

AUSTRALIAN INTELLECTUAL PROPERTY JOURNAL

Volume 16, Number 1

February 2005

ARTICLE

Unauthorised: Some thoughts upon the doctrine of authorisation of copyright infringement in the peer-to-peer age – *Michael Napthali*

Liability for authorisation of copyright infringement is a well established principle of copyright law. However, the courts have not been unanimous about its scope. Across jurisdictions courts have affirmed that the elements of “control” and “knowledge” at the time of an infringement are central integers to be considered. In applying the principle courts have been vocal about the need to use common sense rules in balancing plaintiffs’ rights with risks posed to society from an overbroad construction of liability. The risk most consistently cited is that of foreclosing new technologies before their full implications are ascertained. Today, decisions about nascent peer-to-peer technology have focused attention on this risk. A proposition considered herein is whether, as some critics ask, the doctrine of authorisation (and its United States equivalent: “indirect” or “secondary” liability) is today afforded a scope unintended by original copyright statutes? It will be shown how theories of legal positivism have informed this discourse. On this basis we will examine how judicial activism demonstrated by the courts has spurred rights owners to agitate for remedies born of statutory change. The United States has witnessed the drafting of widely criticised, and now failed, legislative reforms such as the Induce and PIRATE Bills. The present uncertainty which surrounds the scope of the related doctrines of authorisation and indirect liability appears headed soon to receive United States Supreme Court re-examination. Evidence would suggest it to be strongly arguable that a similar re-examination and doctrinal rationalisation is also warranted in Australia. 5

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ISSN 1038-1635

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW