

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CIV-2017-009-760  
[2018] NZDC 12918**

UNDER THE	FAIR TRADING ACT 1986
BETWEEN	SKY NETWORK TELEVISION LIMITED Plaintiff
AND	SARAH FRANCES CLAIRE PULLAN (aka SARAH CAMPBELL) First Defendant
AND	JOHN JAMES CAMPBELL Second Defendant

Hearing: 15 May 2018

Appearances: Ms L A O’Gorman for the Plaintiff  
Ms Wham for the First and Second Defendants

Judgment: 3 July 2018

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**RESERVED JUDGMENT OF JUDGE G S MACASKILL**

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**Introduction**

[1] The plaintiff seeks judgment against the defendants for alleged breaches of the Fair Trading Act 1986. The plaintiff contends that the defendants have made misleading representations as to the legality of the use of media players sold by the defendants, trading under the name “Fibre TV”. The players are pre-loaded with a Kodi software application and, more controversially, additional software add-ons. The add-ons enable users to search the internet for free digital content to view via the player connected to the users’ television sets. In short, the plaintiff says that the defendants have represented that the Fibre TV players are legal but that this is untrue because, loaded with the add-ons, the players (the devices, their marketing and their use) infringe the provisions of the Copyright Act 1994.

[2] The plaintiff founds its analysis on a recent European Court of Justice case, *Stichting Brein v Willems*<sup>1</sup>. The judgment in that case is not formally binding or persuasive in this Court, but it may inform this Court's reasoning. This Court should recognise that legislators seek consistency with the laws of other countries relating to copyright and it is desirable that similar laws be construed in similar ways by the Courts.

### **Relief sought**

[3] The plaintiff seeks by way of relief:

- (a) A declaration that the defendants' representations that it is lawful for users in New Zealand to use the Fibre TV Service to access, receive and view Copyright Works are misleading and/or deceptive and are therefore in breach of section 9 of the Fair Trading Act 1986;
- (b) An injunction, pursuant to section 41 of the Fair Trading Act 1986, to restrain the defendants from:
  - (i) Offering, promoting or supplying the Fibre TV Service (including by offering, promoting or supplying the Fibre TV Boxes) for the purpose of actions that constitute primary infringements of copyright under the Copyright Act 1994;
  - (ii) Representing in any way, in any medium, that the Fibre TV Service is lawful and/or that the use of that service (or any equivalent service) does not breach the Copyright Act 1994 or any other relevant legal obligations;
- (c) An inquiry as to damages.

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<sup>1</sup> (2017) 127 IPR 302

## Material facts

[4] The plaintiff supplies pay television services to subscribers throughout New Zealand, including online via websites and apps. The plaintiff holds the relevant rights in New Zealand to copy and communicate to the public – through these services – various Copyright Works, including films, TV shows and coverage of sports.

[5] The first defendant is the registrant of the Fibre TV NZ website and is an administrator of the “Fibre TV Support” Facebook page. Until recently, the website and the Facebook page promoted the Fibre TV service. The website currently states that it is “under maintenance” but provides contact details for the Fibre TV business in the form of a PO Box, a free phone number and an email address. The Facebook page appears to be disabled.

[6] [The commercial manager] at Sky Network Television Ltd and his account of how the Fibre TV service works is uncontested; in his affidavit he explains that:

- (a) For a fee, purchasers of the Fibre TV Service receive the Fibre TV Box, a set-top media player that connects to a variety of devices.<sup>2</sup>
- (b) The Fibre TV Box is pre-programmed with software and add-ons. These are designed to enable users to search for and find free (pirated) video streams corresponding to the user’s “menu” selection.
- (c) Once a user selects the content that he or she wishes to view, the Fibre TV Service initiates a transmission of the relevant video data over the internet. It is then reproduced for viewing on the device linked to the Fibre TV Box.<sup>3</sup>

[7] The Fibre TV service enables users to view Copyright Works in all cases without the consent of the Copyright Holder. For example, [the commercial manager] refers to the live coverage of the Australia/Pakistan cricket test played in Brisbane on 15 December 2016 for which the plaintiff held the broadcast rights. The Fibre TV

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<sup>2</sup> [The commercial manager] at [11].

<sup>3</sup> [The commercial manager] at [12].

service enabled New Zealand users to view it via a digital stream that was apparently derived from a broadcast by the Pakistan Television Corporation, without the plaintiff's consent.

[8] The representations on the website stated that the Fibre TV Service will enable users to view content without paying the corresponding subscription fees. The representations include the following statements:

Say goodbye to monthly or annual subscription charges! Fibre TV has all the content with none of the fees. Once you have Fibre TV you never have to pay for content again. So call us and make the switch.

Fibre TV makes your Smart TV smarter by delivering all the content for free! No need to pay for monthly content subscriptions.

#### **Streaming Live Sports**

Fibre TV has Streaming Live Sports channels from all the major global networks. All streaming live and monthly subscription free.

Great content from Sky Sports, Fox Sports, BT Sports, Bein Sports and many more. Watch live streaming sport direct from all over the world for free.

[9] The plaintiff contends that this is a clear reference to the fees charged by the plaintiff and legitimate subscription/video/on demand providers, such as Netflix, for access to their content.

[10] Similar representations were made on the Facebook page, including:

We have 27 streaming movie channels!

Including all sky's movie channels and all Netflix

But even better movies on demand (No ads) and the latest releases no geo-blocking.

[11] The posts on the Facebook page prior to its removal show that the Fibre TV service had attracted customers. In or around February 2017, the page had 237 "likes". As at 30 March 2017, there were 135 members of the "Fibre TV Support" Facebook page.

## **The relationship between the Copyright Act and the Fair Trading Act**

[12] At paragraph 3.1 of her written submissions (dated 17 August 2017), Ms O’Gorman said:

3.1 The relationship between the Copyright Act and the Fair Trading Act was considered in *World TV Ltd v Best TV Ltd*.<sup>4</sup> The general language of the New Zealand fair trading legislation must be construed so as to conform with and not override the legislative copyright code. The Court’s task is to ensure that both legislative measures, the Copyright Act and the Fair Trading Act, receive due effect. A misrepresentation is actionable under the Fair Trading Act, so long as this is consistent with and does not undermine the policies of the copyright regime.

[13] I accept that these submissions are correct. Ms Wham did not offer any argument to the contrary.

[14] At paragraph 3.3 of her submissions, Ms O’Gorman said:

3.3 This proceeding has been brought under the Fair Trading Act because the overall misleading nature of the defendants’ conduct in promoting Fibre TV transcends the issues that would arise in respect of any particular copyright work. The Fibre TV representations concern all of the content broadcast by SKY, both to date and into the future, whatever that content might. In those circumstances, this proceeding falls entirely within the scope of the quote from *World TV Ltd v Best TV Ltd* above. It does not create any inconsistency, or undermine the policies of the copyright regime.

[15] I accept that the plaintiff’s reliance on its remedies under the Fair Trading Act is appropriate, for the reasons offered by counsel.

## **Copyright Act 1994**

[16] The relevant provisions of the Copyright Act 1994 are ss 16, 29 and 33:

### **16 Acts restricted by copyright**

- (1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34, the following acts in New Zealand:
  - (a) to copy the work:
  - (b) to issue copies of the work to the public, whether by sale or otherwise:

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<sup>4</sup> *World TV Ltd v Best TV Ltd* (2005) 11 TCLR 247.

- (c) to perform the work in public:
  - (d) to play the work in public:
  - (e) to show the work in public:
  - (f) to communicate the work to the public:
  - (g) to make an adaptation of the work:
  - (h) to do any of the acts referred to in any of paragraphs (a) to (f) in relation to an adaptation of the work:
  - (i) to authorise another person to do any of the acts referred to in any of paragraphs (a) to (h).
- (2) Subsection (1) applies subject to Parts 3 and 8.

### **29 Infringement of copyright**

- (1) Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act.
- (2) References in this Act to the doing of a restricted act are to the doing of that act—
- (a) in relation to the work as a whole or any substantial part of it; and
  - (b) either directly or indirectly;—
- and it is immaterial whether any intervening acts themselves infringe copyright.
- (3) This Part is subject to Parts 3 and 8.

### **33 Infringement by communicating to public**

Communicating a work to the public is a restricted act in relation to every description of copyright work.

[17] Under s 29, it is a direct infringement of copyright to do a “restricted act” in relation to a copyright work without the authority of the copyright owner. “Restricted Acts” include:

- (a) **Communicating copyright works to the public:** the communication of copyright works to the public in New Zealand in breach of ss 16(1)(f), 29 and 33; and/or

- (b) **Copying:** copying of copyright works in breach of ss 16(1)(a), 29 and 30.
- (c) **Authorising:** authorising another person to do a restricted act in breach of ss 16(1)(i) and 29.

### **Communicating copyright works to the public**

[18] Copyright is infringed by communicating copyright works to the public.<sup>5</sup> This restriction applies to every type of copyright work.<sup>6</sup>

[19] “Communicating” is defined in s 3 of the Copyright Act 1994 to mean (among other things) “transmitting the communication work or making it available by means of a communication technology, if that person has responsibility to any extent for its contents”.

[20] The plaintiff contends that the sale of the Kodi media player, with pre-installed add-ons that enable users to access copyright content via streaming websites, amounts to a breach of the owner’s exclusive right to communicate their works to the public, contrary to s 16(1)(f) and an infringement under s 29(1) and s 33. The plaintiff contends that, in truth, the defendant’s business model is the sale of media players for the purpose of accessing copyrighted content and avoiding paying subscription fees to the copyright owners or licensees.

[21] In *Stichting Brein v Willems*,<sup>7</sup> the European Court of Justice (“ECJ”) held that the sale of a multi-media player with pre-installed add-ons that enabled users to access copyright content via streaming websites amounted to a “communication to the public” for the purposes of the relevant EU Copyright Directive. The questions referred to the ECJ for a preliminary ruling are listed in paragraph 22 of the judgment. They include the issue whether a “communication to the public” occurs when someone sells a pre-loaded media box.

[22] The service at issue in that case was directly analogous to the Fibre TV service in this proceeding. The service was described by the ECJ in the following terms:

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<sup>5</sup> Copyright Act 1994, s 16(1)(f).

<sup>6</sup> Copyright Act 1994, s 33.

<sup>7</sup> (2017) 127 IPR 302

[The supplier installed on the player] an open source software, which makes it possible to play files through a user-friendly interface via structured menus, and integrated into it, without alteration, add-ons available on the internet, created by third parties, some of which specifically link to websites on which protected works are made available to internet users without the consent of the copyright holders.

Those add-ons contain links which, when they are activated by the remote control of the multimedia player, connect to streaming websites operated by third parties, some of which give access to digital content with the authorisation of the copyright holders, whilst others give access to such content without their consent. In particular, the add-ons' function is to retrieve the desired content from streaming websites and make it start playing, with a simple click, on the multimedia player ...

...the main attraction of such a multimedia player for potential purchasers lies precisely in the fact that add-on are pre-installed on it which enable users to gain access to sites on which copyright-protected films are made available without the consent of the copyright holders.

[23] Adopting Ms O’Gorman’s analysis as correct, a number of criteria were relevant to whether the vendor’s actions constituted a “communication to the public”:

- (a) **Intention to give access to copyright works:** The defendant makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers and does so, in particular, where, in the absence of that intervention, his customers would not, in principle, be able to enjoy the broadcast work;
- (b) **Public:** the concept of the “public” refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people;
- (c) **Profit objective:** that the profit-making nature of the communication is relevant.

[24] In concluding that the sale of the pre-loaded media player amounted to a “communication to the public”, the ECJ held that all of these criteria were satisfied on the facts:

- (a) **Intention to give access to copyright works:** This was not the “mere” provision of physical means. Rather, it was deliberate intervention by pre-installing add-ons to enable purchasers to access protected works.
- (b) **Public:** The box had been purchased by a fairly large number of people and those people could all access the works at the same time. This meant that the communication was aimed at an indeterminate number of potential recipients and involved a large number of people.



It followed therefore that the protected works were indeed communicated to a “public” .

- (c) **To new public or using specific technical means:** The target users were a “new public” not taken into account by the copyright holders when their authorisations were granted. The add-ons contained hyperlinks to access works published on the internet illegally.
- (d) **Profit objective:** It could not be disputed that the player was supplied with a view to making a profit, without the consent of the copyright holders.

[25] According, the ECJ answered the relevant questions in the affirmative and found that the various requirements for the exemption of temporary re-production did not apply.

[26] The reasoning of the ECJ is applicable to the present case. I find that the sale of the defendants’ Kodi box with pre-installed add-ons that enable access to copyrighted content constitutes a “communication to the public” and is unlawful infringement conduct under the Copyright Act 1994.

[27] Ms O’Gorman drew the Court’s attention to the decision of the Federal Court of Canada in *Bell Canada v 1326030 Ontario Inc*<sup>8</sup>. That case concerned an application for an interim injunction against sellers of pre-loaded set top boxes, which enabled users to access protected content produced and/or re-transmitted by the plaintiffs using streaming websites. The boxes were advertised as a way to access “free” television content and avoid cable bills. The Court held that the plaintiffs had established a strong prima facie case in respect of copyright infringement (the relevant rights including the right to communicate their programmes to the public by tele-communications via television broadcast) and granted the application. The decision was upheld by the Federal Court of Appeal.<sup>9</sup>

[28] More recently, in *Stichting Brein v Ziggo BV*, the ECJ held that making available and managing a website that indexed user-submitted links to torrent files of copyright works constituted copyright infringement and an “act of communication to the public”.<sup>10</sup>

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<sup>8</sup> *Bell Canada v 1326030 Ontario Inc* DVIAT Box.Net [2016] FC 612.

<sup>9</sup> *Wesley v Bell Canada* 2017 CAF 55, 2017 FCA 55, 2017 CarswellNat 850.

<sup>10</sup> *Stichting Brein v Ziggo BV* European Court of Justice C-610./15, EU:C:2017:456, 14 June 2017.

As a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an “act of communication” for the purposes of Article 3(1) of Directive 2001/29.

[29] The analysis that emerges from the cases discussed is fundamentally at odds with the defendants’ contention that they have no responsibility for the streaming of content by users of the media players they provide. This analysis lays bare the essence of their business, which is to sell devices that enable users of the media player to use copyrighted content without paying for it. Their business is not selling media players to enable users to access free but uncopyrighted content. They cannot validly disclaim responsibility for providing access to copyrighted content when that function is the reason why users will pay a premium for their version of the player.

### **Copying**

[30] Copying is defined in s 2 of the Act to mean, in relation to any description of work, “reproducing, recording, or storing the work in any material form (including any digital format), in any medium, and by any means”.

[31] The issue whether viewing streamed content amounts to an act of copying was considered in the context of an application for an interim injunction in *Mongwah Broadcasting Corp v Young International 2009*<sup>11</sup>. The High Court accepted that “reproducing” in “any material form”, in terms of the definition of copying, occurs when content is delivered to a viewer and the viewer watches a streamed broadcast.

[32] In *Football Association Premier League v British Tele-communications Plc*<sup>12</sup> the Court granted the Premier League’s application for a site blocking injunction, which ordered the largest internet service providers in the United Kingdom to block access by the customers to various stream servers being used to deliver infringing live streams of premier league coverage to internet users in the UK. The Court was satisfied that the users and/or operators of the “target servers” infringed the plaintiff’s copyright. It found that “copying” occurred as a result of the streaming:

**Copying by users.** In the course of streaming the Works, users who access a stream cause their computer, mobile device or set-top box to create copies of

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<sup>11</sup> HC Auckland CIV-210-404-203, 17 December 2010.

<sup>12</sup> [2017] EWHC 480 (Ch), [2017] ECC 17.

the Works in the memory of those devices. In some cases, a substantial part of a Work may be copied in a single frame (for example, a Logo). In the case of films of matches, copying of a substantial part is very likely to occur if users stream footage of any appreciable segment of the match. Such copying obviously takes place in the UK insofar as users are located in the UK.

[33] As to a contention that potential legitimate users might be inhibited, the Court noted that the stream content consisted almost exclusively of commercial broadcast content, such as other sports, films and television programmes. All of this material was, by its nature, inherently likely to infringe the rights of third parties who own or licence such material for broadcast.

[34] In the present case, the key advertised feature of Fibre TV service is that it enables users to stream video data over the internet, to view it on a television linked to the Fibre TV player (which is a “set top” box of the kind referred to in *Premier League*), without paying the relevant subscription charges for that content. I find that the Fibre TV service results in Copyright Works being “copied” without authorisation of the copyright owner, in breach of s 6(1)(a) of the Act.

[35] A key point in the defence case is that the “streaming” of content is done by the operator of the server from which the content originates. That conveniently overlooks that, in general usage, digital content is also said to be “streamed” by the recipient. But the issue is not to be decided as a matter of semantics. The defendants argue that the media player does not copy the content by recording it. In fact the data is **stored** in the player’s cache memory before being **transmitted** to the user’s television set and then deleted. It is therefore copied by being “recorded” and “stored” and then “reproduced”. It is irrelevant that the content is held in memory only temporarily. The users of the media players therefore infringe by streaming content to their televisions.

## **Procuring such infringements or participating in a common design to infringe**

[36] Ms O’Gorman further submitted that, to the extent that users to whom media players were supplied commit the infringement of copying, the defendants are jointly and severally liable, for procuring such infringements or participating in a common design to infringe. That may be so. It may at least be said that, by installing add-ons that give users access to copyrighted works, the defendants procure the breaches of copyright. However, it is not necessary to express an opinion in this proceeding and I prefer not do so without the benefit of full argument.

## **Authorising**

[37] Under ss 16(1)(i) and 29 of the Copyright Act 1994, it is a direct infringement of copyright to “authorise” another person to do a restrictive act.

[38] Ms O’Gorman submitted:

4.25 There has been some debate about what “authorisation” means, in terms of defining the word.<sup>13</sup> However, recent English authority indicates that liability primarily turns on a factual analysis, taking into account the relevant criteria discussed in the cases.<sup>14</sup> When defendants gain financially from actively encouraging infringing uses, the threshold between legitimate and breaching conduct is crossed.

4.26 In *Bell Canada v 1326030 Ontario Inc dba ITVBox.net*, the Federal Court of Canada found a strong *prima facie* case of infringement by authorisation, given that the Defendants, through their products and advertising, sanctioned and encouraged accessing copyrighted content through pre-loaded Kodi boxes and private IPTV services.<sup>15</sup>

[39] In a footnote, counsel acknowledged that the Court of Appeal has not determined its own position and referred to *Heinz Watties Ltd v Spantech Pty Ltd*<sup>16</sup>. In that case the Court of Appeal explored the nature of “authorisation” and considered the House of Lords’ decision in *CBS Songs v Amstrad Consumer Electronics plc*<sup>17</sup> and

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<sup>13</sup> Discussed in *Twentieth Century Fox Film Corporation and others v Newzbin Ltd* [2010] EWHC 608 (Ch) [2010] ECC 13 at [86] to [90].

<sup>14</sup> *Twentieth Century Fox Film Corporation and others v Newzbin Ltd* [2010] EWHC 608 (Ch), [2010] ECC 13 at [90] and [95]. \*

<sup>15</sup> 2016 FC 612 at [8] and [26].

<sup>16</sup> (2006) 8 NZBLC 101,679, (2005) 11 TCLR 591 (CA), (2005) 67 IPR 666 (CA)..

<sup>17</sup> *CBS Songs v Amstrad Consumer Electronics plc* [1988] 1 AC 1013 (HL).

the High Court of Australia's decision in *University of New South Wales v Moorhouse*.<sup>18</sup> In *Amstrad* Lord Templeman rejected the view that putting the means of infringement in the hands of an infringer amounted to authorisation. In *Moorhouse* the High Court of Australia took the view that authorisation means facilitation but only in the context of the copying being in the control and possession of the alleged authoriser. In *Heinz* the Court of Appeal declined to make a definitive ruling as to which interpretation should apply in New Zealand but, as a matter of principle, agreed that it is normally sufficient if the authorisation is an authorisation to copy; it does not have to amount to an actual authorisation of a breach of copyright.

[40] As Ms O'Gorman submitted, in *Bell Canada v 1326030 Ontario Inc dba ITVBox.net*<sup>19</sup>, the Federal Court of Canada found a strong *prima facie* case of infringement by authorisation, given that the defendants, through their products and advertising, sanctioned and encouraged accessing copyrighted content through streaming sites and private IPTV services. This analysis takes the argument against suppliers of Kodi boxes significantly further.

[41] Ms Wham did not discuss the authorities but submitted that, on the facts, the defendants had not "authorised" users of the media players it had sold to stream copyrighted content.

[42] In this case, the defendants:

- (a) Represented to purchasers they can use their media players to stream copyrighted content without paying subscriptions to the plaintiff.
- (b) Advertised, facilitated and encouraged the accessing of copyrighted content through pre-loaded media players supplied by them.
- (c) Represented in Facebook posts that they will provide links to content as they find it.

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<sup>18</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1, (1975) 6 ALR 193 (HCA).

<sup>19</sup> 2016 FC 612 at [8] and [26].

- (d) Actively facilitated access by users to copyrighted content in that they:
  - (i) Provided add-ons that allowed users to view copyrighted content that for which they would otherwise have to pay.
  - (ii) Serviced the Fibre TV boxes, including providing updates to the software, and controlled how links are added.

[43] I conclude that, as a matter of fact, the defendants have “authorised” copyright infringements in terms of ss 16(1)(i) and 29 of the Copyright Act 1994.

### **Application of s 9 Fair trading Act 1986**

[44] The plaintiff relies on s 9 of the Fair Trading Act 1986 which provides:

#### **9 Misleading and Deceptive Conduct Generally**

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[45] At paragraph 5.2 of her submissions, Ms O’Gorman submitted:

5.2 As the Supreme Court has observed, the question under s 9 is whether or not the conduct objectively had or has the capacity to mislead or deceive the hypothetical reasonable person.<sup>20</sup> The likelihood that somebody will be misled or deceived by the conduct in question must be a real risk that is more than a mere possibility.<sup>21</sup> However, it is not necessary to prove that anyone actually was misled or deceived (although of course this may be persuasive evidence to support an allegation of breach).<sup>22</sup> Nor is proof of an intention to mislead required.

[46] Ms Wham offered no challenge to these submissions and I accept them.

### **Personal liability**

[47] I accept counsel’s submission that, in terms of personal liability, so long as a person acts “in trade” when they engage in misleading or deceptive conduct, they will be liable under s 9. There is no exemption from liability if that person was acting on

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<sup>20</sup> *Red Eagle Corp v Ellis* [2010] NZSC 20, 2 NZLR 492 at [28].

<sup>21</sup> *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd* [2012] NZCA 357 at [39].

<sup>22</sup> *Red Eagle Corp v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492, at [28].

behalf of another legal entity.<sup>23</sup> Thus an employee may be personally liable under the Fair Trading Act for statements they make in the course of employment and no assumption of responsibility is required. A director who participates directly in his or her company's business will not ordinarily be able to avoid liability under s 9 of the Act and such representations must be regarded as in-trade for the purpose of liability under s 9.<sup>24</sup> In this case, no such issues arise because the first defendant and the second defendant conduct the business of Fibre TV in partnership.

### **Pure statements of law**

[48] Ms O'Gorman acknowledged that, historically, the Courts have held that a pure statement of law could not amount to a misrepresentation but argued that the statements of the defendants relied upon by the plaintiff qualify as misleading and deceptive conduct.

[49] In *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership*<sup>25</sup>, in delivering the judgment of the Court of Appeal, Randerson J stated (at [175]):

... [W]e accept Mr Goddard's submission that the law has evolved substantially from the previous understanding that a statement of law could not be treated as a misrepresentation. We refer to the helpful discussion on this point in *Chitty on Contracts*.<sup>26</sup> Mr Goddard also referred us on this point to a discussion by a French J in *Inn Leisure Industries Pty Ltd v D F McCloy Ltd (no 1)*.<sup>27</sup> We also note the decision of William Young J in *Clifton-Mogg* in which it was held that misrepresentations made as to the true nature of the terms of an insurance policy amounted to an infringement of s 9 of the FTA.<sup>28</sup>

[50] The relevant commentary in *Chitty on Contracts* states:<sup>29</sup>

... it is now more accurate to say that a statement of law will amount to a misrepresentation unless, in the circumstances, it reasonably appeared that the statement was put forward as nothing more than an opinion on which it would not be reasonable to rely .... So a wilful misstatement of law would always

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<sup>23</sup> *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009]2 NZLR 17 at [77](d).

<sup>24</sup> *Gilmour v Decisionmakers (Waikato) Ltd* [2012] NZHC 298 at [87]; cited with approval in *Steel v Spence Consultants Ltd* [2017] NZHC 398 at [64].

<sup>25</sup> *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538.

<sup>26</sup> HG Beale (ed) *Chitty on Contracts* (31<sup>st</sup> ed, Sweet & Maxwell, London 2012) at [6-016].

<sup>27</sup> *Inn Leisure Industries Pty Ltd v D F McCloy Ltd (No 1)* (1991) 28 FCR 151 (FCA) at 164-165.

<sup>28</sup> *Clifton-Mogg v National Bank of New Zealand Ltd* (2001) TCLR 213 (HC).

<sup>29</sup> HG Beale (ed) *Chitty on Contracts* (31<sup>st</sup> ed, Sweet & Maxwell, London, 2017) at [7-016].

amount to a misrepresentation and even an innocent misrepresentation of law may do so where it carries on an implication of fact which is itself untrue.

[51] In *Inn Leisure Industries Pty Ltd v D F McCloy Ltd (No 1)*<sup>30</sup>, the Federal Court of Australia said:

A representation of law may be made in different ways which send different messages to the recipient. It may do no more than convey what is, on the face of it, the untutored opinion of the representor. As such it would be unlikely, if wrong, to constitute misleading or deceptive conduct. If the represented opinion were not in fact held by the representor, then that would be a misrepresentation of fact and able to be characterised as misleading or deceptive conduct.

[...]

The situations in which advice, expert or otherwise, as to the law may be misleading or deceptive for the purposes of s 52 will depend upon the context and circumstances in which it is proffered and the representations implied or expressed that accompany it.

### **The defence case**

[52] Ms Wham did not dispute that s 9 of the Fair Trading Act applies to the defendants, as vendors, seeking to carry on the profit making business of selling pre-loaded media boxes. She did not contest that misrepresentations made by the defendants about the legality of the functions to which their media players might be put would be caught by s 9. The defence case is that, as a matter of fact, the representations made were not misleading or deceptive.

### **The uncontested facts**

[53] The starting point for the determination of the disputed facts is to summarise the material undisputed facts.

[54] Pursuant to the timetable orders made by the Court on 13 December 2017, the plaintiff was required to file any agreed position on factual issues by 22 January 2018. The plaintiff's solicitors prepared a summary of admitted facts and provided it to counsel for the defendants on 18 January 2017. No response was received. The document provided to the Court contains the plaintiff's summary of facts that are

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<sup>30</sup> (1991) 28 FCR 151 (FCA) at 164-165.



admitted in the defendants' amended statement of defence and in the affidavits of the first and second defendants dated 12 January 2018. Ms Wham did not dispute the summary during the course of the hearing and I am satisfied that it is consistent with the evidence in the case.

[55] The plaintiff's summary of facts materially states:

*Parties*

1. The plaintiff is a duly incorporated company having its registered office at 10 Panorama Road, Mt Wellington, Auckland. It carries on business as a pay television broadcaster and digital media company.
2. The defendants are husband and wife and reside at [residential address deleted].
3. The second defendant is in trade within the meaning of section 9 of the Fair Trading Act 1986.

*Fibre TV New Zealand*

4. In 2016, in partnership, the defendants set up a business known as Fibre TV New Zealand ("Fibre TV") and have operated Fibre TV since then.
5. Fibre TV markets and sells devices colloquially known as "Kodi Boxes". The Kodi Boxes are also referred to in this judgment as media players.
6. The Boxes come with a remote control and connect to the internet via WIFI or Ethernet cable. They connect to the television via an HDMI cable, and so turn the television into a computer monitor.
7. The Boxes come preloaded with "Kodi", which is an open-source media player application/software programme.
8. The Boxes also come preloaded with other third party "add-ons" and "plug-ins". These are software components that search the internet for free digital content which, once found, may be viewed via the Box. Users of the Box can choose the content that they want to locate via "menus:" displayed on their device, which list channels and content type as well as specific items of content. Once it has found the content, the Box enables it to be streamed and viewed on the device to which the Box is connected.
9. The content is transmitted to the boxes in packets of data which are decoded in cache, played through the user's television monitor and deleted.

*Website*

10. The defendants operate a website using the domain name fibretvz.co.nz.

11. The defendants use the Website to promote Fibre TV.
12. The Website was registered by the first defendant and the second defendant is listed as the “Admin Contact” for the Website in the registration records held by the Domain Name Commission. The second defendant’s credit card was used to pay the domain name registration fees.

*Facebook*

13. At all material times, the defendants have also promoted Fibre TV through Facebook and operated a “Fibre TV Support” Facebook page: **(SOD, [10])**.
  - (a) Prior to 15 March 2017, the defendants operated a Facebook page at <https://www.facebook.com/fibreTV/> (**“Old Facebook Page”**).
  - (b) Since 15 March 2017, the defendants have operated a Facebook page at <https://www.facebook.com/groups/FibreTVNewZealandOfficial/> (**“New Facebook Page”**).
  - (c) The current “Fibre TV Support” Facebook page is at [www.facebook.com/groups/fibreTV](http://www.facebook.com/groups/fibreTV).
14. The first defendant is listed as an administrator of the “Fibre TV Support Group”.

*Representations*

15. Prior to the grant of the interim injunction against the first defendant in June 2017, the following representations appeared on the Website:

FibreTV New Zealand has a superb [sic] multimedia platform which delivers On Demand Movies, TV Shows and Music as well as Live Streaming TV, Sports and Radio Stations direct to your TV. [sic].

**Say goodbye** to monthly or annual subscription charges! FibreTV has all of the content with none of the fees. Once you have Fibre TV you never have to pay for content again. So call us and make the switch.

Fibre TV makes your SmartTV smarter by delivering all the content for free! No need to pay for monthly subscriptions.

## Streaming Live Sports

FibreTV has Streaming Live Sports channels from all the major global networks. All streaming live and monthly subscription free.

Great content from Sky Sports, Fox Sports, BT Sports, Bein Sports and many more. Watch live streaming sport direct from all over the world for free.

16. As at 15 August 2017, the Website contained a link to a further website, described as a “shop”: <https://fibre-tvmyshopify.com/> (“**Shopify Site**”), which contained the following promotional statements about Fibre TV:

Freedom to choose

You choose what to watch and when to watch it.

No set packages – pay as much or as little as you like.

And

No set Packages, No set Subscriptions. Add your own paid IPTV services, Google Apps or search online for free content from overseas servers.

17. From the Shopify Site, visitors could purchase what were described as “Fibre TV Streaming Media Players”. The description of the players included the following statements:

**Fibre TV** connects straight to your TV’s HDMI and enables you to find streaming content online.

...

Why pay expensive monthly subscriptions when there is a massive world of free streaming media just a few clicks away.

18. The following representations relating to Fibre TV have appeared on the Facebook Pages:

- (a) Post-dated 26 July 2016 on Old Facebook page:

We have 27 streaming movie channels!

Including all sky’s movie channels and all Netflix

But even better movies on demand (No ads) and the latest releases no geo-blocking.

- (b) Exchange dated 15 September 2016 on Old Facebook page:

[Person 1] Will NZ sky sports be made available by any chance?

**Fibre TV** We are always looking at ways to improve the sport. If Sky Sports NZ becomes available for streaming we will definitely be adding it to the build as soon as we can. Check out the Sky

Sports though as some New Zealand content is available, it is just a matter of finding it. We are hoping that as people find content they will post to the page to let others know where to go. There is so much on there that its just a matter of searching for it.

(c) Exchange dated 2 November 2016 on Old Facebook page:

[Person 2] Pretty much decide to go with Fibre TV no netball unfortunately how easy is it to get NZ Ruby can you get the NZ Series Hurricanes Highlanders The Blues etc.

**Fibre TV** Hi Shirley, yes we can get the rugby – from the All Blacks games right through to Canterbury v Tasman, Otago vs North Harbour...

[Person 3] why can we not get the netball? Is it because sky have exclusive rights

**Fibre TV** Our content mainly comes from the northern hemisphere – we have yet to find Netball on any of the Sky channels that they provide. It does not mean that it is not being streamed, we just have been unable to find it. As there are so many streaming channels we are hoping that someone will come across it.

(d) Post dated 15 March 2017 on New Facebook page:

Fibre TV New Zealand has a superb multimedia platform which delivers On Demand Movies, TV Shows, and Music; as well as Live Streaming TV, Sports and Radio Stations direct to your TV.

(e) Post dated 4 August 2017 on New Facebook page by user name “Sarah Campbell”:

The box is designed to search online for free content from overseas servers, enabling you to get TV Shows, Movies and Sports. The cost of the box is \$397 (one off payment). The content is free and there are no charges for this.

18.2 Clause 2.2 of the Fibre TV standard purchase agreement in use in September 2016 contained the following “warranty”.

The supplier represents and warrants that:

- (a) It will perform the Services with reasonable care and skill; and
- (b) The Services and the Materials provided by the Supplier to the Customer under this Agreement will not infringe or violate any intellectual property rights or other right of any third party.
- (c) All warranties [sic] are covered by the Consumer Guarantees Act.

