

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CRI-2015-404-000429  
[2017] NZHC 189**

UNDER the Extradition Act 1999

IN THE MATTER of an appeal on questions of law by way of  
case stated under s 68 of the Extradition  
Act 1999

BETWEEN MATHIAS ORTMANN  
First Appellant

KIM DOTCOM  
Second Appellant

BRAM VAN DER KOLK  
Third Appellant

FINN HABIB BATATO  
Fourth Appellant

AND THE UNITED STATES OF AMERICA  
Respondent  
cont .../2

Hearing: 29 August to 28 September, 12 October 2016

Appearances: G M Illingworth QC, PJK Spring and A K Hyde for First and  
Third Appellants  
R M Mansfield and S L Cogan for Second Appellant  
J Bioletti for Fourth Appellant  
J C Gordon QC, M Ruffin, F Sinclair and F Biggs for  
Respondent

Judgment: 20 February 2017

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**JUDGMENT OF GILBERT J**

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*This judgment is delivered by me on 20 February 2017 at 11 am  
pursuant to r 11.5 of the High Court Rules.*

.....  
*Registrar / Deputy Registrar*

**CIV-2015-404-001733**

UNDER the Judicature Amendment Act 1972, Part 30 of the High Court Rules and s 27(2) of the New Zealand Bill of Rights Act 1990

BETWEEN MATHIAS ORTMANN  
First Plaintiff

BRAM VAN DER KOLK  
Second Plaintiff

FINN HABIB BATATO  
Third Plaintiff

AND THE UNITED STATES OF AMERICA  
First Defendant

THE DISTRICT COURT AT NORTH  
SHORE  
Second Defendant

**CIV-2015-404-001770**

UNDER the Judicature Amendment Act 1972, Part 30 of the High Court Rules and s 27(2) of the New Zealand Bill of Rights Act 1990

BETWEEN KIM DOTCOM  
Plaintiff

AND THE UNITED STATES OF AMERICA  
First Defendant

THE DISTRICT COURT AT NORTH  
SHORE  
Second Defendant

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## Introduction

[1] The United States of America claims that Mathias Ortmann, Bram van der Kolk, Kim Dotcom, Finn Batato (the appellants) and others were members of a worldwide criminal organisation that engaged in criminal copyright infringement and money laundering on a massive scale with estimated loss to copyright holders well in excess of USD 500 million. The United States terms this the “Mega Conspiracy”. The case has been touted as one of the largest criminal copyright cases ever brought by the United States.

[2] The United States seeks the extradition of the appellants to face trial on 13 counts set out in a superseding indictment that was filed in the United States District Court for the Eastern District of Virginia on 16 February 2012.<sup>1</sup> These counts allege conspiracy to commit racketeering (count 1); conspiracy to commit copyright infringement (count 2); conspiracy to commit money laundering (count 3); criminal copyright infringement by distributing a copyright work being prepared for commercial distribution on a computer network and aiding and abetting of criminal copyright infringement (count 4); criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement (counts 5 to 8); and fraud by wire and aiding and abetting fraud by wire (counts 9 to 13).

[3] The appellants have mounted a comprehensive and determined defence to extradition and this has been met with an equally determined response from the United States. The appellants filed a number of interlocutory applications in the District Court leading to appeals and applications for judicial review in the High Court and further appeals to the Court of Appeal and the Supreme Court. By the time the eligibility hearing commenced, nine judgments had been delivered by this Court on issues arising out of the extradition proceedings,<sup>2</sup> seven by the Court of

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<sup>1</sup> This indictment superseded the original indictment returned by the Federal Grand Jury on 5 January 2012.

<sup>2</sup> *Dotcom v United States of America* [2012] NZHC 75; *United States of America v Dotcom* [2012] NZHC 328; *Dotcom v Attorney-General* [2012] NZHC 1494; *United States of America v Dotcom* [2012] NZHC 2076; *Dotcom v Attorney-General* [2012] NZHC 3268; *Dotcom v Attorney-General* [2013] NZHC 1269; *Dotcom v Attorney-General* [2014] NZHC 1505; *Dotcom v United States of America* [2014] NZHC 2550; *Ortmann v District Court North Shore* [2015] NZHC 901.

Appeal<sup>3</sup> and two by the Supreme Court.<sup>4</sup> This does not take into account numerous judgments issued in related proceedings concerning the restraint and forfeiture of the appellants' assets. As a result of these interlocutory processes, the eligibility hearing in the District Court had to be rescheduled nine times before it finally commenced on 21 September 2015. That hearing took three months.

[4] In a judgment delivered on 23 December 2015 in the North Shore District Court, Judge Dawson found that the appellants were eligible for extradition pursuant to s 24 of the Extradition Act 1999 on all counts in the superseding indictment.<sup>5</sup> The appellants appeal against this judgment claiming that the Judge made errors of law in virtually every aspect of his eligibility finding. The United States also appeals against several aspects of the judgment.

[5] The appellants also appeal against the District Court's decision to dismiss three applications which they brought seeking a permanent stay of the extradition proceedings for alleged abuse of process.

[6] These are not general appeals. The appeals are brought pursuant to the former s 68 of the Extradition Act, prior to its amendment by s 413 of the Criminal Procedure Act 2011, and are restricted to questions of law. These questions of law are settled by the District Court.

[7] Additionally, the appellants apply for judicial review of the eligibility determinations and the District Court's decisions dismissing the stay applications. The appellants contend that each of these decisions was the product of procedural unfairness, breaches of natural justice, errors of law and unreasonableness. The appellants also argue that the decisions were tainted by bias and pre-determination.

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<sup>3</sup> *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139; *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213; *Attorney-General v Dotcom* [2013] NZCA 488; *Attorney-General v Dotcom* [2014] NZCA 19, [2014] 2 NZLR 629; *Attorney-General v Dotcom* [2014] NZCA 444; *Attorney-General v Dotcom* [2015] NZCA 309; *Ortmann v the District Court at North Shore* [2015] NZCA 443.

<sup>4</sup> *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 [Disclosure]; *Dotcom v Attorney-General* [2014] NZSC 199, [2014] 1 NZLR 745 [Warrants].

<sup>5</sup> *Ortmann v the United States of America* DC North Shore CRI-2012-092-001647, 23 December 2015.

[8] There is significant overlap between the case stated appeals brought by the appellants and their applications for judicial review. Every error of law relied on for the purposes of the judicial review proceeding is replicated in the case stated appeals. This is in accordance with a judgment given by Asher J in this proceeding on 24 March 2016 directing that all aspects of the District Court judgment, including the procedural rulings that led to it, should be dealt with in the context of the appeals, rather than separately by way of judicial review.<sup>6</sup> The only issue raised in the applications for judicial review that is not also dealt with in the case stated appeals is the allegation of bias and pre-determination. I will therefore deal with that issue separately, at the end.

[9] This judgment is unavoidably lengthy and has taken some time to prepare because the Court has been required to answer hundreds of questions of law that have been stated in the various appeals as well as consider the applications for judicial review.<sup>7</sup> The Court has received some 20,000 documents and hundreds of authorities and has had to consider over 3,000 pages of submissions.

[10] Because almost every aspect of the District Court judgment and the procedural steps that led to it are challenged, a basic understanding of the relevant procedural and factual history is needed to comprehend the many issues requiring determination. It is therefore necessary to start by briefly setting out some of the history.

## **Background**

### *The Mega companies*

[11] In 2005, Mr Dotcom developed a business under the name “Megaupload”. This business enabled users to upload files for storage in the cloud on one of the many servers leased by Megaupload. The user would be provided with a unique link to the file, known as a uniform resource locator. The user could then provide the link to others enabling them to access the file.

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<sup>6</sup> *Ortmann & Ors v United States of America* [2016] NZHC 522.

<sup>7</sup> Over 300 questions of law are raised in the case stated appeals.



[12] The business grew rapidly. By January 2012, Megaupload claimed to have over 60 million registered users. It was said to be the thirteenth most frequently visited site on the Internet attracting an average of 50 million visits daily and more than one billion visitors in total. At its peak, Megaupload was estimated to account for approximately four percent of all Internet traffic worldwide.

[13] Megaupload and Megavideo were the two most frequently visited websites in the Mega group. Users could upload videos to Megaupload and obtain a link which would provide access to it. A user could repeatedly upload the same video and obtain multiple links. The user could then choose to share these links with others, including through third party websites, enabling them to access the video using Megavideo. Megaupload was not responsible for these linking sites. Only the user could determine whether to make a link available to others. However, the United States contends that Megaupload encouraged this file sharing practice by offering financial rewards and incentives to users who uploaded files that attracted high numbers of views or downloads.

[14] Anyone gaining access to a file stored on Megaupload through a link would be limited to viewing approximately 72 minutes of content, which is less than the length of most motion pictures. The viewer was then prompted to subscribe to Megaupload as a “premium user” in order to continue watching. Premium users were also able to view Mega-hosted videos embedded on third party linking websites.

[15] Subscriptions from premium users provided the main source of revenue to the Mega group, estimated by the United States to be approximately USD 150 million. The other principal source of revenue was from online advertising shown prior to the commencement of each video. The United States contends that total advertising revenue exceeded USD 25 million.

[16] The companies in the Mega group were all registered in Hong Kong apart from one which was registered in New Zealand. In all, 220 staff members were employed in the operation, including 52 in New Zealand.

*The appellants*

[17] Mr Dotcom is the founder of Megaupload. He was initially the chief executive officer but later became the chief innovation officer. As the sole shareholder of Vestor Ltd, he indirectly held 68 per cent of the shares of Megaupload and all of the shares in Megavideo Ltd. Mr Dotcom was born in Germany and is a citizen of Germany and Finland. He first came to New Zealand in 2008 on a visitor's permit and was granted permanent residency in November 2010.

[18] Mr Ortmann was the chief technical officer and a director of Megaupload. A company controlled by him held a 25 per cent shareholding in Megaupload. Mr Ortmann is a German citizen and formerly lived in Germany and Hong Kong.

[19] Mr van der Kolk was the chief programmer and held 2.5 per cent of the shares in Megaupload through a company he controlled. Mr van der Kolk is a citizen of the Netherlands. He first came to New Zealand in 2009 and he was granted New Zealand residency in December 2011.

[20] Mr Batato, a German citizen, was employed by Megaupload in late 2007 as the chief marketing and sales officer.

*Indictment and seizure of assets*

[21] In March 2010, the Motion Picture Association of America made a complaint of criminal copyright infringement arising out of the operations of Megaupload, leading to a lengthy investigation by the Federal Bureau of Investigation.

[22] On 5 January 2012, the Grand Jury returned an initial indictment against the appellants. The United States Court immediately issued arrest warrants and made restraining orders in respect of all of the appellants' assets worldwide, including real and personal property in Hong Kong, New Zealand, Germany, the Netherlands and Australia. On 20 January 2012, the United States took control of the website domain name and database service of Megaupload and its associated websites, effectively terminating the entire operation. The websites were replaced with an anti-piracy warning issued by the United States Department of Justice in conjunction with the

Federal Bureau of Investigation and the National Intellectual Property Rights Coordination Centre.

*Arrest of the appellants*

[23] The extradition proceedings commenced in New Zealand on 18 January 2012 when the United States filed a without notice application in the District Court at North Shore and obtained provisional arrest warrants for the appellants under s 20 of the Extradition Act. The following day, search warrants were issued in respect of the properties of Messrs van der Kolk and Dotcom.

[24] The extradition proceedings had been planned over many months and included liaison between the Federal Bureau of Investigation and the New Zealand Police under the Mutual Assistance in Criminal Matters Act 1992. During the planning period, the Government Communications Security Bureau unlawfully intercepted private communications of Messrs van der Kolk and Dotcom. Mr Dotcom's Auckland residence was also subject to unlawful surveillance from 16 to 20 January 2012 using a video camera set up on an adjoining property and by a police officer who visited the property on 19 January 2012 wearing a hidden camera.

[25] Execution of the arrest and search warrant applications was timed to coincide with Mr Dotcom's birthday party to be held at his Auckland residence on 20 January 2012. It had been ascertained that Messrs Ortmann and Batato were planning to travel to New Zealand to attend this function which made it possible to execute the arrest and search warrants while the appellants were all in New Zealand.

[26] Early in the morning on 20 January 2012, Messrs Ortmann, Dotcom and Batato were arrested in the course of a military-style raid on Mr Dotcom's Auckland residence where Mr Dotcom was living with his wife, three young children and various staff members. The operation involved a large number of personnel, including members of the Special Tactics Group (a counter-terrorism unit) who were armed with automatic weapons. Police officers were deployed from two helicopters and others arrived in cars and vans.

[27] Mr van der Kolk, who was living in Auckland with his wife and young son, was awakened by three police officers at about 6.30 that same morning. After he was arrested, he was informed that his bank accounts had been frozen and an order had been made to seize their cars. Mr van der Kolk was also taken into custody.

[28] I mention these matters in this background section because they form part of the alleged misconduct relied on by the appellants in support of their applications for a permanent stay of the extradition proceedings for abuse of process.

### **Extradition Act 1999**

[29] The Extradition Act was enacted to enable New Zealand to carry out its obligations under extradition treaties entered into with other countries.

[30] The task of the extradition Court in determining eligibility for surrender is set out in s 24(2) of the Act which defines the circumstances in which a person will be eligible for surrender (subject to various qualifications set out elsewhere in s 24). Because it is central to the task of the extradition Court and this appeal, it is useful to set out the provision in full:

#### **24 Determination of eligibility for surrender**

- (1) Subject to section 23(4), if a person is brought before a court under this Part, the court must determine whether the person is eligible for surrender in relation to the offence or offences for which surrender is sought.
- (2) Subject to subsections (3) and (4), the person is eligible for surrender in relation to an extradition offence for which surrender is sought if –
  - (a) the supporting documents (as described in section 18(4)) in relation to the offence have been produced to the court; and
  - (b) if –
    - (i) this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions, or qualifications that require the production to the court of any other documents; or
    - (ii) the terms of an extradition treaty in force between New Zealand and the extradition country require the production to the court of any other documents –those documents have been produced to the court; and
  - (c) the court is satisfied that the offence is an extradition offence in relation to the extradition country; and

- (d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act, –
  - (i) in the case of a person accused of an extradition offence, justify the person’s trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
  - (ii) in the case of a person alleged to have been convicted of an extradition offence, prove that the person was so convicted.

[31] Proceedings to determine eligibility for surrender are conducted in the District Court in the same manner and exercising the same jurisdiction and powers as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand.<sup>8</sup>

[32] Sections 72 and 73 of the Act deal with appeals. It is worth setting out s 72 in full at this stage because it prescribes the powers of the High Court on an appeal on questions of law:

**72 Powers of court on appeal**

- (1) The High Court must hear and determine the question or questions of law arising on any case transmitted to it, and do 1 or more of the following things:
  - (a) reverse, confirm, or amend the determination in respect of which the case has been stated:
  - (b) remit the determination to the District Court for reconsideration together with the opinion of the High Court on the determination:
  - (c) remit the determination to the District Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard:
  - (d) make any other order in relation to the determination that it thinks fit.
- (2) In hearing and determining the question or questions of law arising on any case transmitted to it, the court –
  - (a) must not have regard to any evidence of a fact or opinion that was not before the District Court when it made the determination appealed against; and
  - (b) may in the same proceeding hear and determine any application for a writ of habeas corpus made in respect of the detention of the person whose surrender is sought.

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<sup>8</sup> Extradition Act 1999, s 22(1).

[33] Section 101B of the Act is also an important provision but it will be convenient to set out its terms later in this judgment.

### **The United States/New Zealand Treaty**

[34] The Treaty on extradition between New Zealand and the United States of America was the first extradition treaty to be negotiated by New Zealand and came into force on 8 December 1970. Article I contains the commitment by each contracting party to extradite to the other, subject to the terms of the Treaty, persons found in its territory who have been charged with or convicted of any of the offences mentioned in art II and committed within the territory of the other.

[35] Two offences in art II are relevant in this case, items 16 and 19:

#### Article II

Extradition shall be granted, in accordance with the provisions of this Agreement, in respect of the following offences:

16. Obtaining property, money or valuable securities by false pretences or by conspiracy to defraud the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.
19. Receiving and transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained.

[36] As will be discussed below, the Extradition Act was amended in 2002 by the insertion of s 101B which has the effect of deeming certain serious crimes with transnational aspects to be offences listed in any existing treaty. Some of these deemed offences are also relevant in this case.

### **Are the offences in the indictment extradition offences?**

#### *The proper approach*

[37] The primary role of the District Court in extradition proceedings is to determine whether the requested persons are eligible for surrender in relation to the offences for which surrender is sought. Assuming the relevant documents have been produced to the Court in terms of s 24(2)(a) and (b), the first step is to determine

whether the offence for which surrender is sought is an extradition offence in relation to the extradition country under s 24(2)(c). This is one of the key issues in this case.

[38] “Extradition offence” is defined in s 4 of the Act as meaning, in relation to an extradition country, an offence punishable under the law of the extradition country for which the maximum penalty is imprisonment for not less than 12 months, and which satisfies the following condition:

- (2) The condition referred to in subsection (1)(a) is that if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.

[39] However, where there is an extradition treaty, s 11 requires the provisions of the Act to be construed to give effect to the terms of the treaty. This does not apply to the provisions listed in s 11(2), which may not be overridden, but s 4 is not one of the listed provisions. The result is that where extradition offences are listed in a treaty, as is the case with the United States/New Zealand Treaty, the treaty definition prevails over s 4.

[40] This analysis was confirmed by the Court of Appeal in *United States of America v Cullinane*.<sup>9</sup> The Court held that, for the purposes of requests for extradition made by the United States, the definition of “extradition offence” in s 4 is replaced by art II of the United States/New Zealand Treaty:<sup>10</sup>

We consider that the test in art II of the United States/New Zealand treaty *replaces* the test set out in s 4, instead of merely being added to it (especially given the added “subject to” qualification in s 4 itself). The proper enquiry for a Court faced with an extradition request made by the United States is therefore whether the alleged conduct satisfies the requirements of the United States/New Zealand treaty.

[41] It follows that any offence listed in the United States/New Zealand Treaty is an extradition offence in relation to the United States, as the extradition country, for the purposes of s 24(2)(c) of the Act.

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<sup>9</sup> *United States of America v Cullinane* [2003] 2 NZLR 1 (CA).

<sup>10</sup> At [55].

[42] The Extradition Amendment Act 2002 inserted s 101B into the principal Act in response to the United Nations Convention against Transnational Organised Crime (UNTOC). As noted, s 101B of the Act has the effect of deeming various offences to be extradition offences under existing treaties with foreign countries that are party to UNTOC. This applies to the United States/New Zealand Treaty. The deemed offences include, by virtue of s 101B(1)(a), an offence against s 98A of the Crimes Act 1961 (participation in an organised criminal group) as well as any offences falling within s 101B(1)(c):

- (c) any offence against any enactment if –
  - (i) it is punishable by imprisonment by a term of 4 years or more; and
  - (ii) the offence for which extradition is requested is alleged to involve an organised criminal group (as defined in article 2(a) of the TOC convention); and
  - (iii) the person whose extradition is sought is, or is suspected of being, in or on his or her way to the requested country.

[43] In determining whether the offences in the indictment are extradition offences under s 24(2)(c), the Court must identify the essential factual allegations underpinning each count and consider whether the totality of these alleged acts or omissions comes within the description of an extradition offence for the purposes of the Treaty. In carrying out this exercise, the Court should not take a narrow view, focusing on the nomenclature or the constituent elements of the offence. Rather, the Treaty should be interpreted in accordance with cl 31(1) of the Vienna Convention on the Law of Treaties.<sup>11</sup> This provides:

- (1) ... a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[44] The Court of Appeal stated in *Edwards v United States of America* that it was “not appropriate to limit the terms of art II by tying them exclusively to the detail of national definitions”.<sup>12</sup> Keith J, who gave the judgment of the Court, explained the proper approach in these terms:<sup>13</sup>

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<sup>11</sup> At [67].

<sup>12</sup> *Edwards v United States of America* [2002] 3 NZLR 222 (CA) at [27].

<sup>13</sup> At [28].



[the Court's] task is not to reach a decision solely under the law of one particular jurisdiction. Rather, it is to determine whether the counts as charged do fall within the ordinary meaning of [the relevant items in art II] in their context and in the light of the Treaty's purpose and object. A primary purpose, emphasised for us by s 12(a) of the Act, must be to fulfil New Zealand's obligations under the Treaty. It is not however a matter of simply using dictionary definitions, which, in any event, differ and which must be affected by context. Part of the critical context is that the terms are commonly used for legal purposes, they have legal meanings, even if again those meanings may vary in detail, and the members of the delegations of the two countries who in 1970 prepared the list of property offences included in items 12 – 20 of art II would have been fully aware of that general legal usage.

[45] The Court also confirmed in *Cullinane* that it does not matter that the offence charged by the requesting State may contain additional elements beyond those implicit in an art II offence so long as the additional elements do not substantively change the nature of the conduct alleged.<sup>14</sup>

#### *The District Court judgment*

[46] The District Court judgment is divided into three parts. Part A contains an introductory section followed by a recitation of the evidence relied on by the United States to support a *prima facie* case for the purposes of s 24(2)(d) of the Act. Part B addresses the stay applications and Part C deals with eligibility for surrender.

[47] Despite receiving lengthy submissions from all parties directed to the first fundamental step required under s 24(2)(c) of the Act, the District Court gave little attention to it. After quoting s 24 in full at [11] of his judgment, the Judge focused almost exclusively on the second step under s 24(2)(d) of considering whether the evidence produced at the hearing would justify the requested person being committed for trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand. This approach reflects a misdirection at the outset of the judgment where the Judge summarised the Court's task when determining eligibility under s 24 of the Act but omitted reference to the requirement under s 24(2)(c):

[16] Section 24(1) of the Act requires this Court to determine whether each of the respondents is eligible for surrender. Section 24(2)(d)(i) says this Court will be satisfied if the conduct constituting the offence would justify

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<sup>14</sup> *United States of America v Cullinane*, above n 9 at [82].

the respondents' trial on the charges if the offence had occurred within the jurisdiction of New Zealand. ...

[48] The Judge then turned to consider the sufficiency of the evidence, being the enquiry under s 24(2)(d), without first examining whether there was an extradition offence in terms of s 24(2)(c). The Judge commenced by recording the counts in the superseding indictment, the essence of the United States' case as set out in the record of the case and supplements and then summarised the appellants' factual responses. The next 383 paragraphs in Part A of the judgment are almost entirely cut and pasted from volume 2 of the submissions made by the United States. These submissions were devoted to the topic of whether there was a *prima facie* case to satisfy the requirements of s 24(2)(d).

[49] The Judge briefly addressed the requirements under s 24(2)(c) of the Act in Part B of the judgment where he dealt with the stay applications. However, he incorrectly stated that the relevant enquiry under s 24(2)(c) is whether the offence is an extradition offence *in the United States*:<sup>15</sup>

[526] Under s 24 of the Act, the onus is upon the applicant to present to this Court a *prima facie* case to establish that the respondents are eligible for extradition. If a *prima facie* case is established, then under s 24(2) the person is eligible for surrender. This Court must be first satisfied:

- (1) the offence is an extradition offence *in the extradition country* (the USA).
- (2) the evidence would justify the person's trial if the conduct constituting the offence had occurred in the jurisdiction of New Zealand.

[Emphasis added].

[50] The Court is not required to determine whether an offence is an extradition offence *in the requesting State*. Rather, the question is whether the offence is an extradition offence *in relation to the requesting State*. In this case, this requires consideration of whether the conduct described in the indictment is covered by the offending listed in the United States/New Zealand Treaty or deemed to have been listed in it by virtue of s 101B of the Act.

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<sup>15</sup> The Judge did, however, correctly state the test at [435].

[51] Having incorrectly stated that under s 24(2)(c) the Court must be satisfied that the offence charged in the indictment is “an extradition offence in the extradition country (the USA)”, the Judge reasoned that the certificate provided under s 25 of the Act “established a prima facie case that the alleged offences are extradition offences in the USA”:

[527] ... This Court can be satisfied that an offence is an offence in the extradition country (USA) if a person described in [s 25(3A)] certified that “in his or her opinion the record of case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country”: s 25(3)(b). On the face of the documents the ROC and its supplements have been so certified pursuant to s 25(5), and on the face of it the applicant has established a prima facie case that the alleged offences are extradition offences in the USA.

[52] Section 25 is not relevant to the enquiry under s 24(2)(c). Section 25 stipulates the requirements of a record of the case that may be submitted by an exempted country such as the United States to satisfy the *prima facie* case test under s 24(2)(d):

**25 Record of case may be submitted by exempted country at hearing**

- (1) For the purposes of any determination under section 24(2)(d)(i), a record of the case may be submitted by or on behalf of an exempted country.
  - (2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain –
    - (a) a summary of the evidence acquired to support the request for the surrender of the person; and
    - (b) other relevant documents, including photographs and copies of documents.
  - (3) The record of the case is admissible as evidence if it is accompanied by –
    - (a) an affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person’s trial; and
    - (b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.
- (3A) A person referred to in subsection (3)(b) is –

- (a) The Attorney-General or principal law officer of the exempted country, or his or her deputy or delegate; or
  - (b) any other person who has, under the law of the exempted country, control over the decision to prosecute.
- (4) Nothing in this section –
- (a) prevents an exempted country from satisfying the test in section 24(2)(d)(i) in accordance with the provisions of this Act that are applicable to countries that are not exempted; or
  - (b) limits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender.
- (5) A court to which a certificate under subsection (3)(b) is produced must take judicial notice of the signature on it of a person described in subsection (3A).

[53] Given that the Judge considered that the requirement under s 24(2)(c) was satisfied by the certificate provided under s 25, it is unsurprising that he concluded that the principal purpose of the eligibility hearing was to see whether a *prima facie* case had been made out under s 24(2)(d):

[529] The principal purpose of this eligibility hearing is as set out in s 24(2)(d), to decide if the evidence in the ROC and supplements would justify the respondent's trial if the conduct constituting the offences had occurred in New Zealand's jurisdiction. ...

[54] This may explain why the Judge did not address the lengthy submissions he received on the s 24(2)(c) issue in relation to each of the counts in the superseding indictment. Instead, he focused on whether the evidence disclosed by the record of the case and the supplements disclosed a *prima facie* case. On the pivotal issue under s 24(2)(c), the Judge confined himself to the following brief observations on each of the 13 counts, but even then he appears to confuse the separate enquiries needed for the purposes of ss 24(2)(c) and 24(2)(d) by referring to the "evidence in the ROC":

- (a) Count 1 – conspiracy to commit racketeering – no finding.
- (b) Count 2 – conspiracy to commit copyright infringement:
  - (i) Conspiracy to defraud in terms of item 16 of art II of the treaty.

[544] Adopting a liberal interpretation of the Treaty, its purpose, and the rights and obligations of the parties, this Court finds that the counts *in the ROC* relating to copyright do come within the description of “conspiracy to defraud” in Art II.16 in the Treaty.

[Emphasis added].

- (ii) Accessing a computer system for a dishonest purpose in terms of s 249(1) and (2) of the Crimes Act.

[609] The alleged conduct in count 2 correlates with the offences in both s 249(1) and 249(2).

- (iii) Dishonestly using a document in terms of s 228(1)(b) of the Crimes Act.

[615] The respondents are therefore eligible for surrender under the Act under s 228(1)(b) due to the correlation of that section with the conduct alleged in count 2.

- (iv) Criminal liability for dealing with infringing objects in terms of s 131(1)(c) and (d)(ii) and (iii) of the Copyright Act.

[617] The *evidence in the ROC* supports the conduct alleged in count 2. The same alleged conduct translates to breaches of s 131(1)(c) and of s 131(1)(d)(ii) or (iii).

[618] For s 131(1)(c), *the evidence* supports:

- (1) The respondents possessed objects (digital files);
- (2) The objects included infringing files of a copyright work;
- (3) The respondents knew those objects were infringing copies of a copyright work;
- (4) They were possessed with a view to committing an act infringing the copyright;
- (5) They did not possess the objects pursuant to any copyright licence; and
- (6) They possessed the objects in the course of a business.

[619] For s 131(1)(d)(ii) or (iii) *there is evidence* that:

- (1) The respondents exhibited in public the objects (digital files) or distributed the objects;

- (2) The objects included infringing files of a copyright work;
- (3) The respondents knew those objects were infringing copies of a copyright work;
- (4) The respondents did so other than pursuant to a copyright licence; and
- (5) They did so in the course of a business.

[627] ... The conduct alleged in count 2 therefore translates to a deemed extradition offence under both s 131(1)(c) and s 131(d)(ii) or (iii).

[Emphasis added].

(c) Count 3 – conspiracy to commit money laundering – no finding.

(d) Counts 4 to 8 – criminal copyright infringement:

[641] As described in [588] to [589] above, this same analysis places the alleged offending as falling within art II.16 of the Treaty...

[643] It is alleged that each of counts 4 to 8 is a furtherance of the copyright conspiracy in count 2. The correlating offences are in the Crimes Act, s 249(1), s 249(2), s 228(b), and in the Copyright Act, s 131(1)(c) and 131(1)(d)(ii) or (iii), and s 137.

(e) Counts 9 to 13 – fraud by wire:

[671] Counts 9-13 allege conduct of fraud by wire, aiding and abetting fraud by wire. They relate to particular occasions when Mega email accounts were used to send messages to copyright owners that are alleged to be deceptive. The *evidence in the ROC* alleges a plan to deceive copyright owners by:

- (i) Encouraging them to believe that files would be removed from Mega servers when infringing content had been identified when, in reality, only the link specified by the copyright owner, and by which the infringing file was detected, was deleted.
- (ii) Encouraging them to believe that repeat infringers would have their user access terminated.
- (iii) Encouraging them to believe that the operation of the Abuse Tool would result in content or files being deleted, when in fact only specific links were removed by the Tool.
- (iv) Encouraging them to believe that Mega was taking active steps to curb or prevent copyright infringement.
- (v) Maintaining a façade of Mega's compliance with obligations imposed by copyright laws.

[672] The alleged conduct translates into a Treaty offence under Art II.16. It would amount to a joint enterprise to defraud

copyright owners by deceiving them into believing that the Mega business was taking active steps to prevent copyright infringement. Such deception would allow the respondents to continue to profit from the use of that copyright content. For essentially the same reasons the alleged specific acts of fraud are captured by s 249 and s 228(b) Crimes Act as set out in the earlier counts.

[Emphasis added].

[55] Because the Judge did not engage in any meaningful way with the extensive submissions he received on whether the essential conduct alleged in each count translates to an extradition offence (the critically important enquiry under s 24(2)(c)), it is necessary to undertake the exercise afresh for the purposes of answering the questions of law directed to this issue in the case stated appeals.

[56] Racketeering (count 1), money laundering (count 3), and the wire fraud charges (counts 9 to 13) depend on the predicate offending of criminal copyright infringement. It is therefore convenient to start with count 2 which alleges conspiracy to commit copyright infringement, and then address counts 4 to 8 which relate to specific instances of alleged copyright infringement. I will then turn to count 3, money laundering, and counts 9 to 13, wire fraud. Finally, I will deal with count 1, racketeering, an umbrella charge alleging a criminal enterprise formed for the purpose of committing criminal copyright infringement (covered by counts 2 and 4 to 8), money laundering (count 3) and wire fraud (counts 9 to 13).

*Count 2 – conspiracy to commit copyright infringement*

Appellants' submissions

[57] Mr Illingworth QC submits that it is necessary to examine the context in which the Treaty was negotiated in order to understand what was intended by the categories of offences listed in it. This context includes the legal meanings of terms and their general legal usage at that time. He argues that it is significant that the negotiators would not have been aware of any case decided prior to 1970 in the United States or in New Zealand in which a conspiracy to infringe copyright had been held to constitute a species of conspiracy to defraud.

[58] The two major international instruments dealing with copyright at the time the Treaty was negotiated were the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. The United States and New Zealand were parties to the Universal Copyright Convention at the time the Treaty was negotiated. Neither of these instruments required State parties to implement criminal sanctions for breach of copyright or treated breach of copyright as a type of fraud. Mr Illingworth submits that this is important context in considering whether the State parties can have intended that conspiracy to commit copyright infringement would be covered by the concept of conspiracy to defraud in art II.16 of the Treaty.

[59] I deal with Mr Illingworth's submissions relating to the other pathways relied on by the United States for count 2 separately below.

[60] Mr Mansfield submits that the United States/New Zealand Extradition Treaty must be interpreted in good faith in the light of its object and purpose in accordance with art 31(1) of the Vienna Convention on the Law of Treaties. He contends, based on the observations of Glazebrook J in *Cullinane*, that the object and purpose of art II of the Treaty is to limit the types of conduct in relation to which extradition may be ordered:<sup>16</sup>

“[t]he aim [behind Article II] was to ensure that extradition can only occur where certain threshold requirements regarding an accused's conduct are met.

[61] Mr Mansfield also emphasises the importance of the legislative context in determining the object and purpose of art II and interpreting its meaning. The Extradition Act 1965 was in force at the time the Treaty was negotiated in 1970. The First Schedule to that Act listed the offences that New Zealand treaty negotiators were permitted to include as extradition offences under an extradition treaty. Almost all of these offences were under the Crimes Act. The only exceptions were for specified offences under the Bankruptcy Act 1908 and the Dangerous Drugs Act 1927. Mr Mansfield points out that copyright infringement, which was then an offence under s 28 of the Copyright Act 1962 and only punishable by up to three months' imprisonment, was not on the list.

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<sup>16</sup> *United States of America v Cullinane*, above n 9 at [82].



[62] Copyright infringement was similarly not regarded as a serious offence in the United States at the time the Treaty was negotiated. Wilful infringement of a protected copyright for profit was a misdemeanour punishable by up to one year in jail and/or a fine of between \$100 and \$1,000.

[63] Mr Mansfield submits that it is clear that extradition would be available only for conduct constituting serious criminal offending. He argues that the State contracting parties cannot have intended that individuals could be extradited merely for allegedly infringing copyright because this was not a serious offence in either country at the time the Treaty was negotiated. He submits that this apparent intention of the Treaty partners should not be undermined by interpreting the concept of “conspiracy to defraud” in art II.16 as extending to cover copyright infringement.

[64] Mr Mansfield argues that this conclusion is reinforced if one considers the general legal usage of the term “conspiracy to defraud” in New Zealand and in the United States at the time the Treaty was entered into. At that time, copyright infringement had never been prosecuted as a conspiracy to defraud in New Zealand. Mr Mansfield referred to Davison CJ’s observation some 14 years later in *Busby v Thorn EMI Video Programmes Ltd*, recorded without disagreement by Cooke J on appeal, that:<sup>17</sup>

... he knew of no charge of conspiracy to defraud based on copyright infringement ever having been brought in New Zealand. ...

[65] Mr Mansfield contends that any such prosecution could only be brought under the Copyright Act and that conspiracy to defraud does not extend to copyright infringement. He submits, in reliance on Baragwanath J’s decision in *World TV Ltd v Best TV Ltd*, that the Copyright Act is a discrete legislative code for the enforcement of copyright:<sup>18</sup>

The purpose of the copyright legislation, to be inferred from the 181 pages of meticulously specific text contained in the statute book, is to provide a legislative code dealing exhaustively with the subject of copyright of which its enforcement is a vital component.

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<sup>17</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA) at 471.

<sup>18</sup> *World TV Ltd v Best TV Ltd* (2005) 11 TCLR 247 at [48].

[66] On that basis, Baragwanath J held that an unauthorised broadcast of a copyright protected work could not be characterised as “misleading or deceptive conduct” for the purposes of s 9 of the Fair Trading Act 1986 and was therefore not actionable under that Act.

[67] Mr Mansfield contends that the position was even clearer in the United States where copyright infringement could only be sanctioned within the bounds of the Copyright Act. He maintains that in the United States, copyright infringement cannot be re-characterised as a criminal fraud to subvert the careful balance of interests struck by Congress in the Copyright Act. He refers to *Dowling v United States* in which the United States Supreme Court held that mail order shipments of recordings of vocal performances by Elvis Presley in breach of copyright did not come within the reach of a penal statute prohibiting the interstate transportation of property taken by theft, conversion or fraud.<sup>19</sup> Blackmun J, who delivered the majority opinion of the Court, stated that:<sup>20</sup>

The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. ... the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple “goods, wares, [or] merchandise”, for the copyright holder’s dominion is subjected to precisely defined limits.

It follows that interference with copyright does not easily equate with theft, conversion, or fraud. ... The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose – “stolen, converted or taken by fraud” – to describe the sorts of goods whose interstate shipment § 2314 makes criminal. “And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable ‘understandings’.” *Williams v. United States*, 458 U.S., at 286, 102 S.Ct., at 3092.

[68] In summary, Mr Mansfield submits that conspiracy to defraud in art II.16 does not capture copyright infringement as this was plainly never intended.

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<sup>19</sup> *Dowling v United States* 473 US 207 (1985).  
<sup>20</sup> At 216-217.

[69] For similar reasons, Mr Mansfield argues that infringement of copyright is not within the reach of the other crimes against property relied on by the United States, notwithstanding that these may now found extradition offences if the other two elements of s 101B(1)(c) of the Extradition Act are satisfied. These crimes are dishonestly using a document (s 228 of the Crimes Act), obtaining by deception (s 240) and accessing a computer system for a dishonest purpose (s 249). Mr Mansfield submits that the scope of the protection that the law affords to copyright, which is conceptually different from other types of property, is determined by Parliament after it has carefully balanced competing interests and is detailed in the Copyright Act. In other words, he argues that any unlawful interference with copyright can only be sanctioned under the legislative code that created the right. He drew support for this proposition from Professor Nimmer's text on the law of copyright in the United States:<sup>21</sup>

The *Dowling* decision establishes that Congress has finely calibrated the reach of criminal liability [in the Copyright Act], and therefore absent clear indication of Congressional intent, the criminal laws of the United States do not reach copyright-related conduct. Thus copyright prosecutions should be limited to Section 506 of the Act, and other incidental statutes that explicitly refer to copyright and copyrighted works.

[70] Mr Mansfield contends that this conclusion is reinforced by s 225(4) of the New Zealand Copyright Act which provides:

Nothing in this Act affects any right of action or other remedy, whether civil or criminal, available otherwise than under this Act in respect of acts infringing any of the rights conferred by Part 4.

[71] Part 4 of the Act concerns "moral rights" and includes the right not to have a work falsely represented or subjected to derogatory treatment. Section 225(4) would not have been necessary if civil or criminal sanctions outside of the Copyright Act were generally available for breaches of rights conferred under the Act. Mr Mansfield submits that this demonstrates Parliament's intention that rights created outside Part 4 of the Act can only be enforced by the civil and criminal sanctions provided in the Act.

[72] Since the Treaty was signed, certain types of copyright infringement have become regarded as serious criminal offending, punishable by more than four years'

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<sup>21</sup> *Nimmer on Copyright*, § 15.05 at 15-20 (1993).

imprisonment in New Zealand under s 131 of the Copyright Act. These offences are therefore deemed to be extradition offences under the Treaty by virtue of s 101B(1)(c) of the Extradition Act if the other conditions in that section are met. Mr Mansfield submits that the question of whether the alleged conduct falls within s 131 of the Copyright Act had it occurred in New Zealand, is determinative of whether it amounts to an extradition offence.

[73] Mr Mansfield carefully traced the legislative history to support his overall submission that copyright infringement, as alleged in the indictment, is a breach of the communication right in New Zealand created under s 16(1)(f) of the Copyright Act 1994. He submits that this right can only be enforced in New Zealand through civil remedies under s 33 of the Copyright Act, not by criminal sanction under s 131. He argues that Parliament's clear intention not to treat such copyright infringement as a criminal offence, let alone a serious criminal offence for which extradition could be granted, must be respected.

[74] Mr Mansfield also relies on the safe harbour provisions in Part 3 of the Copyright Act, ss 92B and 92C, which shield Internet service providers from liability in circumstances where a user of the service infringes copyright. He submits that these provisions show that Parliament did not intend that Internet services providers could face criminal sanction merely by providing such services. He contends that Megaupload falls into this category. Mr Mansfield argues that these provisions not only support his submission that art II.16 of the Treaty does not capture the alleged offending but also demonstrate that Parliament did not intend that the Crimes Act provisions relied on by the United States would reach this conduct.

[75] Mr Bioletti supported these submissions. He focused particularly on analysing the guidance provided by the Court of Appeal in *Cullinane*.

[76] In summary, the appellants submit that the conduct described in the indictment relating to count 2 does not qualify as an extradition offence. They submit that the same analysis applies equally to counts 4 to 8.

First pathway – art II.16

[77] The starting point is to determine whether the essence of the conduct constituting the offence charged in Count 2 falls within the ordinary meaning of the offence described in art II.16. Although the Court looks at the totality of the alleged acts or omissions in making the assessment, the focus remains on the substance of the offence charged, as was confirmed by the United States Supreme Court in *Factor v Laubenheimer*:<sup>22</sup>

No reason is suggested or apparent why the solemn and unconditional engagement to surrender a fugitive charged with the named offense of which petitioner is accused should admit of any inquiry as to the criminal quality of the act charged at the place of asylum *beyond that necessary to make certain that the offense charged is one named in the treaty.*

[Emphasis added].

[78] The Quebec Court of Appeal emphasised the importance of comparing the conduct with which the fugitive is charged with the relevant extradition offence in *United States of America v Manno* and in *United States of America v Tavormina*.<sup>23</sup> These cases arose under the Canadian Extradition Act 1985 which required the Court to determine whether the offence with which the fugitive was charged was an extradition offence, similar to the Court's function in New Zealand under s 24(2)(c) of the Act.<sup>24</sup> In *Manno*, the Court said:<sup>25</sup>

At the outset, the extradition judge must refer himself to the foreign arrest warrant in order to identify the conduct with which the fugitive is charged and thereby establish the limits of his jurisdiction. In the very great majority of cases, this examination will result in the identification of an identical or equivalent Canadian crime, given the similarities between Canadian and American criminal law. However, it must be understood that this identification is the result of a prior intellectual operation which consists of making the correspondence between the conduct with which the fugitive is charged in the wording of the foreign indictment and the prohibitions set out in Canadian legislation.

[79] In *Tavormina*, the Court explained:<sup>26</sup>

I do not believe that the double-criminality rule permits an extradition judge to base his decision on evidence of certain conduct and to order the fugitive

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<sup>22</sup> *Factor v Laubenheimer* 290 US 276 (1933).

<sup>23</sup> *United States of America v Manno* (1996) 112 C.C.C. (3d) 544; *United States of America v Tavormina* (1996) 112 C.C.C. (3d) 563.

<sup>24</sup> This changed under later legislation.

<sup>25</sup> At 555.

<sup>26</sup> At 569-570.

committed for surrender to the foreign state when this evidence has nothing to do with the conduct charged in the accusation for which his extradition is sought.

In other words, although specific facts can, on occasion, indirectly support other charges, one must keep in mind that they must be analyzed having regard to the conduct alleged in the accusation. The link or connection of relevance is essential. If one were to charge an accused with participating in a robbery, the evidence which indicates that, at the time of his arrest, he was in possession of counterfeit money is far from relevant. Although this evidence may establish the commission of a crime under Canadian law, it has no connection with the charge which weighs against him in the foreign state and for which his extradition is sought. It would be unfair, even illogical, to use such evidence to order the committal of a fugitive for a specific crime knowing quite well that the evidence on this crime is non-existent and that he will be discharged on this charge after being deprived of his liberty for an undetermined period of time. The role of the extradition judge is exactly that, to protect the fugitive against this kind of injustice.

It is necessary therefore to make a distinction between the facts which generate the conduct charged in the accusation and the circumstances surrounding the commission of the act charged.

[80] Count 2 in the superseding indictment charges the appellants with conspiracy to commit copyright infringement. In particular, the appellants are jointly charged with others of conspiring to:

- (1) willfully infringe, for purposes of commercial advantage and private financial gain, at least ten copies and phonorecords of one or more copyrighted works with a total retail value of more than \$2,500 within a 180-day period, in violation of ...; and
- (2) willfully infringe, for purposes of commercial advantage and private financial gain, a copyright by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, when the defendants knew and should have known that the work was intended for commercial distribution, in violation of ...

[81] In his affidavit filed in support of the request for extradition, Jay Prabhu, assistant United States attorney and chief of the Cybercrime Unit, explained that the United States must establish three essential elements for count 2:

- (1) the conspiracy, agreement, or understanding, as described in the Superseding Indictment, was formed, reached, or entered into by two or more persons;
- (2) at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and, with that knowledge, then deliberately joined the conspiracy, agreement, or understanding; and
- (3) at some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly

performed one of the overt acts as charged in the Superseding Indictment and did so in order to further or advance the purpose of the agreement.

[82] The overt acts alleged include:

- (a) in the 180-day period ending 19 January 2012, the appellants and other members of the conspiracy infringed copyright by reproducing and distributing by electronic means at least 10 copies and phonorecords of one or more copyrighted works with a total retail value of more than \$2,500 for the purposes of commercial advantage and private financial gain; and
- (b) infringed copyright in various motion pictures by making them available on publicly accessible Internet-connected servers and reproducing and distributing the works over the Internet without authorisation.

[83] I now consider whether this alleged conduct (constituting the essence of the offence charged in count 2) corresponds to the offence described in the Treaty even though art II.16 does not specifically refer to copyright infringement or conspiracy to commit copyright infringement. I start from first principles and then consider the authorities.

[84] Unlike the single word descriptions considered in *Edwards*, “larceny” and “embezzlement”, there is no difficulty interpreting art II.16 of the Treaty. The wording of the provision is familiar and its meaning is clear. It closely followed the wording of s 257 of the Crimes Act at that time:

**257. Conspiracy to defraud** – Every one is liable to imprisonment for a term not exceeding five years who conspires with any other person by deceit or falsehood or other fraudulent means to defraud the public, or any person ascertained or unascertained, or to affect the public market price of stocks, funds, shares, merchandise, or anything else publicly sold, whether the deceit or falsehood or other fraudulent means would or would not amount to a false pretence as hereinbefore defined.

[85] Similar wording was used in other jurisdictions to capture this offence which merely codified the common law concept of conspiracy to defraud. The nature of

the offence and its broad application were well understood. Such offending could occur in a potentially limitless variety of circumstances encompassing the entire spectrum of dishonest means. The object of the conspiracy need not be criminal; a conspiracy to commit a civil wrong would suffice.<sup>27</sup> I can see no reason in principle why a conspiracy to defraud could not include a conspiracy to obtain money by dishonestly infringing copyright to the detriment of the copyright holders. While art II.16 does not mention copyright infringement or conspiracy to commit copyright infringement in those terms, equally it does not specify any of the other myriad of ways in which offenders could conspire to defraud the public or any person.

[86] Whether or not the State delegates who negotiated the Treaty specifically had in mind that art II.16 could extend to include a conspiracy to defraud by breaching copyright is beside the point. They must be taken to have intended that all conduct coming within this description would be covered, irrespective of whether they specifically envisaged every conceivable fraudulent means or every class of person capable of being defrauded.

[87] This analysis is supported by a number of authorities, both before and after the Treaty was signed, which confirm that a conspiracy to commit copyright infringement is a form of conspiracy to defraud.

[88] The leading text on criminal law in New Zealand at the time the Treaty was signed was the 1964 edition of Adams, *Criminal Law and Practice in New Zealand*.<sup>28</sup> The commentary on s 257 of the Crimes Act in that edition cited the 1906 English case of *R v Willetts* as authority for the proposition that a conspiracy to obtain profits by infringing copyright constitutes a conspiracy to defraud under s 257.<sup>29</sup>

A conspiracy to make pirated music for sale, and so obtain profits out of that music to which the conspirators have no right, is indictable as a conspiracy to deprive the owner of the copyright of his property: *Willetts* 70 J.P. 127.

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<sup>27</sup> *R v Warburton* (1870) LR 1 CCR 274; *R v Orman* (1880) 14 Cox 381; *R v Weaver* (1931) 45 CLR 321.

<sup>28</sup> Francis Adams (ed) *Criminal Law and Practice in New Zealand* (Sweet & Maxwell, Wellington, 1964).

<sup>29</sup> At 409.



[89] In *Willetts*, the defendants had combined to print and sell sheets of copyright music for the purposes of profit. The Court held that although infringement of copyright was not a criminal offence, if two or more people worked together to sell pirated music for the purpose of obtaining profits to which they had no right, this was a conspiracy to deprive the copyright owner of his property and was indictable as a conspiracy to defraud.

[90] In 1973, not long after the Treaty was signed, a Mr Scott was convicted in England on a charge of conspiracy to defraud copyright owners by unlawfully copying and distributing films protected by copyright. This conviction was unanimously confirmed on appeal by the House of Lords in *Scott v Metropolitan Police Commissioner*.<sup>30</sup>

[91] Counsel for Mr Scott argued that the Copyright Act 1956 (UK) was a code dealing exhaustively with copyright and its enforcement and that the common law offence of conspiracy to defraud did not cover a conspiracy to contravene a provision of the Copyright Act. The argument, which is the same as the appellants' advance in this case, was summarised in this way:<sup>31</sup>

The relevant provisions of the Copyright Act 1956, are sections 13, 17, 18, 21, 46(5) and 48. These sections support the proposition that the provisions of the copyright law envisage that remedies, both civil and criminal, are contained within a single code. Parliament has by section 21 of the Act given all the remedies that can be obtained under the criminal law. Piracy of intellectual property is fully protected by statutory civil and criminal remedies.

[92] This argument was given short shrift by the House of Lords. Viscount Dilhorne summarised the submission and disposed of it as follows:<sup>32</sup>

[Counsel] also contended that a charge of the common law offence of conspiracy to defraud would not lie in respect of a conspiracy to commit a summary offence created by statute. The man who had conspired to contravene the provisions of section 21(1)(a) of the Copyright Act 1956 could not, he submitted, be convicted of conspiracy to defraud.

The answer to this last submission is to be found in section 33 of the Interpretation Act 1889 which enacts:

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<sup>30</sup> *Scott v Metropolitan Police Commissioner* [1975] AC 819 (HL).

<sup>31</sup> At 824.

<sup>32</sup> At 835.

“Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence”.

[93] Section 33 of the Interpretation Act was in materially the same terms as s 10 of the New Zealand Crimes Act indicating that the same conclusion should be reached in New Zealand:

**10 Offence under more than 1 enactment**

- (1) Where an act or omission constitutes an offence under this Act and under any other Act, the offender may be prosecuted and punished either under this Act or under that other Act.
- (2) Where an act or omission constitutes an offence under 2 or more Acts other than this Act, the offender may be prosecuted and punished under any one of those Acts.
- (3) Where an act or omission constitutes an offence under 2 or more provisions of this Act or any other Act, the offender may be prosecuted and punished under any one of those provisions.
- (4) No one is liable to be punished twice in respect of the same offence.

[94] In 1982, the House of Lords confirmed in *Rank Film Distributors Ltd v Video Information Centre* that persons who conspire to copy and distribute master tapes in breach of copyright are vulnerable to prosecution for conspiracy to defraud.<sup>33</sup> The plaintiffs in that case were the owners of copyright in films. The defendants were alleged to have infringed copyright by making copies of the films and selling them. The plaintiffs obtained *Anton Piller* orders enabling them to search the defendants’ premises. They also obtained orders requiring the defendants to answer interrogatories relating to the supply and sale of the infringing copies. The issue before the House of Lords was whether the defendants were entitled to rely on the privilege against self-incrimination because there was a real risk that criminal proceedings for conspiracy to defraud could be taken against them. Not only did the House of Lords unanimously agree that the defendants were at risk of being prosecuted for conspiracy to defraud, Lord Wilberforce considered that this was “an appropriate and exact description” of what had occurred:<sup>34</sup>

However, it is only too clear (and I deliberately use the language of reluctance) that supply of the information and production of the documents

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<sup>33</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.

<sup>34</sup> At 441.

sought would tend to expose the respondents to a charge of conspiracy to defraud. In the very nature of this activity, a number of persons are certain to be involved in it – in printing the master tapes, copying from the master tapes, seeking and accepting orders, and distributing the illicit copies. A charge of conspiracy to defraud, so far from being, as it sometimes is, a contrived addition to other charges, is here an appropriate and exact description of what is being done. So far from it being contrived, fanciful, or imagined, it is the charge on which Mr. Dawson, who appears on the existing evidence to be closely connected with Mr. Lee and Ms. Gomberg, is to stand trial. It cannot be said that charges under this head would be nothing but charges under section 21 of the Act of 1956 under another name. An essential ingredient in them is dishonesty, which may exist in cases brought under section 21, but which may not. The much heavier penalties also make it more likely that charges would be brought of conspiracy to defraud. Unless some escape can be devised from this conclusion, the privilege must inevitably attach.

[95] This analysis was adopted by our Court of Appeal two years later in *Busby v Thorn EMI Video Programmes Ltd*, another case concerning alleged breaches of copyright in films.<sup>35</sup> *Anton Piller* orders had been made enabling the plaintiffs to search the defendant's premises and requiring the defendant to provide evidence relating to the alleged infringement. Cooke J considered that there was "every possibility" that the defendant could be prosecuted for conspiracy to defraud under s 257 of the Crimes Act:<sup>36</sup>

The statements of claim make only incidental references to conspiracy, but the very nature of the defendants' operations means that a number of other persons must be involved. There seems to be every possibility in each case of a common purpose extending to defrauding, not the public, but "any person ascertained or unascertained" (that is to say, the copyright owners) within the meaning of s 257 of the Crimes Act 1961.

Somers J agreed with this:<sup>37</sup>

I am of opinion that the facts so far disclosed in the instant cases suggest that each defendant may have been involved in a criminal conspiracy to defraud the plaintiff copyright owners.

So too did Bisson J:<sup>38</sup>

The possibility of the respondents having committed the crimes of conspiracy to infringe copyright and conspiracy to defraud is apparent.

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<sup>35</sup> *Busby v Thorn EMI Video Programmes Ltd*, above n 17.

<sup>36</sup> At 471.

<sup>37</sup> At 480.

<sup>38</sup> At 487.

[96] The suggestion that contraventions of the Copyright Act can only be prosecuted under that Act and not under the Crimes Act, was firmly rejected by the Court of Appeal in the more recent case of *Power Beat International Ltd v Attorney-General*.<sup>39</sup> That case involved an appeal from a judgment dismissing a claim for damages arising out of the execution of a search warrant which the appellant claimed was invalid. The issue was whether the registrar who issued the search warrant could have formed the view that there were reasonable grounds to believe that an offence punishable by imprisonment had been committed in circumstances where a computer programme had been unlawfully copied allegedly in breach of s 131(1)(c) of the Copyright Act and the former s 266A of the Crimes Act (reproducing a document with intent to defraud). In dismissing the appeal, the Court had no difficulty concluding that although the underlying conduct involved copyright infringement, a prosecution under s 266A of the Crimes Act was available.<sup>40</sup>

In this case the police have thought it appropriate to bring a criminal prosecution and the question for the Court is whether the copying of the CD-ROM onto other computers was a reproduction in the sense described in s 266A(1)(b). We have no doubt that it was...

We conclude, therefore, that s 266A(1)(b) is applicable and that the affidavit in support of the application for the warrant sufficiently discloses facts to support the view there were reasonable grounds for believing that there had been a commission of an offence under that provision.

[97] The practice in the United Kingdom of prosecuting serious cases of copyright infringement under general criminal law provisions was acknowledged by the Court of Appeal for England and Wales in *R v Zinga*.<sup>41</sup> In that case, the Court considered whether a private prosecutor could pursue confiscation proceedings under the Proceeds of Crime Act 2002. Virgin Media Ltd, a company that supplied telephone, broadband and television services by cable to customers in the United Kingdom, had successfully pursued a private prosecution for conspiracy to defraud against Mr Zinga and his associates who had provided hardware and software to consumers enabling them to access these services without payment to Virgin. The Court of Appeal noted that commercial organisations such as the Federation Against Copyright Theft (principally the visual media) and the British Music Industry regularly undertake private prosecutions in England and Wales for criminal misuse

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<sup>39</sup> *Power Beat International Ltd v Attorney-General* [2000] 2 NZLR 288 (CA).

<sup>40</sup> At [27].

<sup>41</sup> *R v Zinga* [2014] 1 WLR 2228.

of intellectual property rights. The Court regarded it as inevitable that the number of such prosecutions would increase.<sup>42</sup>

[98] Finally, it is worth noting that the learned authors of the 2016 edition of *Copinger and Skone James on Copyright* confirm that a conspiracy to commit copyright infringement is indictable as a conspiracy to defraud:<sup>43</sup>

**Conspiracy to defraud.** The offences constituted by an agreement, by two or more, by dishonesty to deprive a person of something which is his, or to which he is or would be or might be entitled; or an agreement by two or more by dishonesty to injure some proprietary right of that person. Such rights include copyright, and no doubt also design right and the rights in a performance. It is permissible to charge a person with conspiracy to defraud even though the conspiracy alleged was also a conspiracy to commit a substantive offence. However, conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason not to do so.

[99] It is therefore well-established that conspiracy to commit copyright infringement can be prosecuted as a conspiracy to defraud in the United Kingdom. This has been the case for over 100 years. The copyright legislation in the United Kingdom has never been seen as the only means of recourse or as a bar to such prosecutions being brought under general criminal fraud provisions in serious cases of copyright infringement. The House of Lords specifically confirmed in *Scott and Rank* that such prosecutions were not precluded by the Copyright Act 1956 (UK).

[100] This remains the position following the enactment of the Copyright, Designs and Patents Act 1988 (UK) despite s 171(4) of that Act being in materially the same terms as s 225(4) of the New Zealand Copyright Act:

**171 Rights and privileges under other enactments or the common law.**

- (4) Nothing in this Part affects any right of action or other remedy, whether civil or criminal, available otherwise than under this Part in respect of acts infringing any of the rights conferred by Chapter IV (moral rights).

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<sup>42</sup> At [57].

<sup>43</sup> G Davies, N Caddick and G Harbottle (Eds) *Copinger and Skone James on Copyright* (Sweet & Maxwell, London 2016) vol 1 at 22-50.

[101] New Zealand's copyright legislation has always been modelled on that of the United Kingdom, as Gault J observed when giving the judgment of the Supreme Court in *Tiny Intelligence v Resort Ltd*.<sup>44</sup>

Historically, at least since 1913, New Zealand's copyright statutes generally have followed those of England. That is understandable since copyright has wide international significance with International Conventions directed to recognition and uniformity. As the Explanatory Note to the Copyright Bill introduced in 1994 states, it was largely based on the 1988 UK Act.

[102] No reason has been suggested why a conspiracy to commit copyright infringement can be prosecuted as a conspiracy to defraud in the United Kingdom but not in New Zealand under the former s 257 of the Crimes Act or its successor provisions. Given that our Copyright Act is modelled on the Copyright, Designs and Patents Act, this would be anomalous. The Court of Appeal's decision in *Busby* provides strong support for the conclusion that a conspiracy to commit copyright infringement is a form of conspiracy to defraud under the former s 257 of the Crimes Act and would therefore fall within art II.16 of the Treaty.

[103] However, despite the House of Lords' rejection of the same argument in *Scott*, the appellants submit that the Copyright Act is a code that deals exhaustively with copyright and its enforcement. They argue that Parliament deliberately decided not to create any offence in s 131 of the Copyright Act for communicating a copyright protected work to the public. They say that this is the nature of the copyright infringement alleged in count 2 and that, in New Zealand, the only means of enforcing such a breach is by the copyright owner pursuing civil remedies created under the Act. The appellants submit that it would be wrong in principle and contrary to Parliament's intention to treat the same activity as constituting serious criminal offending under any of the Crimes Act provisions relied on by the United States, the former s 257 or any of the current provisions, ss 228, 240 or 249.

[104] The appellants commence their analysis by referring to Baragwanath J's observation in *World TV Ltd v Best TV Ltd* that the Copyright Act is a legislative code dealing exhaustively with copyright and its enforcement.<sup>45</sup> That case concerned allegedly unauthorised re-broadcast by the defendant, of programmes

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<sup>44</sup> *Tiny Intelligence v Resort Ltd* [2009] NZSC 35, [2009] 2 NZLR 581 at [26].

<sup>45</sup> *World TV Ltd v Best TV Ltd*, above n 18.

from a television channel (CCTV 1) operated by a Chinese state broadcaster. The plaintiff, which had been licensed by the broadcaster to broadcast from a different channel (CCTV 4), brought proceedings against the defendant alleging misleading and deceptive conduct under s 9 of the Fair Trading Act 1986. In dismissing this claim, Baragwanath J stated:<sup>46</sup>

The general language of the New Zealand fair trading legislation must equally be construed so as to conform with and not override the legislative copyright code. It is the Court's task on construction to ensure that both measures receive due effect. If the defendant were to present the CCTV 1 programme in a manner that *added* to the mere rebroadcasting of the CCTV 1 programme a suggestion that it did so with authority, that could in my opinion both infringe and be actionable under s 9 of the Fair Trading Act; there would be no clash with the Copyright Act which could still receive full effect. There would be no problem of inconsistency between policies of the law any more than if a defamatory broadcast resulted in consequential proceedings. But merely to rebroadcast, without more, material for which the owner of the copyright elects not to sue cannot in my opinion be the subject of a Fair Trading Act claim. The scheme of the Copyright Act includes freedom to publish copyright material unless the owner (or at interlocutory stage an exclusive licensee) elects to sue for breach of copyright. It would be inconsistent with that policy to treat conduct that in point of fact goes no further than mere copyright infringement as being in law actionable under the Fair Trading Act by a third party who being neither owner nor exclusive licensee lacks standing to sue for breach of copyright.

[105] Although this case arose in a civil context, the appellants contend that the underlying principle applies equally here and the Crimes Act provisions cannot apply to specific types of copyright infringement that Parliament has chosen not to criminalise under the Copyright Act.

[106] I consider that the appellants seek to place more weight on this case than it is capable of bearing. As Baragwanath J specifically stated, the Court's task was to ensure that both legislative measures, the Copyright Act and the Fair Trading Act, received due effect. There can be no quarrel with that. The learned Judge held that broadcasting in breach of the copyright owner's rights was not, without more, misleading or deceptive conduct in terms of s 9 of the Fair Trading Act; it would only be actionable by the copyright owner. However, if the broadcasting was coupled with a misrepresentation that it was authorised by the copyright owner, that could be actionable under the Fair Trading Act by the party who was in fact

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<sup>46</sup> At [54].

authorised to broadcast the programme. With respect, this reasoning is entirely conventional.

[107] However, in my view, it is drawing a long bow to interpret this case as authority for the proposition that a serious case of conspiracy to commit copyright infringement could never be prosecuted as a conspiracy to defraud under the Crimes Act. On the contrary, Baragwanath J affirmed the basic principle that the Court's task is to ensure that both measures receive due effect. This must include s 10 of the Crimes Act which expressly confirms Parliament's intention that where an act or omission constitutes an offence under that Act and under any other Act, the offender may be prosecuted under either Act. There is nothing in the Copyright Act to exclude the operation of s 10. Nor is there anything to indicate that Parliament intended the Copyright Act to be a code precluding reliance on Crimes Act provisions to prosecute serious cases involving conspiracy to commit copyright infringement.

[108] As noted, the appellants also place significant reliance on the United States Supreme Court's decision in *Dowling*. The issue in that case was whether the interstate transportation of bootleg phonorecords manufactured and distributed without the consent of the copyright owners of the musical compositions recorded on them was an infringement of a provision in the National Stolen Property Act which imposed criminal penalties on any person who "transports ... interstate ... any goods, wares or merchandise ... knowing the same to have been stolen, converted or taken by fraud". The majority held that this penal provision only applied to cases where the physical "goods, wares or merchandise" have themselves been "stolen, converted or taken by fraud". This required a physical identity between the items unlawfully obtained and those eventually transported. Having found that the statute did not specifically reach the conduct in question, the majority considered whether Congress had evinced a clear intention to criminalise such conduct. After examining the legislative history, they concluded that this was not the case:<sup>47</sup>

Nevertheless, the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime

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<sup>47</sup> *Dowling v United States*, above n 19, at 228-229.



and prescribe penalties. Here, the language of § 2314 does not “plainly and unmistakably” cover petitioner Dowling’s conduct, *United States v. Lacker*, 134 U.S. 624, 628, 10 S.Ct. 625, 33 L.Ed. 1080 (1890); the purpose of the provision to fill gaps in state law enforcement does not couch the problem under attack; and the rationale employed to apply the statute to petitioner’s conduct would support its extension to significant bodies of law that Congress gave no indication it intended to touch. In sum, Congress has not spoken with the requisite clarity. Invoking the “time-honoured interpretive guideline” that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,”... we reverse the judgment of the Court of Appeals.

[109] In a dissenting opinion, with which the Chief Justice and White J joined, Powell J stated:<sup>48</sup>

The difficulty the Court finds with the application of § 2314 here is in finding a theft, conversion or fraudulent taking, in light of the intangible nature of a copyright. But this difficulty, it seems to me, has more to do with its views on the relative evil of copyright infringement versus other kinds of thievery, than it does with interpretation of the statutory language.

The statutory terms at issue here, *i.e.*, “stolen, converted or taken by fraud,” traditionally have been given broad scope by the courts. ...

Dowling’s unauthorized duplication and commercial exploitation of the copyrighted performances were intended to gain for himself the rights and benefits lawfully reserved to the copyright owner. Under *Turley, supra*, his acts should be viewed as the theft of these performances. Likewise, Dowling’s acts constitute the unauthorized use of another’s property and are fairly cognizable as conversion under the Court’s definition in *Morissette*.

The Court invokes the familiar rule that a criminal statute is to be construed narrowly. This rule is intended to assure fair warning to the public ... and is applied when statutory language is ambiguous or inadequate to put persons on notice of what the legislature has made a crime. ... I disagree not with these principles, but with their application to this statute. As I read § 2314, it is not ambiguous, but simply very broad. ... The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.

[110] *Dowling* is an illustration of the principle that where a criminal statute is ambiguous, a narrow interpretation favourable to the defendant should be preferred. However, as I read it, the case is not authority for the proposition that there is no room for general penal provisions to apply in cases involving copyright infringement. On the contrary, related convictions sustained in the Court of Appeals for conspiracy to transport stolen property and mail fraud stemming from the same copyright infringing activity were not challenged.

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<sup>48</sup> At 231.

[111] The Copyright Act is but one of many statutes containing offence provisions where it can equally be said that Parliament has carefully calibrated the consequences of infringement. Another example is the Fisheries legislation. A Full Court of the Court of Appeal in *R v Walters* had no difficulty rejecting the argument for the appellants that a conspiracy to obtain paua for the purposes of sale contrary to the Fisheries Act 1983 could not be prosecuted as a conspiracy to defraud.<sup>49</sup> Cooke P, who delivered the judgment of the Court, stated that there was nothing in the Fisheries Act to exclude the applicability of ss 257, 229A (the predecessor of s 228 discussed below), or 310 of the Crimes Act.<sup>50</sup>

To conspire to evade the Fisheries Act by obtaining ordinary paua for the purposes of sale otherwise than in accordance with the Fisheries Act may amount to a conspiracy to act by fraudulent means and clearly did so on the facts found in this case. The circumstance that the obtaining amounted to a series of offences against s 97 of the Fisheries Act does not prevent its being fraudulent means within s 257. There is no sound reason for limiting the words of s 257 in that way. Nor does the circumstance that the same conspiracy could be charged under s 310 affect the scope of s 257. So too there is nothing in s 97 of the Fisheries Act to exclude the applicability of s 229A of the Crimes Act.

[112] For all these reasons, I conclude that a conspiracy to commit copyright infringement is a form of conspiracy to defraud that can be prosecuted under appropriate provisions in the Crimes Act, subject to the appellants' argument concerning the effect of the safe harbour provisions in the Copyright Act.

[113] Section 92B of the Copyright Act relevantly provides:

**92B Internet service provider liability if user infringes copyright**

- (1) This section applies if a person (A) infringes the copyright in a work by using 1 or more of the Internet services of an Internet service provider to do a restricted act without the consent of the copyright owner.
- (2) Merely because A uses the Internet services of the Internet service provider in infringing the copyright, the Internet service provider, without more,—
  - (a) does not infringe the copyright in the work:
  - (b) must not be taken to have authorised A's infringement of copyright in the work:

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<sup>49</sup> *R v Walters* [1993] 1 NZLR 533 (CA).  
<sup>50</sup> At 537.

- (c) subject to subsection (3), must not be subject to any civil remedy or criminal sanction.<sup>51</sup>

[114] Section 92C is also important. It relevantly reads:

**92C Internet service provider liability for storing infringing material**

- (a) This section applies if—
  - (a) an Internet service provider stores material provided by a user of the service; and
  - (b) the material infringes copyright in a work (other than as a result of any modification by the Internet service provider).
- (2) The Internet service provider does not infringe copyright in the work by storing the material unless—
  - (i) the Internet service provider—
  - (ii) knows or has reason to believe that the material infringes copyright in the work; and
  - (iii) does not, as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it;

[115] The purpose of these provisions is to give certainty to Internet service providers and protect them from the liability they would otherwise be exposed to arising out of the acts of users of their services.

[116] Mr Mansfield submits that s 92B is a clear statement of Parliamentary intent that an Internet service provider, acting as such, is absolutely shielded from criminal liability. He contends that Megaupload remained within those boundaries and accordingly the alleged conspiracy to commit copyright infringement cannot qualify as an extradition offence under the Treaty (or under the Crimes Act provisions relied on by the United States).

[117] Mr Mansfield submits that the District Court Judge erred in his interpretation of the words “without more” in s 92B, in particular by construing those words with reference to the exceptions specified in s 92C. He contends that these provisions are discrete regimes dealing with “different scenarios”, s 92C being concerned solely with storage and s 92B being aimed at the “provision of facilities” by an Internet service provider that enable a user to infringe copyright. He relies on s 40 of the

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<sup>51</sup> Subsection (3) makes clear that the right of the copyright owner to obtain injunctive relief remains.

Copyright Act for his contention that these provisions must be construed independently of each other:

**40 Provisions to be construed independently**

The provisions of this Part are to be construed independently of one another so that the fact that an act is not permitted by one provision does not mean that it is not permitted by another provision.

[118] Mr Mansfield submits that applying a purposive approach to the interpretation of s 92B compels the conclusion that this section was intended to create business certainty for Internet service providers and remove all fear of them facing criminal liability for the acts of their users so long as they remain within the defined parameters of an Internet service provider under s 2 of the Copyright Act.

[119] Mr Mansfield submits that Megaupload did not cross the “without more” protection line in s 92B because it was “content neutral”, did not initiate the transmission of infringing material, select the receiver of any such transmission or modify any of the information contained in any such transmission.

[120] For these reasons, Mr Mansfield submits that Megaupload is entitled to protection under s 92B even if it ultimately failed to qualify for protection under s 92C, for example if it was found to be insufficiently diligent in actioning takedown requests from copyright owners. In that event, he acknowledges that Megaupload could be exposed to civil liability for failing to achieve protection under s 92C but submits that it would still be exempt from criminal liability because of the protection it would nevertheless be entitled to under s 92B.

[121] I do not accept these submissions. On the United States’ case, Megaupload’s operation was predominantly designed to profit from copyright protected works by encouraging and facilitating the mass uploading and downloading of such works and blocking copyright owners’ efforts to prevent this. While all of this is vehemently denied, I cannot accept that Parliament can have intended that Megaupload would nevertheless qualify for the “without more” immunity under s 92B if it is established. There is no justification for reading down the plain meaning of the words “without more” in the manner suggested.

[122] Moreover, Mr Mansfield's submission that ss 92B and 92C are discrete regimes requires an unjustifiably narrow reading of s 92B(1):

**92B Internet service provider liability if user infringes copyright**

- (1) This section applies if a person (A) infringes the copyright in a work by using 1 or more of the Internet services of an Internet service provider to do a restricted act without the consent of the copyright owner.

[123] This makes clear that s 92B covers all services that may be provided by an Internet service provider, including storage. "Internet service provider" is defined in s 2 as follows:

**Internet service provider** means a person who does either or both of the following things:

- (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing;
- (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user.

[124] The reference in s 92B to "1 or more of the Internet services of an Internet service provider" must be interpreted as including any or all of these services. Accordingly, s 92B also applies in the narrower circumstances covered by s 92C. This exposes the flaw in Mr Mansfield's analysis. The services covered by s 92B include storage services dealt with in s 92C. These sections are not discrete regimes; they overlap.

[125] Moreover, if Megaupload qualifies for the protection conferred by s 92B even if it failed to do so under s 92C, then it would not be vulnerable to civil or criminal sanction because of the express wording of s 92B(2): "must not be subject to *any civil remedy* or criminal sanction". Such an interpretation would deprive s 92C of any effect.

[126] For these reasons, I do not consider that the safe harbour provisions in the Copyright Act assist the appellants' argument that the alleged conduct could not come within art II.16 of the Treaty (or any of the Crimes Act provisions relied on by the United States).

[127] I now consider whether the conduct charged in Count 2 does correlate to conspiracy to defraud as described in art II.16 of the Treaty.

[128] Count 2 alleges a conspiracy, the object of which was to obtain “commercial advantage and private financial gain”. The superseding indictment alleges that each of the appellants obtained money from their participation in the conspiracy. This satisfies the first element of the offending described in art II.16 – obtaining money.

[129] Count 2 further alleges that the money was obtained pursuant to a conspiracy, agreement or understanding between the appellants and others to infringe copyright. As the authorities discussed below demonstrate, this satisfies the other element of the offending described in art II.16 – the money was obtained *by conspiracy to defraud any person by deceit or falsehood or other fraudulent means*.

[130] In *Scott*, the House of Lords held that it was not necessary to prove that the copyright holders were deceived and that dishonest deprivation of something to which the copyright holders may have been entitled was sufficient. Viscount Dilhorne, with whom Lords Reid, Diplock, Simon and Kilbrandon agreed, stated:<sup>52</sup>

One must not confuse the object of a conspiracy with the means by which it is intended to be carried out. In the light of the cases to which I have referred, I have come to the conclusion that Mr Blom-Cooper’s main contention must be rejected. I have not the temerity to attempt an exhaustive definition of the meaning of “defraud”. As I have said, words take colour from the context in which they are used, but the words “fraudulently” and “defraud” must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, “fraudulently” means “dishonestly”, then “to defraud” ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.

And later:<sup>53</sup>

... it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.

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<sup>52</sup> At 839.

<sup>53</sup> At 840.

Lord Diplock added:<sup>54</sup>

Where the intended victim of a “conspiracy to defraud” is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.

[131] In *R v Olan*, the Supreme Court of Canada considered the meaning of “other fraudulent means” in s 338 of the Criminal Code which made it a crime to defraud the public or any person of any property, money or valuable security by deceit, falsehood, or *other fraudulent means*.<sup>55</sup> The Supreme Court held that “other fraudulent means” encompasses “all other means which can properly be stigmatized as dishonest”.<sup>56</sup> As to the meaning of “defraud”, the Court observed:<sup>57</sup>

Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of “defraud” but one may safely say, upon the authorities, that two elements are essential, “dishonesty” and “deprivation”. To succeed, the Crown must establish dishonest deprivation.

[132] Wilful infringement of copyright can properly be characterised as a dishonest act. Such infringement deprives the copyright holder of something to which it may be entitled. The allegation in count 2 is that the money was obtained through participation in the alleged conspiracy “to defraud any person” (adopting Lord Diplock’s formulation, to cause the copyright holders economic loss by depriving them of something to which they may be entitled) “by fraudulent means” (by intentionally infringing copyright). The conduct alleged in count 2 therefore constitutes the offence of conspiracy to defraud in terms of art II.16.

[133] Because I have concluded, in agreement with the District Court, that the essential conduct charged in count 2 amounts to conspiracy to defraud in terms of art II.16 of the Treaty and is therefore an extradition offence, it is not strictly necessary for me to consider the alternative extradition pathways relied on by the United States. However, because all parties have assured me that an appeal is

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<sup>54</sup> At 841.

<sup>55</sup> *R v Olan* [1978] 2 SCR 1175.

<sup>56</sup> At 1180.

<sup>57</sup> At 1182.

inevitable on every aspect of this judgment regardless of what I decide, I proceed to do so.

Second pathway – s 228 Crimes Act

[134] Assuming I am correct that a conspiracy to commit copyright infringement was an offence under the former s 257 of the Crimes Act, one would expect that it would now be an offence under one or other of the sections that replaced it, including ss 228, 249 and 310.

[135] Prior to the amendment in November 2015, s 228 of the Crimes Act read:

**228 Dishonestly taking or using a document**

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration, –

- (a) dishonestly and without claim of right, takes or obtains any document; or
- (b) dishonestly and without claim of right, uses or attempts to use any document.

[136] Ms Gordon QC submits that count 2 correlates to an offence under s 228 of the Crimes Act in that the appellants dishonestly, without claim of right and with intent to obtain a pecuniary advantage, used or attempted to use a document, namely a digital file that infringed copyright. She submits that the object of the conspiracy alleged in count 2 was to obtain popular digital files and to generate income by hosting and distributing these in breach of copyright. She contends that this amounts to dishonestly using documents for pecuniary advantage in breach of s 228.

[137] “Document” is defined in s 217 of the Crimes Act:

**Interpretation**

In this Part, unless the context otherwise requires,—

**document** means a document, or part of a document, in any form; and includes, without limitation,—

- (a) any paper or other material used for writing or printing that is marked with matter capable of being read; or
- (b) any photograph, or any photographic negative, plate, slide, film, or microfilm, or any photostatic negative; or



- (c) any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded, stored (whether temporarily or permanently), or embodied so as to be capable, with or without the aid of some other equipment, of being reproduced; or
- (d) any material by means of which information is supplied, whether directly or by means of any equipment, to any device used for recording or storing or processing information; or
- (e) any material derived, whether directly or by means of any equipment, from information recorded or stored or processed by any device used for recording or storing or processing information.

[138] In *Dixon v R*, the Supreme Court expressed no hesitation in concluding that any material held in electronic form on a computer falls within the definition of “document” in s 217.<sup>58</sup> The digital files recording films and other copyright protected works alleged to have been used by the appellants (by hosting and distributing them to members of the public) are therefore documents for the purposes of s 228 of the Crimes Act.

[139] Mr Illingworth’s first submission is that the conduct constituting count 2 does not involve an allegation that the appellants acted dishonestly or without claim of right. I disagree.

[140] Section 217 of the Act defines “dishonestly”:

**dishonestly**, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.

[141] Contrary to Mr Illingworth’s submission, an essential element of the conduct constituting the offence charged in count 2 does involve an allegation of dishonesty, namely wilful infringement of copyright. If proved, this would be an act done without a belief that there was express or implied consent to, or authority for, the act from a person entitled to give such consent or authority (the copyright owner).

[142] Mr Illingworth’s next submission is that the allegation in count 2 that the conspiracy involved wilful infringement of at least 10 copies and phonorecords of one or more copyrighted works with a retail value of more than \$2,500 within a 180-day period are not requirements of offending under s 228. He argues that these

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<sup>58</sup> *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 at [31].

exacerbating features substantively change the nature of the conduct alleged. I am unable to accept this submission. I agree that these features are superfluous for the purposes of an offence under s 228. However, they do not change the nature of the alleged offending and would be regarded simply as aggravating features of it.

[143] Mr Illingworth further submits that s 228 cannot provide an available extradition pathway because it does not mention copyright infringement. For the same reasons given in relation to art II.16, it does not matter that a copyright protected digital file is not singled out in s 228 as a particular form of document capable of being dishonestly taken, obtained or used.

[144] Next, Mr Illingworth submits that a cloud storage company like Megaupload does not use a computer file; it merely provides a storage facility which the client uses to store the file. However, the conduct alleged in count 2 distinguishes Megaupload from a cloud storage company that acts purely as a cyber-locker. The essence of the conduct charged in count 2 is that Megaupload's business was based on making use of popular copyright infringing material stored on its servers to generate subscription and advertising revenue. In any event, "use" is not an essential element of offending under s 228. Section 228(a) makes it an offence to "obtain" any document for the purpose of pecuniary advantage. "Obtain" is defined in s 217 of the Crimes Act to include "retain". This is what the appellants are alleged to have conspired to do in count 2.

[145] The conduct charged in count 2 is alleged to have been undertaken for pecuniary gain satisfying that element of s 228.

[146] For these reasons, I conclude that the conduct alleged in count 2 is covered by s 228 of the Crimes Act and is deemed to have been included in the Treaty as an extradition offence provided the requirements of s 101B(1)(c) are met. For convenience, I set this subsection out again:

- (c) any offence against any enactment if –
  - (i) it is punishable by imprisonment by a term of 4 years or more; and

- (ii) the offence for which extradition is requested is alleged to involve an organised criminal group (as defined in article 2(a) of the TOC convention); and
- (iii) the person whose extradition is sought is, or is suspected of being, in or on his or her way to the requested country.

[147] There is no dispute that the requirements under s 101B(1)(c)(i) and (iii) are satisfied: s 228 of the Crimes Act is an offence punishable by a term of imprisonment of seven years; and the appellants are in New Zealand. The issue is whether (ii) is also satisfied.

[148] An “organised criminal group” is defined in UNTOC to mean:

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

[149] “Serious crime” is defined in UNTOC to mean:

conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

[150] Combining these definitions, s 101B(1)(c)(ii) has the following elements:

- (a) a structured group;
- (b) of three or more persons;
- (c) existing for a period of time;
- (d) acting in concert;
- (e) with the aim of committing;
  - (i) offences established in accordance with UNTOC; or
  - (ii) a serious crime, being conduct constituting an offence punishable by imprisonment of four years or more;

- (f) in order to obtain a financial or material benefit (directly or indirectly).

[151] The elements in (a) to (d) and (f) are clearly satisfied. No issue is taken with those. Mr Illingworth submits that the “serious crime” referred to in (e)(ii) must be construed as a reference to a crime punishable in the requesting State by a maximum penalty of four years or more. Taken together with the requirement in s 101B(1)(c)(i), he argues that this imports a double criminality requirement that the offence must be punishable by at least four years’ imprisonment in both the requesting State and the requested State. Mr Illingworth acknowledges that the elements referred to (a) to (f) need only be alleged. However, he says that without access to United States legal expertise because of funding issues arising out of the assets forfeiture order made in the United States, he is unable to assist the Court on whether the conduct alleged in count 2 is punishable under United States law by imprisonment of four years or more.

[152] Ms Gordon submits that s 101B does not require double criminality to be proved. She argues that the four year imprisonment threshold referred to in UNTOC has been met by Parliament under s 101B(1)(c)(i). She contends that Parliament cannot have intended that this aspect would have to be addressed again under subsection (c)(ii). In other words, the “serious crime” requirement in UNTOC (offending punishable by at least four years’ imprisonment) is met by subsection (c)(i), and subsection (c)(ii) is intended to incorporate the other features of an “organised criminal group” as defined in UNTOC.

[153] For the reasons that follow, I accept Mr Illingworth’s submission that s 101B(1)(c)(ii) imports all elements of the definition of an “organised criminal group” as set out in article 2(a) of UNTOC. While the “offence against any enactment” referred to in s 101B(c)(i) refers to an offence against a New Zealand statute or under New Zealand regulations, s 101B(c)(ii) directs attention to the “offence for which extradition is requested”, meaning the offence alleged in the United States. That offence must allegedly involve an organised criminal group as defined in UNTOC. It must therefore be alleged that the group acted in concert with the aim of committing one or more serious crimes, being conduct constituting an

offence punishable by at least four years' imprisonment. In my view, this means an offence punishable by at least four years' imprisonment in the United States.

[154] This interpretation is supported by the relevant provisions in the UNTOC Convention. Section 101B was enacted in accordance with New Zealand's obligations as a party to UNTOC and accordingly the Convention provides important context in considering its proper interpretation. Article 1 of the Convention records that its purpose is to promote cooperation to prevent and combat transnational organised crime more effectively. Article 3 defines the scope of the Convention as follows:

Article 3. Scope of application

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

- (a) The offences established in accordance with articles 5, 6, 8 and 23 of the Convention;<sup>59</sup> and
- (b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

[155] Article 16 deals with extradition. The State Parties agree that each of the offences covered under art 16 will be deemed to be included as extradition offences under any existing treaty between them. This applies to the United States/New Zealand Extradition Treaty:

Article 16. Extradition

1. This article shall apply to the offences covered by this Convention *or* in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, *provided that that offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

[Emphasis added]

...

3. Each of the offences to which this article applies shall be deemed to be included as an extradition offence in any extradition treaty existing between State Parties.

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<sup>59</sup> Article 5 relates to organised criminal groups, art 6 concerns money laundering, art 8 deals with corruption and art 23 relates to obstruction of justice.

[156] Paragraph 1 of art 16 deals with two categories of offences. These are separated by the word “or” in the first line. First, it applies to all offences covered by the Convention, being those meeting the description in art 3, including that the offences be transnational in nature. Second, it applies to the offences referred to in paragraphs 1 (a) and (b) of art 3 where these involve an organised criminal group without any additional requirement that they be transnational in nature. However, for offences falling in this second category, the offence for which extradition is sought must be punishable under the domestic law of both the requesting and the requested State Parties. This is an express double criminality requirement.

[157] Section 101B exceeds the minimum requirements established by art 16. Section 101B(1)(a) has the effect of incorporating in all existing extradition treaties the UNTOC offences established in accordance with arts, 5, 6, 8 and 23:

- (a) every offence against any of sections 98A, 98C, 98D, 100, 101, 102, 103, 104, 105, 116, 117 and 243 of the Crimes Act 1961.

[158] Section 98A of the Crimes Act deals with participation in an organised criminal group and corresponds to the offence established by art 5 of UNTOC. Section 243 deals with money laundering and corresponds to art 6. Sections 100 to 105 all deal with corruption, corresponding to art 8. Sections 116 and 117 concern conspiring to defeat justice and corrupting juries and witnesses and correspond to art 23. These offences are deemed to be included in the Treaty without more; there is no requirement for double criminality or that the offence is transnational in nature or that it involves an organised criminal group (with the exception of s 98A).

[159] Section 101B(1)(c) gives effect to the requirement to include the second category of offences referred to in paragraph 1 of art 16 of UNTOC. Consistent with the double criminality requirement referred to in this part of art 16, s 101B(1)(c)(ii) picks up all aspects of the definition of an “organised criminal group” in art 2(a) of UNTOC, including that the aim of the group was to commit a “serious crime” (the offence for which extradition is requested).

[160] However, as Mr Illingworth accepts, the requirements of s 101B(1)(c)(ii) need only be alleged. Section 18(4) of the Act requires that any request for extradition must be accompanied by specified supporting documents. These include

a written deposition setting out a description of, and the penalty applicable in respect of, the offence and the conduct constituting the offence. Mr Prabhu states in his affidavit that the offence of copyright infringement charged in count 2 carries a maximum penalty of five years' imprisonment in the United States. On that basis, I consider that the requirements of s 101B(1)(c) are satisfied and that s 228 of the Crimes Act provides an available extradition pathway.

Third pathway – s 249 of the Crimes Act

[161] Section 249 of the Crimes Act reads:

**249 Accessing computer system for dishonest purpose**

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right, –
  - (a) obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) causes loss to any other person.
- (2) Every one is liable to imprisonment for a term not exceeding 5 years who, directly or indirectly, accesses any computer system with intent, dishonestly or by deception, and without claim of right, –
  - (a) to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) to cause loss to any other person.
- (3) In this section, deception has the same meaning as in section 240(2).

[162] Section 248 of the Crimes Act defines “access” in this context as follows:

**access**, in relation to any computer system, means instruct, communicate with, store data in, receive data from, or otherwise make use of any of the resources of the computer system.

[163] Ms Gordon submits that the conduct alleged in count 2 satisfies the elements of a conspiracy to commit an offence under s 249 of the Crimes Act. This is because the object of the conspiracy alleged in count 2 was the wilful infringement of copyright (a dishonest purpose) through Megaupload and associated sites (access of a computer system) for financial gain (to obtain a pecuniary advantage, benefit or valuable consideration).

[164] Mr Illingworth submits that the essential conduct constituting the offence charged under count 2 does not correlate to an offence under s 249. First, he submits that dishonesty is not alleged in count 2 and is not an ingredient of the conduct constituting the United States offence. Second, he submits that count 2 does not require proof that the alleged wilful infringement of copyright was carried out by any of the appellants “accessing” a computer system. Rather, he contends that the appellants merely provided a computer facility that could be used either for lawful or unlawful purposes by others. He argues that any relevant “accessing” was the conduct of the users who uploaded the infringing work onto the Megaupload storage system, not the host, Megaupload. Even if Megaupload rewarded increased traffic, Mr Illingworth contends that it was not “accessing” a computer system by doing so.

[165] For the same reasons given when discussing s 228 above, the conduct constituting the offence in count 2 does involve an allegation of dishonesty, namely wilful infringement of copyright.

[166] I also reject the submission that the conduct alleged in count 2 does not involve “accessing” a computer system. On the contrary, the alleged conduct fits comfortably within this definition. It involved accessing a computer system in that the data (the copyright infringing file) was *received* from the uploader onto Megaupload’s computer system, *stored* in that system and made available to others to access using the link provided by Megaupload *using* the computer system. All of this involved making use of the resources of the Megaupload computer system.

[167] It is alleged in count 2 that this “accessing” of the Megaupload computer system was done for the purposes of financial gain. This satisfies the causal nexus required between the accessing of the computer system and “thereby” obtaining the benefit. This is the essence of the conspiracy alleged in count 2 and correlates to an offence under s 249 of the Crimes Act.

[168] The maximum penalty for an offence under s 249 is seven years’ imprisonment under subsection (1) (where the benefit is obtained) or otherwise five years’ imprisonment under subsection (2). The same analysis as for s 228 of the Crimes Act applies for the purposes of the requirements under s 101B(1)(c). I



conclude, in agreement with the District Court, that s 249 provides a further available extradition pathway for count 2.

Fourth pathway – s 131 of the Copyright Act

[169] The specific parts of s 131 of the Copyright Act relied on are:

**131 Criminal liability for making or dealing with infringing objects**

(1) Every person commits an offence against this section who, other than pursuant to a copyright licence,—

...

(c) possesses in the course of a business with a view to committing any act infringing the copyright; or

(d) in the course of a business,—

...

(ii) exhibits in public; or

(iii) distributes; or

...

an object that is, and that the person knows is, an infringing copy of a copyright work.

[170] The key words are “possesses”, “exhibits in public”, “distributes” and “an object”. These terms are not defined in the Act. Their meaning must be determined in the context of the Act as a whole and in the light of the legislative purpose.

[171] The relevant context includes the World Intellectual Property Organisation (WIPO) Copyright Treaty 1996. New Zealand is a long-standing member of WIPO. Although it has not yet ratified this Treaty, it took an active part in the negotiations which led to it. One of the aims of the Treaty was to address the impact of developing information and communication technologies on the creation and use of literary and artistic works. As Robert Clark explains, problems had been identified in applying existing terminology in the digital environment.<sup>60</sup>

Before the adoption of the WIPO Treaty, online dissemination (to use a legally neutral word) of copyright works created conceptual difficulties for judges as definitions and terms of art that were apt earlier in the previous century do not make sense in a digital environment. The reproduction of a

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<sup>60</sup> Robert Clark “Sharing out Online Liability” in Alain Strowel (ed) *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Publishing Limited, 2009).

work, the publication of a work, the distribution of a work, and the broadcasting of a work are the four cornerstones of liability, but their late 20<sup>th</sup> century relevance was problematical.

[172] Dr Mihály Ficsor, the assistant director-general of WIPO at the time, recalls that there was considerable debate over which right should apply to online transmission of copyright-protected works:<sup>61</sup>

... one of the thorniest issues addressed during the preparatory work of [the Treaty] was the question of what right or rights should be applied for interactive, on-demand transmissions in digital networks. The main candidates were the right of distribution and the right of communication to the public.

[173] Because no agreement could be reached on which of these rights should apply, an “umbrella solution” was adopted. This enabled contracting States to choose the right of communication to the public, the right of distribution, or a combination of these rights to fulfil their obligations under art 8 of the Treaty which provided for authors of works to have exclusive rights to authorise any communication to the public of their works, including by wireless means:

#### **Article 8**

##### **Right of Communication to the Public**

... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them ...

[174] This right compares with the right of distribution in art 6 of the Treaty:

#### **Article 6**

##### **Right of Distribution**

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

...

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<sup>61</sup> Mihály Ficsor *The Law of Copyright and the Internet: The 1996 WIPO Treaties their Interpretation and Implementation* (Oxford University Press, 2002).

[175] Dr Ficsor observes that the traditional concepts of distribution and communication to the public would require clarification by contracting parties when enacting legislation to give effect to the Treaty:<sup>62</sup>

As far as the concept of distribution is concerned, in many countries, it closely relates to the transfer of property and/or possession of tangible copies. Thus, if the right of distribution was to be applied, it had to be accepted and clarified that distribution through reproduction through transmission – that is, making available copies by making such copies, through transmission of electronic signals, in the receiving computers and/or in the terminals linked to them – is also covered by the concept of distribution.

[176] The Treaty recognises the important distinction between dissemination by the transfer of possession of a physical embodiment of a protected work (distribution under art 6) and dissemination through electronic transmission (communication under art 8). To that end, the agreed statement regarding art 6 in the Treaty makes clear that the references to “originals” and “copies” refer solely to tangible objects:

**Agreed statements concerning Articles 6 and 7:** As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

[177] The learned authors of *The WIPO Treaties on Copyright* observe that the right of communication to the public under art 8, coupled with the agreed statement concerning art 6, makes clear that the right of distribution under art 6 does not extend to online communication of a protected work:<sup>63</sup>

The right of making available has been conceived as an element of the author’s broader right of communication to the public. This concept excludes the possibility of applying the right of **distribution** under Article 6 WCT (and thus Article 6(2) WCT on the exhaustion of this right) or the right of **rental** under Article 7 WCT to any form of online or other communication. This fact has been clarified by the agreed statement concerning Articles 6 and 7 WCT, according to which those rights only cover the putting into circulation of tangible objects. In the situation covered by Articles 6 and 7 WCT, a copy is handed over to the receiver without remaining at the same time in the hands of the initial owner. It stays in tangible form throughout this entire act. In contrast, where a work is made available under Article 8 WCT, it is put into circulation in **non-**

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<sup>62</sup> Mihály Ficsor “The ‘Making Available’ Right and the Right of Communication to the Public: the Relative Freedom of Legal Characterization of Acts Covered by Copyright” in Daniel Gervais (ed) *Collective Management of Copyright and Related Rights* (Kluwer Law International, 2006).

<sup>63</sup> Jörg Reinbothe and Silke von Lewinski *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT and the BTAP* (2nd edition Oxford University Press, 2015) at 134-135.

**tangible form** rather than as a copy or tangible object, and a new copy is created at the receiver's end, while the initial copy on the server from where it is made available remains there.

The fact that the making available right has been conceived as an element of the right of communication to the public under the WCT does not, however, prevent Contracting Parties from **implementing** this right under **national law** by a different right. This understanding, as expressed by the US in Main Committee I of the Diplomatic Conference, was silently accepted by the other delegations. It is regularly referred to as the 'umbrella solution'.

[Emphasis in original].

[178] The United States implemented the 'making available' right through the distribution right utilising the umbrella solution. Consistent with the approach envisaged by the Treaty and adopted by most other countries, New Zealand dealt with the issue by expanding the existing communication right and making it technology-neutral. This was achieved by the enactment of the Copyright (New Technologies) Amendment Act 2008 following the Digital Copyright Review, an extensive review conducted by the Ministry of Economic Development that commenced in 2001.

[179] The Explanatory Note to the Copyright (New Technologies and Performers' Rights) Amendment Bill 2008 recorded that one of the intended outcomes was to expand the existing communication right to cover online communication of copyright protected works:

The Bill gives effect to the Government's decisions to –

...

amend existing rights to broadcast or include a work in a cable programme service in order to provide a technology-neutral right of communication to the public and extend copyright protection to a technology neutral category of communication works.

...

### **Communication**

It is clear that, in a digital world of almost instantaneous communication, the ability to control communication of copyright works is as significant as the ability to control copying. Control over communication is necessary to encourage investment in, and provision of, the efficient online distribution methods demanded by consumers. The Act provides copyright owners with technology-specific rights to broadcast a work or include a work in a cable programme service. While the definitions of these rights are relatively broad, it is not clear that they cover all aspects of communication and making available of works, particularly as technology continues to develop.

The Bill, therefore, amends the Act by creating a technology-neutral right of communication to the public.

[180] Section 16(1)(f) of the Copyright Act was substituted, on 31 October 2008, by s 12 of the Copyright (New Technologies) Amendment Act 2008. This section now provides for an exclusive communication right that is technology neutral:

**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:

...

(f) to communicate the work to the public:

[181] Prior to the amendment, the communication right applied only to transmission of protected works by cable or broadcast. Infringement gave rise to civil remedies but was not a criminal offence.

[182] Section 29 provides that copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act. The restricted acts are set out in ss 30 to 34 and include, under s 33, communicating a copyright work to the public. Online communication of copyright works to the public now constitutes an infringement and is actionable at the suit of the copyright holder. However, the offence provisions in s 131 of the Act were not amended in any material respect and no new offence was created for infringement of the communication right through the online transmission or dissemination of copyright works. The offences in s 131 which include, in the course of a business, offering for sale or hire, exhibiting in public or distributing, still relate to “an object”. The only amendment to s 131 as a result of the Copyright (New Technologies) Amendment Act 2008 was to subsection (4) but this provision is not relied on by the United States.

[183] It seems clear that Parliament made a deliberate choice not to amend s 131 so as to provide criminal sanction for infringement of the communication right through making copyright works available to the public online despite submissions from industry participants urging it to do so. Microsoft Corporation made a submission to

this effect in response to the Position Paper issued by the Ministry of Economic Development in July 2002:<sup>64</sup>

Microsoft supports MED's proposal for a technology-neutral right of communication covering both the transmission and the making available of works, in place of the existing technology-specific right to broadcast a work or include it in a cable programme service. Microsoft submits that section 131 of the Copyright Act should be amended to ensure that the unauthorized communication or making available of works can be a criminal offence, in the same way as other forms of piracy.

...

However, having accepted that there should be a right of communicating works and making works available, it is important that MED takes the step of ensuring that the right is afforded the protection of criminal penalties as well as civil sanctions.

The current criminal offences in section 131 of the Copyright Act relate specifically to dealings in infringing "objects". The unauthorized communication (or making available) of copyright owner's works in an online environment would not in itself appear to be a criminal offence under section 131 in its current form.

Microsoft submits that to provide commercially equal protection to copyright owners in the digital environment, section 131 should be amended to provide that it is an offence for a person to: "communicate or make available a work, other than pursuant to a copyright licence, if that person knows that the communication or making available of the work is an infringement of copyright".

[184] Motion Picture Association – International made a similar submission on the Bill in February 2007 stating that "For legal certainty, it is imperative that section 131 be amended to expressly make unauthorised communicating to the public a criminal offence parallel [to the] proposed section 33 establishing civil liability".<sup>65</sup>

[185] It is noteworthy that, despite our copyright legislation being based on the Copyright, Designs and Patents Act, New Zealand departed from the approach taken in the United Kingdom in choosing not to create a criminal offence for a breach of the communication right. In the United Kingdom, s 107 of the Copyright, Designs and Patents Act was amended in October 2003 when giving effect to the WIPO

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<sup>64</sup> Microsoft Corporation *Microsoft Submission on 'Digital Technology and the Copyright Act 1994' Position Paper* (21 February 2003) at 15-16.

<sup>65</sup> Motion Picture Association International and NZFACT *Submission on the Copyright (New Technologies and Performers' Rights) Amendment Bill* (16 February 2007) at 11.

Treaty by creating an offence for knowingly infringing the new communication right:

**107 Criminal liability for making or dealing with infringing articles, &c.**

...

- (2A) A person who infringes copyright in a work by communicating the work to the public –
- (a) in the course of a business, or
  - (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work.

[186] The maximum penalty for breaching s 107(2A) is two years' imprisonment, whereas the maximum penalty for other offences under s 107 (which are materially the same as those under s 131 of the New Zealand Act) is 10 years' imprisonment. This discrepancy between the penalties for online infringement and infringement involving tangible objects was commented on by Andrew Gowers in his *Review of Intellectual Property*, a report commissioned by the Government in the United Kingdom to consider whether existing legislation remained "fit for purpose in an era of globalisation, digitisation and increasing economic specialisation".<sup>66</sup>

The penalty for a copyright offence depends on whether the infringement occurred online or not. In relation to those who commercially deal in infringing goods or those who distribute goods other than in the course of business to an extent which prejudicially affects the rights holder the maximum penalty is ten years imprisonment.<sup>67</sup> In contrast, those who commit online infringement by communicating the work to the public (whether commercial or otherwise) may be sentenced to up to two years imprisonment.<sup>68</sup>

...

Several submissions have called for a change in the law to increase online infringement penalties to the levels for physical infringement. The intention and impact of physical and online infringement are the same. Crimes committed in the online and physical world should not be subject to different sentences. Increasing the penalties for online infringement will therefore make the law more coherent.

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<sup>66</sup> Andrew Gowers *Gowers Review of Intellectual Property* (Her Majesty's Stationery Office, December 2006) at 5.79-5.81.

<sup>67</sup> Equivalent to s 131 of the New Zealand Act.

<sup>68</sup> In breach of s 107(2A) of the Copyright, Designs and Patents Act for which there is no New Zealand equivalent.

The Review proposes that the penalty for online commercial infringement should be increased to ten years imprisonment to bring parity with commercially dealing (but not showing) in pirated works. It proposes that the penalty for consumers infringing online to an extent that prejudicially affects the rights holder should also be extended to ten years, again to bring parity with physical infringement.

[187] This review supports the appellants' submission that online infringement of copyright is not an offence in New Zealand under s 131 of the Copyright Act.

[188] Section 198 of the Act provides a further indication that Parliament did not intend to create a criminal offence for infringing a copyright holder's exclusive communication right. Section 198 is the offence provision in Part 9 of the Act which deals with performers' rights. Section 198(1) is in similar terms to s 131 but deals with illicit recordings of performances instead of objects which are infringing copies of copyright work. Like s 131(1), it sanctions: possession in the course of a business with a view to committing any act infringing the rights conferred by this Part (s 198(1)(c)); and distributes an illicit recording in the course of a business (s 198(1)(d)(iii)). However, unlike s 131, s 198 was amended by s 89 of the Copyright (New Technologies) Act by substituting subsection 2(b) to cover infringement of the amended communication right:

**198 Criminal liability for making, dealing with, using, or copying illicit recordings**

- (2) Every person commits an offence against this section who causes a recording that is, and that the person knows is, an illicit recording, to be –
- (b) communicated to the public.

[189] Parliament again reviewed the Copyright Act and made further amendments to it when it passed the Copyright (File Sharing Infringing) Amendment Act 2011. Sections 122A to 122U were inserted to provide more effective means for copyright owners to enforce their rights against persons involved in unauthorised sharing of copyright works via the Internet. This is defined in s 122A of the Act as "file sharing", namely where:



- (a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and
- (b) uploading and downloading may, but need not, occur at the same time.

[190] Significantly, Parliament did not take this opportunity to amend s 131 to create a criminal offence for this type of online infringement. The new remedies are civil only.

[191] It is apparent from this review of the legislative history and context that the existing offences in s 131(1) of the Act relate to physical infringement in the sense that the breach involves tangible copies of infringing works (“an object”). In summary, Parliament addressed online dissemination of copyright-protected works to the public in the Copyright (New Technologies) Amendment Act as follows:

- (a) the copyright owner has the exclusive right to communicate its works to the public by whatever means under s 16(1)(f) of the Copyright Act;
- (b) communicating a copyright-protected work to the public is a restricted act under s 33 of the Act;
- (c) infringement of this right is actionable at the suit of the copyright holder under s 29(1) of the Act; and
- (d) Parliament chose not to follow the approach taken in the United Kingdom of making infringement of the communication right a criminal offence in relation to copyright works, despite being urged to do so by industry participants.

[192] I conclude, in respectful disagreement with the District Court, that the conduct alleged in count 2 is not an offence against s 131(1)(c), (d)(ii) or (iii) of the Copyright Act. For the reasons given, I consider that these offences, which all relate

to “an object”, do not apply to online infringement as is alleged here. It follows that s 131 of the Copyright Act does not provide an available extradition pathway.

*Count 4 – copyright infringement – movie “Taken”*

[193] Count 4 alleges that on or about 25 October 2008, the appellants wilfully and for the purposes of commercial advantage and private financial gain, infringed copyright by distributing a work being prepared for commercial distribution in the United States (the motion picture “*Taken*” which would not be commercially distributed until on or about 30 January 2009) by making it available on a computer network accessible to members of the public when they knew, or should have known, that the work was intended for commercial distribution.

[194] Ms Gordon submits that the offending in count 4 (like the offending in counts 5 to 8 which also allege specific instances of copyright infringement) can also be regarded as falling within art II.16 because these counts all concern the operation of the conspiracy to defraud, namely running Megaupload in such a way as to encourage the uploading and distribution of popular infringing content or files resulting in:

- (a) obtaining property (uploading of digital files subject to copyright);
- (b) obtaining property (retaining it on the servers); and
- (c) indirectly, obtaining money.

[195] I do not accept this submission. The appellants are not charged in counts 4 to 8 with any of the elements of the offending described in art II.16 of the Treaty. They are not charged in these counts with obtaining property or money, let alone obtaining it by false pretences or by conspiracy to defraud. The conduct alleged in counts 4 to 8 is directed at specific instances of copyright infringement and does not match the offending described in art II.16 of the Treaty.

[196] However, for the same reasons given in respect of count 2, I consider that count 4 qualifies as a deemed extradition offence because of its correlation to ss 228

and 249 of the Crimes Act (but not s 131 of the Copyright Act), so long as the requirements of s 101B(1)(c) of the Extradition Act are satisfied. Count 4 alleges that the appellants wilfully infringed copyright for the purposes of commercial advantage and financial gain. This satisfies the requirement in ss 228 and 249 that the relevant acts were committed with intent to obtain pecuniary advantage or valuable consideration. The further allegation in count 4 that the appellants wilfully infringed copyright by making the motion picture available to members of the public satisfies the requirement that they obtained and/or used a document (a digital file) dishonestly and without claim of right. The alleged conduct also involved accessing a computer satisfying this requirement under s 249.

[197] Mr Illingworth submits that ss 228 and 249 of the Crimes Act cannot provide available extradition pathways for count 4 in any event because the requirements of s 101B(1)(c)(ii) are not satisfied. He notes that, unlike the other counts, count 4 stands alone and does not specifically cross-reference other factual allegations. It does not contain any allegation that the appellants acted in concert with the aim of committing this offence. By contrast to the allegations in count 2, count 4 does not include any allegation that the appellants “intentionally combined, conspired or agreed together with each other” to commit this offence.

[198] This submission overlooks that the appellants are all alleged to have been at the relevant time members of the “Mega Conspiracy”, also referred to as the “Conspiracy”, and acted as an organised criminal group. Paragraph 73 of the superseding indictment identifies the overt acts said to have been committed in furtherance of the Conspiracy. These include the acts underpinning count 4, namely that on or about 25 October 2008 Mr van der Kolk uploaded an infringing copy of *Taken* and emailed a link to the file to another person. On that basis, I consider that the offence for which extradition is requested, count 4, is alleged to involve an organised criminal group and that s 101B(1)(c)(ii) is satisfied. Mr Prabhu states in his affidavit that count 4 is punishable by a maximum penalty of five years’ imprisonment.

[199] Accordingly, I consider that ss 228 and 249 of the Crimes Act provide available extradition pathways for count 4.

*Counts 5 to 8 – other copyright infringement*

[200] Counts 5 to 8 allege further specific acts of alleged copyright infringement. These counts are brought pursuant to the same provisions of the United States Code as for count 4 but the nature of the infringement is different. Count 4 refers to distributing a motion picture which the appellants knew was intended for commercial distribution by making it available on a computer network accessible to members of the public. By comparison, counts 5 to 8 refer to the wilful reproduction and distribution of copyright protected works over the Internet for commercial advantage, specifically at least 10 copies and phonorecords of one or more copyrighted works with a total retail value of more than USD 2,500. For counts 5 to 8, the United States relies on the same four pathways as for counts 2 and 4, namely art II.16 of the Treaty, ss 228 and 249 of the Crimes Act and s 131 of the Copyright Act.

[201] For the same reasons given in relation to count 2, I consider that s 131 of the Copyright Act is not available as an extradition pathway for counts 5 to 8. I have already concluded that art II.16 does not apply to counts 4 to 8. However, the analysis as to whether ss 228 and 249 of the Crimes Act provide extradition pathways for count 4 applies equally to counts 5 to 8. The conduct complained of in these counts is also said to have been carried out in furtherance of the Mega Conspiracy. The maximum penalty in each case is alleged to be five years' imprisonment. The fact that these counts all require proof of additional elements in the United States is irrelevant.<sup>69</sup> I conclude that counts 5 to 8 are also extradition offences.

*Count 3 - conspiracy to commit money laundering*

[202] The essence of count 3, as detailed in the superseding indictment, is that each of the defendants conspired with others to commit one or more of the following money laundering offences:

- (a) to knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, which in fact involved the proceeds of the specified unlawful activities of criminal copyright

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<sup>69</sup> *United States of America v Cullinane*, above n 9, at [82].

infringement and wire fraud with the intent to promote the carrying on of the specified unlawful activities of criminal copyright infringement and wire fraud, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i);

- (b) to transport, transmit, and transfer and attempt to transport, transmit, and transfer a monetary instrument and funds from a place in the United States to and through a place outside the United States, and to a place in the United States from or through a place outside the United States, with the intent to promote the carrying on of the specified unlawful activities of criminal copyright infringement and wire fraud, in violation of Title 18, United States Code, Section 1956(a)(2)(A); and
- (c) to knowingly engage and attempt to engage in monetary transactions in criminally derived property of a value greater than \$10,000 that is derived from the specified unlawful activities of copyright infringement and wire fraud, in violation of Title 18, United States Code, Section 1957.

[203] The United States relies on art II, item 19 in support of its contention that the conduct constituting count 3 correlates to an extradition offence under the Treaty:

- 19. Receiving and transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained.

[204] The District Court did not carry out any analysis of whether the conduct alleged in count 3 amounted to a Treaty offence. However, it can safely be assumed that the Judge was so satisfied because he found the appellants eligible for extradition on that count.

[205] Mr Mansfield did not separately address count 3 or any of the other counts. His contention is that copyright infringement is not an extradition offence. Accordingly, there is no predicate offence to support the other counts in the indictment and these too must fall away.

[206] Mr Illingworth focused his submissions on the concept of “transporting” described in art II.19 of the Treaty. This is not a term used in New Zealand law and is derived from United States federal law governing “transport” across state or international borders. Mr Illingworth observes that each of the three components of count 3 quoted above refers to a separate provision of the United States Code and therefore involves a separate offence. Because the word “transport” appears in (b)

but not in (a) or (c), he submits that only the conduct constituting the offending referred to in (b) can correlate to art II.19. However, Mr Illingworth argues that there is not a sufficient correlation between the conduct referred to in (b) and art II.19 because there is no allegation that the appellants knew that the money had been unlawfully obtained. Instead, under (b), the allegation is that money was transported with intent to carry out the predicate offences of criminal copyright infringement and wire fraud, not that the money had been unlawfully obtained or that the appellants knew this.

[207] Ms Gordon submits that the terms “financial transaction” and “monetary transactions” used in (a) and (c) of count 3 amount to “transporting” money from one place to another. She also argues that “transport” does not require a cross-border transaction. On that basis, she contends that the “transport” of funds across international borders alleged in (b) is merely a subset of the broad category of “transport” denoted by the reference to “financial or monetary transactions” in (a) and (c).

[208] Money laundering was not an offence in New Zealand at the time the Treaty was negotiated in 1970 and was not an offence listed in the first schedule to the Extradition Act 1965. Nor was there any offence in New Zealand of “receiving and transporting” money or other property knowing it had been unlawfully obtained. I accept Mr Illingworth’s submission that the parties must have used the word “transporting” in the sense commonly understood under United States law and was included in the Treaty to meet the constitutional requirement in the United States for a federal offence. This conclusion is supported by the concluding sentence of art II of the Treaty. Although this provision does not apply to art II.19 because of the inclusion of the word “transporting” in that item, it nevertheless sheds light on the intended meaning of “transport” in this context:

Extradition shall also be granted for any offence of which one of the above listed offences is the substantial element, when, for the purposes of granting jurisdiction to the United States Government, transporting or transportation is also an element of the specific offence.

[209] “Transport” is not defined in the United States statute but it seems that it refers to a transaction across state or national borders. Mr Prabhu confirms in his

affidavit that an essential element of the offence described in (b) above (s 1956(a)(2)(A)) is a particular type of transport requiring the transmission or transfer of a monetary instrument or funds from a place in the United States to a place outside the United States or vice versa.

[210] While the word “transport” is only expressly used in the second of the three money laundering offences listed in count 3, the same underlying monetary transfers are relied on to support all three of these money laundering offences which variously categorise these monetary transfers as “a financial transaction affecting interstate and foreign commerce”, “transport, transmit and transfer a monetary instrument and funds” and “monetary transactions”. Apart from one transfer of USD 185,000 allegedly made on 10 November 2011, all of the transfers relied on for count 3 are alleged to involve the proceeds of criminal copyright infringement. For example, it is alleged that multiple transfers totalling more than USD 6 million, which involved the proceeds of criminal copyright infringement, were made from a PayPal, Inc. account to a bank account in Hong Kong.

[211] Although these transfers are described in count 3 as “transfers affecting interstate and foreign commerce” or “a monetary transaction”, this is the same as “transport” in this context. In each case, the transaction involved a wire transfer. In *United States v Monroe*, the United States Court of Appeals for the Ninth Circuit had no difficulty finding that “transport” involving money would not be restricted to the physical carrying or conveying of money from one place to another but would include a wire transfer:<sup>70</sup>

[10] We believe, however, that where money is concerned, a contemporary meaning of “transport” would have to include a wire transfer, since funds are increasingly “conveyed” electronically.

[212] For these reasons, I consider that the essential conduct alleged in count 3 correlates to the offence described in art II.19 and is an extradition offence.

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<sup>70</sup> *United States v Monroe* 943 F.2d 1007 (9<sup>th</sup> Cir. 1991).

*Counts 9 to 13 – wire fraud*

[213] Counts 9 to 13 allege that the appellants devised a scheme to defraud copyright owners and obtain money by means of false and fraudulent pretences, representations and promises, including:

- (a) misleading copyright holders into believing that the notifications of infringing copies of copyright works would result in the removal of the file or access to the file being disabled when, in fact, only the link identified by the copyright holder was disabled;
- (b) falsely representing to copyright holders that repeat infringers would have their access terminated pursuant to Megaupload's terms of service whereas they were allowed to continue their infringement and sometimes even rewarded financially for it; and
- (c) misrepresenting to copyright holders Mega Conspiracy's "Abuse Tool" and "notice-and-takedown" procedure.

[214] The United States alleges in the superseding indictment that the scheme allowed infringing copies of copyrighted works to remain on the servers controlled by the Mega Conspiracy thereby allowing it to obtain advertising revenue:

101. The scheme allowed infringing copies of copyrighted works to remain on the servers controlled by the Mega Conspiracy and accessible to members of the public ...

...

103. It was further part of the scheme that the Mega Conspiracy obtained advertising revenue as a result of the continued availability of files known to be infringing ...

[215] Each count relates to a specific wire communication in furtherance of the allegedly fraudulent scheme.

[216] Ms Gordon relies on art II.16 and ss 228, 240 and 249 of the Crimes Act as providing available extradition pathways for counts 9 to 13.



### First pathway – article II.16

[217] Mr Illingworth submits that counts 9 to 13 are not charged as a conspiracy. Instead, he contends that the allegations concern the implementation of a fraudulent scheme. On that basis, he submits that the conspiracy limb of art II.16 does not apply. He argues that the other limb cannot apply either because there is no causal nexus between the alleged misrepresentations and the receipt of company revenue from advertising and subscriptions. He claims that there is no suggestion that Megaupload obtained any property or money *from* the persons to whom the allegedly false representations were made or that these representations *caused* anyone to transfer money or property to Megaupload or any of its officers, including the appellants. In other words, there is no suggestion that property or money was obtained *by* false pretences.

[218] I consider that the conduct alleged in counts 9 to 13 does correspond to art II.16 of the Treaty. It is alleged that the appellants obtained money “as a result” of the false representations. This is another way of saying that they obtained money “by” false pretences. This allegation satisfies the causal nexus required between the obtaining of the money and the false pretences. The allegation is that the false representations to the copyright owners enabled the appellants to continue to make the copyright protected works available for viewing by members of the public thereby generating advertising revenue and subscriptions. I accept Ms Gordon’s submission that it is not necessary for the money to be obtained from the person who has been deceived.

[219] Further, contrary to Mr Illingworth’s submission, I consider that these counts do allege that money was obtained by a conspiracy to defraud the copyright holders. The essence of these counts is that the appellants devised a scheme to defraud copyright owners. That is tantamount to an allegation of conspiracy to defraud. I conclude that art II.16 provides an available extradition pathway for counts 9 to 13.

### Second pathway – s 228 of the Crimes Act

[220] Mr Illingworth acknowledges that the emails sent to copyright holders in furtherance of the allegedly fraudulent scheme are “documents”. They could fall

within the scope of using a document dishonestly and without claim of right for the purposes of s 228 of the Crimes Act. However, he submits that the document must also be shown to have been used with intent to “obtain” the property or money. He argues that this element is not satisfied by the conduct alleged in counts 9 to 13 because the infringing copies of copyright works were already on the Megaupload computer system. However, this submission overlooks that s 217 of the Crimes Act defines “obtain” as meaning “obtain *or retain* for himself, or herself, or for any other person”. [Emphasis added].

[221] The requirements of s 101B(1)(c) are also satisfied in relation to counts 9 to 13. An offence against s 228 of the Crimes Act is punishable by a term of imprisonment of more than four years and the conduct complained of in counts 9 to 13 is alleged to involve an organised criminal group.

[222] I conclude that the District Court was correct to find that s 228 of the Crimes Act is an available extradition pathway for counts 9 to 13.

### Third pathway – s 240 of the Crimes Act

[223] Section 240 of the Crimes Act reads:

**240 Obtaining by deception or causing loss by deception**

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right, –
- (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
  - (b) in incurring any debt or liability, obtains credit; or
  - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy or alter any document or thing capable of being used to derive a pecuniary advantage; or
  - (d) causes loss to any other person.

[224] Mr Illingworth acknowledges that the emails alleged to contain false representations could fall within the definition of “deception” in s 240. However, he contended that this section does not assist the United States because nothing has been “obtained” nor has loss been caused by the alleged deception. He argues that at

best, all the emails could be said to have achieved was preservation of the existing situation.

[225] In accordance with the Supreme Court's decision in *Dixon*, the digital files recording the copyright protected films are "property". It is alleged that this property was "obtained" in the sense that it was "retained" as a result of the deceptive emails. Mr Illingworth concedes that the emails may have enabled the appellants to retain the files, preserving the existing situation. It follows that the conduct alleged in counts 9 to 13 would be within s 240 of the Crimes Act if it had occurred in New Zealand.

#### Fourth pathway – s 249 of the Crimes Act

[226] It is helpful to set out this section again:

**249 Accessing computer system for dishonest purpose**

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right, –
  - (a) obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) causes loss to any other person.
- (2) Every one is liable to imprisonment for a term not exceeding 5 years who, directly or indirectly, accesses any computer system with intent, dishonestly or by deception, and without claim of right, –
  - (a) to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) to cause loss to any other person.
- (3) In this section, deception has the same meaning as in section 240(2).

[227] Counts 9 to 13 relate to specific emails sent to copyright holders in response to takedown requests. For example, count 9 alleges that on or about 23 November 2010, members of the so-called Mega Conspiracy caused an email to be sent to a representative of a copyright holder stating: "1 file and 1 video removed from our system" in response to a takedown request concerning the copyrighted film *A Nightmare on Elm Street*. The allegation is that this representation was knowingly false because only the specific link identified in the notice was disabled and the file remained on the Megaupload system and able to be accessed by way of other links.

[228] Mr Illingworth argues that Parliament cannot have intended that merely sending an email would be caught by the concept of “access” of a “computer system”. He contends that it is significant that Parliament has used the term “computer system” not “computer”. He suggests that s 249 was enacted to address various forms of computer “hacking”.

[229] I cannot see any justification for reading down the plain words of s 249 in the manner suggested. There is nothing in the point that Parliament has used the term “computer system”, not “computer”. “Computer system” is defined in s 248 to include “a computer”. “Access” is very broadly defined and includes instructing or communicating with any computer system (including a computer) or using any resources of a computer. Sending an email plainly comes within the broad scope of this definition.

[230] Counts 9 to 13 correlate to the offending in s 249 because it is alleged that, in furtherance of the conspiracy, the appellants caused knowingly false responses to be sent to copyright holders in response to take down notices. This was achieved by accessing the Megaupload computer system (instructing, communicating with and using a computer system). As a result of accessing the computer system in this way, it is alleged that the appellants “thereby” dishonestly or by deception, and without claim of right, obtained a benefit. The alleged benefit achieved by this dishonest and deceptive response was that it enabled Megaupload to retain the copyright infringing file on its computer system and continue to profit from it. There can be no doubt that the necessary causal connection between the relevant access of a computer system and the obtaining of the benefit is met. This is the allegedly operative cause of Megaupload being able to retain these files despite the efforts of the copyright holders to have them removed.

*Count 1 – conspiracy to commit racketeering*

[231] Count 1 alleges that the appellants and others constituted an “enterprise” as defined by Title 18, United States Code, section 1961(4), being a group of individuals and entities associated in fact. It is alleged that the enterprise was engaged in interstate and foreign commerce and its members conspired to conduct

the affairs of the enterprise for the purpose of enriching themselves through a pattern of racketeering activity involving criminal copyright infringement, money laundering and fraud by wire.

[232] The Court of Appeal held in *Cullinane* that racketeering is not an offence under art II of the Treaty. The Court described racketeering and continuing criminal enterprise as umbrella crimes aggregating more traditional crimes for the purpose of facilitating prosecution and conviction and increasing the penalties.<sup>71</sup> The Court warned against allowing extradition for umbrella crimes in circumstances where this would provide a backdoor means of achieving extradition for offences that, if charged separately, are not extradition offences.<sup>72</sup> The Court referred to the specialty principle in art XIII as justifying a restrictive and cautious approach to umbrella crimes like racketeering.<sup>73</sup> Article XIII relevantly provides:

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for any offence other than an extraditable offence disclosed by the facts on which his surrender was granted nor be extradited or surrendered under an analogous procedure by that Party to a third State ...

[233] However, *Cullinane* was decided under the law applicable before s 98A of the Crimes Act and s 101B(1)(a) of the Extradition Act were enacted in response to the UNTOC treaty. Ms Gordon relies on these provisions in support of her contention that count 1 is an extradition offence. Section 98A provides:

**98A Participation in organised criminal group**

- (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
- (a) knowing that 3 or more people share any 1 or more of the objectives (the particular objective or particular objectives) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and
  - (b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and
  - (c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may

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<sup>71</sup> *United States v Cullinane*, above n 9, at [84].

<sup>72</sup> At [89].

<sup>73</sup> At [90].

contribute, to achieving the particular objective or particular objectives of the organised criminal group.

- (2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—
  - (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
  - (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
  - (c) the commission of serious violent offences; or
  - (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences.
- (3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—
  - (a) some of them are subordinates or employees of others; or
  - (b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or
  - (c) its membership changes from time to time.

[234] The allegation in count 1 is that the appellants and others were members of a group of individuals and entities associated in fact. This constitutes an “enterprise” under the relevant provision of the United States Code. It is alleged that this was an ongoing organisation whose members functioned as a continuing unit for the common purpose of achieving the objectives of the enterprise which were to enrich its members through copyright infringement, money laundering and wire fraud. It is further alleged that the members conspired to conduct the affairs of the enterprise through a pattern of racketeering activity being criminal copyright infringement, money laundering and wire fraud, and that each of the appellants participated in this activity.

[235] Ms Gordon contends that the appellants comprised an organised criminal group as defined in s 98A(2)(a) of the Crimes Act. This is because the “Mega Conspiracy” was an enterprise that comprised a group of three or more persons, including the appellants, who allegedly conspired to pursue the objective of obtaining material benefits for the members of the group from the commission of

multiple offences punishable by more than four years' imprisonment. Reliance is placed on s 131 of the Copyright Act and ss 228, 240 and 249 of the Crimes Act, all of which are punishable by more than four years' imprisonment. The United States alleges in count 1 that each of the appellants shared in this objective and knowingly participated in the activities of the enterprise or group for the common purpose of achieving it.

[236] Mr Illingworth focused his attention on the conduct constituting the underlying offences asserted by the United States to support the umbrella charge of racketeering. For the same reasons given in response to the counts specifically alleging criminal copyright infringement, money laundering and wire fraud, he submitted that this conduct does not correspond to the New Zealand offences relied on by the United States. Accordingly, he submits that there is insufficient correlation between the conduct that constitutes the offence of racketeering and s 98A of the Crimes Act.

[237] I have already concluded that the conduct constituting the alleged criminal copyright infringement and wire fraud charges correlates to New Zealand offences punishable by at least four years' imprisonment. The other elements of s 98A of the Crimes Act are satisfied by the conduct alleged in count 1 because it alleges that each of the appellants had a common purpose of achieving the group's objective of enriching its members from the commission of these offences and knowingly participated in the commission of these offences to help achieve this objective. In these circumstances, I am satisfied that the conduct relied on by the United States for count 1 would amount to an offence against s 98A of the Crimes Act if it had occurred in New Zealand and is accordingly an extradition offence.

[238] In summary, I consider that all counts in the indictment qualify as extradition offences.

**Is there sufficient evidence to justify a trial of the appellants on each count?**

[239] Section 24(2)(d)(i) of the Extradition Act reads:

**24 Determination of eligibility for surrender**

- (2) Subject to subsections (3) and (4), the person is eligible for surrender in relation to an extradition offence for which surrender is sought if –

...

- (d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act, –
- (i) in the case of a person accused of an extradition offence, justify the person’s trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or

...

[240] Because the United States is an exempted country, it may submit a record of the case for the purposes of the Court’s determination under s 24(2)(d)(i). This must contain a summary of the evidence relied on to support the request for surrender and other relevant documents, including photographs and copies of documents. The record of the case is admissible as evidence if it is accompanied by an affidavit and a certificate complying with the requirements of s 25(3):

- (3) The record of the case is admissible as evidence if it is accompanied by –
- (a) an affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person’s trial; and
- (b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.

[241] Mr Illingworth submits that even if the District Court was correct to find that the offences for which surrender is sought are extradition offences, it erred in finding that there was sufficient evidence to justify a trial on each of the counts because:

- (a) the record of the case and supplements do not comply with the requirements of s 25 and are accordingly not admissible as evidence. First, the record of the case is not a “summary of evidence”, but rather an amalgam of conclusion, conjecture, supposition, bald assertion, legal argument and summarised evidence (s 25(2)(a)). Second, the



evidence has not been preserved for trial (s 25(3)(a)). Third, the certification that the evidence is sufficient to justify prosecution in the United States is invalid (s 25(3)(b));

alternatively, –

- (b) only those parts of the record of the case containing a summary of evidence should have been considered. The evidence summarised in this part of the record of the case is unreliable and insufficiently probative to be taken into account; or
- (c) even if these parts of the record of the case could be relied on, the evidence is insufficient to establish key elements of the alleged extradition offences including, in particular, breach of copyright.

[242] Mr Mansfield supports these submissions. He submits that despite Mr Prabhu's affidavit certifying to the contrary, the United States has failed to comply in good faith with the requirement in s 25(3)(a) to preserve the evidence for use in any trial. He says that this is because the servers containing the digital files, the subject of the alleged copyright infringements, have been allowed to deteriorate by the United States authorities.

[243] Mr Mansfield also contends that the United States failed to comply in good faith with the certification requirement under s 25(3)(b) that the record of the case discloses the existence of evidence sufficient under the law of the United States to justify a prosecution in that country. He submits that the evidence given in the District Court by one of Mr Dotcom's United States lawyers, Ira Rothken, and Professor Lawrence Lessig, a leading expert on United States copyright law, casts doubt on whether Mr Prabhu's certification was given in good faith.

[244] Even if, contrary to these submissions, the record of the case is admissible, Mr Mansfield submits that the District Court failed to make a meaningful judicial assessment of whether the record of the case discloses evidence on each element of each offence against each appellant that was:

- (a) available at the time of the extradition hearing;
- (b) reliable (in that the United States has not excluded material in its possession that would undermine or seriously detract from the evidence it relies on); and
- (c) sufficient to justify committal for trial.

[245] Mr Bioletti again supported these submissions. He emphasised the importance of considering the adequacy of proof against Mr Batato on each of the alleged offences taking into account the more limited role he played in the Mega Group.

*Is the record of the case admissible?*

Is the record of the case a summary of the evidence (s 25(2)(a))?

[246] Mr Illingworth provided the District Court with a colour coded version of the record of the case and the first seven supplements, 303 pages in total, showing his analysis of those paragraphs that provide a summary of evidence and nothing more and those that contain commentary, assertions, legal submissions and conclusory statements. His analysis was as follows:

- (a) some 60 paragraphs/subparagraphs consist solely of commentary, assertions, legal submissions and conclusory statements;
- (b) some 650 paragraphs/subparagraphs include at least some non-evidential material of this nature;
- (c) some 260 paragraphs are a summary of evidence without more; and
- (d) some 20 paragraphs were left unclassified because these appeared to have insufficient relevance to warrant classification.

[247] Based on this analysis, Mr Illingworth calculates that only 26.9 per cent of paragraphs are devoted exclusively to summarised evidence. He contends that the

inadmissible parts of the record of the case are so extensive and intertwined with the summary of evidence as to render the record of the case wholly inadmissible. He submits that the record of the case is simply not what it purports to be, it is not a summary of the evidence.

[248] The Supreme Court considered the record of the case and the first supplement.<sup>74</sup> On Mr Illingworth's analysis, these documents suffer from the same fundamental defects as the later supplements and are wholly inadmissible because they are not what they purport to be, namely a summary of the evidence. The Supreme Court clearly did not take that view. McGrath J, who gave the reasons of himself and Blanchard J, commented:

[195] Part 3 of the Extradition Act provides for the manner in which a requesting state that is an exempted country may present its evidence to the New Zealand court. A record of the case is admissible as evidence at the extradition hearing subject to requirements as to its availability and its sufficiency to justify a prosecution in the requesting country. A record of the case must include a summary of the evidence relied on and, in this case, that has been provided. ...

...

[198] The case against the appellants is largely based on circumstantial evidence and the inferences that can be drawn from it. The appellants already have access to much of the information gathered as evidence by the United States investigators and summarised in the record of the case. ...

[249] Glazebrook J accepted that the record of the case and the first supplement include a number of conclusory statements but considered that the evidence relied on for extradition purposes had been set out:

[260] It was submitted by Mr Davison QC that the record of the case was faulty because there were a number of conclusory statements, effectively submissions, in the record, especially related to the alleged existence of a conspiracy. He submits that the appellants are entitled to copies of the documents or other materials underlying those conclusory statements.

[261] I agree that there are some conclusory statements in the record of the case but the evidence relied on (or at least a selection of that evidence) is set out. Either that evidence supports the conclusions and inferences the United States wants to draw to support the existence of a prima facie case or it does not. As already indicated, it is for the requesting state to decide what information to put forward in support of those inferences and it takes the risk that, if insufficient material is provided, the extradition judge will not be satisfied that a prima facie case exists.

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<sup>74</sup> *Dotcom v United States of America* [Disclosure] above n 4.

[250] The fact that the record of the case including the supplements contains material that cannot be relied on as evidence does not mean that it is inadmissible in its entirety. It is the function of the Judge determining eligibility for surrender to ensure that there is sufficient summarised evidence to justify each appellant being committed for trial on each extradition offence. In carrying out this function, the Judge will differentiate between what qualifies as a summary of evidence and what does not.

[251] A similar argument to that advanced by Mr Illingworth was considered by the Court of Queen's Bench of Alberta in *United States v Chavez*.<sup>75</sup> The respondents in that case argued that the whole of an "overview" section was a summary that was not sourced to any witness and should not be considered. The Court rejected this argument:

[18] The first part of the ROC entitled "Overview" provides an outline of the "story", in the form of evidence and argument that it hopes to prove in the proposed trial in the United States. The *Act* and jurisprudence do not prohibit the requesting state from doing so. It is clear that the overview is not evidence and cannot be used as evidence by a judge considering whether a committal is allowed, unless the contents of the overview are supported by the evidence or inferences from the evidence summarized in the remainder of the ROC.

[19] [The police officer's] use of the words "participating in the conspiracy" constitute argument or comment based on the totality of the evidence. His comments can be considered in association with the examples in the "Summary of Evidence" that follows, which demonstrates how a connection to the conspiracy will be proven ... This is a permissible way to summarize evidence in a ROC.

[20] A judge reading the ROC must ensure that summarized evidence is adequately sourced and that overviews and linking explanations are viewed merely as informational. Providing a clearly labelled overview as a roadmap is not prohibited by the *Act*. There is no requirement that every statement be sourced and there is no restriction from making comments in a ROC. The ROC must be read as a whole and the emphasis is on what can be established by the evidence. To argue every minute part of the wording and insist the state should only summarize evidence, with nothing more, suggests that a judge is unable to isolate the requisite evidence and look at it in the context of the offence alleged.

[252] I respectfully agree with this analysis.

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<sup>75</sup> *United States v Chavez* (2013) 107 WCB (2d) 259 (ABQB).

[253] Even if Mr Illingworth's categorisation is correct, only 60 paragraphs out of a total of 990 contain no summarised evidence. The Court could not disregard the evidence summarised in the remaining 930 paragraphs merely because many of these paragraphs include commentary or other material. The Court is *required* to determine whether the evidence that is summarised in the record of the case is sufficient to establish a *prima facie* case. The Court is not excused from this responsibility merely because some of the material in the record of the case does not qualify as summarised evidence.

Has the evidence been preserved for trial (s 25(3)(a))?

[254] Mr Prabhu's affidavit confirming that the evidence has been preserved for use at trial creates a presumption of availability that can only be rebutted by cogent evidence establishing otherwise. This was confirmed by the Supreme Court of Canada in *United States of America v Ferras*:<sup>76</sup>

... where evidence is certified as available by a requesting state, that certification results in a presumption of availability for trial. However, cases might arise where a person sought could cogently challenge the presumption of availability of evidence for trial. For example, where a person can show that a requesting state relies on evidence of a witness who, prior to the extradition hearing, retracted his or her statement, the availability of that evidence for trial may be brought into doubt. Another example is where a state makes only a bare assertion that evidence exists without providing any description whatsoever of its content or form. In such a case, the availability of the evidence may be in doubt. Furthermore an extradition judge does not make a prediction about the future state of the evidence. He or she makes a commonsense determination about whether the evidence exists and is available for trial – *at the time of the extradition hearing* – based on the evidence itself, any circumstantial guarantees of availability (such as certification) and any evidence tendered to dispute the presumption of availability for trial.

[255] Mr Dotcom stated in his evidence that the appellants have been given metadata but not the actual files. He said that it is not possible to determine whether a particular file infringes copyright without accessing the file. Because the prosecution is founded on allegedly copyright infringing files accessible on the Megaupload servers and the way the Megaupload business was configured and operated, the appellants contend that *all* of Megaupload's data from inception of the business in 2005 must be preserved for trial, regardless of the expense. They say

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<sup>76</sup> *United States of America v Ferras* [2006] 2 SCR 77 (SCC) at [58].

that this has not occurred because hundreds of servers on which this data was stored have not been maintained properly.

[256] Mr Rothken's evidence was that the power supply to the key Megaupload servers has been cut off and they are no longer maintained in a climate-controlled environment. Professor Philip Sallis, a professor in computer science at Auckland University of Technology, explained that electronic media will deteriorate over time and the rate of deterioration will depend on environmental conditions. His unchallenged evidence was:

In general terms, electronic media will deteriorate over time (a very long time – usually decades) when operated in ideal conditions. If servers are disconnected from their power source and stored in unsuitable environments, such as very humid, damp, extreme cold or hot locations, the likelihood of deterioration increases.

[257] In these circumstances, the appellants submit that Mr Prabhu's statement that the evidence has been preserved is misleading at best, or false.

[258] Section 25 must be interpreted in the light of its purpose. It is for the requesting State to decide what evidence it will rely on to support its request for extradition. The extradition Court is only concerned with whether this evidence is sufficient to justify a trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand. This will be the case if the Court is satisfied the summarised evidence is sufficient to establish a *prima facie* case and this evidence has been preserved for use at trial. "The evidence" in s 25(3)(a) plainly refers to the evidence summarised in the record of the case and not to every piece of evidence that has been reviewed in the course of the investigation or which could be relevant at trial. If the appellants' argument was right, it would mean that if any of Megaupload's data was lost, no matter how inconsequential for the purposes of a committal hearing, the entire record of the case would become inadmissible. That cannot have been what Parliament intended when enacting s 25(3).

[259] While data stored on servers that have not been maintained adequately may be compromised or lost, I accept Ms Gordon's submission that no effective challenge has been made to Mr Prabhu's sworn statement that the evidence summarised in the record of the case and relied on for extradition purposes has been preserved for use

at trial. Whether other evidence needs to be preserved to enable a fair trial is not the concern of an extradition court. Fair trial issues are for the requesting State to determine and it would be an affront to the principle of comity upon which extradition is based for an extradition court to trespass into this domain.<sup>77</sup>

Is Mr Prabhu's certificate valid (s 25(3)(b))?

[260] Mr Prabhu has control over the decision to prosecute the appellants in the United States. On the face of it, Mr Prabhu's certification that, in his opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the United States to justify a prosecution in that country meets the requirements of s 25(3)(b).

[261] Nevertheless, Mr Illingworth submits that Mr Prabhu's certification is invalid because the record of the case contains commentary, conclusory assertions and legal submission without any work by work analysis required to establish breach of copyright. He submits that there are no relevant documents, including briefs of witnesses, "will say" statements or other documents to overcome these defects. He also relies on the evidence of Professor Lessig who considers that the superseding indictment and the record of the case do not establish a *prima facie* case under United States federal law.

[262] In my view, these submissions are also founded on a misinterpretation of s 25. If an exempted country relies on the record of the case procedure, it need only present a summary of the evidence, not the detail of it.<sup>78</sup> It does not have to present briefs of evidence, "will say" statements or other documentary proof as contended by the appellants. However, because the extradition Court only receives a summary of the evidence and not the evidence itself, the Act requires an appropriate assurance that the record of the case discloses the *existence* of evidence sufficient to justify a trial in the exempted country and the evidence relied on for extradition purposes has been preserved for trial.

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<sup>77</sup> *Argentina v Mellino* [1987] 1 SCR 536 at 558.

<sup>78</sup> *Dotcom v United States of America* [Disclosure], above n 4 at [145].

[263] The purpose of the record of the case is to enable the extradition Court to determine whether the evidence establishes a *prima facie* case if the conduct constituting the offence had occurred within the jurisdiction of New Zealand. This determination is made according to New Zealand law. The extradition Court in New Zealand is not concerned with whether the evidence is sufficient to justify a trial in the exempted country and it would be wholly inappropriate for it to enquire into this. Parliament intended that the extradition Court would rely on a certificate in proper form from a person qualified to give it. Absent cogent evidence showing that such a certificate is a forgery or has been given in bad faith, the extradition Court cannot look behind it. Professor Lessig may disagree with Mr Prabhu's opinion (and the opinions of the Grand Jury who returned the indictment and the United States Judge who authorised the arrest warrants and restraining orders) as to the adequacy of the summarised evidence to justify a trial in the United States, but this does not approach the proof required to establish that Mr Prabhu's certificate was given in bad faith and should be disregarded by the Court as being invalid.

[264] For the reasons given, I reject the appellants' challenge to the admissibility of the record of the case.

*Other alleged errors of law*

[265] Mr Illingworth submitted that the District Court made four other specific errors of law in this part of its determination. The first three are: proof of copyright infringement – conclusory statements; weight and sufficiency of evidence; and transposition. These challenges are interrelated and require consideration of the conduct that must be proved to a *prima facie* standard and the level of detail required in the record of the case. The fourth concerns the limitation period in the Copyright Act. I start by setting out the appellants' contentions on the first three of these alleged errors. I will then address proof of copyright infringement and transposition together before turning to the limitation issue. The criticism relating to the weight and sufficiency of the evidence is most appropriately addressed when considering whether or not a *prima facie* case has been established on each of the counts.



### Proof of copyright infringement – conclusory statements

[266] The United States’ prosecution arises out of alleged copyright infringement. All counts in the indictment relate to such offending in one way or another. Despite its central importance to all counts, Mr Illingworth submits that there is insufficient evidence in the record of the case to establish any breach of copyright of any copyright protected work by any of the appellants. He says that the record of the case refers to 520 works allegedly protected by copyright but provides no proof of this at the time of the alleged offending. Further, Mr Illingworth argues that there is no evidence of a breach of copyright in relation to any of these works, for example, that the files stored by Megaupload were unlawful copies rather than legitimate versions of the works uploaded by users for their personal use.

[267] By way of illustration, Mr Illingworth submits that in relation to the 187 motion pictures or films mentioned in the record of the case, the United States must provide specific evidence to prove: whether the work is an original cinematic work, a re-issue or adaptation; the date the work was created; the identity of the producer or production company; the identity of the owner of the copyright at the time of the offending; the country in which the film was made; and the law or laws of copyright of the country or countries applicable to the original work. To establish whether the particular file uploaded to Megaupload is copyright infringing, he submits that the United States must provide evidence of the identity of the uploader and whether he or she had a licence to make a copy of the work or was otherwise undertaking a permitted act in respect of the copyright work. He says that the record of the case contains none of this evidence, only conclusory assertions of copyright infringement such as “infringing content”, “infringing copies”, “infringing copy of a copyrighted work”, “infringing work”, and “infringing file”.

[268] Mr Illingworth, supported by Mr Mansfield, made the same submissions in the District Court but these are not addressed anywhere in the judgment.

### Weight and sufficiency of evidence

[269] Mr Illingworth submits that even if the District Court was entitled to accept conclusory assertions as to copyright and infringement, it needed to scrutinise

whether the person making the assertion was qualified to make it. He argues that statements “expected” to be made by an unnamed and unidentified “computer specialist with the Federal Bureau of Investigation” or a “representative of the FBI” cannot be accepted as expert evidence. In particular, Mr Illingworth refers to statements as to copyright made by Agent Poston of the Federal Bureau of Investigation. He says that Agent Poston has not been qualified as an expert to give evidence about copyright law and suggests that he may not now be available to give evidence because he is not referred to in the supplements, apparently having been replaced by an unknown “representative of the FBI”, whose qualifications are also unknown. Mr Illingworth also submits that the Court is unable to accept “evidence” from witnesses identified by their initials only, for example, “JR” or “TP”, or by description, for example, “representatives from the Motion Picture Association of America, the Recording Industry Association of America, the Business Software Alliance, as well as other copyright owners”. He contends that unless witnesses are identified, the Court is unable to make any assessment of whether they are available, whether their evidence would be reliable and whether it can be afforded sufficient weight.

[270] Mr Illingworth argues that the failure to provide evidence with this level of detail is fatal to the United States’ application for extradition because all counts in the indictment are dependent on proof of breach of copyright. Counts 2 and 4 to 8 involve allegations of copyright infringement. Count 1, conspiracy to commit racketeering, is an umbrella offence covering multiple acts of unlawful activity, in this case criminal breach of copyright and money laundering. Count 3, conspiracy to commit money laundering, concerns funds derived from unlawful activity, in this case criminal copyright infringement. The wire fraud charges, counts 9 to 13, are also founded on alleged copyright infringement.

[271] Mr Illingworth refers to the observations of the Ontario Court of Appeal in *United States of America v Yang* in support of his submission that the record of the case is fundamentally defective because it deprives the Court of the opportunity to

carry out its function under s 24(2)(d)(i) of conducting a meaningful assessment of whether there is a *prima facie* case on the critical issue of copyright infringement:<sup>79</sup>

Equally, this critical function for protection of the liberty of the individual cannot be reduced to a meaningless ritual. While the judicial phase is not a full-fledged trial, neither “is it a mere formality”: Shulman at p. 307 C.C.C. Thus, the judge must be in a position to exercise that function. If the material presented in the record of the case is so bereft of detail, such as the witness’ means of knowledge, that that judge cannot determine its sufficiency, the judge will have to discharge the person sought for prosecution. This is not a question of the judge weighing the evidence or passing on its reliability, but of carrying out the function assigned by statute.

...

[272] Mr Mansfield supports these submissions. He argues that the evidence required to satisfy the test under s 24(2)(d)(i) must be: available at the time of the extradition hearing; reliable, in that no vitiating material has been omitted; and sufficient to justify committal.

[273] The appellants are undoubtedly correct that bare conclusory statements are of no value in proving the essential conduct constituting the alleged offence and must be disregarded. Such statements do not assist the Court in carrying out its fundamental obligation of weighing the evidence for the limited purpose of determining whether it would be sufficient to enable a properly directed jury to return a guilty verdict on each of the charges if the offence had occurred within the jurisdiction of New Zealand. Ms Gordon did not contend otherwise but argues that the United States has established a *prima facie* case based on properly attributed evidence as summarised in the record of the case. She also submits that the appellants have misapprehended what must be proved in relation to each count, particularly having regard to the concept of transposition.

### Transposition

[274] The parties made extensive submissions in the District Court about the concept of transposition and how it applies in this case but there is no mention of this topic in the judgment. Mr Illingworth assumes that the District Court must have accepted the argument advanced on behalf of the United States that issues of copyright are determined according to the law of the requesting State and must be

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<sup>79</sup> *United States of America v Yang* (2001) 56 OR (3d) 52, 203 DLR (4<sup>th</sup>) 337 (Ont. CA).

transposed as a “state of things” for extradition purposes without requiring proof. He argues that this proposition is incorrect and is based on a misunderstanding of the authorities. He contends that copyright ownership and whether a particular object is an infringing copy must be determined according to New Zealand law. Alternatively, he submits that these issues must be determined by applying the law applicable in the requesting State based on evidence provided to the Court at the extradition hearing. Mr Illingworth argues that if the United States’ submission was correct, these issues of mixed fact and law, which underpin the alleged copyright offending, would not be subjected to any meaningful judicial assessment by the extradition Court applying New Zealand law or United States law. Mr Mansfield agrees and says that the United States’ position is untenable and offends basic principles of extradition and copyright law.

[275] A useful example to illustrate the competing contentions is Count 4 because it alleges unauthorised distribution of a specific work claimed to have been protected by copyright, the movie *Taken*. The appellants contend that in order to satisfy the requirements of s 24(2)(d)(i) of the Act, the United States must provide evidence from which a properly directed jury could reasonably conclude, amongst other things, that this movie was protected by copyright at the relevant time. The appellants’ primary submission is that this must be proved applying New Zealand law but their fallback position is that it must be proved to the requisite standard according to United States law.

[276] The United States disagrees with this analysis. It contends that whether or not copyright existed in the film *Taken* in New Zealand at the relevant time is immaterial. It argues that it would be nonsensical and contrary to the intention of the Treaty if the appellants were able to escape surrender if, for example, the owners of copyright in the work had not obtained copyright protection for it in New Zealand or had licensed it in New Zealand to someone else. Further, it claims that the extradition Court must assume, as a transposed “state of things”, that *Taken* was protected by copyright at the relevant time in the United States. It argues that this issue of mixed fact and foreign law need not be enquired into by the extradition Court because it does not form part of the appellants’ conduct which is all the Court is concerned with under s 24(2)(d)(i).

[277] The concept of transposition necessarily arises in extradition cases because the extradition Court is required to proceed on the basis of the fiction that the relevant conduct constituting the offence had occurred within its jurisdiction. However, it is important to keep in mind that the focus of the extradition Court under the Act is on the conduct constituting the alleged offence, not the offence itself. Although conduct constituting an extradition offence will in most cases be criminalised in both the requesting and the requested States, this is not strictly necessary. An “extraditable person” in relation to an extradition country is defined in s 3 of the Act as including a person accused of having committed an extradition offence against the law of *that* country.

[278] The Court of Appeal confirmed in *Cullinane*, following *Factor v Laubenheimer*<sup>80</sup> and *Riley v Commonwealth of Australia*,<sup>81</sup> that it is open to contracting parties to agree in an Extradition Treaty to extradite persons to face trial for an offence arising out of conduct committed in the requesting State that is not regarded as criminal in the requested State and that s 24(2)(d) of the Extradition Act does not import a double criminality requirement.<sup>82</sup> The Court explained that the words “according to the law of New Zealand” in s 24(2)(d) refer only to questions of evidence and criminal procedure, not to substantive criminal law. This is consistent with art IV of the Treaty which provides that “extradition shall be granted only *if the evidence be found sufficient, according to the laws of the place where the person sought shall be found*, either to justify his committal for trial if the offence of which he is accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party”.

[279] Once satisfied under s 24(2)(c) that the request relates to an extradition offence, the Court no longer needs to be concerned about whether the conduct constituting the offence in the requesting State would also be an offence under the law of New Zealand if that conduct had occurred here. The enquiry under s 24(2)(d) is the same either way and is focused on the conduct constituting the extradition offence.

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<sup>80</sup> *Factor v Laubenheimer*, above n 22.

<sup>81</sup> *Riley v Commonwealth of Australia* (1985) 159 CLR 1 (HCA).

<sup>82</sup> *United States v Cullinane*, above n 9, at [59]-[65].

[280] The irrelevance of whether the conduct would have amounted to an offence under New Zealand law for the purposes of s 24(2)(d)(i) is reinforced by s 24(2)(d)(ii) which provides that where a person is alleged to have been convicted of an extradition offence, the Court need only be satisfied that the requested person was so convicted. Any such conviction will be according to the law of the requested State and the extradition Court is not required to consider whether the conduct constituting the offence was also criminalised in New Zealand. It would be anomalous if the test for extradition for an accused person contained this additional limb and therefore differed from that applying to a person who has been convicted.

[281] For these reasons, I reject the appellants' contention that the extradition Court must determine under s 24(2)(d)(i) whether the conduct constituting the offence would have been an offence under New Zealand law had it occurred in New Zealand at the relevant time. To find otherwise would import a double criminality requirement into this section, contrary to the Court of Appeal's decision in *Cullinane*.

[282] I now address whether the enquiry under s 24(2)(d)(i) requires proof of the applicable foreign law or whether it is solely concerned with the conduct constituting the extradition offence as identified for the purposes of s 24(2)(c). This is a question of statutory interpretation and must be answered by reading the text in the light of the purpose of the Act, which is to facilitate performance of the international obligations New Zealand has assumed under the various extradition treaties it has entered into.

[283] Although the definition of an extradition offence in s 4 of the Act is displaced by the Treaty, it provides important context in interpreting the scheme of the Act and the test to be applied under s 24(2)(d)(i). An extradition offence as defined in s 4 directs attention to "the conduct of the person constituting the offence". Section 5 provides that the "conduct constituting an offence" refers to the acts or omissions of the requested person by virtue of which the offence is alleged to have been committed. A request for surrender under s 18 of the Act must be accompanied by supporting documents including a written deposition setting out a description of the offence, the applicable penalty and "the conduct constituting the offence". Under

s 24(2)(c), the Court must be satisfied that the offence for which surrender is sought is an extradition offence in relation to the extradition country. As noted, this requires the Court to identify the essential conduct constituting the offence, being the acts or omissions of the person sought to be surrendered. This strongly suggests that the enquiry directed by s 24(2)(d)(i) is confined to whether or not there is *prima facie* proof that the person whose surrender is sought committed the acts or omissions constituting the extradition offence and does not require consideration of questions of foreign law.

[284] *Cullinane* confirms that the conduct test for extradition applies in New Zealand, not the offence test, consistent with the approach adopted in most other jurisdictions. One of the reasons for this choice is to avoid the extradition Court having to examine questions of foreign law. Justice La Forest, writing for the majority in the Supreme Court of Canada in *United States v McVey*, warned of the dangers of an extradition court being required to grapple with issues of foreign law and considered that this could never have been intended in a process that was designed to be limited in scope and expeditious.<sup>83</sup>

... to require evidence of foreign law beyond the documents now supplied with the requisition could cripple the operation of the extradition proceedings. It is unthinkable that this would even have been contemplated at the time the Act was passed ... To transport witnesses, sometimes halfway across the world, would have seemed an impossible prospect. Quite different reasons argue against the possibility in modern times. In our days, crime does not stop at the border. Much organized crime is international in scope... This criminal community would certainly welcome the need to prove foreign law. Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law.

[285] Under Canadian law at the time *McVey* was decided, double criminality had to be demonstrated. The task under the equivalent of our s 24(2)(c), of determining whether the offence was an extradition offence, was left to the executive. The Court was concerned with the question of whether a *prima facie* case had been established,

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<sup>83</sup> *United States v McVey* [1992] 3 SCR 375 at [40].

the equivalent of our s 24(2)(d). The majority concluded that foreign law was irrelevant to this enquiry and should not have been admitted:<sup>84</sup>

All the extradition judge is concerned with is to determine that there is prima facie evidence that the conduct with which the accused is charged in the requesting state would, if committed in Canada, constitute a crime listed in the treaty.

[286] The House of Lords cited *McVey* with approval in *Norris v Government of the United States of America* and concluded that a broad conduct-based approach to extradition was required, thereby avoiding the need for an extradition court to investigate the legal ingredients of the foreign offence.<sup>85</sup>

[287] These authorities support the interpretation contended for by the United States that the test under s 24(2)(d)(i) relates to the conduct constituting the extradition offence and does not require consideration of foreign law.

[288] The same approach has been followed in Australia. In *Griffiths v United States of America*, the Full Court of the Federal Court of Australia considered a similar submission to that made by the appellants in the present case, that in a case involving alleged copyright infringement the requesting State must prove, amongst other things, the identity of the owners of the copyright claimed to subsist in the relevant works.<sup>86</sup> Under the relevant extradition law, the Court's task was confined to the equivalent of our s 24(2)(c), namely the determination of whether the offence for which surrender was sought was an extradition offence. Nevertheless, the same conduct-based approach to extradition was applied and the Court's observations provide assistance on the present issue.

[289] The Full Court commenced by referring to s 19(3)(c)(ii) of the Extradition Act 1988 (Cth), which is equivalent to our s 18(4)(c)(ii), requiring the requesting State to accompany its request with a statement setting out the conduct constituting the alleged offence. The Court noted that the "conduct constituting the offence" is a reference to the acts or omissions by which the offence is alleged to

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<sup>84</sup> At [73].

<sup>85</sup> *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 2 WLR 673 at [89].

<sup>86</sup> *Griffiths v United States of America* [2005] FCAFC 34, (2005) 143 FCR 182.



have been committed. This corresponds to our s 5. Significantly for present purposes, the Court considered that the question of whether or not the allegedly pirated material is a matter of copyright in either the United States or Australia was not itself a matter of conduct but more in the nature of “a state of things”.<sup>87</sup>

The requirement of s 19(3)(c)(ii) is to provide a statement of the “conduct constituting the offence”. That conduct, as s 10(2) indicates, is a reference to the acts or omissions by virtue of which the offence has been, or is alleged to have been, committed. Whether or not the pirated material is a matter of copyright in either the United States or Australia is not of itself a matter of conduct. It is more in the nature of “a state of things rather than an act”; (*Riley v Commonwealth* (1985) 159 CLR 1 at 8) which, as the United States acknowledges, it will be required to prove in any trial of the charges. The evidence of it was not required to be included in the supporting materials for the purposes of describing the conduct constituting the offence.

A magistrate dealing with the extradition request is entitled to rely upon the asserted fact that the various enumerated works were protected by United States copyright without having evidence of that fact. The double criminality requirement of s 19(2)(c), likewise does not require evidence of the fact that copyright in those works would notionally have been available in Australia if the conduct had occurred in New South Wales. The question for the magistrate was, simply, would it be an offence notionally in Australia to breach copyright substantively in the way that has been alleged in the supporting documents. This would have required that the magistrate be satisfied that the *type* of work pirated, ie, software, was itself a type of work capable of attracting protection under the Australian *Copyright Act*. It clearly had that quality. Beyond this the magistrate’s concern was with the appellant’s conduct.

As counsel for the United States put it in submissions, what s 19 relevantly is about is the conduct of the fugitive. Given the allegation that the pirated works were of a description or nature which was subject to copyright, and if that conduct occurred in New South Wales would that conduct have constituted an offence? We consider this test correctly states the proper approach to s 19 for present purposes.

[290] The Ontario Court of Appeal took a similar approach in a case involving alleged tax evasion in *Germany (Federal Republic) v Schreiber*.<sup>88</sup> The Court rejected a submission that the applicable double criminality rule had not been satisfied because it had not been proved that taxable income under German law would also be considered taxable income in Canada. The Court held that the extradition Court’s focus is on the conduct of the person sought and that the German definition of “income” is transposed from the requesting jurisdiction:

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<sup>87</sup> At [85]-[87].

<sup>88</sup> *Germany (Federal Republic) v Schreiber* (2006) CCC (3d) 339 (Ont. CA).

[42] ... I do not accept the submission that it is necessary to advert to the German definition of income to satisfy the double criminality. I agree with the extradition judge (at para. 37) that when “transposing the facts from the requesting jurisdiction to the requested jurisdiction, the institutions and laws of the foreign jurisdiction of necessity must be brought along to provide context for the committal decision.” As Anne Warner La Forest, *La Forest’s Extradition To and From Canada*, 3<sup>rd</sup> ed. (Aurora, Ontario: Canada Law Book, 1991) states at pp. 69-70. “... The institutions, and laws of the foreign country must necessarily form the background against which to examine events occurring in that country. It is after all, the essence of the offence that is important in extradition.” The point was well expressed by Duff J. in *Re Collins (No.3)* (1905), 10 CCC 80 (BCSC) at p. 103:

... if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged.

[43] There is little authority on precisely what may be included in the imported legal environment and what must be considered to be an element of the conduct alleged against the person sought. It is probably impossible to provide a precise bright line distinction that will cleanly define the boundary in all cases. However, I am satisfied that the legal definition of income falls within the category of the foreign legal environment that is properly considered as the context or background within which the alleged wrongful conduct occurred. One must look to the definition of income to identify the nature and extent of the obligation to pay taxes but the essence of the alleged wrong is the use of deceitful and dishonest means to avoid that legal obligation, however it is determined.

[291] Applying this analysis to Count 4 relating to the movie *Taken*, the rights protected by the relevant copyright legislation in the United States form part of the imported legal environment and need not be enquired into. The extradition Court is solely concerned with the alleged conduct constituting the offence, namely that the appellants wilfully infringed those rights by making the film available to members of the public on a computer network.

[292] Mr Illingworth sought to distinguish *Schreiber* on the basis that it is a tax case and should be treated as *sui generis*. He notes that Parliament regarded tax cases as falling into a special category by addressing the issue of differing tax regimes in other jurisdictions in s 5(3) of the Act:

(3) An offence may be an extradition offence although –

- (a) it is an offence against a law of the extradition country relating to revenue (including taxation and customs and excise duties) or foreign exchange controls; and
- (b) New Zealand does not impose a tax, duty, or other impost of that kind.

[293] I do not accept that the analysis in *Schreiber* can be disregarded on this basis. The Court arrived at its conclusion on this issue applying basic principles of extradition law, including the conduct-based approach, and without the benefit of any specific statutory direction such as that set out in s 5(3) of the New Zealand Act. Moreover, s 5(3) is concerned with whether an offence is an extradition offence, the prior enquiry under s 24(2)(c). It says nothing about the conduct constituting an extradition offence that must be proved to a *prima facie* standard under s 24(2)(d).

[294] I conclude that for the purposes of its determination under s 24(2)(d)(i) the Court must focus on the acts or omissions of the requested person, being those acts or omissions identified for the purposes of s 24(2)(c) as constituting the extradition offence. In a case involving alleged copyright infringement by making a copyright protected work available to members of the public without licence, the question of whether or not copyright subsisted in the relevant work in the United States at the relevant time is not an act or omission of the requested person and falls outside the scope of the enquiry. The extradition Court is not required to determine this issue, which would necessitate consideration of foreign law, a task it is ill-suited to undertake. The existence of copyright in the works at the time is a circumstance or “state of things” that is transposed to New Zealand as part of the relevant legal environment against which the evidence of the requested person’s conduct must be assessed.

#### Statutory limitation period: s 131 Copyright Act

[295] The District Court accepted the appellants’ submission that s 131 of the Copyright Act did not provide an available extradition pathway for counts 7 and 8 because, at the relevant time, an information for such an offence had to be laid within three years of the commission of the offence.<sup>89</sup> The superseding indictment

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<sup>89</sup> Copyright Act 1994, s 131. This provision was inserted on 20 August 2003 but repealed on 1 July 2013 by s 413 of the Criminal Procedure Act 2011.

was filed on 16 February 2012, more than three years after the infringement alleged in counts 7 and 8. It is accepted that if the limitation period is relevant for extradition purposes, it would apply equally to count 4 despite the District Court's conclusion to the contrary.

[296] For the reasons already given, I do not consider that s 131 of the Copyright Act provides an available extradition pathway for any of the counts in the superseding indictment. Accordingly, it is not strictly necessary for me to consider whether the limitation period in s 131A applies. However, because of the inevitability of an appeal, I briefly consider whether s 131A would have been relevant if the conduct constituting the offences described in counts 4, 7 and 8 translated to an extradition offence by virtue of s 131.

[297] Article VI of the Treaty states:

Extradition shall not be granted in any of the following circumstances:

...

3. When the prosecution ... has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time according to the laws of the requested Party had the offence been committed in its territory.

[298] This provision amounts to a mandatory restriction on the surrender of a person in terms of the Treaty for the purposes of s 30(2)(ab) of the Extradition Act. This reads:

**30 Minister must determine whether person to be surrendered**

- (2) The Minister must not determine that the person is to be surrendered –

...

- (ab) if the Minister is satisfied that a mandatory restriction on the surrender of the person applies under the provisions of the treaty (if any) between New Zealand and the extradition country;

[299] It is therefore for the Minister, not the Court, to determine whether the prosecution is barred by the laws of New Zealand if the offence had been committed within its jurisdiction. This is confirmed by s 24(3)(b):

- (3) The person is not eligible for surrender if the person satisfies the court –

...

- (b) except in relation to a matter referred to in section 30(2)(ab), that the person's surrender would not be in accordance with the provisions of the treaty (if any) between New Zealand and the extradition country.

[300] The analysis is further confirmed by the Explanatory Note to the Extradition (Amendment) Act 2002 (no 2) which inserted s 30(2)(ab) into the principal Act and amended s 24(3)(b). The Explanatory Note says:

If there is an extradition treaty between New Zealand and the relevant extradition country in a particular case and that treaty contains a mandatory restriction on the surrender of the person, the court is not required or entitled to consider this restriction. A restriction of that kind is for the Minister to consider.

[301] Whether or not there is a mandatory restriction on surrender for the purposes of counts 4, 7 and 8 if sole reliance had been placed on s 131 of the Copyright Act is for the Minister to determine. It is not part of the Court's function when determining eligibility for surrender under s 24 of the Act.

*Count 2 – conspiracy to commit copyright infringement*

[302] The appellants' arguments in relation to the sufficiency of the evidence to establish a *prima facie* case under the specific counts are largely disposed of in the foregoing discussion. However, I briefly address the specific submissions made in relation to each count.

[303] Mr Illingworth submits that the question of whether there is *prima facie* evidence of an unlawful conspiracy must be judged according to the substantive law of New Zealand. He contends that the primary provision relating to count 2 is s 310 of the Crimes Act which deals with conspiring to commit an offence in New Zealand. This requires proof that the conspiracy was to commit an offence under New Zealand law. For the reasons previously outlined, he argues that digital copyright infringement of the type alleged is not an offence under New Zealand copyright law. He contends that the essence of the allegations against the appellants is that they constructed a facility which enabled others, the users of Megaupload, to commit copyright infringement. He submits that on a plain reading of s 310 of the Crimes Act, this is not sufficient to establish a conspiracy under New Zealand law.

Absent evidence of copyright infringement constituting a criminal offence under our Copyright Act, Mr Illingworth argues that the District Court was wrong to infer a conspiracy to commit any of the alleged extradition offences. He also emphasises his earlier submission that inferences cannot be drawn from “threadbare conclusory assertions about breach of copyright”.

[304] The fallacy of this reasoning has already been demonstrated. Article II.16 is an extradition offence because it is listed in the Treaty. It happens to correspond to the common law offence of conspiracy to defraud that was formerly codified in s 257 of the Crimes Act, but that is an aside. The relevant conduct constituting the offence is that correlating to art II.16 (and the other pathway offences). Whether or not such conduct would also constitute an offence under s 310 of the Crimes Act is irrelevant and proof of it is not required. It is therefore not necessary to prove that the agreement was to commit an offence under New Zealand law as Mr Illingworth contends. As *Cullinane* confirms, s 24(2)(d)(i) does not import a double criminality requirement.

[305] If, contrary to his principal submission, New Zealand law does not apply in its entirety (substantive as well as procedural), then Mr Illingworth argues that copyright infringement must be determined by the extradition Court applying foreign law which must be proved as a fact. Mr Illingworth submits that if this is correct, there is a “gaping hole” in the evidence because there is no expert evidence in relation to the relevant foreign law. I have already explained why I consider that this reasoning is incorrect; the extradition Court is not required to enquire into matters of foreign law.

[306] Even if it were necessary to prove a conspiracy to commit an offence under New Zealand law, this would not require proof that such an offence, the object of the conspiracy, was actually committed. The offence of conspiracy to defraud is complete on the formation of the agreement or understanding to commit an unlawful act by a common plan or course of action. It is not necessary to prove that the participants succeeded in achieving their unlawful objective. Thus, even if Mr Illingworth was correct that the object of the conspiracy had to be an offence

under New Zealand law, the work-by-work analysis of copyright ownership and infringement he contends for would not be required for count 2.

[307] The essence of the conduct alleged in count 2 is that the appellants knowingly formed an agreement or mutual understanding to defraud copyright owners by a common plan or course of action and each obtained money by that agreement. I agree with the District Court Judge that the record of the case discloses sufficient evidence to establish a *prima facie* case that the appellants committed the acts or omissions by virtue of which this offence is alleged to have been committed. Their respective roles and the history of their involvement as senior officers of Megaupload are described. The payments that each are alleged to have obtained from their involvement in the conspiracy are set out. The nature of the alleged conspiracy is addressed in considerable detail, including by reference to the various overt acts that are relied on as evidence of it.

[308] The District Court Judge devoted a large proportion of his judgment to setting out extracts from the summarised evidence in the record of the case and identifying the inferences he considered a trier of fact would be entitled to draw from that evidence. This set the basis for his conclusion that a *prima facie* case has been established against the appellants on all counts. Apart from the specific errors of law already addressed, the appellants do not take particular issue with this part of the Judge's analysis, which mirrored the submissions made on behalf of the United States in the District Court and coincides with the conclusion reached by the Grand Jury in the United States.

[309] As noted, the appellants' challenge was primarily based on their contention that ownership of copyright on a work-by-work basis under New Zealand law (or alternatively United States law) is essential and that adequate evidence of this had not been provided. Having rejected that contention as a matter of law, it is sufficient for me to explain briefly my reasons for agreeing with the District Court that a *prima facie* case on Count 2 has been established.

[310] Ms Gordon submits that the evidence summarised in the record of the case shows an agreement or understanding between Messrs Dotcom, Ortmann and

van der Kolk to dishonestly deprive copyright owners of their rights by various means, including by:

- (a) offering monetary rewards to incentivise users to upload popular copyright infringing files, including commercial movies, in order to generate high levels of traffic to the Megaupload site from members of the public;
- (b) paying rewards to such users knowing that this was for files protected by copyright;
- (c) setting free viewing times of content on Megavideo so as to incentivise users to pay subscriptions to enable them to view the remainder of copyright infringing videos, including motion pictures;
- (d) facilitating the mass distribution of the most popular infringing video files by converting these into a form that enabled faster distribution;
- (e) manipulating their audit procedures to allow copyright infringing files to be posted;
- (f) disguising the availability of copyright infringing material on their sites by populating the front pages of these sites with user-generated content unlawfully copied from YouTube; and
- (g) frustrating attempts by copyright owners to take down or block access to copyright infringing files.

[311] The record of the case runs to 336 pages, including the supplements, and sets out the evidential foundation for each of the dishonest methods asserted and the appellants' participation in them. Much of the summarised evidence has been extracted from the Megaupload database and information systems and includes a significant amount of correspondence and discussions between the appellants. The District Court Judge recited much of this material in his judgment. It is not necessary for me to repeat that exercise or to address each of the alleged strands of



dishonesty. For present purposes, I need only determine whether there is sufficient evidence from which the trier of fact could infer that each of the appellants was party to an agreement or understanding to dishonestly deprive copyright holders of their rights as alleged. That the record of the case contains *prima facie* proof that they each obtained money from their participation in the agreement is beyond argument.

[312] The record of the case contains evidence sourced from publicly available information that in about September 2005, Megaupload announced its “Uploader Rewards” scheme, the object of which was to incentivise users by way of monetary reward to upload and post links to popular files that would generate high levels of downloads by members of the public. The announcement included the following statement:

Today we are also introducing our ground breaking Uploader Rewards. Our new reward program pays money and cash prizes to our uploaders. This makes Megaupload the first and only site on the Internet paying you for hosting your files. The more popular your files the more you make. ... You deliver popular content and successful files. We provide a power hosting and downloading service. Let’s team up! ... You must have at least 50,000 downloads within 3 months to qualify.

[313] By July 2011, this scheme had become so successful that users needed to attract 100 times as many downloads in a three month period (at least 5 million) to qualify for a reward payment of USD 10,000.

[314] Messrs van der Kolk and Ortmann administered the rewards programme. A jury could infer that they knew that in order to achieve such high levels of traffic, users needed to upload and distribute large numbers of popular files in breach of copyright. The topic was addressed on numerous occasions in correspondence between them. For example, in a conversation via Skype as early as August 2007:

Mr Ortmann: how clean are the existing videos on MRV now, what do you think?

Mr van der Kolk: still lots of copyright infringements ... if we want to clean things up we have to agree on what has to go and what not ... otherwise I can delete 90% of the content. ... So videos longer than 10 minutes on MRV should be set to private or something...

Mr Ortmann: yes, direct linking/embedding is fine.

Mr van der Kolk: embedded players are not so harmful.

Mr Ortmann: searchability is dangerous and will kill us.

Mr van der Kolk: yeah.

[315] In the same conversation, Mr Ortmann acknowledged the financial impact on copyright holders and raised a concern that they could make a claim against Megaupload based on the view-counts they were displaying:

Mr Ortmann: as we're displaying view-counts, the copyright industry could be tempted to send us invoices for lost revenue based on that.

Mr van der Kolk: that will hurt.

Mr Ortmann: indeed.

[316] On 7 October 2007, Mr van der Kolk again discussed with Mr Ortmann via Skype that virtually all uploaded content was pirated:

Mr van der Kolk: maybe we should automatically delete videos on Megavideo that are longer than 30 minutes and have more than XXX views or something because I still see so much piracy that is being embedded. ... What kind of videos are legit and longer than 30 minutes and views more than XXX times.

Mr Ortmann: what we can indeed do is put them into 'temporarily not available' state and priority-audit them ... anything that's legit will then be unblocked permanently, the rest will go to deleted.

Mr van der Kolk: yeah but 99.999% will be deleted then.

[317] Messrs Ortmann and van der Kolk recognised the vulnerability of the business to being shut down following legal action. They discussed this that same day:

Mr Ortmann: back in the early days, I hoped that we would stay online for 2, 3 more months ... before law enforcement would take our servers down.

Mr van der Kolk: seriously? You were that sceptical?

Mr Ortmann: every day that passed without something serious happening on that side made me feel happy. ... if we were a 100% clean site with that growth and profit, we would have sold for a nine-figure sum already.

Mr van der Kolk: ... it will be hard to get sold to a big player because we're not 100% legit.

Mr Ortmann: this is exactly the point where the higher-level suits always cancel the investment ... and they've got a point there.

Mr van der Kolk: yeah that's very unfortunate, we have to think of a work around for that otherwise we'll never cash in and we'll just end up with legal problems in a few years or other problems. ... this can't last forever I think.

[318] There is evidence indicating that by November 2007, Megaupload could not cope with the large volume of DVD rips being uploaded, many of which were

protected by the copyright holders by encryption. Mr Ortmann discussed this problem with Mr Dotcom via Skype on 14 November 2007:

Mr Ortmann: we have a long queue of dvd-rips ... and some DRM [Digital Rights Management] protected, that cannot be converted.

Mr Dotcom: then we need more conversion servers ... please order.

[319] In another Skype conversation in January 2008, Mr van der Kolk told Mr Ortmann that over 90 per cent of their profits came from copyright infringing files and it would be counter-productive and very costly to exclude these in calculating rewards:

Mr Ortmann: he [an uploader] probably has 100% fraudulent files in his account.

Mr van der Kolk: most likely ... that's the big flaw in the rewards program ... we are making profit of more than 90% infringing files ... so either we should just lower the points a bit and pay everybody, or stop paying rewards. ...the rewards system will only really contribute to our growth if we stop pissing off users ... so as long as we disqualify users for infringing files it is only counter-productive and very costly in my opinion because growth is mainly based on infringement anyway.

[320] Free viewing times were set to incentivise payment of subscriptions to Megaupload to enable viewers to watch entire movies as premium subscribers. Mr van der Kolk discussed with Mr Ortmann by Skype on 7 September 2008 the boost in profits this was likely to generate:

Mr van der Kolk: I am looking forward to the first 1M\$ profit/month.

Mr Ortmann: you are looking at December or January, provided the new player performs well.

Mr van der Kolk: but especially the fact that video will stop after XX minutes and then show a message will trigger sales I think... the users want to see the rest.

Mr Ortmann: yes, the concept is absolutely ingenious ... much more incentive to pay ...

[321] Mr Ortmann commented on the explosive growth of Megavideo and its prospect of becoming the Rapidshare of video in a Skype conversation with Mr van der Kolk on 27 September 2008:

Mr Ortmann: we did some things right ... we allowed fraud for a long time, fueling our growth ... then we forced our own player, making us explode ... and now we can capitalise on it.

Mr van der Kolk: yes.

Mr Ortmann: and again, it's nicely non-searchable ... really nice... let's become the Rapidshare of video ... our strongest country (USA) isn't even fully awake yet.

Mr van der Kolk: indeed.

[322] The rewards programme and the limits set on free viewing times proved to be very successful as evidenced by the extent of data storage required by Megaupload. Evidence summarised in the record of the case shows that Megaupload leased 25 petabytes (25 million gigabytes) of data storage on over 1,000 computer servers from Carpatha Hosting Inc. in the United States at a monthly cost of USD 950,000. A further 36 computer servers were leased from Cogent Communications in the United States and France. Hosting and support services provided by Cogent to Megaupload cost up to USD 1.6 million per month. A further 690 servers were leased from Leaseweb, a company based in the Netherlands.

[323] On 15 February 2009, Mr van der Kolk and Mr Ortmann discussed ways of curbing copyright holders' ability to prevent access to infringing material:

Mr van der Kolk: Kim was suggesting to maybe limit it up to 10 of the same files per user, he just thought that it could be useful for some users to upload the same file several times if they want to have easy backups against deletions, or spread different links on different forums.

Mr Ortmann: yeah, could be useful then.

Mr van der Kolk: we would provide a feature that would make it harder to control for copyright holders.

[324] There is evidence indicating that Mr Dotcom directed that infringement notices from copyright holders should not be actioned indiscriminately because of the effect this would have on profits. For example, on 23 April 2009, he sent an email to Messrs van der Kolk, Ortmann and Mr Bencko, another alleged co-conspirator:

I told you many times not to delete links that are reported in batches of thousands from insignificant sources. I would say that those infringement reports from MEXICO of '14,000' links would fall into that category. And the fact that we lost significant revenue because of it justifies my reaction.

[325] Later that day, Mr Dotcom issued the following instruction to Mr Ortmann:

Please do what I wrote Bram. Undelete everything that was in the last 4 weeks reported from non first world countries. SIMPLY everything. And you will see we have daily record again.

[326] The following day, he wrote to them again recalling a similar incident in 2008 when multiple links were deleted at the behest of copyright holders causing a steep decline in revenue:

I remembered the steep drop of revenue at the same time in 2008 and I thought that this might have also been caused by careless mass link deletions. This made me very mad, especially because I told you that such mass deletions should be prevented and sources checked more carefully. I am sure that such mass link deletions are also contributing to a drop of revenue ... In the future please do not delete thousands of links at once from a single source unless it comes from a major organisation in the US.

[327] After searching the Megaupload database in early 2009, Mr van der Kolk reported that it contained more than 41,000 files of high-definition video, including numerous copyrighted motion pictures. Mr Ortmann discussed this with Mr van der Kolk on 3 March 2009:

Mr van der Kolk: with HD [high definition] video, we'll easily need 50 gigs more already ... but we'll also be MUCH more popular/valuable.... Kim likes the idea as well I suppose?

Mr Ortmann: he loves it. I just wonder what Warner Bros. will say when they see crystal clear BD [blu-ray] rips instead of the usual blurry video.

Mr van der Kolk: yeah will be even more pissed off.

[328] Soon after, on 7 March 2009, Mr van der Kolk observed that the copyright holders must not yet be aware of the scale of the Megaupload business, otherwise they would have taken action to stop it:

Mr van der Kolk: if copyright holders would really know how big our business is they would surely try to do something against it ... they have no idea that we're making millions in profit every month.

Mr Ortmann: indeed.

[329] Mr Dotcom also appears to have been concerned about the legal exposure. He spoke about this with Mr Ortmann on 8 March 2009:

Mr Dotcom: let's talk about how we should prepare for lawsuits, should they ever happen.

Mr Ortmann: we need to take a look at how YouTube has dealt with that so far. Promise some kind of technical filtering crap and then never implement it.

Mr Dotcom: we should already be hiring an attorney now, perhaps an in-house one, to get us prepared for anything.

[330] On 20 March 2009, Mr Dotcom expressed his enthusiasm about the prospect of Megavideo being able to provide high definition content:

Mr Dotcom: I'm looking forward to MV [HD], it will be cool.

Mr Ortmann: the quality is going to be amazing ... the Warner Brothers opening credits for *Terminator 3* on Andrus' [Nomm] unoptimised demo video is already a feast for the eyes.

[331] It appears that Mr Ortmann predicted that the availability of high definition movies on Megavideo rivalling theatre quality would "kill" the movie industry. This was discussed on 25 May 2009 by Messrs Ortmann, van der Kolk and Nomm, an alleged co-conspirator who has pleaded guilty to conspiracy to commit copyright infringement:

Mr Ortmann told Mr Nomm: H.264 [a standard for video compression used for high definition videos] will kill the movie industry the way that MP3 has killed the music industry, pure eye candy.

Mr van der Kolk: what will be the HD launch page?

Mr Ortmann: a landing page advertising 'Megavideo goes High Definition'.

Mr van der Kolk: Hollywood will curse us.

Mr Ortmann: this is indeed the point where streaming web video is starting to rival theatre quality.

[332] On 19 July 2009, Mr Ortmann spoke to Mr van der Kolk about the risk of 10 of their top 15 referrers, all Spanish sites, being closed down:

Mr Ortmann: I just fear the day when those ten Spanish sites that make up for 20% of our payments get busted.

Mr van der Kolk: nah sites will come and go all the time.

Mr Ortmann: true.

[333] On 10 October 2009, Mr Ortmann and Mr van der Kolk again discussed the high level of pirated content on Megavideo and how to manage the associated risks, including by sanitising the front pages of the site so that it only listed "harmless" material that did not infringe copyright "while all the piracy is going through direct links and embedded":

Mr van der Kolk: theoretically we could make MV just like MU ... remove all the video listing stuff.

Mr Ortmann: yep, but even better than that, we list only really harmless stuff.

Mr van der Kolk: yes but problem is almost no harmless stuff is being uploaded to MV. ... We should actively add YouTube videos again perhaps.

Mr Ortmann: yes, we could do that indeed. ... Kim's idea of leaving the semi-harmful stuff online for 23 hours is also pretty good.

Mr van der Kolk: yes also not bad, but then there will always still be harmful content on the site always. ... I would say we should not even make it public at all. ...we make money from direct links & embedded, no need to risk anything.

Mr Ortmann: harmful content isn't bad per se as long as we process takedowns and don't upload it ourselves.

Mr van der Kolk: that we already do now even.

Mr Ortmann: it has a positive effect in that it allows content owners to search our site and send takedown requests.

Mr van der Kolk: but it's good to stay off the radar by making the front end look like crap while all the piracy is going through direct links and embedded.

Mr Ortmann: the important thing is that nobody must know that we have auditors letting this stuff through.

Mr van der Kolk: yes that's very true also.

[334] This strategy appears to have been implemented. The record of the case discloses that on 25 October 2009, Mr van der Kolk instructed an employee by email how to alter the "featured" videos list on Megavideo.com and the "Top 100" list on Megaupload.com. Mr van der Kolk instructed that the Top 100 should not list any copyright files but instead should list game demos, software demos and movie trailers. He told the employee to track what was currently popular on the Internet and to download material from various websites, including three he identified. He also instructed the employee to create fake accounts on Megaupload.com and Megavideo.com and upload the files to those accounts so that it would appear that the files had been uploaded by active users, not by a Megaupload employee. As Mr van der Kolk had observed in discussion with Mr Ortmann on 23 December 2008, the purpose of doing this was to make "our whole site look much more legit". Mr Ortmann replied, "exactly".

[335] Mr Batato appears to have participated in the arrangement and been aware of the need for concealment. He wrote numerous emails to advertisers and users from which a jury could infer that he was knowingly involved in the arrangement. One example is an email he sent in response to an enquiry from a user on 28 January 2010:

User: where can we see full movies?

Mr Batato: you need to go to our referrer sites. Such as [www.thepiratecity.org](http://www.thepiratecity.org) or [www.ovguide.com](http://www.ovguide.com). There are the movie and series links. You cannot find them by searching on MV directly. That would cause us a lot of trouble.

[336] Mr Batato advised Mr Nomm by Skype on 27 July 2010 that an advertising seller had banned Megaupload because of users being directed from strange sites. In the course of this exchange, Mr Batato appears to have acknowledged that most of the content on their servers infringed copyright:

Mr Batato: [A particular ad seller] temporarily banned us because there were a lot of users coming from strange sites to us.

Mr Nomm: look [at our] site names ... look [at] our content ... and then they should wonder why strange sites ... most of our content is stolen and uploaded by users.

Mr Batato: I know.

[337] Mr Dotcom discussed with Mr Ortmann the risk of legal action in a Skype conversation on 16 October 2010:

Mr Dotcom: at some point a judge will be convinced about how evil<sup>90</sup> we are and then we're in trouble. We have to make ourselves invulnerable ...

Mr Ortmann: to counter the justice system with technical methods is difficult at our size ...

Mr Dotcom: the file servers are not the issue here. The web and db servers are. This structure has to be secure. No one will impound 1,000 file servers.

Mr Ortmann: if a US-court prohibits Cogent from providing us service, we will soon lose the vast majority of our connectivity worldwide.

Mr Dotcom: you should not log our chats, too much shit in there.

Mr Ortmann: unfortunately Skype autologs them ... I'm going to erase them all.

[338] The foregoing is only a brief summary of a small part of the evidence contained in the record of the case but it is sufficient to demonstrate *prima facie* proof each of the appellant's knowing participation in the conspiracy alleged in count 2.

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<sup>90</sup> I do not overlook that the appellants claim that the word "evil" is an inaccurate translation of this message which was in German. However, that is a disputed issue of fact and does not have any material bearing on the sufficiency of the evidence to establish a *prima facie* case.



*Count 4 – the movie ‘Taken’*

[339] Michael Poston, a Special Agent with the Federal Bureau of Investigation assigned to the National Intellectual Property Rights Coordination Centre in Virginia, was charged with the investigation of crimes involving the infringement of intellectual property rights, including criminal copyright violations. In the course of its investigation, which commenced in March 2010, the Federal Bureau of Investigation obtained millions of emails relating to Megaupload spanning the time period from March 2006 to December 2011. Agent Poston personally conducted searches and reviews of this material to identify relevant documents for the purposes of the investigation.

[340] The record of the case records that Agent Poston is expected to testify that his search of Megaupload’s database revealed that Mr van der Kolk personally uploaded an infringing copy of the copyrighted motion picture, *Taken*, to Megaupload on 25 October 2008 and emailed a link to the file to a third party that day. The file name was “Taken 2008 DVDRip Repack [A Release Lounge H264 By Micky22].mp4”. Agent Poston is also expected to testify that he downloaded this particular file and viewed the movie by accessing Megaupload’s servers at Carpathia in Ashburn, Virginia on 27 November 2011.

[341] Another Federal Bureau of Investigation representative is expected to testify that this particular copy of the movie *Taken* was viewed at least nine times through Megavideo.com. The United States’ case is that this movie was not released in theatres in the United States until 30 January 2009 and was not commercially distributed there until 11 February 2012. Although these matters will need to be proved to establish the elements of the offence charged in Count 4, they are not relevant in proving an extradition offence.

[342] The record of the case summarises the expected evidence of a representative of the Motion Picture Association of America that this particular file, which was downloaded and viewed by Agent Poston, was an infringing copy of the copyrighted motion picture, *Taken*. This representative will confirm the dates *Taken* was released and commercially distributed in the United States.

[343] For the reasons given earlier in this judgment, I have concluded that the only extradition pathways for Count 4 are via ss 228 and 249 of the Crimes Act. In reaching the conclusion that this section does provide an available pathway, I rejected the appellants' arguments that the offence in Count 4 (unlike the other counts) was not alleged to have been committed as part of the conspiracy and that the requirements of s 101B(1)(c) of the Extradition Act (the offence must allege the involvement of an organised criminal group) were accordingly not satisfied. Contrary to this submission, the superseding indictment does allege that the offence in count 4 was committed in furtherance of the "Mega Conspiracy" to which all appellants were party at the relevant time. It is one of the overt acts relied on to support count 2.

[344] This disposes of Mr Illingworth's submission that the absence of evidence of direct participation by any of the appellants other than Mr van der Kolk is fatal to the case against them.

[345] Mr Illingworth submits that the evidence is in any event insufficient because:

- (a) the allegation that Mr van der Kolk uploaded the movie is based on an unidentified email, the content of which has not been disclosed;
- (b) there is no evidence that the file found by Agent Poston on the Megaupload server is the one allegedly uploaded by Mr van der Kolk;
- (c) there is no evidence that the file Mr van der Kolk uploaded was not his; and
- (d) there is no adequate evidence of the time of commercial distribution of the movie.

[346] The email did not have to be produced to the extradition Court. Section 25(2) makes it clear that exempted countries such as the United States need only provide a summary of the evidence acquired to support the request for surrender and that such

a summary, so long as the admissibility requirements under subsection (3) are met, is admissible “as evidence”. This is all subject to the overriding duty of candour.

[347] While s 25(2)(b) refers to “other relevant documents”, this does not mean that every document relevant to each of the charges must be produced. If that were so, the United States would have been required to include thousands of documents in the record of the case. This would largely defeat the purpose of the section which is to expedite the process for exempted countries by allowing them to submit their evidence in a summarised form. It would also tend to undermine the need for the attendant safeguards, being an affidavit under s 25(3)(a) confirming that “the evidence has been preserved” for use at trial (it would hardly be necessary to have an affidavit stating that the evidence has been ‘*preserved*’ if the documents must be provided to the Court), and a certificate under s 25(3)(b) that the record of the case discloses the “existence of evidence” sufficient under the law of the exempted country to justify a prosecution (again, there would be no need for a certificate stating that ‘sufficient evidence *exists*’ if such evidence must be produced to the Court).

[348] On 9 November 2015, Nicola Pye, a solicitor employed by the firm acting for Messrs Ortmann and van der Kolk, searched the Internet movie database, an online Internet tool providing information relating to films, television programmes and video games. The search terms “*Taken*” and “*Taken (2008)*” yielded 40 results although one of these, *The Fog (1980)*, appeared to be erroneous. Mr Illingworth claims that this evidence shows that there are at least 39 films or television series/episodes that are called “*Taken*” and it is impossible to know what particular work is being referred to in the record of the case. I disagree. In my view, this evidence is nothing more than a distraction. The search showed only one result for “*Taken(1)(2008)*”; the others were for different years (ranging from 1999 to 2015) and most of these were identified as television episodes. While the search demonstrates that there are numerous copyright protected films, television programmes or episodes and video games incorporating the name “*Taken*”, Agent Poston specifically identifies the particular movie file that is the subject of Count 4. This is the file that was viewed both by him and by the representative of the Motion Picture Association of America.

[349] Contrary to Mr Illingworth’s submission, I consider that the trier of fact could infer that this file did not belong to Mr van der Kolk. The name of the file, “*Taken 2008 DVDRip...*”, indicates that it was a copyright infringing copy. The evidence that the copyright holders did not release the movie to the public in theatres until 30 January 2009 or commercially distribute it in the United States until 12 May 2009 provides further support for an inference that in October 2008, Mr van der Kolk did not own the file and was not entitled to upload it onto Megaupload or make it available to others by providing a link to it.

[350] I conclude that the summarised evidence in the record of the case, which I have set out above, is sufficient to establish a *prima facie* case that, in furtherance of the alleged conspiracy, Mr van der Kolk:

- (a) intentionally uploaded the file and thus “obtained” a “document”; and/or
- (b) “used the document” by emailing a link to it to a third party; and
- (c) did so dishonestly and without claim of right; and
- (d) did so with the intention of obtaining a pecuniary advantage.

[351] The summarised evidence is sufficient to establish a *prima facie* case that, in furtherance of the alleged conspiracy, Mr van der Kolk accessed Megaupload’s computer system and thereby dishonestly and without claim of right obtained a benefit.

[352] There is sufficient evidence summarised in the record of the case from which the trier of fact could infer that all of the appellants participated in the alleged conspiracy and that the movie *Taken* was uploaded by Mr van der Kolk in furtherance of of the joint agreement or understanding as was his further act in providing a link to the file to a third party. The eligibility requirement under s 24(2)(d)(i) is therefore satisfied against all appellants on Count 4 via the pathways available under ss 228 and 249 of the Crimes Act.

*Counts 5 to 7 – other instances of copyright infringement*

[353] It is convenient to deal with these counts together because they all allege violation of the same section of the United States Code, by wilfully, and for the purposes of commercial advantage and private financial gain, reproducing and distributing over the Internet, during a 180-day period, at least 10 copies and phonorecords of one or more motion pictures and other copyrighted works having a total retail value of more than USD 2,500. Each count relates to a different 180-day period. The appellants' criticisms of the evidence in respect of these counts is the same.

[354] As with count 4, I have found that the only available extradition pathways for each of these counts are under ss 228 and 249 of the Crimes Act. The appellants repeat their submission that the conduct giving rise to these counts is not alleged to be part of the conspiracy (and therefore does not allege the involvement of an organised criminal group for the purposes of s 101B(1)(c)(ii) of the Extradition Act). They contend that the Judge was wrong to conduct his analysis in relation to these charges on that basis. I do not accept that submission for the same reasons given in relation to count 4.

[355] To satisfy the requirements of s 24(2)(d) in relation to these counts, it is sufficient to find *prima facie* evidence that in furtherance of the alleged conspiracy, one or more of the appellants obtained or used a digital file with intent to obtain a pecuniary advantage during the relevant period.

[356] Mr Illingworth submits that the evidence in relation to these counts is "so generic and unspecific" that the Judge's conclusion that a *prima facie* case had been established is "nonsensical". For the reasons that follow, I do not agree.

[357] For count 5, the record of the case lists 10 copyright infringing files that Agent Poston found from his search of the servers leased from Carpathia were available over the Internet on Megaupload in the relevant six month period. Six of these were copyrighted motion pictures: *Lord of the Rings; Fellowship of the Ring; The Twilight Saga: Breaking Dawn; Taken; Happy Feet Two; Puss in Boots;* and *The Adventures of Tintin*. One was a copyrighted television programme: *Bored to Death*

(Season 3, Episode 8). The other three were copyrighted software programmes: *Dungeon Siege III*, *Ecotect Analysis 2011* and *3DS Max 2012*. Any one of these would be sufficient to satisfy the requirement that a document was obtained for the purposes of s 228.

[358] *Prima facie* proof of “use”, the alternative element under s 228, is also provided in the record of the case. For example, the evidence summarised in the record of the case is that more than 150 links to *Puss in Boots* were provided by Megaupload and it was viewed at least 10,000 times, including during the relevant period.

[359] The evidence in the record of the case is that Megaupload received a number of notices from the copyright owner or its representative that the content on this particular file (as well as the others) infringed copyright. Mr Illingworth says that the validity of the takedown notices cannot be scrutinised because they are not annexed to the record of the case. In any event, he submits that these notices could not provide even *prima facie* evidence of copyright infringement because they merely contain *assertions* of copyright by an *asserted* copyright owner. Even if there was any force in this submission taking into account the particular works referred to, it is undermined by the evidence that Megaupload itself appears to have accepted the legitimacy of the notices by removing a number of the links to the file (at least 14) in response to them. However, it did not delete the file and continued to use it by maintaining a large number of links to it (more than 119 links remained active as at 20 January 2012).

[360] I consider that the trier of fact could infer from this evidence, disregarding all of the other evidence summarised in the record of the case to which I need not refer, that in furtherance of the alleged conspiracy the appellants obtained or used a document (this digital file) dishonestly and without claim of right with the intention of obtaining a pecuniary advantage during the relevant period. This benefit was achieved by accessing a computer system. Accordingly, I consider that a *prima facie* case is established for count 5.

[361] Similar evidence is provided for the other counts. As noted, the appellants' criticisms of this evidence mirror their submissions in relation to count 5 and accordingly, I do not need to address them further. I agree with the District Court that a *prima facie* case of an extradition offence is established in respect of these counts.

*Count 8 – copyright infringement relating to YouTube*

[362] Count 8 is slightly different because it relates to the alleged reproduction and distribution of files obtained from YouTube in breach of copyright. The United States' case is that, in furtherance of the conspiracy, the appellants unlawfully copied video clips from YouTube and used them to populate the Megaupload site. The United States claims that the object was to 'sanitise' the site and make it appear as if it primarily hosted user-generated content rather than content that infringed copyright.

[363] Mr Illingworth submits that the District Court Judge failed to consider the evidence to support the elements of the alleged extradition offences and instead wrongly assessed the evidence against the elements of the United States offence. For example, the Judge referred to the evidence that at least 10 YouTube videos from 2007 were available on Megaupload in January 2012.<sup>91</sup> I agree with Mr Illingworth that it is not necessary for extradition purposes to show that copyright was infringed in respect of at least 10 copies of copyrighted works having a particular value during the stipulated period. These additional elements will need to be proved at any trial in the United States on Count 8 but are not relevant to whether there is a *prima facie* case of a corresponding extradition offence under s 228 or s 249 of the Crimes Act. However, even if the Judge did err in considering these additional elements, and I am not persuaded that he did, this was superfluous and immaterial to the outcome.

[364] The record of the case discloses sufficient evidence to establish a *prima facie* case of an extradition offence in terms of ss 228 and 249 of the Crimes Act. This can be demonstrated by referring to just a few extracts from this evidence:

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<sup>91</sup> At [669].

- (a) a computer specialist with the Federal Bureau of Investigation investigated the Megaupload databases and associated software code and found that a software tool was used to copy videos from Youtube.com, import these to randomly selected existing users of the Mega sites, and assign a random, false “view” count to them;
- (b) on 10 April 2006, Mr van der Kolk sent an email to Mr Ortmann asking “do we have a server available to continue downloading of the Youtube’s vids? ... Kim just mentioned again that this has really priority. ... Hope [Youtube.com is] not implementing a fraud detection system now ... \*praying\*. ... We’ll only have 30% of their videos yet. ... In my opinion it’s nice to have everything so we can decide and brainstorm later how we’re going to benefit from it”;
- (c) on 11 February 2007, Mr van der Kolk sent an email to Mr Ortmann stating “Kim really wants to copy Youtube one to one”;
- (d) a number of copyright owners wrote to Megaupload complaining that their videos had been copied and were available on Megavideo. For example, on 12 August 2007, a copyright owner wrote to Megaupload “my YouTube video, in which I have to get permission to upload, seems to be included in your megavideo clips ... it’s not just the clip is on your service, MY clip is on your service, meaning the exact same title, same tags, same description, and the same typo”. ... “The clip was uploaded [to Megavideo.com] 11 days ago, but that user’s profile says he hasn’t even logged in for SIXTEEN days. How is that possible?; and
- (e) a number of users who uploaded content to Youtube.com are expected to testify that they retained copyright ownership to that content and that infringing copies were reproduced on the Mega sites without their authorisation.



[365] Although the record of the case discloses a considerable amount of further evidence, this evidence on its own is sufficient to enable the trier of fact to conclude that, in furtherance of the conspiracy, the appellants obtained a document (actually a vast number of files or documents) dishonestly and without colour of right with intent to obtain a pecuniary advantage or valuable consideration.

*Count 3 – conspiracy to commit money laundering*

[366] The District Court Judge apparently considered that the appellants all but conceded a *prima facie* case on count 3:

[631] It is not disputed that the respondents received money from the Mega businesses, or that money was transported from users to Mega and then on to the respondents. There is also sufficient evidence to find a *prima facie* case has been established that the respondents knew that at least some of the funds they received from the Mega businesses came from the traffic of infringing copyright material. The respondents are therefore eligible for surrender on count 3 under Art II.19 of the Treaty.

[367] I accept Mr Illingworth’s submission that no such concession was made. The appellants argued in the District Court and again in this Court that no “transportation” occurred. They also contend that the funds were not unlawfully obtained because there was no underlying offending and, further, there is insufficient evidence to show that the appellants knew that the monies had been unlawfully obtained.

[368] For the reasons given earlier, I have found that the evidence summarised in the record of the case provides *prima facie* proof of a conspiracy to commit copyright infringement and of multiple instances of wilful copyright infringement constituting the extradition offences of: conspiracy to defraud; dishonestly taking or using a document; obtaining by deception; and accessing a computer system and thereby dishonestly and without claim of right obtaining a benefit. The evidence summarised in the record of the case is sufficient for the trier of fact to infer that most of the revenue generated by the Mega Group came from subscriptions that were paid by users to access popular digital content hosted by Mega that infringed copyright and from associated advertising. The evidence summarised in the record of the case is sufficient to provide *prima facie* proof of the numerous money transfers alleged.

[369] In summary, I am satisfied that the record of the case provides *prima facie* proof that the appellants received money knowing that it had been unlawfully obtained through wilful infringement of copyright and transported that money by making one or more of the money transfers detailed.

*Counts 9 to 13 – conspiracy to commit wire fraud*

[370] These counts allege that, in furtherance of the conspiracy, the appellants knowingly devised a scheme to enable them to preserve revenue streams generated from the availability of copyright infringing files on the Megaupload sites. The scheme allegedly involved knowingly misleading copyright holders into believing their takedown notices would result in removal of the infringing file or the prevention of access to it when, at best, only the link specifically identified by the copyright holder would be disabled. As long as one link remained in place, new links to the file could be created. It is also said that the appellants deliberately misled copyright holders in various other ways, including by representing that repeat infringers would have their access terminated in accordance with Megaupload's terms of service when, in fact, these repeat infringers were not only allowed to continue, they were often rewarded by Megaupload for the high levels of traffic their links to these files generated.

[371] Counts 9 to 13 all relate to this allegedly fraudulent scheme. Each count refers to a specific instance of a fraudulent misrepresentation being made to a copyright holder in furtherance of the scheme. For example, count 9 alleges that on or about 23 November 2010, in response to a takedown request in relation to the 2010 version of the film *A Nightmare on Elm Street*, the appellants caused the following knowingly false message to be sent to the copyright holder: "1 file and 1 video removed from our system". The United States alleges that this representation was knowingly false because only the specific link identified by the copyright holder was disabled. Contrary to the representation, the file and the video were not removed from the server and access to it continued to be available. The record of the case summarises the evidence Agent Poston is expected to give confirming these facts.

[372] I have already found that the conduct constituting these offences correlates to extradition offences under art II.16 of the Treaty and ss 228 and 249 of the Crimes Act.

[373] Mr Illingworth repeats his submission that these charges involve breach of copyright and accordingly there must be proof of the works said to have copyright protection and the particular acts of infringement alleged. He submits that there must also be evidence that copyright holders were actually misled by these messages. He says that the evidence in the record of the case is insufficient to prove these matters.

[374] I do not accept this submission. None of the extradition offences correlating to these counts requires proof of breach of copyright. Apart from the extradition offence relying on s 240 of the Crimes Act, none requires proof that any copyright owner was in fact deceived. For the purposes of art II.16 for example, all that is required is *prima facie* evidence of the alleged conspiracy to defraud. It is not necessary to prove that the conspiracy was implemented at all, let alone in relation to a particular copyright owner or copyrighted work, or that the copyright owner of that work was thereby deceived. The record of the case contains sufficient evidence to support a *prima facie* case for these extradition offences.

[375] In any event, there is evidence that copyright owners were misled. For example, the record of the case records that a representative of Warner Brothers Entertainment, which owns the copyright in the motion picture *A Nightmare on Elm Street*, will give the following evidence:

Warner Brothers Entertainment reasonably understood that submitting takedown notifications that identified infringing copies of copyrighted works available on the Mega Sites would result in the removal of the file or disabling of all access to the infringing file. Warner was not aware that only the identified URL link(s) would be disabled, and that infringing copies of the copyrighted work would remain on servers controlled by the Mega Conspiracy and accessible to members of the public (as long as at least one link remained), which would also allow new links to the infringing copy to be created.

Warner relied on these misrepresentations and continued to submit takedown notifications rather than pursue additional action against the Mega Sites.

[376] Similar evidence is given in relation to the other copyright works dealt with in Counts 10 to 13.

[377] Mr Illingworth makes three points about this evidence in support of his overall submission that it is seriously deficient and inadequate to establish a *prima facie* case. First, none of the witnesses say that they were misled by any specific act of deception. Instead, their evidence is based on their general understanding of how Megaupload responded to takedown notices. Second, the names of the witnesses are not disclosed in the record of the case and it is not clear whether they were the actual recipients of the particular emails. Third, the statement contains a conclusory assertion of the reasonableness of the witnesses' understanding.

[378] For the reasons explained, none of this matters for the extradition offences available under art II.16 of the Treaty and ss 228 and 249 of the Crimes Act because proof of deception is not required for those offences (s 249 requires that the benefit be obtained dishonestly *or* by deception). Such evidence is only required for the purposes of the extradition offence available under s 240 of the Crimes Act.

[379] Mr Illingworth is correct that there is no direct evidence in the record of the case that anyone from Warner Brothers recalls receiving the email sent by Megaupload on 23 November 2010 in response to the takedown notice concerning *A Nightmare on Elm Street* stating: "1 file and 1 video removed from our system". The evidence summarised in the record of the case indicates that many thousands of takedown requests were sent by copyright holders and responded to and it would be surprising if this particular response could now be remembered by anyone, sender or recipient. However, proof of this is not required to establish that Warner Brothers and other copyright holders were misled by these sorts of messages. The United States' case is that they were designed to mislead copyright holders. The evidence quoted above is sufficient, in my view, to enable a properly directed jury to infer that Warner Brothers was deceived by the allegedly fraudulent messages that the Mega computer system was programmed to transmit in response to takedown notices, including this particular message in relation to the movie *A Nightmare on Elm Street*.

[380] Mr Illingworth is correct that it is for the Court, not the witness, to determine whether a particular understanding was ‘reasonable’. That word can be ignored for present purposes but it does not detract from the remainder of the evidence which is sufficient to establish a *prima facie* case on counts 9 to 13.

*Count 1 – conspiracy to commit racketeering*

[381] I have found that the conduct constituting the alleged offending in count 1 correlates to an offence against s 98A of the Crimes Act and is accordingly deemed to be an extradition offence by virtue of s 101B(1)(a) of the Extradition Act.

[382] The District Court Judge’s reasoning that a *prima facie* case had been established for the purposes of s 98A is encapsulated in the following two paragraphs of his judgment:<sup>92</sup>

It is not in dispute that the respondents were officers of the Mega businesses. Those businesses, the applicant alleges, are an organised criminal group due to at least part of its activities involving multiple acts of criminal copyright infringement, wire fraud, and subsequent money laundering of the profits obtained from these activities. Knowledge of the alleged criminal activities can be inferred from the participation by each of the respondents’ active involvement in the running of the business and promotion of its growth.

All the elements of the offence in s 98A have been satisfied to a *prima facie* standard by the applicant and the respondents are therefore eligible for surrender on count 1.

[383] Mr Illingworth submits that this reasoning is inadequate and fails to address the numerous elements of s 98A. Further, he submits that the Judge wrongly accepted the United States’ submission that Megaupload was involved in criminal copyright infringement upon which the wire fraud and money laundering charges are dependent.

[384] For the reasons explained earlier in this judgment, I have concluded, contrary to the view taken by the District Court, that the alleged conduct (making copyright works available to members of the public via the Internet) is not criminalised under s 131 of the New Zealand Copyright Act. To that extent, I agree with the appellants’ submissions. However, it makes no difference to the analysis under s 98A because I have found that the same conduct would constitute offences against ss 228 and 249

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<sup>92</sup> At [637] – [638].

of the Crimes Act. Such offences are punishable in New Zealand by more than four years' imprisonment. Accordingly, although for different reasons, I agree with the District Court Judge that this element of an offence under s 98A is established.

[385] It follows from my conclusion that a *prima facie* case has been established on the other counts, that this is also established for Count 1. The evidence I have reviewed in relation to the other counts establishes a *prima facie* case under s 98A as follows:

- (a) the appellants and others participated in the Mega business with the shared objective of obtaining material benefits from the conduct underpinning the other counts;
- (b) if that conduct occurred in New Zealand, it would constitute the commission of offences punishable by a term of at least four years' imprisonment (under ss 228 and 249 of the Crimes Act);
- (c) each of the appellants knew that their conduct contributed to such criminal activity; and
- (d) each of the appellants knew that the criminal activities contributed to achieving the group's objectives.

[386] In summary, I am satisfied that the evidence in the record of the case discloses a *prima facie* case on all counts.

#### **Other alleged errors of law**

[387] The appellants assert three other errors of law. These relate to:

- (a) whether the United States has complied with its duty of candour and good faith;
- (b) whether the other eligibility requirements under s 24(2)(a) and (b) have been met; and

- (c) the admissibility of reply evidence.

*Duty of candour*

[388] The appellants submit that the United States breached its duty of candour and good faith in four respects:

- (a) it misled the Court in critical technical areas as to the operation of the Internet in general and cloud storage facilities in particular;
- (b) it mis-stated the copyright status of the motion picture *Taken*;
- (c) it misled the District Court when obtaining the provisional arrest warrants; and
- (d) it failed to disclose that the case against the appellants is a test case under United States law and there is no basis for certifying that the evidence in the record of the case justifies a prosecution in that country.

Technical matters

[389] Mr Illingworth refers to the following paragraph in the fifth supplemental record of the case which records that a representative of the Federal Bureau of Investigation is expected to give evidence that:

As described in Paragraph 45(a) of the Record of the Case, every digital file has a “fingerprint”, which can be generated by applying a mathematical algorithm to the file. Though a variety of algorithms exist, a particular algorithm, known as Message-Digest 5 (“MD5”), produces an effectively unique 32-digit identification value, commonly called an “MD5 hash”. Altering a file, for example by changing the length of the file, will change its MD5 hash. If two users, using the most prevalent techniques, each create a compressed digital copy for the same copyrighted motion picture DVD on different computers, the two copies will have different MD5 hashes. Even if a single user creates two compressed digital copies of the same motion picture DVD on the same computer, the two copies will have different MD5 hashes because they were created at different times and the compression algorithms incorporate random variables.

[390] Professor Sallis gave evidence in the District Court questioning the correctness of one aspect of this statement. He said:

As far as I can ascertain, industry practice when using the MD5 algorithm is that this value is independent of, and does not include a record of, information such as the time or date the file was created; nor does it record details of the system or server from which the file originates.

I have insufficient information available to me to categorically state this to be the case for Megaupload but because of my interpretation of the general industry use of the MD5 algorithm, I consider the process described in Paragraph 162a of the Record of Case to be incorrect.

...

There may be systems that concatenate (append) time stamps to the hash value when files are created but in my experience this is not generally the case. Time and date stamps are appended to the characteristic descriptions of files when they are created and/or edited and updated but that information is not likely to be part of the MD5 hash value assignment process.

[391] Professor Sallis' evidence could not justify the extremely serious allegation that the United States has acted in bad faith or breached its duty of candour. In my view, this allegation is without adequate foundation and should not have been made. Professor Sallis does not categorically state that the evidence summarised in the record of the case is wrong and he does not suggest that anyone with knowledge of the industry would know that it was wrong. His evidence is equivocal: "As far as I can ascertain"; "I have insufficient information available to me to categorically state this"; "my interpretation of the general industry use of the MD5 algorithm"; "in my experience this is not generally the case". His evidence indicates that there is no uniform practice and it depends on the particular software used: "[t]here may be systems that concatenate (append) time stamps to the hash value when files are created". The challenged evidence in the record of the case is similarly qualified: "using the most prevalent techniques". There is nothing in this point.

#### Copyright status of the movie *Taken*

[392] The appellants claim, based on Internet searches carried out by their solicitor, Ms Pye, that "*Taken (2008)*" had been released to cinemas in 30 countries worldwide as at 25 October 2008 (although not in the United States), the day Mr van der Kolk allegedly uploaded this movie and emailed a link to it to a third party (count 4). Based on Ms Pye's search of *Wikipedia*, the appellants claim that *Taken (2008)* was



likely to have been distributed on DVD in at least eight countries by this date. The appellants allege that the United States misled the Court by failing to disclose this in the record of the case.

[393] Mr Illingworth submits that this is significant because it is critical for the United States to establish that the copyright offending in count 4 is punishable by at least four years' imprisonment in the United States as well as in New Zealand. While the United States advanced a contrary position in this Court, it appears originally to have accepted (consistent with my conclusion) that a deemed offence under s 101B(1)(c) requires proof of an offence punishable by at least four years' imprisonment under the law of the United States as well as New Zealand. That this was the United States' understanding is confirmed by a statement made by its counsel in a memorandum filed in support of the application for the provisional arrest warrants:

The US copyright charges have a New Zealand equivalent in section 131 of the Copyright Act 1994 – dealing with infringing objects – which has a maximum penalty of five years' imprisonment. This offence is deemed to be an extradition offence because it satisfies s 101B(c) of the Extradition Act 1999. *It is an offence punishable in both countries by more than four years' imprisonment*, and the offence is alleged to involve an organised criminal group as defined in article 2(a) of the TOC convention.

(Emphasis added).

[394] Mr Illingworth claims that the United States deliberately added the allegation that Mr van der Kolk acted for the purposes of commercial advantage or private financial gain (rather than for purely personal purposes) to elevate the seriousness of the charge in order to satisfy the minimum four year imprisonment threshold for an extradition offence. He contends that the United States “showed a serious lack of good faith” in doing so and that its failure to disclose that *Taken* had already been released in numerous other countries at the relevant time “can only be considered to be a breach of the duty of candour”. He contends that this was a seriously vitiating factor that should have been disclosed because of its relevance to whether Mr van der Kolk uploaded the file and emailed a link to a third party for commercial advantage or private financial gain or merely for “private reasons”. He argues that there is no evidence that the file was not Mr van der Kolk's to upload.

[395] There is considerable evidence in the record of the case to support the United States' overall contention that the appellants' business model was designed to achieve significant commercial profits from making copyright protected works available to members of the public via the Internet. Mr van der Kolk often described the appellants, himself included, as pirates. As I have already noted for the purposes of the discussion as to whether a *prima facie* case has been established on count 4, the name of the file Mr van der Kolk uploaded provides an indication that it was a pirated pre-release copy: *Taken 2008 DVDRip Repack [A Release Lounge H264 By Micky22].mp4*. The evidence that Mr van der Kolk uploaded this file to Megaupload and emailed a link to a third party indicates that this was done in furtherance of the business activities, not for "private reasons".

[396] While I accept that the evidence Mr Illingworth refers to could well be relevant at trial, an extradition hearing is not a trial. The evidence is not of such a character that it seriously undermines the evidence summarised in the record of the case. I do not consider that the United States was obliged to disclose that evidence in support of its request for extradition. In my view, Ms Pye's evidence does not come close to demonstrating bad faith on the part of the United States or a breach of the duty of candour it owed to the Court.

#### Provisional arrest warrants

[397] The appellants were arrested pursuant to provisional arrest warrants issued by the District Court on 18 January 2012 under s 20 of the Extradition Act. This section reads:

##### **Provisional arrest warrant may be issued**

- (1) A District Court Judge may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him or her that –
  - (a) a warrant for the arrest of a person has been issued in an extradition country by a court or a Judge or other person having authority under the law of the extradition country to issue it; and
  - (b) the person is, or *is suspected of being, in New Zealand or on his or her way to New Zealand*; and
  - (c) There are reasonable grounds to believe that the person is an extraditable person in relation to the extradition country and the offence for which the person is sought is an extradition offence; and

(d) *It is necessary or desirable for an arrest warrant to be issued urgently.*

- (2) A warrant may be issued under this section even though no request for surrender has been made.

[Emphasis added].

[398] The United States, represented by Crown Law, applied for these warrants on an *ex parte* basis. It had an obligation to make full and frank disclosure to the Court of all relevant facts and circumstances to enable the Judge to make a proper and just determination of whether the warrants should be issued. The level of disclosure needed to be commensurate with the importance of the application, which concerned the appellants' liberty.

[399] The appellants contend that the United States misled the Court in two respects when applying for these provisional arrest warrants:

- (a) it did not advise the Court that the Government Communications Security Bureau had intercepted the appellants' communications and that such interception was unlawful in respect of Messrs van der Kolk and Dotcom because they are New Zealand residents; and
- (b) it led the Court to believe that the arrest warrants were required urgently, when that was not the case.

[400] The United States' application was supported by an affidavit from Nigel McMorran, a detective sergeant with the Organised and Financial Crimes Agency of New Zealand. He stated that the appellants, and others involved in the activities of Megaupload, were the subject of a major investigation by the Federal Bureau of Investigation which had commenced in March 2010. He went on to explain the basis for his belief that the appellants and others were expected to be in Auckland to celebrate Mr Dotcom's birthday on 21 January 2012:

In my role as a Detective Sergeant at OFCANZ, I have been assisting the US authorities with this investigation. I have made numerous enquiries in New Zealand and have been in constant contact with the Federal Bureau of Investigation and other US agencies. This has included investigation of the business and banking records associated with the subjects in New Zealand, together with other assets held here, such as money and vehicles. The

investigation has identified phones and internet communications that these people use and have access to.

...

I currently have in place Customs border alerts and can say that I believe that Kim Dotcom, Bram van der Kolk and Mathias Ortmann are in New Zealand at the time this affidavit was sworn.

The remaining four subjects are expected to arrive in New Zealand some time during the next week. The reason for this belief is that the leading members of the Mega group usually assemble from various places around the world to celebrate the birthday of Kim Dotcom on 21 January. In the past, this has sometimes occurred in other countries, *but the Federal Bureau of Investigation has obtained intercept information* that indicates the celebration this year will occur in New Zealand. The likely venue is Dotcom's residence in Coatesville, which he describes as Dotcom Mansion.

(Emphasis added).

[401] The memorandum of counsel submitted with the application refers to information obtained by the Federal Bureau of Investigation but also makes no reference to Government Communications Security Bureau involvement:

Dotcom resides in New Zealand. So too does the second most important member of the conspiracy, Bram van der Kolk, who is the lead programmer. It has been usual for leading members of the Mega to assemble for the celebration of Dotcom's birthday. On this occasion, the FBI has obtained information that points to this gathering occurring in Auckland. Mr Ortmann has recently arrived in Auckland. The other four suspects are expected to come here for this reason.

[402] Mr Illingworth submits that the affidavit and memorandum would have led the District Court Judge to believe that the interception of communications had been undertaken by the Federal Bureau of Investigation only, when that was not the case.

[403] This complaint was dismissed in the District Court on the basis that the application was made four years prior to the eligibility hearing and could be disregarded as no longer relevant.<sup>93</sup>

The provisional arrest warrants were issued almost four years ago. They do not impact upon whether this eligibility hearing is fair nor [are] the respondents prejudiced in their defence. It is not a breach of the duty of candour before this eligibility Court.

[404] I accept the appellants' submission that this is not a proper basis for sweeping their complaints to one side. If there was a breach of the duty of candour when the

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<sup>93</sup> At [688(xiii)].

warrants were applied for, this would not be cured by the passage of time. Nor would it be proper to disregard any such breach of duty merely because it pre-dated the eligibility hearing.

[405] No specific details were given in the affidavit as to how the Federal Bureau of Investigation obtained the intercept information. Detective Sergeant McMorran simply states that the Federal Bureau of Investigation “has obtained intercept information”. This hearsay statement is lacking in detail and is capable of more than one interpretation. It could be interpreted as meaning that the Federal Bureau of Investigation obtained the intercept information directly, as Mr Illingworth contends, or it could mean that it obtained the information from other sources during the course of the investigation. Given that Messrs Dotcom and van der Kolk were living in New Zealand, and taking into account the detective sergeant’s reference to the identification of phones and Internet communications, the Judge may have considered it more likely that any intercepted conversations involving these men would have been obtained, not by the Federal Bureau of Investigation directly, but indirectly from an agency in New Zealand.

[406] In any event, I consider that the appellants’ criticism overplays the significance of this evidence. The relevant issue was whether the persons whose arrest was sought were either in New Zealand or suspected of being on their way to New Zealand. Messrs Dotcom and van der Kolk were known to be New Zealand residents, living in Auckland. Detective Sergeant McMorran knew from Customs’ border alerts that they were in New Zealand at the time, as was Mr Ortmann. The intercepted information was solely relevant to whether the others were *suspected* of being on their way to New Zealand. As at the date of the application, the grounds for such a suspicion were readily demonstrated without recourse to intercepted communications. It was known to be usual for leading members of the Mega Group to assemble each year from different parts of the world to celebrate Mr Dotcom’s birthday and he, Mr van der Kolk and Mr Ortmann were already in New Zealand when the affidavit was sworn, just a few days before the birthday.

[407] This evidence was sufficient to prove the necessary suspicion. Nevertheless, it was proper for Detective Sergeant McMorran to note that this was not the only

basis for the United States' suspicion and that it had obtained intercepted communications which confirmed it. However, it was not necessary for the United States to prove the intercepted communications because they were not needed to establish the suspicion. This likely explains why Crown Law did not provide such proof by way of an affidavit from someone who had been involved in obtaining and analysing the communications and by producing the relevant transcripts. It may also explain why the Judge did not call for any further information on this topic.

[408] Viewed in this context and appreciating its limited significance to the application, I am not persuaded that Detective Sergeant McMorran's statement was misleading. Even if the statement, read literally, was potentially misleading, it could not possibly justify a conclusion that the United States deliberately misled the Court on this issue in breach of its duty of good faith and candour.

[409] I do not consider that there is anything in the second aspect, namely the alleged failure to disclose that the interception was unlawful. It was not until the Inspector-General of Intelligence and Security released his report in late September 2012 that it became known that Government Communications Security Bureau had intercepted communications involving Messrs van der Kolk and Dotcom unlawfully. There is no evidence before me to indicate that the United States was aware that Government Communications Security Bureau had acted unlawfully in intercepting these communications at the time it applied for the provisional arrest warrants. Self-evidently, the United States cannot have breached its duty of candour by failing to disclose something it was not aware of.

[410] Mr Illingworth's next submission is that the United States misled the Court into believing that the arrest warrants were required urgently. He maintains that this was not the case.

[411] Counsel for the United States submitted that it was necessary or desirable for the arrest warrant to be issued urgently in terms of s 20(1)(d) of the Act for the following reasons outlined in the memorandum:

18. Urgency is demonstrated by the matters set out in paragraphs [15-19] of the McMorran affidavit:

- 18.1 A co-ordinated “takedown” operation is anticipated, which will need to involve simultaneous arrests, as well as the restraint of bank accounts and other assets in at least three other countries.
- 18.2 There is a very high risk of flight if the subjects become aware of the operation. The five visitors have no connection to New Zealand. All seven have access to very significant financial resources, well outside of the normal range of wealth for New Zealand. All hold foreign citizenships and some are domiciled in other countries. They each have the international connections and access to cash that would enable them to avoid border controls in New Zealand. Dotcom has access to foreign accounts holding in excess of US\$20m. He maintains three aliases, with travel documents and bank accounts in various names. He has previously fled authorities when he faced prosecution in Germany. The members of the group are expected to meet at the so-called “Dotcom Mansion” in Coatesville. Dotcom usually has a chartered helicopter at this site. He is highly mobile, and travels by private jet which he has access to on a retainer basis.
- 18.3 The alleged offending is serious; the maximum penalties in some cases are up to 20 years’ imprisonment. The United States District Court has issued a restraining order, restraining criminal proceeds of US\$175,000,000.

[412] Mr Illingworth argues that the United States breached its disclosure obligations by not advising the Court that:

- (a) the New Zealand Police and the Federal Bureau of Investigation had been conferring over the proposed arrests for several months; and
- (b) there had been ample opportunity for the United States to follow the standard process for obtaining arrest warrants “for at least some of the suspects”.

[413] Mr Illingworth submits that the reasonable inference to draw from Detective Sergeant McMorran’s affidavit was that New Zealand Police had only recently become involved in the matter in order to assist with the planned arrest and asset seizure in January 2012. He claims that if the Court had been advised that New Zealand Police had been working with United States authorities since early 2011, this would have “put different context around” the following further statements in the Detective Sergeant’s affidavit:

- (a) that Mr Dotcom was a New Zealand resident who first arrived here in 2008;
- (b) that Mr van der Kolk had lived in New Zealand since April 2011 and he and his wife were granted New Zealand residency on 2 December 2011;
- (c) Mr Ortmann regularly travels to New Zealand and had been here during the period 1 to 11 December 2011;
- (d) Mr Batato also often travels to New Zealand and had been here during the period 28 November to 9 December 2011; and
- (e) Detective Sergeant McMorran had “been in constant contact with the Federal Bureau of Investigation and the Department of Justice in the US”.

[414] I have great difficulty with this submission. There was no suggestion that the timing of involvement of the New Zealand Police was in any way relevant to the claimed urgency. In any event, Detective Sergeant McMorran advised the Court that the investigation had commenced nearly two years’ earlier, in March 2010. He said that he had been assisting the United States authorities with this investigation and had been in constant contact with them concerning it. I cannot see how it can be inferred from this evidence that the New Zealand Police had only recently become involved, and then only to assist with the planned arrest and asset seizure in January 2012 as claimed by Mr Illingworth. Nor can I see how such advice would have provided useful context for the Judge when considering the other factual statements in the affidavit set out above or put a different complexion on them.

[415] In my view, the claim for urgency was properly made. The United States planned to implement a major operation: shut down the Megaupload operations worldwide; arrest the appellants and the other alleged conspirators; and restrain bank accounts and other assets in multiple jurisdictions. This needed to be carried out simultaneously and in a coordinated fashion. It was obviously important for the



United States to maintain strict confidentiality to ensure that the appellants were not forewarned before the plan was ready to be executed in all relevant jurisdictions. The risk of flight was real, as demonstrated by the evidence. So too was the risk that the appellants and the other alleged conspirators might take steps to thwart the United States' plan and potentially interfere with evidence if given notice of the impending action. The appellants were not indicted until 5 January 2012. The arrest warrants and asset restraint orders were issued in the United States on that date. It would not have been appropriate to initiate extradition proceedings in New Zealand before these steps were taken. Once the orders were made in the United States, the rest of the plan needed to be implemented promptly.

[416] I do not accept that the United States breached its duty of candour by failing to state the date the New Zealand Police became involved in the investigation. This was not relevant to the application and did not need to be disclosed. I reject the submission that the claim of urgency was contrived. The suggestion that a different approach could have been adopted for "some of the suspects" is unrealistic and ignores the practical realities of successfully implementing a major operation of this kind in multiple jurisdictions.

Section 25(3)(b) certificate

[417] The appellants submit that the United States wrongly certified that the evidence in the record of the case justifies prosecution in the United States. They say the case is, at best, a test case and is unsupported by the law of the United States. However, the appellants say they have been prevented from bringing evidence to demonstrate this because of funding restrictions imposed by the United States.

[418] This is an ambitious submission, particularly given the appellants' acknowledgement that they cannot provide evidence to substantiate it. A Federal Grand Jury has found that the record of the case discloses a *prima facie* case against each of the appellants according to the law of the United States. Mr Prabhu has stated on oath that the evidence disclosed in the record of the case is sufficient to prove beyond reasonable doubt that the appellants are guilty of the offences with which they have been charged, according to the law of the United States. Mr Nomm,

an alleged co-conspirator, has pleaded guilty to conspiracy to commit copyright infringement and has been convicted of this offence in the United States. A United States Judge has found that the factual allegations in the superseding indictment are sufficient to support a conspiracy to commit copyright infringement under United States law. In dismissing the appellants' motion to strike out the civil *in rem* action for forfeiture of their assets, Judge O'Grady stated:<sup>94</sup>

The claimants argue that the government has not properly alleged a violation of any federal statute to support jurisdiction under § 1355. Specifically, they argue that the government has not adequately alleged criminal copyright infringement because the complaint only references acts of "secondary" infringement, rather than direct infringement. This argument refers to the government's allegations concerning the Mega business model, which involved the claimants' alleged encouragement and facilitation of infringement by others. ... The claimants argue that they cannot possibly be held criminally liable for acts that contributed to or facilitated infringement. Even assuming, *arguendo*, that only acts of contributory infringement are alleged in the forfeiture complaint, this argument ignores the complaint's allegations that the claimants engaged in a conspiracy to commit copyright infringement. Section 981(a)(1)(C) authorizes civil forfeiture of property traceable to, among numerous other offenses, copyright infringement or conspiracy to commit copyright infringement.

...

... the factual allegations in the complaint and the superseding indictment show that there was an agreement among the claimants to engage in the alleged Mega Conspiracy, and at least some overt acts in furtherance of the conspiracy occurred within this judicial district. ... This court is therefore satisfied that there are sufficient factual allegations to support either probable cause or a reasonable belief that the assets listed in Attachment A are traceable to a conspiracy to commit copyright infringement.

[419] There may be competing views about whether the prosecution can succeed in the United States but that is not the point; the question is whether the United States genuinely believes that it has a proper case. It seems clear that the United States does consider that there is a proper factual and legal foundation to justify its prosecution of the appellants. I have found, in agreement with the District Court here, that the same evidence would justify a prosecution in New Zealand. The suggestion that the United States knows that there is no basis for the prosecution according to the law of the United States and that it should have disclosed this to the District Court is far-fetched. I have no hesitation in rejecting the submission that the United States breached its duty of candour.

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<sup>94</sup> *United States of America v Defendants in rem* District Court for the Eastern District of Virginia, Civil No. 1:14-cv-969, Judge O'Grady, 27 February 2015 at 6-9.

*Eligibility requirements under s 24(2)(a) and (b) of the Extradition Act*

[420] A person is eligible for surrender in relation to an extradition offence for which surrender is sought if all of the requirements set out in s 24(2)(a) to (d) of the Extradition Act are met. Mr Illingworth submits that the District Court erred in law by failing to address the matters in s 24(2)(a) and (b). For convenience, I set out these subsections again:

**24 Determination of eligibility for surrender**

- (2) Subject to subsections (3) and (4), the person is eligible for surrender in relation to an extradition offence for which surrender is sought if –
- (a) the supporting documents (as described in section 18(4)) in relation to the offence have been produced to the court; and
  - (b) if –
    - (i) this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions, or qualifications that require the production to the court of any other documents; or
    - (ii) the terms of an extradition treaty in force between New Zealand and the extradition country require the production to the court of any other documents –Those documents have been produced to the court; and

[421] “Supporting documents” are defined in s 18(4) to mean:

**18 Request for surrender**

...

- (4) In this section, **supporting documents**, in relation to an extradition offence, means, –
- (a) if the offence is an offence of which the person is accused, –
    - (i) a warrant for the arrest of the person for the offence issued in the extradition country by a court of a Judge or other person having authority under the law of the extradition country to issue it; or
    - (ii) a copy of such a warrant:
  - (b) [not relevant – applies where the person has been convicted]
  - (c) in the case of any offence, a written deposition setting out –
    - (i) a description of, and the penalty applicable in respect of, the offence; and
    - (ii) the conduct constituting the offence.

[422] Article X of the Treaty states:

...

The request shall be accompanied by a description of the person sought, a statement of the facts of the case, the text of the applicable laws of the requesting Party including the law defining the offence, the law prescribing the punishment for the offence, and the law relating to the limitation of the legal proceedings.

When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting Party and by such evidence as, according to the laws of the requested Party, would justify his arrest and committal for trial if the offence had been committed there, including evidence proving the person requested is the person to whom the warrant of arrest refers.

...

[423] Mr Illingworth submits that the matters in s 24(2)(a) and (b) are “precedent facts” and that the District Court had no jurisdiction to embark on the enquiry under s 24(2)(c) or (d) unless these requirements were satisfied. However, in a somewhat circular argument, Mr Illingworth submits that the s 24(2)(a) and (b) requirements were not met because the United States did not produce evidence justifying the appellants’ arrest and committal for trial if the offences had been committed in New Zealand, the test under s 24(2)(d). Contrary to the “precedent facts” and jurisdictional argument, Mr Illingworth said elsewhere in his submissions:

Essentially, the overlap between s 24(2)(d) and the NZ-US Treaty means that the Court cannot be satisfied of the matters under s 24(2)(b) unless and until it is satisfied as to the matters in s 24(2)(d).

[424] In other words, the submission is that the Court has no jurisdiction to consider the matters raised under s 24(2)(d) until the requirements under s 24(2)(a) and (b) are satisfied, but these requirements cannot be satisfied unless and until s 24(2)(d) is satisfied. For obvious reasons, this cannot be right.

[425] Extensive submissions were presented to the District Court at the extradition hearing over a period of three months. As far as I can ascertain, no one suggested that the appellants were not eligible for surrender because the formalities under s 24(2)(a) and (b) had not been met. This no doubt explains why the Judge did not address this in his lengthy judgment. In any event, the documents required under these subsections were produced.

*Admissibility of reply evidence*

[426] Section 22 of the Extradition Act provides that Part 5 of the Summary Proceedings Act 1957 (now repealed) continues to apply to the extradition hearing so far as applicable and with any necessary modifications. Section 184A of the Summary Proceedings Act, which is in Part 5, sets out the procedure to be followed at a committal hearing. This section relevantly provides:

**184A Procedure at committal hearing**

...

- (2) After all the evidence for the prosecution has been given and any amended charge has been read to the defendant, the defendant must, if the defendant intends to provide evidence, -
  - (a) provide to the court any formal written statements or exhibits that have not already been provided to the court; and
  - (b) call any defence witness (including the defendant) who is to give oral evidence for the defence under an oral evidence order.

[427] The appellants submit that there is no right of reply enabling the prosecution to provide further evidence to patch up deficiencies identified by the defence and that the District Court should not have received the eighth supplementary record of case that was filed on 23 November 2015, the second to last day of the eligibility hearing. This was a three paragraph response to Professor Sallis' evidence.

[428] I agree with the appellants that this evidence should not have been admitted in reply leaving the appellants with no opportunity to address it. However, this evidence merely served to highlight the contest on the "MD5 hash" issue that was already apparent from the other evidence and did not add to the United States' case. The Judge did not refer to this evidence in his judgment and it does not appear that he took it into account. Mr Illingworth acknowledges that "it is unclear whether the District Court admitted the ... evidence" and only advances this submission on the basis that he erred in law if he did. I am not persuaded that the Judge made any such error.

### **Funding stay application**

[429] On 14 July 2015, the appellants applied for a permanent stay of the extradition proceedings claiming that the United States had abused the District Court's processes by deliberately pursuing a strategy designed to deny the appellants a reasonable opportunity to defend the extradition proceedings. This was said to be because the United States insisted that restrained monies released to the appellants by the Hong Kong and New Zealand Courts to meet their living and legal expenses could not be used to pay legal or technical experts who were either United States' citizens or located in the United States. They contended that without assistance from such experts they could not have a fair hearing and that public confidence in the integrity of the New Zealand criminal justice system would be undermined if the extradition hearing was allowed to proceed in these circumstances.

[430] The appellants filed the application after: the extradition proceedings had been in progress for three and a half years; the eligibility hearing in the District Court had been adjourned nine times for various reasons; and they had expended well over \$10 million on their defence. The appellants nevertheless contend that they were forced into making the application at that late stage (just two months before the tenth rescheduled eligibility hearing) because it was only then that the United States sought to prevent them from paying United States experts. The United States strenuously disputes this. It contends that the restraint orders made in January 2012 meant that: these monies could never have been used to pay United States experts; evidence of that kind was irrelevant and would be inadmissible at the extradition hearing in any event; and the application was nothing more than an attempt to delay the hearing further. It is necessary to review the procedural background before attempting to evaluate these competing contentions.

#### *Factual background*

[431] In January 2012, the District Court for the Eastern District of Virginia issued post-indictment restraining orders over the appellants' property worldwide, including real and personal property in Hong Kong, New Zealand, Germany, the Netherlands, the Philippines and Australia (none of the appellants had any assets in the United States). This order was made on the basis that the Judge was satisfied that

there was probable cause to believe that the property constituted the proceeds of the appellants' alleged offending. These orders prohibit any person from disposing of, or otherwise dealing with, the restrained property while the orders remain in force. The United States gave notice in the indictment that it would seek forfeiture of these assets to the total value of USD 175 million upon conviction.

[432] The restraining orders were registered against the appellants' assets in Hong Kong pursuant to an order made by the High Court in Hong Kong on 18 January 2012.<sup>95</sup>

[433] In April 2012, this Court registered the United States restraining orders against the assets of Messrs Dotcom and van der Kolk in New Zealand under the Mutual Assistance in Criminal Matters Act.<sup>96</sup> However, in making the registration order, Potter J allowed the release of monies to enable these appellants to meet their living expenses. The New Zealand restraining order did not affect Messrs Ortmann or Batato because they had no assets in New Zealand.

[434] In August 2012, Potter J varied the restraining order by permitting the release of a further \$6 million from Mr Dotcom's restrained property for ongoing legal and living expenses and \$2.6 million for legal expenses already incurred.<sup>97</sup> The Court directed that Mr Galbraith QC, an independent barrister, was to review all claims for legal expenses against stated criteria including:<sup>98</sup>

- (a) the amount expended should be appropriate to fund an adequate, but not extravagant, defence of the proceedings;
- (b) Mr Dotcom is entitled to engage counsel of his choice and to have his defence conducted in the manner in which he and his legal advisors wish;

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<sup>95</sup> *In Re Dotcom & Ors* HCMP No.116 of 2012, Bokhary J, 18 January 2012.

<sup>96</sup> *The Commissioner of Police v Dotcom* [2012] NZHC 634.

<sup>97</sup> *The Commissioner of Police v Dotcom* [2012] NZHC 2190.

<sup>98</sup> At [61] and [149].

- (c) an expensive defence, which does not go to the point of being wasteful, is not a luxury to which Mr Dotcom is not entitled; and
- (d) the fees should not be such as to deplete wastefully or dishonestly the restrained property in which there is a contingent public interest.

[435] The Court declined Mr Dotcom's request for \$300,000 to be released to pay legal fees, travel and accommodation expenses of his United States' lawyers. Potter J accepted the Commissioner's submissions that this would not be appropriate because: no details or supporting documents had been provided; there was no justification for United States' counsel to travel to New Zealand rather than consult by video conferencing or other means; and it would be contrary to international comity to allow Mr Dotcom to achieve in New Zealand what he could not achieve in the relevant primary jurisdiction, the United States. The United States Court had been requested to release restrained money to pay for legal representation in the United States and elsewhere but these applications were declined.

[436] The eligibility hearing was originally scheduled to commence in August 2012 but was postponed because of a contest about whether the appellants were entitled to an order requiring the United States to provide disclosure of documents relevant to the prosecution including, for example, all documents evidencing legal ownership of the copyright interests allegedly infringed. Such disclosure was ordered by the District Court on 29 May 2012.<sup>99</sup> The United States applied for judicial review of that decision but this was dismissed by Winkelmann J in a judgment delivered on 16 August 2012.<sup>100</sup> That decision was reversed by the Court of Appeal on 1 March 2013.<sup>101</sup> The appellants' appeal to the Supreme Court was dismissed on 21 March 2014.<sup>102</sup>

[437] Mr Dotcom says that he had exhausted the monies available for legal fees in terms of Potter J's order by the end of May 2013. However, by that time, he had

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<sup>99</sup> *Dotcom v United States of America* [2012] DCR 661.

<sup>100</sup> *United States of America v Dotcom* [2012] NZHC 2076.

<sup>101</sup> *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139.

<sup>102</sup> *Dotcom v United States of America* [Disclosure], above n 4.



started two new businesses and was able to meet his ongoing living and legal expenses from substantial unrestrained assets.

[438] On 29 July 2013, the High Court in Hong Kong ordered the release of restrained assets held by Messrs Ortmann and van der Kolk in that jurisdiction to enable them to meet their living and legal costs. These orders were made on the same terms as the order made by Potter J, including that the legal costs were to be scrutinised by Mr Galbraith.

[439] Funding again became an issue in November 2014 after Mr Dotcom had spent considerable sums on various pursuits, including some \$4 million on the 2014 New Zealand general election as a backer of the Internet Party. By that time Mr Dotcom estimates that he alone had spent \$10 million on legal costs resisting extradition and said he was no longer able to meet living and legal expenses. The appellants' solicitors and counsel were given leave to withdraw in mid-November 2014 and the eligibility hearing was adjourned as a result from 16 February 2015 to 2 June 2015.

[440] With the assistance of his new legal team, who were instructed in mid-December 2014, Mr Dotcom applied for the release of further restrained assets. In a series of three judgments issued in March and April 2015, Courtney J authorised the release of a further \$4.6 million to Mr Dotcom for living and legal expenses.<sup>103</sup> At that stage, the eligibility hearing was due to commence in less than two months.

[441] In the meantime, the appellants also applied for a further adjournment of the eligibility hearing on the grounds that they had not been given proper notice of the case against them and their new lawyers were unable to prepare adequately for the hearing because of funding constraints. This application was declined by the District Court on 16 March 2015.<sup>104</sup>

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<sup>103</sup> *Commissioner of Police v Dotcom* [2015] NZHC 458; *Commissioner of Police v Dotcom* [2015] NZHC 761; *Commissioner of Police v Dotcom* [2015] NZHC 820.

<sup>104</sup> *United States of America v Dotcom* DC North Shore CRI-2012-092-001647, 20 March 2015.

[442] The appellants' application for judicial review of this decision was granted by Katz J "with some reluctance" on 1 May 2015.<sup>105</sup> Her Honour directed that a new eligibility hearing date be set no earlier than 1 September 2015 but made it clear that the appellants needed to ensure they were ready for the adjourned hearing and should not expect any further latitude:<sup>106</sup>

I have therefore concluded, with some reluctance (given the time that has elapsed since the plaintiffs were first brought before the Courts), that the interests of natural justice require an adjournment of the 2 June 2015 extradition hearing date. This should not be taken by the plaintiffs, however, as a signal that any ongoing funding or representation difficulties (if they arise) would be likely to justify further adjournments. On the contrary, the plaintiffs must take full responsibility for preparing for their extradition hearing on whatever new date is allocated, with whatever level of legal support they are able to secure. For the reasons I have outlined in relation to Mr Batato, even if all of the plaintiffs were to be self-represented, it would not automatically follow that the requirements of natural justice could not be met at a future hearing.

[443] In accordance with this ruling, the District Court notified the parties on 6 May 2015 that the eligibility hearing would commence on 21 September 2015.

[444] As noted, the appellants filed their application for a permanent stay of the extradition proceedings because of funding issues on 14 July 2015. This has been referred to as the "funding stay application" to differentiate it from an earlier application for a permanent stay based on other alleged misconduct by the United States. This latter application was originally filed prior to the funding stay application but was subsequently amended and has been referred to as the "August and September stay applications" (being the respective filing dates in 2015 of the amended applications by Messrs Ortmann and van der Kolk, and Mr Dotcom).

[445] Despite the clear indication given by Katz J in her judgment, the appellants say they were forced into making the funding stay application because of subsequent developments arising out of civil forfeiture orders that were made in the United States on 27 March 2015 in relation to the restrained assets.<sup>107</sup> The appellants' appeal against the forfeiture order in the United States has now been dismissed by the United States Court of Appeals for the Fourth Circuit but the appeal

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<sup>105</sup> *Ortmann v District Court at North Shore* [2015] NZHC 901.

<sup>106</sup> At [118].

<sup>107</sup> *United States v All Assets Listed in Attachment A*, 89 F. Supp. 3d 813 (E.D. Va. 2015).

process has not yet been exhausted.<sup>108</sup> The United States sought to enforce the forfeiture order against assets held in New Zealand but the appellants have opposed the application and no further steps have yet been taken to proceed with it. The appellants understand that the forfeiture order cannot be enforced in Hong Kong until the appeal processes in the United States have been concluded.

[446] However, the appellants were unsure whether the forfeiture orders made in the United States prevented them from paying experts there using monies released for legal expenses by the Courts in New Zealand and Hong Kong. Accordingly, on 29 April 2015, Mr Dotcom's solicitors sought an urgent undertaking from the United States that it would not take any steps to enforce the forfeiture order in relation to monies released pursuant to the judgments issued by Courtney J.

[447] The position was not clarified until a memorandum was filed with Courtney J on 23 June 2015 stating:

2. ... The United States has advised that its government will not proceed against New Zealand citizens or residents or entities who receive forfeited funds in accordance with the Court's order of 18 April 2015. As to the position with the United States, it advises:

2.1 Judge O'Grady has previously declined to release restrained funds for legal expenditure and has now declared those funds forfeit.

2.2 While New Zealand law permits property restrained pursuant to the registered US restraining orders to be released for legal expenses, the position is different in the United States (and comparable to the ordinary position under the Criminal Proceeds (Recovery) Act 2009 in New Zealand). The decisions of the United States Court, both in relation to forfeiture and previously in relation to restrained funds, must be respected by United States authorities.

[448] In his affidavit in support of the July 2015 funding stay application, Mr Ortmann explained why he considered the United States' position would compromise his defence of the extradition proceedings:

101. ... our US lawyers have been an important resource for us given their expertise in the subject matter of this case, including advice as to US law and process.

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<sup>108</sup> *United States v Batato* 833 F 3d 413 (4<sup>th</sup> Cir 2016).

102. This year, our US counsel have been instructed to locate and brief expert witnesses in the US, being experts in:
  - (a) United States criminal/copyright law;
  - (b) Cloud storage/Internet commerce.
103. The advice that I have received is that we are unlikely to be able to find a suitably qualified cloud storage/Internet commerce expert in Australasia – an expert located in the United States would be both more appropriate and better qualified.
104. In particular, we intended to retain (at least) two legal experts in the United States to review the affidavits of Mr Jay Prabhu sworn 21 February 2012 in support of the requests for our extradition, to advise whether Mr Prabhu has correctly and candidly described the legal position in the United States and provide expert evidence as to the same.

[449] The appellants sought an urgent hearing of the July funding stay application in the District Court. The Judge issued a minute on 21 July 2015 advising that it would be heard at the commencement of the extradition hearing on 21 September 2015. Messrs Ortmann, van der Kolk and Batato filed an application for judicial review of this scheduling decision. This was mirrored by an application filed by Mr Dotcom. Katz J declined an urgent hearing of the judicial review application by Mr Ortmann and others directing that it be heard at the time of any substantive appeal from the District Court's determination of eligibility. Peters J adopted the same approach in relation to Mr Dotcom's application.

[450] The appellants appealed to the Court of Appeal against these decisions declining to grant a priority fixture. The appeals were heard on 8 September 2015 and dismissed on 14 September 2015.<sup>109</sup> The Court concluded that it was unable, in the time available, to resolve the contest as to whether assistance was needed from United States experts for the extradition hearing, doing justice to the voluminous submissions filed.<sup>110</sup> The Court considered that the issue should be resolved in the first instance by the District Court and it was satisfied that the appellants' rights to a fair hearing would not be prejudiced because the District Court's decision could be challenged on appeal or by way of judicial review:

[21] ... If [Judge Dawson] decides the actions of the United States have deprived the appellants of American expertise they need properly to defend

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<sup>109</sup> *Ortmann v the District Court at North Shore* [2015] NZCA 443.

<sup>110</sup> At [12].

the extradition application, then inevitably he will have to adjourn the extradition hearing.

[22] If the Judge decides such expertise is not needed, and holds the appellants are eligible for extradition, then the combination of judicial review and the right of appeal in s 68 of the Extradition Act will provide the appellants with ample remedies should they not accept the outcome. ...

### *District Court judgment*

[451] The Judge received numerous affidavits in support of the application and a number of witnesses were cross-examined. The parties also filed lengthy submissions. As a result, the hearing of this application did not conclude in the District Court until 20 October 2015. The Judge then invited the appellants to proceed immediately with their August and September stay applications. Mr Mansfield asked the Judge whether he proposed to proceed before determining the outcome of the funding stay. The Judge confirmed that this was his intention. The appellants complain that this decision defeated the object of their application because it forced them to proceed with the eligibility hearing while suffering the very disadvantage that the application was intended to avoid.

[452] The Judge gave his reasons for declining the funding stay application in Part B of his substantive judgment.<sup>111</sup> The Judge accepted that the Court had jurisdiction to grant a stay in appropriate cases but considered that there was no basis for doing so in the present case, primarily because the appellants did not need access to United States experts to have a fair eligibility hearing and proceeding with the hearing would not undermine public confidence in the integrity of the criminal justice system,

### *Appellants' submissions*

[453] The appellants argue that the District Court Judge:

- (a) breached their right to natural justice and a meaningful judicial assessment of their application;
- (b) made multiple errors of law; and

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<sup>111</sup> At [437]-[571].

(c) acted unreasonably.

[454] In particular, the appellants submit that the Judge made errors of law in three categories: procedure; jurisdiction; and in rejecting the grounds of the application. These grounds were that the United States' conduct denied the appellants access to assistance from United States experts which they needed:

- (a) to understand and respond to the case;
- (b) to scrutinise compliance with the duty of candour;
- (c) to ascertain whether conspiracy to commit copyright infringement (Count 2) corresponds to the offence listed in art II.16 of the Treaty;
- (d) to assess double criminality for deemed offences under s 101B(1)(c) of the Extradition Act;
- (e) to review and respond to Mr Prabhu's evidence;
- (f) to provide commentary on the proceedings in the United States; and
- (g) to advance technical arguments about the operations of Internet and cloud storage services.

[455] Mr Illingworth took the lead on this aspect of the case because it is contended that his clients were most affected by the spending barrier. Mr Mansfield advised that the key issue from Mr Dotcom's perspective was the inability to obtain access to industry expertise in the United States, not legal expertise.

#### *Procedure*

[456] Mr Illingworth submits that the District Court only engaged with the issue as to whether foreign expertise was needed for the extradition hearing whereas the application raised broader issues concerning the United States' conduct. He placed particular reliance on the Canadian Supreme Court's decision in *Cobb v United*

*States of America*.<sup>112</sup> In that case, the Supreme Court stayed extradition proceedings against the appellants, Messrs Cobb and Grossman, in light of comments made by the United States Judge assigned to their trial and the prosecutor. When sentencing a co-conspirator, the Judge made the comment that those fugitives who did not cooperate would get “the absolute maximum jail sentence”. The prosecutor threatened in the course of a television interview that uncooperative fugitives would be subjected to homosexual rape in prison, saying: “you’re going to be the boyfriend of a very bad man if you wait out your extradition”. The Supreme Court held that the United States had disintitiled itself from pursuing extradition because it had attempted to interfere with the extradition proceedings in Canada by pressuring the appellants to abandon their right to that hearing. The Court framed the issue in this way:<sup>113</sup>

The issue at this stage is not whether the appellants will have a fair trial if extradited, but whether they are having a fair extradition hearing in light of the threats and inducements imposed upon them, by those involved in requesting their extradition, to force them to abandon their right to such a hearing. ... Conduct by the Requesting State, or by its representatives, agents or officials, which interferes or attempts to interfere with the conduct of judicial proceedings in Canada is a matter that directly concerns the extradition judge.

[457] The Supreme Court was unimpressed by the United States’ contention that a stay should not be granted because the appellants had not been deterred by the intimidation to abandon their rights to contest extradition:<sup>114</sup>

It may very well be that the threats of the severe and illegal consequences that may follow their resistance to extradition have made the appellants more, not less, determined to resist their surrender. Frankly, this would have been quite understandable. The abuse of process here consists in the attempt to interfere with the due process of the court. The success or failure of that interference is immaterial.

[458] Mr Illingworth submits that the conduct of the United States in the present case is worse than in *Cobb* because instead of the “*blunt instrument*” employed in that case (inappropriate comments made by United States’ officials), here, the United States employed a more sophisticated strategy of pursuing forfeiture in order “to choke off [the appellants’] defence and starve them into submission”. He

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<sup>112</sup> *Cobb v United States of America* [2001] 1 SCR 587.

<sup>113</sup> At 603.

<sup>114</sup> At 610-611.

submits that the Judge fell into the trap of considering only the effect of the alleged misconduct and not whether such conduct amounted to an attempt to interfere with the due process of the District Court.

[459] I do not consider that this is a fair criticism. The Judge initially considered that the most efficient way of approaching the application was to start by hearing submissions on whether United States legal and technical evidence would be relevant to the extradition hearing. However, when Mr Illingworth objected to this course, the Judge agreed to hear all aspects of the application together. Moreover, it is clear from reading the judgment that the Judge did address the question of whether the United States had engaged in misconduct by pursuing a strategy designed to prevent the appellants from being able to mount an effective defence in the extradition proceeding (“choke off their defence and starve them into submission”):

[565] Both grounds appear to be based upon what the [appellants] describe as a wave of attacks on their financial resources to “starve” them into submission at this eligibility hearing. There has been no evidence of such intent adduced at this hearing to back up those allegations, nor has it been shown that any of the legal steps taken by the [United States] were wrongly taken so as to achieve the alleged purpose. ... There has been no evidence that they have been starved of funds. There is evidence of funds being released to the [appellants] for the funding of their legal defence through decisions made by the High Court. They have had funding available to them far above and beyond the funding that most litigants would have available to them. There is no merit in these submissions that would justify a stay.

### *Jurisdiction*

[460] It was not disputed that the District Court has an implied power to stay proceedings for abuse of process. This was confirmed by the Supreme Court in *Siemer v Solicitor-General*.<sup>115</sup>

The court’s inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction. Their scope extends to preventing abuse of the courts’ processes and protecting the fair trial rights of an accused.

[461] This decision was affirmed by the Supreme Court in *Dotcom v United States of America*.<sup>116</sup> Glazebrook J added that, in the extradition context, the District Court has an inherent power to ensure a fair hearing:<sup>117</sup>

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<sup>115</sup> *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114].

<sup>116</sup> *Dotcom v United States of America* [Disclosure], above n 4.



It seems to me to be axiomatic that the District Court must have the inherent power to ensure that there is a fair hearing. Indeed, there is a statutory acknowledgement of that position in s 22(1)(a) of the Extradition Act, which gives the courts the same jurisdiction and powers as if the proceedings were a committal hearing. It is also reinforced by the Bill of Rights and common law requirements for natural justice.

[462] In *R v Antonievic*, the Court of Appeal confirmed that criminal proceedings can appropriately be stayed in two situations: where it is impossible for the accused to receive a fair trial; or where it would undermine public confidence in the integrity of the criminal justice system to allow the trial to proceed.<sup>118</sup> The *Antonievic* test was affirmed by the Supreme Court in *Wilson v R*.<sup>119</sup>

[463] To guard against the risk that allegations of abuse of process may be made as a delaying tactic, the Divisional Court held in *R (Government of the United States of America) v Bow Street Magistrates' Court* that an initial screening test should be applied before the substance of the allegations are enquired into:<sup>120</sup>

The judge should be alert to the possibility of allegations of abuse of process being made by way of delaying tactics. No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place. Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred.

[464] Mr Illingworth submits that the District Court failed to recognise that the *Bow Street* screening procedure and the test for abuse of process are discrete enquiries and wrongly conflated these. Second, he submits that the Judge incorrectly considered that the appellants had to satisfy both tests for abuse of process as set out in *Antonievic* and *Wilson*, whereas these are alternative tests. Mr Illingworth submits that these errors are apparent from the following paragraphs in the District Court judgment:

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<sup>117</sup> At [309]

<sup>118</sup> *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 at [48].

<sup>119</sup> *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [40].

<sup>120</sup> *R (Government of the United States of America) v Bow Street Magistrates' Court* [2007] 1 WLR 1157 at [84].

[454] Adopting the approach of *Bow Street* and the guidance of our Supreme Court in *Siemer, USA v Dotcom* and *Wilson v R*, this eligibility Court needs to:

- (1) Decide whether the conduct alleged to constitute an abuse has been clearly identified;
- (2) If that is established, is the conduct complained of capable of amounting to an abuse of process?
- (3) If it is, are there reasonable grounds for finding that such conduct occurred?
- (4) If so, would that abuse prevent the Court from conducting a fair hearing?
- (5) Recognise that the granting of a stay is an extreme remedy given only in the clearest of cases when it is necessary to maintain the integrity of the judicial system.

[465] It should be noted that this passage in the judgment prefaced consideration of both the July funding stay applications and the August and September misconduct stay applications. The United States does not accept that the *Bow Street* test applies in New Zealand. However, this is immaterial in the context of the funding stay application because the United States accepted that the District Court did not need to apply the *Bow Street* screening test and should move directly to considering whether there had been an abuse of process that would render the eligibility hearing unfair. Mr Illingworth accepted, for these reasons, that the impact of the alleged errors on the District Court's consideration of the funding stay "is slight". He acknowledges that the fundamental question was whether a fair eligibility hearing could be held and he accepts that this was, "for the most part", the standard the District Court applied. It follows that there is nothing in this point for present purposes. It need only be addressed in the context of the August and September stay applications which are dealt with in the next section of this judgment.

#### *Grounds of application*

#### Understanding and responding to the case

[466] In the District Court, and again in this Court, Messrs Ortmann and van der Kolk argued that they needed assistance from experts on United States law to

investigate and respond to five references to United States law in the United States' submissions on eligibility that were served on 8 June 2015:<sup>121</sup>

- (a) that the essence of the United States offence of conspiracy to commit racketeering is a defendant's knowing participation in a group that engages in unlawful activity (at [138] of the submissions);
- (b) that the definition of "repeat infringer" in the Digital Millennium Copyright Act 1998 (US) would apply to Megaupload users, consistent with a United States decision, *Disney Enterprises, Inc. v Hotfile Corp* (at [152]);
- (c) that the appellants' argument that the charges against them are not viable in the United States has already been determined against them by courts in that jurisdiction (at [168]);
- (d) that pirating a pre-release movie has particular significance under United States law (at [388]); and
- (e) the elements of criminal copyright infringement under United States law (at [393]-[394]).

[467] The District Court rejected this submission finding that, at best, legal experts on foreign law could only provide an alternative view on trial issues.<sup>122</sup> Mr Illingworth described the District Court's failure to address the concept of transposition anywhere in the judgment as "totally unsettling".

[468] Ultimately, this issue comes back to whether there was any basis for the District Court to determine questions of United States law when assessing eligibility for surrender. I have already addressed this issue.

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<sup>121</sup> Mr Dotcom also argued in the District Court that Mr Dotcom would be denied a fair eligibility hearing if he was forced to proceed without legal expert assistance on United States law for the purposes of both the s 24(2)(c) and the s 24(2)(d) analyses. While not abandoning his position on that issue, Mr Mansfield advised that Mr Dotcom's primary concern related to the impact of the spending restriction on the argument under s 24(2)(d).

<sup>122</sup> At [533]-[534].

[469] As noted, the appellants' primary position is that the alleged conduct must be transposed to New Zealand and an assessment made of whether a *prima facie* case has been established if that conduct had occurred in New Zealand. They argue that this must be determined according to the substantive law of New Zealand and requires proof of ownership and infringement of copyright under New Zealand copyright law. I have already rejected this analysis. However, if the appellants were correct, they would not require access to United States legal experts because, on their analysis, the determination would be governed by the substantive law of New Zealand.

[470] The appellants argue that if, contrary to their principal submission, questions of copyright ownership and infringement must be determined according to United States law applying the doctrine of transposition, then this must be proved in the usual way with evidence of the relevant foreign law. Their submission is that foreign law cannot be proved by the conclusory assertions in the record of the case and accordingly no *prima facie* case has been established. I have also rejected this submission. However, even if the appellants were correct, I cannot see how they were prejudiced by any inability to have access to, or call evidence from, experts on United States law at the eligibility hearing. If their submission was correct that the United States could not succeed without proving the relevant United States law as a question of fact, the extradition case against them would fail for lack of proof. There could be no advantage to the appellants in being able to plug the hole in the United States' case by supplying the Court with the missing evidence.

[471] In his submissions to this Court, Mr Illingworth expressed the matter in this way:

[The appellants] cannot be required simply to accept that the US has correctly categorised files as copyright infringing under US law. Indeed, the plaintiffs have the right to challenge the "evidence" in the ROC and the SROCs. The [appellants] must therefore be able to submit that:

- (a) The US cannot rely on conclusory assertions as to US law; and
- (b) In the alternative, the conclusory assertions as to US law contained in the ROC and SROCs are insufficient to, and do not, establish copyright or copyright infringement under US law.

To make the second of those submissions, access to US legal expertise is critical.

[472] The appellants were able to make the submissions set out in (a) and (b) and did so in the District Court and again in this Court at great length. I do not accept that the appellants were in any way impeded in making these submissions without access to United States legal expertise. If those submissions had been correct and such proof was required, the appellants would have succeeded without needing access to United States experts on copyright law. Indeed, that is the result they strongly contended for.

#### The duty of candour

[473] Mr Illingworth submitted in the District Court that the appellants needed experts on United States law to show that Mr Prabhu's affidavit and certificate under s 25(3) of the Extradition Act had not been given in good faith and/or misstated United States law. He argued that the importance of this could not be overstated because the validity of the certificate was critical to the admissibility of the record of the case. He relied on an affidavit from his co-counsel, Peter Spring, stating:

[149] My present understanding, based on advice from Mr Dotcom's United States lawyers, the Rothken Law Firm, is that Mr Prabhu's affidavits are, at a minimum, materially misleading insofar as Mr Prabhu:

- (a) Asserts criminalisation of secondary criminal copyright infringement (i.e. criminal liability for copyright infringement undertaken by third parties);
- (b) Neglects to mention that under US law there is neither civil nor criminal liability for copyright infringement that takes place outside US borders, or otherwise is misleading as to extra-territoriality of the charges laid;
- (c) In respect of the wire fraud charges, fails to address the legal position that such charges can only succeed where money was received from the party that was deceived (alleged by the US to be rights-holders) and that intangible rights cannot form the basis of a wire fraud charge.

[474] The appellants also relied on Professor Lessig's affidavit expressing his view that the record of the case does not disclose a *prima facie* case under United States law.

[475] The District Court accepted that it must be open to the appellants to challenge Mr Prabhu's certificate and affidavit by showing that these had not been given in good faith or misstate United States law. However, the Judge considered that the

appellants would need to show that these documents were “so in error that this eligibility hearing cannot be conducted in a fair manner”.<sup>123</sup> The Judge concluded that the difference of view was a trial issue and it had not been demonstrated that Mr Prabhu’s affidavit had been given in bad faith or in breach of the duty of candour.<sup>124</sup>

[476] Mr Illingworth submits that this analysis was flawed because it misunderstood the basis of the stay application, namely, that a fair hearing required the appellants to have access to United States legal experts so that they could have a reasonable opportunity of demonstrating lack of candour and good faith and therefore the admissibility of the record of the case. He argues that it was illogical for the Judge to dismiss this ground of the application on the basis that the appellants had not, without access to such assistance, been able to demonstrate a lack of candour or good faith.

[477] Mr Illingworth is particularly critical of the Judge’s reliance on s 25(5) of the Extradition Act which requires the Court to take judicial notice of the signature of the person giving the certificate under s 25(3)(b). The Judge said this:

[537] On the evidence in his affidavit, Mr Prabhu appears on the face of it to be well qualified to form the view of USA law that he has expressed. That Mr Rothken and Professor Lessig have a different view of USA law is not sufficient for this Court to disregard the certificate produced pursuant to s 25(5). ...

[549] ... To grant a stay or an adjournment to allow the respondents time and money to analyse the evidence and legal views of Mr Prabhu due to a perceived possibility that they might show that the appellant has breached its duty of candour is to ignore s 25(5). ...

[478] I accept Mr Illingworth’s submission that s 25(5) is not relevant to the analysis. It simply obviates the need for the requesting State to prove that the signature on the certificate is the signature of the person authorised to give it. However, I agree with the Judge’s conclusion overall. While Professor Lessig’s opinion deserves respect, and while the appellants may have been able to locate other similarly qualified experts in the United States to confirm his view if there had been

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<sup>123</sup> At [535].  
<sup>124</sup> At [537].

no spending restriction, such evidence could not be sufficient to establish bad faith or a breach of the duty of candour by the United States in this case.

[479] The appellants have been committed for trial on all counts by a Grand Jury in the United States relying on the same evidence as set out in the record of the case. In issuing the post indictment restraining orders in January 2012, Judge O’Grady found that the United States had “demonstrated that there is probable cause to believe that the property with respect to which this order is sought constitutes the proceeds or an instrument of the criminal offenses described above”. In his judgment dated 27 February 2015 concerning the asset forfeiture proceedings, Judge O’Grady stated that he was “satisfied that there are sufficient factual allegations to support either probable cause or a reasonable belief that the assets listed in Attachment A are traceable to a conspiracy to commit copyright infringement”. On 13 February 2015, Mr Nomm pleaded guilty to conspiracy to commit copyright infringement relating to his involvement in the alleged Mega Conspiracy. Judge O’Grady was satisfied that the facts submitted to the Court were sufficient to uphold a conviction and Mr Nomm was duly convicted. All of this serves to confirm that Mr Prabhu’s certificate and affidavit were given in good faith and in compliance with the duty of candour.

[480] I agree with the District Court Judge that it would have been wrong to grant a permanent stay of the extradition proceedings on the basis that, in the short period prior to the hearing, the appellants were unable to pay United States legal experts (United States citizens or persons located in the United States) to provide further evidence of the type given by Professor Lessig in an attempt to demonstrate bad faith or a breach of the duty of candour. Such evidence could not assist on that issue. It is not the task of the extradition Court to enquire into issues of foreign law and it would be particularly offensive to comity to attempt to do so in this case where a Federal Court in the United States has already determined the sufficiency of the allegations in the superseding indictment to support the offences charged.

Ascertaining whether the alleged offences are extradition offences

Conspiracy to defraud

[481] Mr Illingworth submitted in the District Court that the appellants needed United States legal expertise to address the United States' contention that conspiracy to commit copyright infringement falls within the scope of conspiracy to defraud in art II.16 of the Treaty. He contended that in order to interpret the Treaty, it was "necessary to reconstruct the legal matrix, in both New Zealand and the US, at the time the Treaty was executed by the respective State parties". He argued that evidence as to the legal position in the United States in 1970 would be "crucial" in challenging the United States' submissions on this issue.

[482] Mr Illingworth submits that the District Court mischaracterised the issue as being "whether the Treaty can be interpreted so that 'conspiracy to defraud' includes copyright offending".<sup>125</sup> While he accepts that that issue would arise in the course of the analysis under s 24(2)(c) of the Extradition Act, the issue before the Court on the July stay application was whether the appellants had the right to access United States legal expertise to support their submission that the Treaty could not be so interpreted, and whether the United States had prevented them from doing so. I agree with Mr Illingworth that the Judge was wrong to dismiss this argument on the basis that:<sup>126</sup>

At best, any US legal evidence that might be obtained by the [appellants] would only provide an alternative argument which is a matter for trial. It is not a basis for a stay application.

[483] With respect to the learned District Court Judge, the question as to whether conspiracy to commit copyright infringement correlates to conspiracy to defraud and is therefore an extradition offence under the Treaty, is only relevant to extradition and could never be a trial issue.

[484] Nevertheless, I consider that the Judge was quite correct to dismiss this ground of the application. In my view, it could not possibly justify a permanent stay of the extradition proceeding. As discussed above, it is quite clear from the Extradition Act 1965 that Parliament authorised extradition treaty negotiators to

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<sup>125</sup> At [538].

<sup>126</sup> At [544].



agree to include only those offences listed in the schedule to the Act. These included conspiracy to defraud in terms of s 257 of the Crimes Act 1961, which in turn codified the long-established common law offence of conspiracy to defraud. It is quite clear what the State parties must be taken to have intended by the wording of art II.16 (which closely follows the wording of s 257):

16. Obtaining property, money or valuable securities by false pretences or by conspiracy to defraud the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.

[485] In my view, it would have been wrong for the Judge to have granted a permanent stay of the extradition proceedings on the grounds that the United States had denied the appellants the opportunity, in the few months prior to the tenth scheduled eligibility hearing, to seek evidence from an expert on United States law in 1970 that these words would have been understood by both State parties at that time as excluding a conspiracy to commit copyright infringement. If this evidence was “crucial” as Mr Illingworth suggests, it could and should have been sought much earlier.

*Deemed offences and double criminality*

[486] I have earlier accepted Mr Illingworth’s submission that offences that are deemed to be listed as extradition offences in treaties pursuant to s 101B(1)(c) of the Extradition Act must be punishable in both the requesting and the requested States by a term of at least four years’ imprisonment. Mr Illingworth says that New Zealand counsel are not competent to advise on United States criminal law and that it would be “negligent” not to seek advice from an expert in the United States on this issue.

[487] The District Court dismissed this argument on the basis that s 101B(1)(c) does not import any double criminality requirement.<sup>127</sup> Because I have come to a contrary view, I need to consider whether the Judge’s conclusion that this ground could not justify a stay was nevertheless correct.

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<sup>127</sup> At [545]-[548].

[488] If such advice was as fundamentally important as Mr Illingworth suggests, it is surprising that it was not sought in the three and a half year period before the funding issue surfaced, especially considering the vast sums of money spent on the defence during that time. The more likely explanation is that such evidence was not sought because it was not relevant. As discussed earlier, the need for the offence to be punishable in the United States by at least four years' imprisonment is because of the definition of an organised criminal group in art 2(a) of UNTOC. However, as Mr Illingworth acknowledges, this need only be alleged, as it has been. It should also be kept in mind that Mr Dotcom's United States attorney, Mr Rothken, has been assisting throughout. The appellants have shared resources and the burden of preparing for the hearing. In my view, the Judge would not have been justified in granting a permanent stay of the extradition proceedings merely because, at a very late stage, the United States had impeded the appellants' ability to seek advice from a United States lawyer on the maximum penalty in the United States for the relevant offences.

Other needs for expert evidence on United States law

[489] In the District Court, Mr Illingworth identified three categories under this heading. First, he said the United States had itself put United States law in issue by filing Mr Prabhu's affidavit setting out the legal position in the United States. Although he submitted that this was "critically" important, I note that this is simply what the statute requires (s 18(4)(c)(i) of the Extradition Act). Second, echoing his earlier submission regarding the duty of candour, he contended that such assistance was needed to understand the indictment:

...the Court is surely entitled to the assistance of US experts to look at the indictment and have the matters contained therein explained. The only evidence presently before the Court to that effect is the affidavit of Mr Prabhu. However, the [appellants] should not be forced to rely on the evidence of the party seeking their extradition (especially when they have reason to believe such evidence is materially misleading) or be prevented from adducing their own evidence on the same points.

[490] Finally, Mr Illingworth submitted that the appellants needed to scrutinise the following assertions made by the United States:

- (a) At [42] (footnote 29), it is asserted that the US District Court of Eastern Virginia has held that the respondents' conduct took place within its jurisdiction.
- (b) At [155] (footnote 129), it is asserted that the US District Court of Eastern Virginia has concluded that "*the respondents obtained money from that dishonest agreement, through the profits of the Mega companies and ultimately by their individual drawings*".
- (c) At [168], the United States submits that the respondents' argument that the charges against them are not viable in the United States has already been determined (in favour of the United States) by Courts in that jurisdiction.
- (d) The United States has invited this Court to conclude that by reason of Mr Nomm's guilty plea, the Court can be satisfied that valid charges had been laid against the Applying Respondents in the United States.

[491] Mr Illingworth submitted that these assertions were misleading because some of the findings were made by default after the appellants were deemed to be fugitives and because there was no evidence of what information was before the Court when Mr Nomm entered his guilty plea.

[492] The District Court rejected these submissions, partly in reliance on s 25(5) of the Extradition Act and partly because it would offend principles of comity:

[550] In addition, this court is being asked to:

- (i) Overlook that a Grand Jury has issued an indictment for the respondents; and
- (ii) Assume that the prosecutor may have incompetently or dishonestly brought the charges; and
- (iii) Find the Federal Court of USA had misapplied American law; and
- (iv) Overlook the comity required between the Treaty partners to give effect to their treaties.

There has been [no] basis established for this Court to do so.

[493] Mr Illingworth says that the appellants did not ask the Court to make any of these findings in the context of the stay application and accordingly the Judge asked himself the wrong questions.

[494] Further, Mr Illingworth submits that each of the points made in this paragraph of the judgment was wrong and shows that the Judge overlooked the need for advice on United States law. He contends that the Judge should not have placed

any weight on the Grand Jury's decision without giving the appellants an opportunity to tender evidence about the significance of this. He submits that the second point made by the Judge indicates that he applied a presumption in favour of the prosecutor which may have been inappropriate. He postulates that advice from an American lawyer may have been helpful on this point. Next, he submits that the Judge inappropriately applied a presumption in favour of the validity of the Federal Court's decision in circumstances where the appellants were deprived of expert evidence or expertise. Finally, he submits that comity is "problematic"; although it is a factor that the Judge was entitled to take into account, it is not a "trump card".

[495] I do not accept these submissions. Like the Judge, I do not consider that a permanent stay of the extradition proceedings could be justified by the appellants' inability to access expert advice on United States law on any of these issues. The Court was entitled to rely on Mr Prabhu's affidavit and certificate provided in conformity with ss 18(4) and 24(2) of the Extradition Act. The decisions made by the Courts in the United States speak for themselves; there is no need for evidence from a United States legal expert to explain what they mean. Any inadequacy in the information supplied regarding Mr Nomm's guilty plea and conviction, dealt with in the sixth supplement record of the case, is a matter for submission, not evidence.

#### Technical expertise

[496] In the District Court, Messrs Ortmann and van der Kolk submitted that the United States had misrepresented that Megaupload was configured so as to incentivise copyright infringement by users. They submitted that Megaupload, like other cloud storage service providers, was content neutral and it was not designed or operated to encourage copyright infringement. They claimed that they required access to appropriately qualified, independent technical experts in the United States to give evidence to this effect, there being no such experts in New Zealand (or, presumably, anywhere else in the world). Mr Illingworth argued that such evidence would be relevant to whether the United States had complied with its duty of candour and also whether a *prima facie* case had been established.

[497] Mr Mansfield presented the District Court with a more detailed list of the topics he claimed needed to be addressed with the assistance of technical experts in the United States to enable Mr Dotcom to mount an effective defence at the eligibility hearing. This reads as follows:

- (i) forensic IT experts to take urgent steps to immediately preserve the Megaupload servers and their content against corruption, as is currently occurring, and which will prejudice any later audit or the ability of Mr Dotcom to rely on it at trial and to lead evidence of these relevant events and or the loss of the data;
- (ii) an objective audit of Megaupload and its actual operation as an Internet Service Provider providing cloud storage to users;
- (iii) technical matters relating to the provision of cloud storage by the industry, including infrastructure and technology;
- (iv) industry practice in the cloud storage industry in relation to allegedly infringing material and takedown notices;
- (v) the instruction of private investigators to locate and interview said infringing and non-infringing users of Megaupload;
- (vi) United States law; and
- (vii) Computer forensics to:
  - (aa) analyse the data stored on the Megaupload servers seized by the United States, to verify or disprove the allegations made throughout the record of case; and
  - (bb) analyse his personal devices for Trojans or other programs unlawfully installed by the United States to intercept Mr Dotcom's communications.

[498] Mr Mansfield did not explain how all of this work could have been carried out in the limited time remaining before the eligibility hearing, even if there had been no spending barrier. However, Mr Rothken ventured the following evidence about timing and cost:

MR MANSFIELD:

- Q. Now, we've talked about the two types of experts that would need to be called in order to assist the Court of the reliability of the United States' case and whether it complied with its duty of candour, how long might it take, reasonably, with funding to instruct and have such witnesses ready?

MR ROTHKEN:

- A. I'd have to say that it could be anywhere from two or six months, depending upon how much funding is available and whether or not any availability of each person's time schedule for testimony in New Zealand.

...

MR MANSFIELD:

Q. And what kind of cost would be involved in briefing both the legal and technical witnesses, I know it's hard without formal finalised quotes from such experts, but just approximately given your experience in the United States and preparing such cases, what's the kind of budget for that?

MR ROTHKEN:

A. My estimate with a reasonable standard of deviations around \$500,000 for all the experts combined.

[499] The Judge concluded that a stay could not be justified because of the claimed need for this technical expertise. He considered that unless the proposed evidence “is likely to undermine the evidence [in the record of the case] so that it can be seen to be manifestly unreliable, a stay or an adjournment to look for this evidence should not be granted”.<sup>128</sup> He found that “[t]here is no evidence to suggest that if such experts were consulted, they would undermine the ROC to the extent that it would be apparently unreliable”.<sup>129</sup>

[500] Mr Illingworth submits that the Judge was wrong to deny the appellants the *opportunity* of undermining the evidence in the record of the case on the basis that they had not shown that they could do so. He submits that the proposed evidence could tend to render worthless, undermine or seriously detract from at least some of the evidence put forward by the United States and would therefore be admissible at the eligibility hearing as being relevant to the duty of candour and to whether the inferences invited by the United States could reasonably be drawn. He argues that the appellants have been prejudiced to the extent that the United States has prevented them from putting this evidence before the Court.

[501] I consider that the Judge was correct in rejecting this ground of the stay application. An eligibility hearing is not a trial. The extradition Court does not weigh competing inferences; it merely considers whether the inferences sought to be drawn are reasonably available and whether there is sufficient evidential support for them. The evidence which the appellants say they wished to locate in the United States could not assist them at the eligibility hearing unless it was so potent as to be capable of demonstrating: a breach of the duty of candour; that the evidence

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<sup>128</sup> At [552].

<sup>129</sup> At [558].

summarised in the record of the case should be disregarded as being completely defective or unreliable; or that the inferences sought to be drawn from that evidence are not reasonably available.

[502] In *MM v United States of America*, the Supreme Court of Canada emphasised the high threshold required to displace the presumptive reliability of evidence submitted by the requesting State in a record of the case:<sup>130</sup>

The extradition judge's starting point is that the certified evidence is presumptively reliable: see *Ferras*, at paragraphs 52-56. This presumption may only be rebutted by evidence showing "fundamental inadequacies or frailties in the material relied on by the requesting state": *Anderson*, at para 31.

[503] The Supreme Court considered that the extradition Court should not receive evidence challenging the reliability of the evidence in the record of the case without "an initial showing" that the proposed evidence is realistically capable of satisfying that very high standard:<sup>131</sup>

[77] A significant procedural point follows from this as I see it. Before the extradition judge embarks on hearing evidence from the person sought whose object is to challenge the reliability of the evidence presented by the requesting state, the judge may, and I would suggest generally should, require an initial showing that the proposed evidence is realistically capable of satisfying the high standard that must be met in order to justify refusing committal on the basis of unreliability of the requesting state's evidence. This showing may be based on summaries or will-say statements or similar offers of proof. If the judge concludes that the proposed evidence, taken at its highest, is not realistically capable of meeting this standard, it ought not to be received. ... there is no point in permitting the evidence if there is no reasonable likelihood that it will impact on the question of committal.

[504] In the New Zealand context, s 22 of the Extradition Act directs that the eligibility hearing must be conducted in the same manner as a committal hearing applying Part 5 of the Summary Proceedings Act. This means that the Court is precluded from hearing the oral evidence of any witness unless an oral evidence order has been made.<sup>132</sup> The Court of Appeal observed in *United States of America v Dotcom* that this provides a mechanism for the extradition Court to control the extent

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<sup>130</sup> *MM v United States of America* [2015] 3 SCR 973 at [72].

<sup>131</sup> At [77].

<sup>132</sup> Summary Proceedings Act 1957, s 184B.

of any oral evidence to ensure it is relevant to the limited task the Court must perform.<sup>133</sup>

[505] The timetable set by the District Court for the purposes of the tenth scheduled eligibility hearing to commence on 21 September 2015 required the appellants to file and serve any oral evidence applications supported by briefs of the proposed evidence and copies of any exhibits by 15 July 2015.<sup>134</sup> The July funding stay application was filed one day before the expiry of this deadline.

[506] The appellants had over three years to obtain this evidence if they genuinely considered that it could be so potent as to be capable of destroying critical aspects of the record of the case and demonstrate that there was no case to answer. They had very substantial financial resources available to them during that period including unrestrained funds and were spending vast sums on their defence to extradition. If the required evidence could have been obtained in two to six months at a total cost of \$500,000 as Mr Rothken suggested, that could, and should, have been done much earlier in accordance with the various timetable directions made by the Court.

[507] In my view, there is no substance in the appellants' contention that they were denied a fair eligibility hearing because, in the last few months prior to the commencement of the eventual hearing, they could not instruct technical experts in the United States. This is particularly so given the general and wide-ranging nature of the enquiries they wished to conduct and the lack of any convincing explanation as to why the required experts could only be found in the United States. I agree with the Judge that there was nothing to indicate that even if the appellants were given a further opportunity to cast such a wide net in the United States, it would have produced evidence meeting the high threshold required to displace the statutory presumption of reliability accorded to the evidence summarised in the record of the case.

[508] Returning to Mr Mansfield's list, it is clear that a number of items could not possibly be relevant at an extradition hearing. This includes the first item relating to

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<sup>133</sup> *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139 at [100].

<sup>134</sup> Minute of Dawson DCJ dated 11 June 2015.



the preservation of data on Megaupload servers for trial purposes and the need to lead evidence about the loss of data. Whether all of the data on all of Megaupload's servers spanning its entire period of operation must be preserved to ensure a fair trial in the United States, as Mr Mansfield contended, is not the concern of the extradition Court. In any event, Professor Sallis gave evidence about the risk of data loss at the extradition hearing, even though that evidence was irrelevant to the District Court's limited enquiry. The last item, the supposed need for a United States' expert to analyse Mr Dotcom's personal devices to assess any unlawful interception of his communications, also falls squarely into this category. I am unable to see how this could be useful in demonstrating that the evidence in the record of the case is completely unreliable or that the inferences sought to be drawn from it are not available.

[509] The other claimed requirements are so vague and general that the Court could not have any confidence that the proposed work would yield evidence meeting the requisite standard. An example is the proposed instruction of a computer forensics expert in the United States to analyse the data stored on Megaupload's servers to "verify or disprove the allegations made throughout the ROC". The claimed impediment to commissioning such open-ended investigative work on the eve of the eligibility hearing does not appeal as a reason that could justify granting a permanent stay of extradition.

[510] Equally unappealing is the suggestion that extradition should be stayed permanently because the appellants were unable to engage private investigators in the United States "to locate and interview infringing and non-infringing users of Megaupload". This would appear to be a pointless exercise given that Megaupload claimed to have had over 60 million registered users by January 2012, an average of 50 million daily visits and more than one billion visitors in total. It is hard to understand why it would be useful to locate and interview these infringing and non-infringing users of Megaupload or how their evidence could undermine the evidence in the record of the case.

[511] Nor does technical evidence from a United States' expert regarding "the provision of cloud storage by the industry, including infrastructure and technology"

appear to be relevant or required for the extradition hearing. What matters is what the appellants did, not how the industry provides cloud storage services or the infrastructure and technology required for this. Similarly irrelevant is the proposed evidence from a United States expert on “industry practice in the cloud storage industry in relation to allegedly infringing material and takedown notices”. Again, the issue for the extradition Court is confined to what the appellants are said to have done, not what others in the industry do.

#### Delay and distraction

[512] The appellants’ submission in the District Court was that Katz J intended, by directing the adjournment of the eligibility hearing, that they should have five months to obtain the evidence they needed from United States’ experts. This argument was constructed on the basis of the following two paragraphs from Katz J’s judgment:<sup>135</sup>

[28] Mr Mansfield advised that Mr Dotcom intends to engage two United States academics to give expert evidence on aspects of United States copyright law, a New Zealand expert on copyright law, and Mr Dotcom’s US attorney to give factual evidence. All of those witnesses require payment and could not be formally engaged until funding was secured. Briefs of evidence were due to be filed, however, relatively shortly after Courtney J’s judgment of 12 March 2015 was delivered, ordering an interim payment of funds to cover legal expenses. By then it was simply impossible to comply with the current timetable (putting to one side the prospect that Her Honour’s judgment would be appealed or otherwise challenged).

[53] The submission that Messrs Ortmann and van der Kolk will not have a reasonable opportunity to prepare and present their case if the extradition hearing proceeds on 2 June 2015 is not a particularly compelling one on the evidence they have presented. I have ultimately concluded, however, that although they have had access to funds to meet their legal expenses, they have likely not had access to sufficient resources to prepare *the foreshadowed evidence*. It appears to have been envisaged that Mr Dotcom and his team would take the lead on evidence issues, and [provide] the necessary funding (or most of it). In this respect Messrs Ortmann and van der Kolk’s preparation has been detrimentally impacted by Mr Dotcom’s funding issues.

[Emphasis added].

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<sup>135</sup> *Ortmann v District Court at North Shore*, above n 104.

[513] Mr Illingworth submitted to the District Court that the United States had frustrated the intent of this judgment by:

- (a) attempting to enforce the United States' forfeiture orders in New Zealand;
- (b) failing to clarify until 23 June 2015 its position regarding enforcement of the United States' forfeiture orders against monies expended in the United States sourced from funds released pursuant to orders made in Hong Kong and New Zealand; and
- (c) failing to confirm the detail of its position until 4 September 2015.

[514] Mr Illingworth also contended in the District Court that the United States had deliberately diverted the appellants' time and resources away from preparation for the eligibility hearing. This was said to be because the appellants were required to:

- (a) oppose the Commissioner's application to register the United States forfeiture order in New Zealand;
- (b) oppose the United States' application to strike out the appellants' application for judicial review in relation to the United States forfeiture order;
- (c) oppose the Attorney-General's application for orders allowing him to send items seized in January 2012 to the United States;
- (d) make repeated requests for the funding position to be clarified; and
- (e) apply to the District Court, the High Court and the Court of Appeal for orders staying the proceeding for abuse of process by the United States.

[515] The District Court Judge dismissed these submissions, saying “I am satisfied that the respondents have had more than sufficient time and resources to prepare for this eligibility hearing if they were so minded”.

[516] Mr Illingworth submits that the Judge failed to appreciate that the funding issue was not known to the appellants at the time of the hearing before Katz J. It did not surface as a potential problem in the minds of the appellants until Mr Dotcom’s solicitors sought clarification of the position on 29 April 2015. That was one week after the hearing before Katz J, and two days before her decision was released on 1 May 2015.

[517] Whether or not Mr Illingworth is correct about this makes no difference to the outcome. This is because the entire submission is built on an insecure foundation. Katz J did not purport to make any finding that the “*foreshadowed evidence*” would be relevant or admissible at the extradition hearing, noting that this would be a matter for the District Court Judge to determine.<sup>136</sup> I have found, in agreement with the Judge, that the foreshadowed evidence on “aspects of United States copyright law” was not relevant because of the concept of transposition. In any event, Mr Dotcom did provide evidence from Professor Lessig on United States copyright law. The evidence from a “New Zealand expert on copyright law” was never impeded by the spending barrier and not needed anyway. The only other foreshadowed evidence was from “Mr Dotcom’s US attorney”, Mr Rothken. He gave evidence.

#### Prejudice to the appellants

[518] The District Court was not persuaded that the appellants had been prejudiced in any event because there was “no evidence that they have been starved of funds” and, on the contrary, “[t]hey have had funding available to them far above and beyond the funding that most litigants would have available to them”.<sup>137</sup> Mr Illingworth submits that this fails to address the prejudice complained of. He says, rightly, that the fact that a litigant has the means to pay for assistance is no answer to an allegation that his opponent has prevented him from obtaining that

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<sup>136</sup> At [30].  
<sup>137</sup> At [565].

assistance. Nevertheless, for the reasons already given, I agree with the District Court that the appellants have not demonstrated that they have suffered any material prejudice as a result of the spending barrier that they identified shortly prior to the eligibility hearing.

#### Other submissions

[519] Mr Illingworth criticises the District Court for misstating his submissions in the following two passages of the judgment:<sup>138</sup>

[The appellants] fail to explain how this Court should ignore the provisions of the Act and grant a stay because of the risk of an adverse decision to [the appellants] from this hearing.

...

... Whatever advantages it is perceived [the United States] might have pursuant to MACMA and the Act are those legitimately available to them. They are not a basis for a stay application. Granting a stay application based on these submissions with total disregard for the law is more likely to undermine public confidence in the criminal justice system than it is to proceed with this eligibility hearing to a conclusion.

[520] I readily accept that Mr Illingworth made no such submission. However, these errors are immaterial to the outcome.

#### *Conclusion*

[521] In summary, I agree with the District Court that there was no misconduct by or on behalf of the United States in obtaining and seeking to enforce forfeiture orders that were properly obtained in its jurisdiction. There was no strategy “to choke off the appellants’ defence and starve them into submission”. I also agree with the Judge’s conclusion that the constraint on paying United States experts, which the appellants only identified as an issue at the end of April 2015, did not prevent the appellants from having a fair extradition hearing. There could be no justification in this case for taking the extreme step of granting a permanent stay of the extradition proceedings based on the limited spending constraint. Contrary to Mr Illingworth’s submission, there is no comparison between this case and the grave misconduct in *Cobb*. The Judge was right to dismiss the July funding stay application.

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<sup>138</sup> At [568] and [570].

## **Misconduct stay applications**

### *August stay application*

[522] The appellants filed a joint application for an order permanently staying the extradition proceedings on 30 October 2014. This application was brought on the grounds that there had been an abuse of process in the way the United States and the New Zealand authorities had acted in bringing the appellants before the Court and in carrying out various steps under the Mutual Assistance in Criminal Matters Act. This joint application was amended on 21 August 2015. Then, on 16 September 2015, Mr Dotcom filed his own separate application adding further grounds. As noted, these applications have been referred to respectively as the August and September stay applications to differentiate them from each other and from the July funding stay application.

[523] The following alleged misconduct was relied on to support the August stay application which was pursued by Messrs Ortmann, van der Kolk and Batato:

- (a) unlawful interception of communications by Government Communications Security Bureau and unlawful surveillance by police;
- (b) unreasonable search and seizure by police;
- (c) non-disclosure by police when applying for arrest warrants;
- (d) asset forfeiture;
- (e) unlawful removal of computer clones;
- (f) preventing the appellants from having access to their electronic data;  
and
- (g) attempting to “stifle” the appellants’ claims for justice in other proceedings being conducted in the High Court.

[524] The appellants claimed that, in these circumstances, it was not possible for them to have a fair eligibility hearing and that allowing it to proceed would undermine public confidence in the integrity of the justice system and bring the administration of justice into disrepute.

*September stay application*

[525] Mr Dotcom's September stay application was based on the following alleged misconduct:

- (a) commencing the prosecution in the United States for political reasons;
- (b) granting permanent residence to Mr Dotcom in order to facilitate his extradition to the United States;
- (c) applying without notice to stop Mr Dotcom's businesses from trading;
- (d) applying without notice to restrain the assets of Mr Dotcom and individuals associated with him;
- (e) applying without notice to restrain Mr Dotcom's assets globally so as to prevent him from being able to contest extradition;
- (f) applying without notice to restrain Mr Dotcom's assets globally so as to prevent him from being able to contest the prosecution in the United States;
- (g) asserting unilateral extra-territorial jurisdiction to regulate the Internet contrary to the global public interest;
- (h) gathering intelligence relating to Mr Dotcom;
- (i) denying Mr Dotcom access to exculpatory data;

- (j) breaching its alleged duty to preserve evidence stored on the Megaupload servers and frustrating Mr Dotcom's attempts to do so;
- (k) pursuing the arrest and extradition of Mr Dotcom;
- (l) taking steps against Mr Dotcom pursuant to the Mutual Assistance in Criminal Matters Act;
- (m) publicly humiliating Mr Dotcom and members of his family;
- (n) traumatising Mr Dotcom's children contrary to their best interests; and
- (o) engaging in related litigation in New Zealand and overseas.

*United States' preliminary objection*

[526] The United States objected to these applications being heard substantively for two reasons. First, it argued that it was outside the jurisdiction of the extradition Court to consider these allegations. Second, even if the extradition Court did have jurisdiction and the allegations were proven, it argued that they could not reach the high threshold required to justify permanently staying the extradition proceedings.

[527] After hearing submissions, the Judge upheld the United States' preliminary objection, which was effectively a strike-out application. The Judge stated that he would give full reasons for this decision after concluding the eligibility hearing.

*District Court judgment*

[528] Mr Illingworth submits that the Judge failed to give any reasons for granting the strike-out application in his judgment. He says that the only mention of the United States' preliminary objection is in the following paragraph:

[572] On 21 October 2015 [the United States] filed a preliminary objection to stay applications 2 and 3 (dated 21 August and 16 September 2015) filed for the first respondent, Mr Dotcom. Full submissions were heard on this objection prior to commencing a hearing of these stay applications.



[529] Mr Illingworth submits that the Judge appears to have thought that only Mr Dotcom applied for a stay and overlooked that the August application was made by the other appellants. Second, Mr Illingworth claims that this passage of the judgment shows that the Judge thought he had heard the stay applications when, in fact, he had declined to do so. Mr Illingworth and Mr Mansfield both argue that the Judge purported to dismiss the stay applications on the merits in the judgment.

[530] I deal with the second complaint first because there is nothing in it in my view. The Judge was simply recording in [572] his decision to hear the preliminary objection (the strike-out application) before embarking on any hearing to enquire into the substance of those applications, despite the appellants' objections to this course. The Judge advised the parties at the time that the strike-out application was granted and indicated that he would give his reasons for doing so in the substantive judgment. That is what he did. I consider that the appellants are mistaken in reading more into this paragraph.

[531] It is also clear from his reasoning that the Judge did not purport to determine the stay applications on their merits but confined his attention to whether the grounds of Mr Dotcom's application could justify a stay, even if the supporting allegations could be proved. This is evident from the following statements in [578] of the judgment where the Judge addresses each of the pleaded grounds of Mr Dotcom's September application:

[578] *The grounds alleging an abuse of process in the paragraph above [Mr Dotcom's September application] are considered below using the same paragraph numbers:*

- a. (Political motivation for United States prosecution) ... There is no direct evidence ... *Even if there was* ... Their motives to seek extradition do not potentially affect the fairness of this eligibility hearing and [this] is not a ground to grant a stay application.
- b. (Granting of permanent residence) ... *pointless exercise seeking* a stay of the eligibility hearing on this ground.
- c.d.e.f. (Global asset restraint) ... The *conduct that has been alleged* does not prevent this Court from conducting a fair eligibility hearing.
- g. (Assertion of extra-territorial jurisdiction to regulate the Internet) *If correct or not, this allegation has no relevance to the conduct of a fair eligibility hearing.*

- h. (Intelligence gathering) ... *Any allegation of illegality of improperly gained evidence by the [United States] or its agents is a trial issue, not an eligibility hearing issue.*
- i. (Denial of access to exculpatory material) ... *This ground is a trial issue and does not prevent a fair eligibility hearing.*
- j. (Failure to preserve data) ... *this is a trial issue and does not prevent a fair eligibility hearing.*
- k. (Pursuing arrest and extradition) *The methods and tactics used by authorities to arrest [Mr Dotcom] and the following processes are not relevant to an eligibility hearing and nor do they impact upon the fairness of the hearing.*
- l. (Steps taken under MACMA) *The steps taken by the authorities pursuant to the MACMA are alleged to amount to an abuse of process have not been shown to have impacted upon the conduct of a fair eligibility hearing.*
- m.n. (Humiliating Mr Dotcom and his wife and traumatising their children) *The alleged public humiliation ... and the alleged trauma, do not amount to an abuse of process affecting the fair conduct of this eligibility hearing.*
- o. (Engaging of collateral or related litigation) *There is no evidence that collateral or related litigation in New Zealand or overseas has affected the fair conduct of this eligibility hearing. Any such litigation will be heard and decided upon by those Courts. It is not appropriate, and nor does this Court have the jurisdiction, to intervene.*
- p. (Otherwise conducted themselves in relation to these proceedings) ... *This allegation does not lead to any finding that this eligibility hearing was not conducted in a fair manner.*

[Emphasis added].

[532] For these reasons, I reject the submission that the Judge purported to determine the stay applications on their merits. In my view, it is quite clear that he struck those applications out on the basis that the pleaded grounds could not have any bearing on the fairness of the eligibility hearing and accordingly could not justify a stay of the extradition proceedings. In short, the Judge concluded that these allegations fell outside the scope of the jurisdiction of the extradition Court.

[533] Returning to Mr Illingworth's first complaint, I accept his submission that the Judge appears to have overlooked that Messrs Ortmann, van der Kolk and Batato were the applicants under the August stay application, not Mr Dotcom who had by then filed his own separate application. The Judge did not address the August stay application directly because he misunderstood first, that both applications had been

brought by Mr Dotcom and were merely supported by the other appellants and second, that the grounds of Mr Dotcom's August application were subsumed in his September application. This error is evident from the following passage of the judgment:

[574] [Mr Dotcom] confirmed that the Amended Application by [Mr Dotcom] for an Order Staying the Proceedings of 16 September 2015 includes the grounds for the stay application of 21 August 2015 and can be considered together. The general ground of the stay application is the alleged abuse of process by the [United States]. [Mr Dotcom] submits that in the circumstances, allowing the eligibility hearing to take place would undermine public confidence in the integrity of the New Zealand criminal justice system, as described in *R v Antonievic*. This application is supported by the other [appellants] and they submit that the eligibility hearing should also be stayed against them.

### *Judicial review*

[534] There is considerable overlap in the grounds Mr Illingworth relies on in support of his overall contention that the District Court's determination of the August and September stay applications was invalid:

- (a) failure to observe the principles of natural justice by:
  - (i) permitting the United States to make its preliminary objection;
  - (ii) failing to give reasons;
  - (iii) dismissing the applications on their merits;
  - (iv) criticising Mr Dotcom's failure to prove the allegations in his application when the Judge had denied him an opportunity to do so; and
  - (v) failing to address the August stay application.
- (b) errors of law:
  - (i) incorrect test for determining jurisdiction to hear the stay applications;

- (ii) incorrect test for determining abuse of process and the substance of the stay applications; and
  - (iii) failing to consider grounds of August stay application.
- (c) unreasonableness:
  - (i) dealing with the preliminary objection in a manner that was unprincipled, illogical and lacking a coherent basis (deciding to hear the preliminary objection first and allegedly granting it without giving reasons); and
  - (ii) dealing with the August/September stay applications in a manner that was unprincipled, illogical and lacking a coherent basis (allegedly determining the stay applications on the merits without hearing substantive argument or evidence and determining the August stay application without considering the grounds of it).

[535] Because of the overlap, it is convenient to address the grounds rather than focusing on the categories of review under which they fall.

#### Hearing sequence

[536] Although the United States did not propose until a late stage that jurisdiction for the August and September stay applications should be addressed before the substance of those applications was enquired into, that was the proper course for the Judge to follow and the appellants cannot have been disadvantaged by having to address jurisdiction at the outset. The appellants must have appreciated that the Judge was required to determine whether he had jurisdiction to enquire into these applications. Self-evidently, he would have been wrong to spend weeks hearing evidence from the 17 witnesses summoned by the appellants relating to an application he had no jurisdiction to hear.

### Failure to give reasons

[537] I have already addressed this complaint which arises out of the appellants' misreading of the judgment. Contrary to their submission, [578] of the District Court judgment quoted above contains the Judge's reasons for striking out the stay applications, not for dismissing them on their merits.

### Dismissal of applications on the merits

[538] For the reasons given, I reject the appellants' contention that the Judge determined the applications on their merits.

### Criticism of failure to prove matters when no opportunity given

[539] This criticism is founded on the same misreading of the judgment.

### Failure to address the August stay application

[540] I consider that this criticism is well-founded. It resulted from a misunderstanding on the part of the Judge. However, when filing his September application, Mr Dotcom did not abandon his reliance on any of the grounds of the August stay application to which he had been a party. His September application, which ran to 81 pages, added to, but did not subtract from, the grounds of the 11 page August application.

[541] Mr Illingworth accepts that there is "some overlap" between the two applications but says that where the grounds are common, the Judge has only considered that ground in relation to Mr Dotcom and has ignored the position of the other appellants. He also argues that even if the Judge's reasons in respect of Mr Dotcom's September stay application could be taken as applying to Messrs Ortmann and van der Kolk, the Judge still needed to consider a number of grounds raised in the August application. He cited the examples listed below, but all of these were covered in the September application.

- (a) the New Zealand Police allegedly denied Mr Ortmann (as well as Messrs Dotcom and Batato) access to legal advice on 20 January 2012, the day of the arrests;<sup>139</sup>
- (b) the New Zealand Police issued an allegedly misleading media statement after the arrest and search warrants had been executed;<sup>140</sup>
- (c) the New Zealand Police gave allegedly misleading evidence at a hearing in the High Court in 2012;<sup>141</sup>
- (d) the New Zealand Police and others allegedly attempted to conceal the unlawful interception of communications by Government Communications Security Bureau prior to the arrests;<sup>142</sup>
- (e) the New Zealand Police seized Mr and Mrs van der Kolk's assets knowing that the order obtained from the High Court was unlawful or likely to be unlawful;<sup>143</sup>
- (f) the New Zealand Police unlawfully shipped to the United States clones of computer hard drives seized on 20 January 2012;<sup>144</sup>
- (g) the United States failed to return the clones to New Zealand;<sup>145</sup> and
- (h) the New Zealand Police did not disclose material facts when applying for the provisional arrest warrants in January 2012.<sup>146</sup>

[542] The Judge was correct in his understanding that the grounds of the August application were effectively subsumed in the September application. If these grounds could not justify a stay of the extradition proceedings against Mr Dotcom,

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<sup>139</sup> At [7.32] on p 70 of Mr Dotcom's September application but only in relation to Mr Dotcom.

<sup>140</sup> At [7.33] on p 70.

<sup>141</sup> At [8.10] on p 73.

<sup>142</sup> At [8.10] on p 74.

<sup>143</sup> At [1.11] on p 15 but only in relation to Mr Dotcom.

<sup>144</sup> At [8.12] on p 75.

<sup>145</sup> At [8.13] on p 75.

<sup>146</sup> At [8.9] on p 73.

equally they could not justify a stay against the other appellants. It follows that if the Judge was right to strike out Mr Dotcom's September application, the August application also had to be struck out. The critical issue is whether the Judge was right to strike these applications out. This turns on whether he applied the correct legal test.

#### Jurisdiction to consider stay applications

[543] Mr Illingworth submits that the District Court's decision to uphold the preliminary objection was erroneous but he claims it is not possible to examine the reasons for that decision because no reasons were given. This is the same point already discussed and results from a misreading of the judgment. The Judge did give reasons for striking out the applications and he did not purport to determine them on their merits.

[544] As discussed in the context of the July funding stay application, the parties disagree about whether the *Bow Street* screening test applies in New Zealand in cases where an abuse of process is alleged. The steps directed in *Bow Street* are as follows:

- (a) the Judge should insist that the conduct alleged to constitute the abuse be identified with particularity;
- (b) the Judge should consider whether the conduct, if established, could constitute an abuse of process; and
- (c) if so, the Judge should consider whether there are reasonable grounds for believing that such conduct may have occurred.

[545] It is clear that the Judge accepted Mr Illingworth's submission that the *Bow Street* screening test should be adopted in New Zealand and he set out the three steps in the passage quoted at [463] above. While this screening test has not been expressly approved in New Zealand, it seems an entirely appropriate means of assessing whether alleged misconduct falls within the jurisdiction of the extradition Court and should be enquired into.

### Test for abuse of process and stay of proceedings

[546] Mr Illingworth repeats the submission he made in connection with the July funding stay application that the Judge confused and conflated the *Bow Street* screening procedure with the substantive test for abuse of process as set out in *Antonievic* and confirmed in *Wilson*. Moreover, he submits that the Judge did not apply the correct substantive test, but instead asked himself whether the conduct was relevant, supported by evidence, and would prevent a fair eligibility hearing.<sup>147</sup> Mr Illingworth submits that this test is unsupported by any authority.

[547] In summary, Mr Illingworth submits that the District Court made two key errors. First, the Judge failed to identify and apply the correct legal test for abuse of process. Second, the Judge applied that test in determining the applications on their merits, having refused to hear them. I need only deal with the first of these submissions because the second has already been disposed of.

[548] The starting point is to examine the jurisdiction of an extradition court. The Court is required to determine eligibility under s 24 of the Extradition Act and for that purpose it has the same jurisdiction and powers as if it were conducting a committal hearing (s 22 of the Act).

[549] In *Police v D*, the Court of Appeal held that the District Court exceeded its jurisdiction in a committal hearing by enquiring into allegations of abuse of process to determine whether the proceeding should be stayed. The allegations included entrapment, police partiality and misconduct and witness misconduct.<sup>148</sup> In giving the judgment of the Court, Gault J stated:<sup>149</sup>

The committal jurisdiction is statutory. The powers exercisable in such a jurisdiction are those expressly conferred and those implied having regard to the nature and purpose of the jurisdiction. There are inherent in the statutorily conferred jurisdiction those powers necessary to enable the Court to carry out its statutory function effectively.

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<sup>147</sup> This submission is based on [578] of the District Court judgment quoted at [513] above.

<sup>148</sup> *Police v D* [1993] 2 NZLR 526 (CA).

<sup>149</sup> At 530.



[550] The Court concluded that the allegations fell outside the scope of the Court's limited function in a committal hearing:<sup>150</sup>

... we do not see how these matters bear upon the evidence of the elements of the offences charged. They may be entirely reprehensible and may call for action elsewhere but the present focus must be on the function of the committal hearing.

[551] *Police v D* was applied by the Court of Appeal in the extradition context in *Bujak v Republic of Poland*.<sup>151</sup> In that case, Mr Bujak argued that the District Court should decline to order his surrender because of undue delay. The Court of Appeal concluded that the District Court's role was simply to determine eligibility for surrender, not whether there were circumstances justifying a refusal to surrender someone otherwise eligible.<sup>152</sup>

[552] The extradition Court's power to ensure a fair hearing is beyond doubt and was confirmed by the Supreme Court in *Dotcom*.<sup>153</sup> That was the yardstick against which the District Court assessed each of the grounds of the application, correctly in my view. None of the matters complained of has any bearing on whether the eligibility hearing could be conducted fairly, save to the extent of the overlap with the July funding stay application. Nor did they have any bearing on the extradition Court's limited enquiry in determining eligibility for surrender.

### *Conclusion*

[553] For the reasons given, I consider that the Judge was correct to strike-out the August and September stay applications. The extradition Court had no jurisdiction to enquire into these matters as they had no bearing on the Court's statutory task.

### **Bias/pre-determination**

[554] The appellants contend that the District Court Judge displayed apparent bias throughout the process:

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<sup>150</sup> At 532.

<sup>151</sup> *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604.

<sup>152</sup> At [64].

<sup>153</sup> *Dotcom v United States of America* [Disclosure], above n 4.

- (a) during the hearing, particularly his decisions as to the order in which the applications would be heard (stay and eligibility);
- (b) in failing to address the appellants' case in his judgment; and
- (c) in attempting to deny the appellants' appeal rights by refusing (initially) to sign their cases stated.

