assistance to, Cooper in relation to the maintenance and operation of the site. Takoushis studied Information Technology at TAFE until September 1999 and thereafter was employed by Com-Cen. His assertions as to his professed ignorance of the meaning of the expressions "webmaster", "MP3 files" and the possible indications of the name "MP3s43" indicates to me a calculated attempt to evade and deny lack of any significant knowledge of what was happening on the Cooper website contrary to the true position. The extreme position taken by him in relation to his professed ignorance in respect of basic matters indicates a strenuous effort to create the impression of a naiveté that I am convinced did not exist. In my view, it is more likely than not that he visited the Cooper website and that he was aware of its contents. It is likely that he discussed these matters with Georgiopoulos and/or Bal at the offices of E-Talk/Com-Cen at Camperdown in the period prior to the execution of the Anton Piller orders in this matter.

123 Takoushis was an evasive, non-cooperative witness who did not address questions directly. One matter which, in my view, impacts adversely on his credit is the extreme position that he took to the effect that he paid no attention to the domain name of the website and drew no inferences from it, even to the extent that he said that he would never make any inquiries as to the content of a site which might be indicated by its name. Takoushis was asked whether he would investigate a domain name whose name seemed to indicate that the website contained pornographic contents, however, he adhered to

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his position that he would not have checked the contents of the site even in those circumstances. Furthermore, 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, Takoushis or Bal for the free web hosting arrangement, I consider that 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. I do not accept that he, Georgiopoulos or Bal were unconscious of the need to visit the website and check whether the arrangements were being implemented by Cooper, such as placing the name Com-Cen on the website in a satisfactory position where it could be accessed to the benefit of E-Talk/Com-Cen.

124 I do not accept that Takoushis, Bal or Georgiopoulos made no investigations regarding, or were uninterested to check, whether the amount of traffic attracted to the host site was as initially suggested by Cooper. The records indicate there were a very high number of hits recorded over a 12 day period on the Cooper website in circumstances where there is no reason to suspect that this period was atypical.

125 I am satisfied that Takoushis did not have any directorial or managerial function. I find that he was involved in the maintenance, establishment and operation of the hosting services and, in my view, knowingly involved. In these circumstances, I am satisfied that Takoushis was substantially more involved and acquainted with the contents and operation of the website than he professes to be and was involved to the extent that he was aware of the probability of legal problems with respect to that site before the execution of the Anton Piller orders and probably going back to March 2001.

126 I should add that even if the version of events provided by Takoushis and Bal was accepted (which it is not) to the effect that it was a practice of E-Talk/Com-Cen not to make inquiries in relation to the contents of websites by reason of their title or name or other circumstances, this amounted to unreasonable conduct in relation to the provision of hosting services and to turning a blind eye to possible contraventions of copyright which could take place on the hosting site. Accordingly, within the meaning of s 112E it could not be said that they

were doing no more than "merely" hosting the website involved in the present circumstances. Where a host is on notice of an irregularity and deliberately elects not to investigate the operation and contents of a site and turns a blind eye to such indications, even having regard to the possible indication afforded by the title of the website, then, in my view, there are additional factors called into play beyond merely hosting the site.

127 The repeated evasiveness of Bal and Takoushis under cross-examination, their lack of frankness, and their failure to acknowledge an acquaintance with some basic matters of terminology such as "webmaster" and "MP3's", support a conclusion that they were both involved in and aware of some problems with the operations on the website but decided not to further investigate or take any effective action in relation to the hosting of the website. Instead, they simply relied on an alleged assurance from Cooper that there was no problem with the website because no music files were actually stored on it.

128 My conclusion is that Takoushis was not a mere uninvolved conduit for the carrying out of instructions and communication between Cooper and his superiors in relation to the website but rather that he was well aware of possible difficulties in relation to the website and actively participated in the establishment and operation of the hosting and maintenance of the site, thus making the infringements possible. In my view, both Takoushis and Bal did not intend to take any action in relation to the Cooper site having regard to the perceived substantial financial advantage that E-Talk/Com-Cen derived from hosting the Cooper site.

129 As to the involvement of E-Talk, I am satisfied that the transfer of 3,000 customers by Com-Cen to E-Talk in 2001, together with the subsequent registration of the domain name comcen.com and E-Talk since at least November 2002, together with the fact that E-Talk is the registered owner of the business name "Com-Cen Internet Services", demonstrate that E-Talk has been carrying on the hosting operation during the relevant period. This is reinforced by the fact that virtually all the business was from online registrations and at the "comcen.com.au" website there is no provision for a visitor to sign up so as to take up internet services. The only party offering the

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services at the Cooper website was E-Talk. The emphasis on the website is on E-Talk and not on Com-Cen as a separate company. As late as 2 September 2003, the ABN number for E-Talk appears on an invoice from Com-Cen Internet Services although this was sought to be explained as an error in using an older form. I am satisfied that E-Talk authorised the infringing activities.

130 As Bal is the controlling mind of E-Talk/Com-Cen, I am satisfied on the evidence that E-Talk/Com-Cen authorised 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.

131 For the same reasons given earlier in relation to Cooper, I am not satisfied that the second to fifth respondents can invoke the protection of s 112E of the Act. They have done more than merely provide facilities for the making of the communications. The word "merely" must be given its full force and effect. The second to fifth respondents have assumed an active role by agreeing to host the website and assisting with the operation of the website, which are necessary steps to effectively trigger the downloading of the copyright material. The reciprocal consideration passing between them, namely, the free hosting in return for the display of the Com-Cen logo on the website, is an additional matter which takes the situation beyond the protection afforded by s 112E.

132 The second to fifth respondents also rely on the defence in s 111A of the Act. That section provides that copyright is not infringed by the making of a temporary copy of an audio-visual item as part of the technical process of making or receiving a communication. The applicants submit, first, that they do not rely upon the mere making of a "temporary copy" of any sound recording as an act of infringement, as the copies of the sound recordings that were available on the remote websites and the copies that were downloaded from these websites are all permanent copies of the files, and, secondly, that s 111A does not apply where the temporary copy is made "as part of the technical process of making a communication if the making of the communication is an infringement of copyright." I agree with the submissions made by the applicants that s 111A, by its terms, cannot

provide the respondents with a defence in this case.

133 I am not satisfied that s 103 applies in relation to the second to fifth respondents. There is no "article" and there has also been no sale or exposure for sale of copyright material by the second to fifth respondents.

JOINT TORTFEASORS

134 So far as the allegation that the respondents, together with the internet users and the operators of the remote websites, are joint tortfeasors is concerned, I am not persuaded that there is a sufficient common design established as between the parties to make them liable in respect of their participation in the infringement.

135 The authorities indicate that in order to make out a case of joint tortfeasor liability on the basis that copyright infringement is a statutory tort, it is necessary to establish that there has been a common design by the respondents to participate in or induce or procure another person to commit an act of infringement. In *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 283, Gummow J points out that the circumstance that two or more persons assisted or concurred in or contributed to an act causing damage is not of itself sufficient to found joint liability and there must also be some common design. In other words, there must be something in the nature of concerted action or agreed common action. It is not necessary that there must be an explicitly mapped out plan with the primary offenders. Tacit agreement between the parties is sufficient: see *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583 at 609 per Mustill LJ; *Molnlycke AB v Proctor & Gamble Pty Ltd* (No 4) [1992] RPC 21 at 29 per Dillon LJ (with whom Leggatt LJ agreed). In *Intel Corporation v General Instrument Corporation* (No 2) [1991] RPC 235 at 241, Aldous J stated that:

"... that capacity to control will not establish a common design. It is the extent of the control actually exercised or the involvement which is relevant and, in particular, whether it amounts to a common design to do the acts complained of."

136 The relevant authorities were considered by the High Court in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, where the joint judgment referred to the

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necessity for two or more persons to act in concert in committing the tort. At 600, Gummow J cited with approval the comment of Sargent LJ in *The "Koursk"* [1924] P 140 at 159-60 that persons are joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a "common design" so that those who aid or counsel, direct or join in the commission of the tort are joint tortfeasors.

137 In the present case, I am not satisfied that there has been an entry into a common design or participation sufficient to amount to 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. Although Bal and Takoushis, on the findings that I have made, were aware that there was a problem in relation to the downloading of the sound recordings, there has not been shown to be a sufficient degree of common design or concerted action to make them joint tortfeasors. As Bal is the controlling mind of E-Talk/Com-Cen, I therefore find that E-Talk/Comcen are also not joint tortfeasors.

TRADE PRACTICES CLAIMS

138 The applicants allege that certain statements made on, or by the operation or hosting of, the website gave rise to contraventions of ss 52 and 53 of the TPA, s 38 of the QFTA and 42 of the FTA. The applicants claim that statements on the website contained or conveyed the misrepresentation that the sound recordings available via the website were licensed by the relevant copyright owners or that a visitor to the website would not infringe the rights of the copyright owner if he or she made a copy of a copyright sound recording by converting it to MP3 as long as the downloaded sound recording was for personal use or educational purposes or was downloaded for evaluation purposes and was deleted within 24 hours.

139 The applicants submit that Cooper, as the owner and operator of the website who was responsible for its content, and E-Talk/Com-Cen, which hosted the website and were responsible for maintaining the connection to the internet, made the misrepresentations. In the alternative, the applicants submit that E-Talk/Com-Cen, together with Bal and Takoushis, was knowingly concerned in the contraventions by Cooper within the meaning of s 75B of the TPA.

140 The respondents deny the alleged contraventions of the TPA on the basis that Cooper was not relevantly engaged "in trade or commerce". This expression refers to "the central conception" of trade or commerce and not to the "immense field of activities" in which corporations may engage in the course of, or for the purpose of, carrying on some overall trading or commercial business: *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603-604 per Mason CJ, Deane, Dawson and Gaudron JJ. Cooper did not charge visitors to the website any sum of money for the ability to downloading the sound recordings, to which the website provided hyperlinks, from the remote websites on which they were stored. However, the evidence is that Cooper received a commercial benefit from third parties for sponsorship and advertisements on the website. The commercial reality is that Cooper used the hyperlinks on the website, and the high traffic of internet users attracted by the freely available music recordings, to gain this sponsorship and advertising revenue. Therefore, Cooper's business activity was closely connected with the availability and accessibility of the music recordings and the representations formed part of the "central conception" of that business.

141 The respondents submit that there is no evidence that any person was actually misled or deceived by any of the statements on the website. However, as Burchett J stated in *Shoshana Pty Ltd v 10th Cantanae Pty Ltd* (1987) 18 FCR 285 at 292, it is for the Court to determine whether the conduct of the respondents has the character alleged and no evidence need be called from any particular individual who has been deceived. The question for the Court to decide in the present case is whether a significant section of the public would be misled into believing, contrary to the fact, that it was legal to download the music recordings from the remote websites.

142 I am not satisfied that the statements on the website referred to by the applicants contain or convey the misrepresentations alleged. The section on the website headed "What Are MP3s?" states that "MP3s are both legal and illegal. It is legal when the song's copyright owner has granted permission to download and play the song" (Emphasis added). Neither this statement nor the statement in the "Privacy Policy" that "[a]ll songs are copyrighted and all

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rights reserved by the respective companies and authors" amount to representations that the copies of sound recordings available to users of the internet via the website were licensed by the relevant copyright owners. These statements merely represent that the legality of the downloading will depend upon whether the copyright owner has granted permission for the downloading. No express or implicit representation is made as to whether this permission has, in fact, been granted by the copyright owner in respect of each of the music recordings to which the Cooper website provides hyperlinks. When these statements are read in the context of the statements on the website as a whole, I consider that it is evident that Cooper did not represent that the relevant copyright owners had authorised the downloading of the sound recordings to which the website provided hyperlinks. The website makes it clear that MP3s are "both legal and illegal" and then provides numerous disclaimers to the effect that the website does not assume any responsibility or liability for the addition of hyperlinks to the website or for the content of any materials stored on the remote websites. Although not determinative, these statements form part of the context in which the statements complained of were made.

143 The statements to which the applicants refer also do not misrepresent that the downloading of the sound recordings for personal or educational or evaluation purposes will be sufficient, of itself, to render the downloading legal. These are expressed to be conditions, imposed by the website owner and operator, that are additional to the legal requirement that the relevant copyright owner must have granted permission for the internet user to download and play the music recording.

144 There is a statement in the "Terms and Conditions" on the website that asserts:

"You may only access and use the Materials for personal or educational purposes or as expressly provided for in application MP3s4FREE program terms and conditions. You may not otherwise reproduce, distribute, publicly perform, publicly display, modify or create derivative works of these Materials, unless authorised by the appropriate copyright owner(s)." (Emphasis added)

In my view, read in context, this statement is not a misrepresentation. The statement points to the need for authorisation by the copyright owners. The statement could possibly be read to wrongly indicate that copyright would not be infringed if the recordings were accessed for merely personal or educational purposes, however, in my view, any possible inferred misrepresentation is negated by the emphasis on the website to the need for the authorisation or approval of the copyright owners.

145 As against Cooper, it is also alleged by the applicants that the mp3s4free.net domain name itself conveys representations that are misleading or deceptive or likely to mislead or deceive. However, I am not persuaded that the domain name or the title of the website or the reference to mp3s4free is, of itself, sufficient to constitute a representation that whatever is downloaded from the website is in accordance with law and does not breach the rights of the copyright holder. The domain name merely represents that the download of copies of music recordings is free and does not make any representation regarding the legality of this downloading.

146 I wish to record the Court's appreciation for the considerable assistance received from all counsel in this matter. Immediately prior to the hearing, Mr Cooper was unrepresented in what is a complex case, both legally and factually. In particular, I thank those who appeared for Mr Cooper, including Mr Morris QC and Mr Gray SC and their juniors.

147 Accordingly, for the above reasons, I am satisfied that there has been an infringement of copyright by the first to fifth respondents in relation to the sound recordings.

148 I direct the applicants to file and serve, within fourteen days, appropriate Short Minutes of Orders to give effect to the above Reasons for Judgment and as to costs.

I certify that the preceding one hundred and forty eight (148) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

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