18.3 Clause 4.2 of the Fibre TV “Terms and Conditions/Purchase Agreement” effective from 23 November 2016 contains the following “warranty”:

Fibre TV represents and warrants that:

- (a) It will perform their Services with reasonable care and skill; and
- (b) The Services and the Hardware provided by Fibre TV to the Customer under this Agreement will not infringe or violate any intellectual property rights or other right of any third party.
- (c) All warranties [sic] are covered by the Consumer Guarantees Act.

[56] Two points should be noted:

- (a) I find that the first defendant is in trade within the meaning of section 9 of the Fair Trading Act 1986.
- (b) “Kodi Boxes” are referred to in this judgment as media players.

### **Determination of the disputed facts**

[57] Except as specifically noted, Ms Wham’s attack on the plaintiffs’ case addressed the sufficiency of the evidence relied upon by the plaintiff to establish that the defendants have engaged in misleading or deceptive conduct.

#### *Website statements*

[58] The plaintiff says that the statements on the defendants’ website represent that the Fibre TV service will enable users to view content without paying the corresponding subscription fees, which is a clear reference to the fees charged by SKY and legitimate subscription “video on demand” providers, such as Netflix, for access to the content.

[59] Ms Wham responded that the statements do not necessarily amount to an offer of pirated content, that is, content the subject of copyright.

[60] I find that the subscription services referred to on the website clearly relate to New Zealand providers, and the plaintiff in particular, who provide access to copyrighted content for subscription fees charged. While the statements do not identify SKY specifically, the defendant's business model and all the evidence of the case prove that the access provided by the defendants' media player is intended to allow users to avoid paying subscription charges to SKY and other providers.

*Facebook page*

[61] As to the statements made on the defendants' Facebook page before it was disabled, Ms Wham submitted that these did not "necessarily" amount to offers to access pirated content.

[62] I find that the statements clearly indicate an alternative service to that provided by the plaintiff, although that SKY New Zealand's movie channels could not be streamed by the media player at that time and that the reference may have been intended to be to SKY movie channels out of New Zealand. Access to such channels from New Zealand would breach the owner's copyright (the reference to "geo-blocking" is of significance in this context) and infringe the plaintiff's New Zealand licences for the movies. The content of the HBO channel is offered in New Zealand as the plaintiff's SOHO channel. The fact that the logos shown in this context<sup>31</sup> relate to channels out of New Zealand do not assist the defendants because they do not have legitimate access to any of the channels indicated.

[63] Ms Wham endeavoured to make something of the lack of evidence that SKY UK is a subscription channel or that the defendants offer access to copyrighted material. However, the plaintiff's case is that the defendants overtly offer access to content for which the plaintiff has copyright. The plaintiff has achieved that evidential threshold.

[64] Ms Wham sought to describe the exchange with [person 1] on 15 September 2016 as showing that the defendants were not offering SKY New Zealand sports content. I find that the defendants clearly and unequivocally

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<sup>31</sup> [The commercial manager]'s affidavit exhibit B

indicated that if SKY Sports New Zealand became available for streaming, necessarily from an illegitimate source, it would be made available by the defendants. This exchange makes clear that this would be by “adding it to the build”, that is, by incorporating the link into the software. This is direct evidence that the defendants deliberately facilitated access to pirated content. Also, the defendants actively encouraged

[person 1] to search for such content and, when she found it, to let others know where to go.

[65] The Facebook exchanges<sup>32</sup> also provide advice to [person 2] on 26 September 2016 that “our content comes from overseas – England and USA mainly. We have no control over what content they provide, but you can get NRL and NASCAR”. This demonstrates that the defendants were actively assisting and encouraging users to find content.

[66] On 2 November 2016, the defendants explained to [person 3]:

Fibre TV our content mainly comes from the northern hemisphere - we have yet to find netball on any of the Sky channels that they provide. It does not mean that it is not being streamed, we have just been unable to find it. As there are so many streaming channels we are hoping that someone will come across it.

[67] In the post to Sarah Campbell, on 4 August 2017, the defendants said that “the box is designed to search online for free content from overseas servers, enabling you to get TV shows, movies and sports”. This post make no distinction between content which is the subject of copyright and content that is legitimately in the public domain.

[68] These exchanges clearly show that the defendants were completely indifferent as to whether the streamed content was copyrighted or not.

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<sup>32</sup> On the same page of Exhibit C.

### *Contractual warranties*

[69] Under both forms of purchase agreements proved in evidence, the defendants warrant that the services provided under the agreement “will not infringe or violate any intellectual property rights or other right of any third party”.

[70] Ms Wham argued that the warranties mean that the defendants were not intending to breach copyright. I prefer and accept Ms O’Gorman’s submission, that the warranties (unwise though it may have been to give them) were calculated to lead purchasers to believe that using the media player to stream content would not breach any copyright. These representations were plainly untrue. The defendants were marketing the media player to enable users to avoid paying subscription charges for copyrighted work.

### *Representations ambiguous*

[71] Ms Wham contended that the representations relied upon by the plaintiff are ambiguous and in Court should refer to additional evidence to clarify their meaning. I am satisfied however, that the meaning of each of the representations is clear from the context from which they appeared and that they prove the defendants’ business model, as earlier described.

### **The defendants’ position**

[72] Ms Wham summarised the defendants’ position in this way:

Viewing a stream of content initiated by another party is not a breach of the Copyright Act in that the defendants did not authorise any such breach or provided access to copyrighted works and they have not communicated the copyrighted works.

Neither they nor their clients have copied any such works.

They have not represented that they or their clients could do so.

They are, therefore, not in breach of s 9 of the Fair Trading act 1986, because they have not engaged in misleading or deceptive conduct.

They have at no time promoted or advertised any ability to access SKY NZ content.



The plaintiff has provided no evidence of copyright status of any content that was advertised.

### **Conclusions as to the facts**

[73] As to the facts, I conclude that:

- (a) The defendants are in the business of selling media players for a profit.
- (b) Their business model necessarily involved representations that their media players could be lawfully used to stream content in breach of the plaintiff's (and others) copyright.
- (c) The defendants charged a premium for their media players that can reasonably only be attributed to the fact that they were pre-loaded with add-ons that enabled the streaming of copyrighted works.
- (d) That functionality includes a search function, an indexing system and a user-friendly facility for streaming the copyrighted material found from the player to a television.
- (e) The defendants' service includes providing links to new material found.

### **Conclusions as to breach of copyright**

- (a) The defendants have breached the plaintiff's copyright by:
  - (i) **Communicating** copyright works to the public by selling media players for the purpose of streaming copyrighted content, a restricted act, in breach of ss 16(1)(f), 29 and 33 of the Copyright Act.
  - (ii) **Copying** copyright works by enabling users of the media players it supplies to stream video data over the internet and to view it on televisions linked to the media players, without

authorisation of the copyright owner, in breach of ss 16(1)(a), 29 and 30.

- (iii) **Authorising purchasers** to use media players for the purpose of streaming copyrighted content, a restricted act, in breach of ss 16(1)(i) and 29.
  
- (b) It is irrelevant that, as an alternative to buying pre-loaded media players, consumers might use standard media players or personal computers and load the “add-ons” for the same unlawful purpose. The greater threat to copyright owners is the mass sale of media players that require little expertise to operate.
  
- (c) It is not necessary for the plaintiff to prove that any particular user of a media box purchased from the defendants has been used to stream content in breach of the plaintiffs’ rights. It is reasonable to infer that this has been done, from the defendants’ marketing of its devices and the exchanges on its Facebook pages.

### **Conclusions as to misleading and deceptive conduct**

[74] As to the defendants’ liability under s 9 of the Fair Trading Act, I conclude that:

- (a) The defendants have engaged in conduct that is misleading and deceptive is likely to mislead or deceive by **breaching the plaintiff’s copyright** by:
  - (i) **Communicating copyright works to the public** by selling media players for the purpose of streaming copyrighted content.
  
  - (ii) **Copying copyright works** by enabling users of the media players it supplies to stream video data over the internet, to view it on a television linked to the media player, without authorisation of the copyright owner.

- (iii) **Authorising purchasers** to use media players for the purpose of streaming copyrighted content.
  
- (b) The defendants have engaged in conduct that misleading and deceptive is likely to mislead or deceive by **representing to purchasers** that using media players for the purpose of streaming copyrighted content does not infringe the plaintiff's copyright when this is not true.
  
- (c) I do not decide whether the defendants have engaged in conduct that misleading and deceptive or likely to mislead or deceive **by procuring infringements of copyright or participating in a common design to infringe** to the extent that users commit the infringement of copying.

[75] The fundamental flaw in the defendants' case is that their business model involves direct competition with the plaintiff and seeks to avoid the copyright protection that lies at the heart of the plaintiff's business. The defendants have failed to recognise that copyright law has sufficient reach to respond. The defendants' key argument, that they have nothing to do with any breaches of copyright by users of their media players, is destroyed by the evidence of their marketing. Their contention that users of the media players do not breach the plaintiff's copyright by streaming copyrighted content from illicit websites is plainly wrong. To the extent that their conduct is in conflict with the plaintiff's copyright, it is misleading and deceptive.

#### **Status of the first defendant**

[76] While the second defendant may have been primarily responsible for the establishment and management of the Fibre TV Service business, the evidence shows that the first defendant was not just involved in an administrative role.

[77] In her affidavit, the first defendant affirms that she is in partnership with the second defendant and that she has been given training on the basic technical aspects, such as how to operate the boxes and give troubleshooting support.

[78] The second defendant affirms that they were partners in the business. In his affidavit of 12 January 2018, the second defendant says:

I set up Fibre TV New Zealand (Fibre TV) with the first defendant, my wife. While we are officially in partnership, the first defendant was not involved at all in the set up of the business and only ever carried out general administrative and customer service work.

[79] The first defendant's status as a partner in the business is sufficient to make her jointly and severally liable with the second defendant. Her status is not affected by the fact that her functions may have been administrative in nature.

### **Relief**

[80] The plaintiff is entitled to an injunction against the first and second defendants to restrain them from committing the misleading and deceptive conduct condemned in this judgment.

[81] I have some reservations about the form of the injunction sought. In my opinion, the nature of the misleading and deceptive conduct should be clearly defined. Any references to infringements of copyright should be definitive. It should not left to the defendants to make their own judgment. The injunction should leave the defendants in no doubt as to what is restrained, so that they can ensure their compliance. An injunction can be difficult to enforce if the prohibited acts are not clearly defined. The plaintiff ought to take these comments into consideration before submitting the order for injunction for sealing.

[82] The plaintiff seeks and is granted an order for inquiry as to damages. I direct that the plaintiff file and serve within 28 days a memorandum as to the directions sought to expedite the inquiry. The defendants shall file and serve their response within 28 days thereafter. The file is to be referred to me for directions on the expiration of 56 days or when the defence memorandum is filed, whichever is the sooner.

[83] The plaintiff is entitled to costs and to disbursements as fixed by the Registrar. If the parties cannot agree as to costs, the plaintiff shall file and serve a memorandum as to costs and the defendants shall reply within fourteen days thereafter. Upon the

expiration of that period or upon the filing of the defence memorandum, the file is to be referred to me.

**G S MacAskill**  
District Court Judge