[555] The test for apparent bias in New Zealand was described by the Supreme Court in *Saxmere Company Limited v Wool Board Disestablishment Company Limited* as follows:<sup>154</sup>

... a judge is disqualified “if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”.

[556] The fair-minded lay observer in this context is presumed to be intelligent and to view matters objectively, without undue sensitivity or suspicion but without being complacent. The requirement reflects the need for justice not only to be done, but be seen to be done.

[557] The appellants place particular reliance on a decision of the High Court of Australia in *Antoun v The Queen*, another case in which the allegations of bias against the Judge were made after delivery of the judgment.<sup>155</sup> That case involved a Judge-alone trial in a District Court of two persons charged with demanding money with menaces with intent to steal. During the course of the trial, defence counsel indicated that they wished to apply for a directed verdict of acquittal on the basis that there was no case to answer. The Judge immediately responded, before hearing the application, “I see, well that application will be refused”. The following morning, before the application was heard, the Judge said:

I simply point out in relation to whatever application is about to be made in relation to a no case that I have a very, very firm view that as a matter of law, ... an application for a no case cannot succeed in this particular trial. I shall make that clear in the fullness of time, although I could make it clear now. I shall make it clear however at the conclusion of the submissions. ... an

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<sup>154</sup> *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

<sup>155</sup> *Antoun v The Queen* [2006] HCA 2, (2006) 224 ALR 51.

application of that description in my considered view on the law is doomed to failure.

[558] The Judge then heard the submissions and promptly dismissed application.

[559] The High Court of Australia unanimously concluded that the Judge's conduct gave rise to a reasonable apprehension of prejudgment. Kirby J emphasised the essentiality of fairness in the process:<sup>156</sup>

The manifest observance of fair procedures is necessary to satisfy the requirements not only of fairness to the accused but also of justice before the public so that they may be satisfied, by attendance or from the record, that the process has followed lines observing basic rules of fairness. Excessively telescoping the procedures in such cases can lead to a sense of disquiet on the part of the accused, and of objective observers whose attitudes, where relevant, must be represented, and given effect, by appellate courts.

[560] The Court allowed the appeal despite the weakness of the appellants' case. Kirby J explained:<sup>157</sup>

... the entitlement of the appellants to an impartial tribunal is not simply one afforded in disposing of appeals under Australian law. It reflects a human right and fundamental freedom that belonged to the appellants of which, by the way their trial was conducted, the trial judge deprived them. In a sense, the stronger the prosecution case against the appellants, the more important it was for the judge of trial to listen for a time to the submissions put on their behalf. No case is judged hopeless in our courts before a party has had a reasonable opportunity, by evidence and argument, to advance its case and contentions to the independent judge.

[561] Mr Spring carried the argument for the appellants on this aspect of the case. He submitted that a fair-minded lay observer might reasonably apprehend that the Judge did not bring an impartial mind to the resolution of the case. He argues that this concern would be raised by what occurred at the hearing, in the judgment and when settling the case stated appeals.

#### *Conduct of the hearing*

[562] Mr Spring submits that the only fair and practicable course was for the District Court Judge to determine the July stay funding application before considering anything else. This is because forcing the appellants to proceed with the

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<sup>156</sup> At [28].

<sup>157</sup> At [48].

eligibility hearing meant that they suffered the very prejudice they were seeking to avoid by bringing the stay application.

[563] Instead of following this course, the Judge decided to commence hearing the United States' case for eligibility first, reasoning that this would provide context for considering the funding stay application. Mr Spring contends that hearing detailed submissions on the United States' case for eligibility over a period of two weeks went far beyond supplying any necessary context and also prejudiced the appellants because the Judge then considered the stay application without hearing the appellants' response to the substance of the United States' case on eligibility. Although the appellants were given the opportunity of responding on eligibility, Mr Spring submits that this would have been even more unsatisfactory because they would have been forced to do so without the required assistance from United States experts on legal and technical issues.

[564] In short, Mr Spring submits that the District Court Judge excessively "telescoped" the proceeding (adopting Kirby J's expression in *Antoun*) by delaying to hear it until it was robbed of much of its efficacy. He argues that this was exacerbated by the Judge's failure to give a decision on the funding stay application until after the conclusion of the eligibility hearing.

[565] While I agree with Mr Spring that the ideal course would have been to hear and determine the July funding stay application before proceeding with the eligibility hearing, the Judge was placed in a difficult position because of the late filing of that application. It should not be overlooked that the Court of Appeal was unable, in the limited time available before the hearing in the District Court and doing justice to the extensive submissions filed, to resolve the contest as to whether assistance was needed from United States experts for the extradition hearing. Having considered these same extensive submissions myself, I am not at all surprised that the District Court Judge concluded that he had no practical option but to take time to consider whether the funding stay application should be granted and that he would be assisted by hearing full argument from both sides on all issues before doing so.

[566] If the Judge had announced his decision on the stay application immediately after the conclusion of argument, it is likely that he would have faced the criticism that he did not bring an open mind to the application and had failed to give it the careful consideration it required. It could also have been argued that he had not acted fairly by allowing the United States to present its full case on eligibility without hearing the appellants' detailed response, the very point Mr Spring now makes. On the other hand, if the Judge reserved his decision on the stay application and deferred the rest of the hearing until his judgment was ready, he would be vulnerable to the criticism that he was effectively granting the appellants the further adjournment of the eligibility hearing that the United States wished to avoid. The District Court Judge would also have been aware of Parliament's intention that extradition proceedings are to be carried out expeditiously. These proceedings had already been on foot for well over three years and had fallen well short of meeting that expectation.

[567] In my view, the fair-minded lay observer equipped with the relevant facts would have understood why the Judge proceeded as he did in the challenging circumstances he confronted. Such an observer would not have been troubled by the fact that the Judge chose to reserve his decision on the July funding stay application until after hearing fully from the parties on all matters before the Court. If the Judge had concluded that the appellants had been denied their right to a fair eligibility hearing, he would have granted the stay and declined the United States' application for a finding of eligibility. I consider that the Judge took the best course available in the circumstances and it could not fairly be said that any party was disadvantaged in the process.

[568] Mr Spring submits that the fair-minded lay observer would also have been concerned about the sequence adopted for determining the August and September stay applications, particularly the late decision to hear the United States' "preliminary objection". However, Mr Spring's main point is that the Judge found that the United States' preliminary objection was well-founded and effectively struck out the stay applications at the end of the hearing. Mr Spring argues that the lay observer would have expected the Judge to reserve his decision on the strike-out application and proceed to hear the substance of these applications.

[569] I do not accept this submission. The appellants urged the Judge to follow the *Bow Street* screening procedure. I agree that this was an appropriate course. I see nothing that would concern the fair-minded lay observer about the Judge applying the *Bow Street* screening test, reaching a clear view at the conclusion of the argument that the strike-out application had to be granted, but delaying the giving of reasons to enable the parties to use the hearing time to present their full arguments on eligibility. For the reasons given earlier, it would have been wrong for the Judge to have embarked on a lengthy hearing enquiring into allegations of misconduct when he was satisfied that there was no jurisdiction for him to do so. The fair-minded lay observer would understand that.

[570] The appellants also raised a concern about where the Judge's eyes were directed at various times during the hearing. I received an affidavit from Mr van der Kolk deposing that he observed the Judge looking at his computer screen and using the mouse during submissions. He said that he initially thought that the Judge was following the submissions in digital form but then formed the view that the Judge may have been looking at something else based on the Judge's questions to counsel. During the course of the argument in the High Court, the appellants formally abandoned reliance on this evidence and submission, rightly in my view. There is nothing in this point.

#### *Errors in the judgment*

[571] Mr Spring's next submission is that the fair-minded lay observer would have been concerned about the impartiality of the decision-maker when reading the judgment in relation to the July funding stay application. This is because, he submits, the Judge failed to grasp the factual background, fundamentally misstated and misapprehended the appellants' legal submissions, failed to engage with counsel and unjustifiably narrowed the scope of the application so as not to decide it upon its terms.

[572] Mr Spring relies on the following alleged factual errors:

- (a) at [466] of the judgment the Judge referred to forfeiture orders being made in the United States against the appellants' "restrained domestic

and foreign assets”. This overlooks Mr Spring’s evidence in the District Court that none of the appellants had any assets in the United States;

- (b) at [465], the Judge referred to funds being released by this Court to Mr Dotcom and Mr van der Kolk whereas Mr van der Kolk’s expenses were met from funds in Hong Kong, not New Zealand;
- (c) at [472], the Judge suggests that the appellants did not seek clarification of the spending restriction until after 24 June 2015, whereas Mr Dotcom’s solicitors wrote seeking such clarification on 29 April 2015;
- (d) at [557], the Judge said that Mr Dotcom called Professor Sallis whereas he was called by Messrs Ortman and van der Kolk; and
- (e) at [558], the Judge stated that Professor Sallis was not asked whether experts based outside of the United States would have the necessary expertise to challenge the evidence in the record of the case whereas Professor Sallis said: “Evidence as to industry practice regarding take down requests (i.e. how take down requests are actioned) could be given by a technological ‘insider’, being someone who has actual experience in the Cloud industry overseas (preferably the United States, where the main Cloud storage providers are located)” and, “Essentially, as is the case in relation to take down procedures, this is information that only an outsider from a particular Cloud storage service provider could comment on. For the most part, and especially for the major service providers, such insiders would need to be sourced from outside of New Zealand”.

[573] Given the extraordinarily large volume of materials presented to the Judge, the fair-minded lay observer would excuse him for making these inconsequential errors.

[574] Mr Spring says that he can identify 25 legal issues that were submitted to the Judge on the July funding stay application. However, he argues that 17 of these were not adequately addressed by the Judge. Mr Spring contends that the most telling issue relates to the Judge's decision to dismiss the application, in part, on the basis that the appellants had failed to provide evidence to demonstrate a breach of the duty of candour. Mr Spring adds the alleged failure by the Judge to engage with counsel and again complains that the Judge unreasonably limited the scope of the July funding stay application.

[575] Mr Spring captured what he described as the essence of his submissions in the following terms:

The net effect of His Honour hearing only the narrow issue he originally wished to at the outset and effectively ignoring the balance of the application is that the key issue arising from the July Stay Application – whether the conduct of the United States amounted to an attempt to interfere with the due process of the District Court – was roundly ignored in the judgment.

[576] I have already dealt with these submissions. I do not accept that the Judge unreasonably limited the scope of the hearing. The Judge did consider whether the United States had engaged in misconduct in an attempt to interfere with the due process of the District Court and found that there was no evidence of this. In my view, there was nothing about this that would have raised the concern of the fair-minded lay observer.

[577] Mr Spring repeats the arguments addressed earlier concerning the manner in which the August and September stay applications were dealt with in the judgment. I have accepted the appellants' submission that the Judge appears to have thought that both applications were both brought by Mr Dotcom and only supported by the other appellants and that all grounds of the August application were subsumed in the September application. However, these misunderstandings were not material to the correct disposition of these applications and would not have concerned the fair-minded observer in the circumstances. The Judge understood from his enquiry of Mr Mansfield that the September application covered every ground raised in the August application.



[578] Mr Spring's principal submission in relation to these applications is that the Judge purported to decide them on their merits whereas he had declined to hear them. For the reasons already given, I consider that this criticism is the result of the appellants' misreading of the judgment. The Judge did not make the error complained of and accordingly this concern falls away.

[579] Finally, Mr Spring submits that the fair-minded lay observer would be concerned about the Judge's impartiality having read the judgment. He bases this submission on the Judge's alleged failure to: identify which parts of the 336-page record of the case were admissible (the colour coded analysis of the 990 paragraphs undertaken by the appellants); identify what evidence was sufficient and reliable; identify the "matters of fact" upon which the judgment was based; and analyse the evidence against each appellant individually. Further, he submits that the Judge failed to consider the submissions impartially by cutting and pasting into the judgment large sections of the United States' submissions and dealing with the appellants' submissions in a perfunctory manner. Mr Spring's next point is that the Judge misdirected himself as to the requirements of s 24 of the Extradition Act and reached an erroneous view of what he was required to decide for the purposes of eligibility.

[580] In summary, Mr Spring submits that the fair-minded lay observer would conclude that the Judge gave the appearance of bias and pre-determination because the errors in the judgment are too numerous, fundamental and one-sided to permit any alternative rational explanation.

[581] I consider that these criticisms are both harsh and unfair. For the reasons set out at [46] to [55] above, I agree with the appellants that the Judge fundamentally misdirected himself as to the task of the extradition Court under s 24(2). This misdirection explains why the Judge did not consider it necessary to address many of the submissions he received from the appellants or the United States. However, this error is no more than that and is no indication that the Judge was biased or pre-determined the matter.

*Post-judgment – settling the case stated appeals*

[582] The concern here is that the Judge signed the case stated appeals submitted by the United States but difficulties were encountered in settling the appellants' case stated appeals. The Judge apparently considered that the District Court was *functus officio* and should not be ruling on the dispute as to what questions of law arising out of his decision should be included in the case stated appeals. The Judge was concerned that any such decision would itself be subject to appeal and the matter should be resolved in the High Court:<sup>158</sup>

[6] The issues the parties have raised in their respective case stated documents taken in their entirety amount to a large number of issues if all are taken on appeal to the High Court. On the face of the documents, the parties fundamentally disagree upon what can or cannot be included in a case stated for appeal before the High Court.

[7] In order to make any ruling upon the many fundamental disagreements that exist between the applicant and the respondents, this Court would be placed in the position of interpreting its own decision of 23 December 2015 and making rulings pursuant to s 68.

[8] This Court is now *functus officio* and should not be ruling on potential appeal points from its own decisions. Any decision or interpretation in the absence of agreement by the parties would of itself become subject to appeal.

[583] I agree with the appellants that the Judge was wrong to consider that he was *functus officio*. However, there is no reason to conclude that this belief was not genuinely held, even though it was mistaken. Upon being invited by the parties to reconsider, the Judge recognised his continuing role and duly signed the case stated appeals. He did not seek to restrict the number of issues of law able to be raised by the appellants.

[584] For all of these reasons, I reject the appellants' claim that they were denied a fair hearing before an unbiased judge. In my view, the fair-minded lay observer would have understood the challenges faced by the Judge and been satisfied that all parties had been given a fair hearing.

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<sup>158</sup> *Ortmann v the United States of America* DC North Shore CRI-2012-092-001647 (Minute of Judge Dawson dated 29 February 2016).

## **Other matters**

[585] The appellants strongly criticised the District Court Judge for failing to refer to all of their submissions in his judgment and declaring that these were not relevant:

[699] Given the very large volume of material presented during the hearing it is not possible to issue decisions that would be less than encyclopaedic in length in order to cover every minor point alluded to in the hearing. There is no need to do this. Much of the material presented to his Court has not been relevant to an eligibility hearing and a number of the submissions were unsupported by appropriately sworn evidence. They do not come near to undermining the applicant's case or point to a breach of the duty of candour and good faith. If some aspects of the parties' submissions or evidence has not been referred to in this judgment that is because it was not relevant to the decision given.

[586] I have some sympathy for this approach in the present case given the extent of the materials presented. At the risk of facing the same criticism, I have concluded that it is equally not possible for me to refer to every submission or piece of evidence and I have chosen to address only those that appear to me to be of importance to the issues I have to decide.

[587] At the end of the hearing, the appellants sought leave to admit a significant amount of further material annexed to an affidavit of Michael Timmins, a lawyer who has been assisting Mr Dotcom. I have not taken this material into account because I do not consider that it should be received, particularly at such a late stage, in the context of a case stated appeal and application for judicial review. In any event, I do not consider that this material would alter any of the conclusions I have reached.

[588] I commend the industry and scholarship of counsel and am grateful for their considerable assistance.

## **Summary**

[589] It has repeatedly been said that extradition proceedings are limited in scope and should be conducted expeditiously. However, the pursuit of this ideal can never be at the expense of the rights of those persons whose surrender is sought. This case

concerns the appellants' liberty. The stakes are high. The appellants are entitled to a fair hearing before an impartial judge observing their rights to natural justice assured under the Bill of Rights Act 1990. The delays that have occurred in this case may be regrettable but they illustrate appropriate commitment to the observance of these fundamental rights.

[590] I reject the appellants' contention that they have been denied a fair eligibility hearing. I also reject their allegation that the United States has breached its duty of good faith and candour. I am satisfied that the District Court Judge was correct to dismiss the appellants' applications for a permanent stay of these extradition proceedings.

[591] The core of this case involves allegations of copyright infringement. I have accepted one of the main planks of the appellants' argument that online communication of copyright protected works to the public is not a criminal offence in New Zealand under s 131 of the Copyright Act. Accordingly, I have found, contrary to the view taken in the District Court, that this section does not provide an extradition pathway in this case.

[592] However, I have concluded that the appellants are not correct in asserting that the general criminal law fraud provisions in the Crimes Act cannot apply in cases of copyright infringement and that such cases can only be prosecuted under the Copyright Act. This largely explains why I have reached the same overall conclusion as the District Court. In short, these Crimes Act provisions, in combination with s 101B of the Extradition Act, provide other extradition pathways, as does the Treaty itself.

[593] I agree with the District Court Judge that the evidence summarised in the record of the case is sufficient to establish a *prima facie* case on all counts. I also agree with his ultimate conclusion that the appellants are eligible for extradition on all counts for which their surrender is sought.

## **Answers to questions of law**

[594] Because the case stated appeals raise so many questions of law, it is not practical to set them all out in this judgment and then answer them. Instead, I have annexed the case stated appeals to this judgment with the answers to each question set out.

[595] The case stated appeal for Mr Batato is identical to that filed on behalf of Messrs Ortmann and van der Kolk. For that reason, I have only included the case stated appeal filed on behalf of Messrs Ortmann and van der Kolk. This is Appendix 1. The answers for Mr Batato are the same. Appendix 2 is the case stated appeal filed on behalf of Mr Dotcom. Appendix 3 is the case stated appeal on behalf of the United States.

## **Result**

[596] The questions of law raised in the appellants' appeals are answered in Appendices 1 and 2.

[597] The questions of law raised in the United States' appeal are answered in Appendix 3.

[598] The applications for judicial review are dismissed.

[599] The District Court's determination that the appellants are eligible for surrender on all counts in the superseding indictment is confirmed.

[600] Costs are reserved.

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M A Gilbert J

**APPENDIX 1**

**CASE STATED**

**MESSRS ORTMANN, VAN DER KOLK AND  
BATATO**

**CASE STATED ON APPEAL BY MESSRS ORTMANN AND VAN DER  
KOLK FROM DETERMINATION OF DISTRICT COURT**

The United States of America sought the surrender of Mathias Ortmann, Bram van der Kolk, Kim Dotcom and Finn Habib Batato from New Zealand to the United States of America under Part 3 of the Extradition Act 1999 in relation to the following offences:

1. Conspiracy to commit racketeering (Count 1)
2. Conspiracy to commit copyright infringement (Count 2)
3. Conspiracy to commit money laundering (Count 3)
4. Criminal copyright infringement by distributing a copyrighted work being prepared for commercial distribution on a computer network & aiding and abetting criminal copyright infringement (Count 4)
5. Criminal copyright infringement by electronic means & aiding and abetting criminal copyright infringement (Count 5)
6. Criminal copyright infringement by electronic means & aiding and abetting criminal copyright infringement (Count 6)
7. Criminal copyright infringement by electronic means & aiding and abetting criminal copyright infringement (Count 7)
8. Criminal copyright infringement by electronic means & aiding and abetting criminal copyright infringement (Count 8)
9. Fraud by wire & aiding and abetting fraud by wire (Count 9)
10. Fraud by wire & aiding and abetting fraud by wire (Count 10)
11. Fraud by wire & aiding and abetting fraud by wire (Count 11)
12. Fraud by wire & aiding and abetting fraud by wire (Count 12)
13. Fraud by wire & aiding and abetting fraud by wire (Count 13)

Mathias Ortmann, Bram van der Kolk, Kim Dotcom and Finn Habib Batato defended the proceedings, and after hearing the parties and the evidence adduced by them, on 23 December 2015, I made the following determination: that, pursuant to s 24 of the Extradition Act 1999 ("the Act"), Mathias Ortmann, Bram van der Kolk, Kim Dotcom and Finn Habib Batato are eligible for surrender to the United States of America on all 13 counts listed in the United States superseding indictment as set out above.

Within 15 days of the determination, Mathias Ortmann, Bram van der Kolk, Kim Dotcom and Finn Habib Batato ("the appellants") each filed in the office of the District Court at North Shore a notice of intention to appeal by way of case stated for the opinion of this Honourable Court on a question of law only; and I therefore state the following case:

It was proved upon the hearing that:

1. On 13 January 2012, the Ministry of Foreign Affairs and Trade received diplomatic notes from the United States Embassy in Wellington requesting the provisional arrest of the appellants for the purpose of extradition.
2. In response to that request, Crown Law (on behalf of the United States of America), filed with the North Shore District Court an application dated 17 January 2012 for the provisional arrest of the appellants, together with the appropriate supporting documentation.
3. On 18 January 2012, the North Shore District Court issued provisional arrest warrants for the appellants under s 20 of the Act.
4. On 20 January 2012, the appellants were arrested by the New Zealand Police.
5. On 28 February 2012, the United States of America, via a diplomatic representative, delivered four formal requests to the Ministry of Foreign Affairs and Trade for the surrender of the four appellants for extradition to the United States.



6. These formal requests were then transmitted to the Ministry of Justice. Upon receipt of these formal requests to surrender from the United States the then Minister of Justice, the Honourable Judith Collins, gave written notification of such matters, dated 1 March 2012, to the North Shore District Court under s 23(4) of the Act.

I made the decisions and the resultant determination set out in my written judgment dated 23 December 2015 (“judgment”) and as more particularly described in the appendix attached hereto.

The questions for the opinion of the court are whether those decisions and/or the resultant determination were erroneous in point of law in respect of the issues identified in the appendix attached hereto.

Date: March 2016

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N Dawson

District Court Judge

**APPENDIX TO CASE STATED:  
DETERMINATIONS OF THE DISTRICT COURT**

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## **APPLICATIONS FOR STAY OF PROCEEDINGS**

### **A1. Jurisdiction**

Regarding this Court's jurisdiction to stay extradition proceedings for abuse of process, I determined, expressly or by implication:

1. That, as set out in my judgment at [442], the effect of *Police v D* [1993] 2 NZLR 526 (CA) and *Bujak v Republic of Poland* [2008] 2 NZLR 604 (CA) is that an extradition court should ensure fairness at the hearing but should not look beyond the charges and the evidence before it to see if a prima facie case has been made out – it should venture no further.
2. That the extradition court does have jurisdiction to hear a stay application that is based on an allegation of abuse of the Court's process, for the reasons set out at [443]-[449] of my judgment.
3. That, for the reasons set out at [451]-[454] of my judgment, when considering applications for stay of proceedings on the basis of abuse of process, the extradition court needs to:
  - (a) Decide whether the conduct alleged to constitute an abuse has been clearly identified;
  - (b) If that is established, is the conduct complained of capable of amounting to an abuse of process?
  - (c) If it is, are there reasonable grounds for finding that such conduct occurred?
  - (d) If so, would that abuse prevent the Court from conducting a fair hearing?

- (e) Recognise that the granting of a stay is an extreme remedy given only in the clearest of cases when it is necessary to maintain the integrity of the judicial system.

4. That, when considering whether the conduct complained of is capable of amounting to an abuse of process, the eligibility court needs to consider whether the conduct complained of would violate those fundamental principles of justice which underlie the community's sense of fair play or decency as set out in my judgment at [455].

5. That the common law rights for natural justice and rights of the appellants under the New Zealand Bill of Rights Act 1990 must also be considered in conjunction with the need to prevent abuse of the Court's processes, as set out in my judgment at [455].

*The first question for the Court is whether I erred in law in making determinations 1 to 5 above. In particular:*

- (a) Did I correctly describe the jurisdiction of the District Court in terms of considering applications to stay extradition proceedings for abuse of process?

**No material error.**

- (b) Did I correctly articulate the test for determining whether there is an abuse of process such that extradition proceedings can or should be stayed?

**No material error.**

## **A2. July 2015 stay application**

Regarding the appellants' 14 July 2015 stay application, I determined, expressly or by implication:

- 6. As noted in my judgment at [456] and [525], that the appellants based their application for stay in part on the fact that the respondent had had their assets restrained.

7. That the appellants claimed in their application that natural justice was not afforded to them when they were served with the respondent's submissions on 8 June 2015 given the uncertainty over the funding of US counsel, which was considered necessary due to the respondent making references to US law in its submissions, as set out in my judgment at [481].
8. That the appellants applied in the 14 July 2015 stay application for the extradition proceeding to be stayed on the basis of a breach of the duty of candour and good faith by the respondent, as set out in my judgment at [484].
9. That the appellants said they required access to experts who could give evidence as to the relevant intentions of the State Parties to the NZ-US Extradition Treaty when the Treaty was signed in 1970 for the purposes of determining whether there is a prima facie case for the commission of the alleged extradition offences, as set out in my judgment at [487].
10. That the respondent, in support of its interpretation of the Treaty, relied on international case law that pre-dated the execution of the Treaty in 1970, as set out in my judgment at [489].
11. That the appellants submitted that expert evidence relating to Megaupload's infrastructure, operations, processes, compliance audits and the general cloud storage industry practice was necessary to raise alternative reasonable inferences, as set out at [504] of my judgment.
12. That the appellants submitted that the actions and conduct of the respondent amounted to abuses of process and consequently a fair eligibility hearing could not be held, in breach of the natural justice principles in s 27 of the New Zealand Bill of Rights Act 1990 ("NZBORA"), as set out at [515] of my judgment.
13. That nowhere in the Act is it a requirement that the extradition court should undertake any analysis of the USA offences and applicable law, as these are matters for the courts in the USA, as set out in my judgment at [529].
14. As set out in my judgment at [532], that the appellants had had adequate time to prepare for the eligibility hearing.

15. That no submission was made by the appellants that the respondent had acted illegally by taking the actions it had to freeze the appellants' overseas assets, as set out at [533] of my judgment.
16. That the appellants were arguing that if the respondent released back to the appellants sufficient of the assets the respondent had legally frozen, then the appellants would be able to pay for legal advisors and technical experts who might produce evidence that would dispute the evidence in the record of case (“ROC”) and supplements. At best, that would only provide an alternative point of view as to the correctness of the certification process, the applicable USA law, and on technical matters, all of which are issues for trial, as set out at [533] of my judgment.
17. That the stay application was being sought either to stay the eligibility hearing, or to grant an adjournment until the respondent allowed the release of money for the appellants to look for evidence that might be useful for their defence at trial, and that this is not a basis for granting a stay, as set out in my judgment at [534].
18. That, in order to succeed in their application, the appellants had to show that there was content in the affidavit or certificate accompanying the ROC that was so in error that the eligibility hearing could not be conducted in a fair manner.
19. That must remain the position unless the certificate is shown to be wrong to the extent that it would be unfair to conduct the eligibility hearing based upon the record of the case evidence covered by that certificate, as set out at [535] of my judgment.
20. That holding a different view of the law does not amount to bad faith on the part of the certifier of the ROC or a breach of the duty of candour, nor does it undermine or invalidate the ROC, for the reasons set out at [537] of my judgment.

21. For the reasons set out in my judgment at [538]-[544], that the counts relating to copyright come within the description of “conspiracy to defraud” in art II.16 in the Treaty.
22. That, at best, any evidence adduced by the appellants regarding the interpretation of art II.16 of the Treaty would only provide an alternative argument, which is a matter for trial, and that it is not a basis for a stay application, as set out at [544] of my judgment.
23. That pursuant to s 144 Evidence Act, expert evidence on USA law is admissible, but it had not been shown to be relevant, as set out in my judgment at 54
24. That *USA v McVey* [1992] 3 SCR 475 is authority for evidence of foreign law not being admitted by an extradition judge in New Zealand, as set out in my judgment at [544].
25. That an extradition judge’s responsibility is to determine whether alleged conduct would constitute a crime if committed in the requested country and falls within the description of that crime in the Treaty, and evidence of foreign law is not relevant to that process, as set out in my judgment at [544].
26. That no double criminality assessment arose under s 101B of the Act, for the reasons set out in my judgment at [545]-[548].
27. That to grant a stay or an adjournment to allow the appellants time and money to analyse the evidence and legal views of the certifier of the ROC due to a perceived possibility that they might show that the respondent had breached its duty of candour, was to ignore s 25(5), as set out at [549] of my judgment.
28. That any disagreement with the certifier’s assessment of US law is a matter for trial, as set out at [549] of my judgment.

29. As set out at [550] of my judgment, that the appellants were (without any basis for doing so) asking the Court to:
- (a) Overlook that a Grand Jury had issued an indictment for the appellants; and
  - (b) Assume that the prosecutor may have incompetently or dishonestly brought the charges; and
  - (c) Find the Federal Court of USA had misapplied American law; and
  - (d) Overlook the comity required between the Treaty partners to give effect to their treaties.
30. That an alternative innocent explanation of evidence in the record of the case was not enough for this eligibility court to grant a stay or an adjournment, for the reasons set out in my judgment at [552].
31. That a competing analysis of the respondent's evidence was not a sufficient basis for granting a stay: the appellants' challenge must go to the reliability of the record of the case, as set out in my judgment at [556].
32. That Professor Sallis' evidence provided an alternative explanation to some of the evidence in the record of the case, but did not undermine that evidence and show it to be reliable – at best, it offered an alternative explanation that could be relevant at trial, as set out in my judgment at [557].
33. That the appellants' submission that only experts based in the USA had the expertise to challenge the evidence in the record of the case was a bare submission unsupported by evidence, as set out at [558] of my judgment.
34. That the appellants submitted that expert technical evidence was necessary to raise alternative reasonable inferences, and if that was all that was expected to be adduced, then it was a trial matter and not relevant to the eligibility hearing, as set out in my judgment at [558].



35. That the appellants' submission that technical expertise was needed to challenge the respondent's candour in the record of the case was largely a rerunning of the disclosure case decided upon by the Supreme Court in *Dotcom v USA* [2014] 1 NZLR 355, as set out in my judgment at [559].
36. As set out at [560] of my judgment, that:
- (a) The respondent was not required to produce all the evidence in the ROC it had available to it;
  - (b) The respondent was not required to produce evidence which might be useful to the appellants;
  - (c) The respondent did have a duty of candour and good faith to produce evidence which might destroy or seriously undermine the ROC;
  - (d) The appellants had not established a breach of the duty by the respondent. At best, they were submitting an alternative explanation that might be available, which is a trial matter; and
  - (e) A stay or an adjournment should not be granted for the claimed need for technical expertise.
37. That the Court is bound by Katz J stating in *Ortmann & Ors v The District Court at North Shore* [2015] NZHC 901 that any ongoing funding or representation difficulties would be unlikely to justify further adjournments, as set out in my judgment at [561].
38. That the appellants had had more than sufficient time and resources to prepare for the eligibility hearing if they were so minded, as set out in my judgment at [562].
39. That there was no barrier for a stay or adjournment of the eligibility hearing on the basis of alleged delay or distraction as submitted by the appellants, as set out at [563] of my judgment.

40. That the appellants had adduced no evidence of intent on the part of the respondent to starve them into submission or that any of the legal steps taken by the respondent were wrongly taken so as to achieve the alleged purpose, as set out in my judgment at [565].
41. That a stay was not justified because there was no evidence that the appellants had been starved of funds, and the appellants had had funding available to them far above and beyond the funding that most litigants would have available to them, as set out in my judgment at [565].
42. As set out in my judgment at [568]-[570], that the appellants should not be granted a stay on the basis of submissions that:
- (a) A stay should be granted because of the risk of an adverse decision to them from the eligibility hearing.
  - (b) A stay should be granted because the respondent had had full access to the New Zealand legal system to advance its objectives, including the advantage provided to the respondent by having a privileged status under MACMA and the Act.
43. That there was no basis for granting this application for a stay for any of the submissions advanced either individually or collectively, as set out in my judgment at [571].

*The second question for the Court is whether I erred in law in making determinations 6 to 43 above. In particular:*

- (a) *Did I correctly articulate, and did I correctly address, the grounds of the appellants' application?*

**Yes.**

- (b) *Did I apply the correct test for abuse of process and stay of proceedings?*

**Yes.**

(c) *Was I correct to deny the application on the basis that:*

(i) *The appellants had not, in the context of the stay application, proven that the respondent had breached its duty of candour and good faith?*

**No material error in the circumstances.**

(ii) *The counts in the ROC relating to copyright came within the description of “conspiracy to defraud” in art II.16 in the Treaty?*

**Yes.**

(iii) *No double criminality assessment arose under s 101B of the Act?*

**No.**

(iv) *The law of a requesting state is irrelevant to extradition proceedings?*

**Yes.**

(v) *The points at issue in the extradition had been known about by the appellants for some time, and they had therefore had adequate time to prepare for the hearing?*

**Yes.**

(vi) *The evidence of Mr Prabhu, and his opinion as certified, could not be contradicted?*

**No.**

(vii) *The evidence in the record of the case could not be contradicted in the circumstances of this case?*

**No.**

*(viii) The factors I listed at [550] of my judgment could not be overcome by any evidence the appellants might adduce?*

**No.**

**A3. August/September 2015 stay applications**

Regarding the appellants' August and September 2015 stay applications, I determined:

44. That the applications were denied on the basis that none of the grounds raised in the first respondent's September application affected the fairness of the eligibility hearing, as set out in my judgment at [577]-[579].

*The third question for the Court is whether I erred in law in making determination 44 above. In particular:*

*(a) Did I correctly articulate, and did I address, the grounds of the appellants' application?*

**No material error.**

*(b) Was I correct to determine the stay applications without having allowed evidence to be called and without hearing submissions concerning such evidence?*

**Yes.**

*(c) Did I apply the correct test for abuse of process and stay of proceedings?*

**No material error.**

(d) *Was I correct to consider only the grounds in the September 2015 application and not those additional grounds contained in the August 2015 application?*

**No.**

**B. ELIGIBILITY FOR SURRENDER**

**B1. The role of the District Court**

Regarding the role and jurisdiction of the District Court under s 24 of the Act, I determined, expressly or by implication:

45. That, although the extradition court has the discretion to reject evidence that is manifestly unreliable, it is not required to weigh the evidence before it, as set out in my judgment at [18].
46. That the applicable standards or requirements of natural justice in extradition proceedings are as described in the judgment of Elias CJ in *Dotcom v United States of America* [2014] 1 NZLR 355, as set out in my judgment at [21].
47. As set out in my judgment at [526], that the extradition court is required, under s 24(2) of the Act, to be satisfied that:
  - (a) The offence is an extradition offence in the extradition country (the USA);
  - (b) The evidence would justify the person's trial if the conduct constituting the offence had occurred in New Zealand.
48. That the extradition court can be satisfied that an offence is an offence in the extradition country (USA) if a person described in s 25(3A) of the Act has certified that in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country, as set out in my judgment at [527].

49. That the respondent had satisfied one of the requirements of s 24(2) of the Act (which I set out at [526] of my judgment) on the basis that the respondent had established a prima facie case that the alleged offences are extradition offences in the USA, as set out in my judgment at [527].
50. That the principal purpose of the eligibility hearing before the extradition court is, as set out in s 24(2)(d) of the Act, to decide whether the evidence in the ROC and supplements would justify the appellants' trial if the conduct constituting the offences had occurred in New Zealand's jurisdiction, as set out in my judgment at [529].
51. That the role of the eligibility court is to assess whether the respondent has established a prima facie case and that, provided there is sufficient evidence to show that the appellants could be convicted at trial, that is sufficient to find them eligible for surrender, as set out in my judgment at [552].
52. That the role of a New Zealand extradition court is as described in the Canadian judgment of *United States of America v Mach* [2006] ONSC 4832, as set out in my judgment at [553].
53. That the court is required to decide whether extradition is being sought for alleged offences that are extradition offences under s 24(1) of the Act, as stated at [582] of my judgment.
54. That it is not within the jurisdiction of this Court to rule upon competing views of US law, as set out in my judgment at [537].

*The fourth question for the Court is whether I erred in law in making determinations 45 to 54 above. In particular:*

- (a) *Did I correctly articulate the role of the extradition court under New Zealand law?*

**No.**

(b) *Did I correctly set out the matters of which I was required to be satisfied under s 24 of the Act?*

**No.**

(c) *Was I correct to find that the extradition court is not required to undertake any weighing of the evidence before it?*

**No.**

**B2. Section 24(2)(a) and (b)**

Regarding the documentation produced by the United States of America, I determined, expressly or by implication:

55. That the respondent had produced the requisite supporting documents, in satisfaction of s 24(2)(a) and (b).

*The fifth question for the Court is whether I erred in law in making determination 55 above.*

**No.**

**B3. The duty of candour and good faith**

Regarding the respondent's duty of candour and good faith, I determined, expressly or by implication:

56. That it was open to the appellants to show that either or both the affidavit of an officer of the investigating authority (s 25(3)(a) of the Act) and the certificate of a person described in s 25(3A) (s 25(3)(b) of the Act) had not been given in good faith or misstated US law, as set out in my judgment at [535].

57. That, even if the appellants had demonstrated that either the affidavit or certificate described in s 25 was not given in good faith or misstated US law, the appellants would still have had to go on to show that there was content in the affidavit that was so in error that the eligibility hearing before me could not have been conducted in a fair manner, and that that must remain the position unless the certificate was shown to be wrong to the extent that it would be unfair to conduct the eligibility hearing based on the ROC evidence contained in that certificate, as set out in my judgment at [535].
58. That disagreement as to US law between Mr Prabhu on the one hand, and Mr Rothken and Professor Lessig on the other, was not sufficient for the Court to disregard the certificate produced pursuant to s 25(5) of the Act, as set out in my judgment at [537].
59. That holding a different view of the law did not amount to bad faith on the part of Mr Prabhu or a breach of the duty of candour, nor did it undermine or invalidate the ROC, as set out in my judgment at [537].
60. That a challenge to the evidence and legal views of Mr Prabhu in terms of his compliance with the duty of candour was precluded by or was inconsistent with s 25(5) of the Act, as set out in my judgment at [549].
61. That the appellants' submissions as to compliance with the duty of candour regarding technical matters largely amounted to a rerunning of the disclosure case decided upon by the Supreme Court in *Dotcom v USA* [2014] 1 NZLR 355, as set out in my judgment at [559].
62. As set out in my judgment at [560], that:
  - (a) The respondent was not required to produce all the evidence in the ROC it had available to it.
  - (b) The respondent was not required to produce evidence which might be useful to the appellants.



- (c) The respondent had a duty of candour and good faith to produce evidence which might destroy or seriously undermine the ROC.
  - (d) The appellants had not established a breach of the duty by the respondent. At best, they had submitted an alternative explanation that might be available, which is a trial matter.
63. That, subject to its duty of candour and good faith, it is for the requesting state to decide what material it will rely upon at the eligibility hearing, as stated in my judgment at [684].
64. That, consistent with the Supreme Court decision in *Dotcom v USA* [2014] 1 NZLR 355, the requesting state has a duty to disclose evidence which renders worthless, undermines or seriously detracts from the evidence upon which the requesting state has placed reliance, as set out in my judgment at [684]-[685].
65. That Professor Lessig's evidence demonstrated a difference in expert opinion, which did not amount to a breach of the duty of candour and good faith, for the reasons set out at [688(i)] of my judgment.
66. That the appellants' arguments as to whether or when the respondent had fully disclosed its case did not amount to a breach of the duty of candour and good faith, for the reasons set out at [680(ii)] of my judgment.
67. That there is no requirement for a requesting state to preserve all data which might or might not be relevant for trial. The issue of lost data (if any) is a fair trial matter for the US court to consider. It was not an issue for this Court and did not constitute a breach of the duty of candour and good faith, for the reasons set out in my judgment at [688(iii)]-[688(iv)].
68. That it is not the role of this Court to consider the alleged impropriety of the respondent's counsel; that the allegations regarding the circumstances in which Mr Dotcom was granted residency are historical and irrelevant to the

decision of this Court in deciding whether a prima facie case has been established for eligibility for extradition of the appellants.

69. Ongoing and repetitive allegations of conduct previously rejected by the Courts or being appropriately dealt with in other litigation does not impact so as to cause this hearing to be unfair, and does not establish a breach of the duty of candour and good faith in this hearing, as set out in my judgment at [688(v)].
70. For the reasons set out in my judgment at [688(vi)], that the respondent had not breached its duty of candour and good faith because it was not required to disclose:
  - (a) All investigations undertaken by whom and when;
  - (b) A full summary of all evidence obtained;
  - (c) The identity and qualifications of proposed witnesses;
  - (d) Full transcripts of skype conversations;
  - (e) How qualitative figures in the ROC had been obtained.
71. That disputes as to translation of communications did not evidence a breach of the respondent's duty of candour and good faith, for the reasons set out in my judgment at [688(vii)].
72. That the respondent was not required to identify how its evidence was obtained, as set out in my judgment at [688(viii)].
73. That submissions that the respondent had selectively picked its evidence were just submissions and did not amount to evidence that there was a basis for finding a breach of the duty of candour and good faith, for the reasons set out in my judgment at [688(viii)].

74. That the manner in which the respondent had sought to draw inferences from the evidence contained in the ROC did not amount to a breach of the duty of candour and good faith, for the reasons set out in my judgment at [688(ix)].
75. That the evidence of Professor Sallis amounted to an alternative expert view, and did not demonstrate any breach by the respondent of its duty of candour and good faith, for the reasons set out in my judgment at [688(x)].
76. For the reasons set out at [688(xi)] of my judgment, that the respondent did not breach its duty of candour and good faith in respect of count 4 of the superseding indictment (the "Taken" charge).
77. That, for the reasons set out in my judgment at [688(xii)]-[688(xiii)], the respondent did not breach its duty of candour and good faith when applying for provisional arrest warrants in January 2012.
78. That the respondent's submissions on transposition did not amount to a breach of the duty of candour and good faith, for the reasons set out in my judgment at [688(xiii)].
79. That, for the reasons set out in my judgment at [688(xiv)], there was no breach of the respondent's duty of candour and good faith based upon the alleged novelty of the issues in this case.
80. That this case is not novel due to its similarities with *Griffiths v USA* [2004] FCA 879 and *Twentieth Century Fox Film Corporation v Newzbin* [2010] EWHC 608 (Ch), as set out at [688(xiv)] of my judgment.
81. That the appellants' remaining submissions regarding alleged breaches of the duty of candour and good faith were raised mainly in respect of matters upon which the respondent and the appellants have different points of view, a re-litigation of matters already decided upon by New Zealand courts, or were accusations about matters of no relevance to the eligibility hearing, as set out at [689] of the judgment.

82. That none of the appellants' submissions made individually or submissions made if considered in their entirety come close to establishing a breach of the duty of candour and good faith, as set out in my judgment at [689].

*The sixth question for the Court is whether I erred in law in making determinations 56 to 82 above. In particular:*

(a) *Did I correctly articulate the scope of the respondent's duty of candour and good faith?*

**Yes.**

(b) *Was I correct in law to conclude that the respondent had not breached its duty of candour and good faith?*

**Yes.**

#### **B4. Section 101B of the Act**

Regarding the interpretation of s 101B of the Act, I determined:

83. That s 101B of the Act does not import any double criminality requirement, for the reasons set out at [547] of my judgment.

**Not correct.**

84. That the role of the extradition court is to determine whether the alleged conduct falls within s 101B as that conduct is defined in the United Nations Convention against Transnational Organised Crime, as set out in my judgment at [548].

**Correct.**

85. That the assessment by the extradition court under s 101B is of criminality against offences in New Zealand, and not an assessment of USA law, as set

out at [548] of my judgment.

**Correct.**

*The seventh question for the Court is whether I erred in law in making determinations 83 to 85 above.*

**See answers above.**

**B5. Section 24(2)(c) of the Act**

Regarding s 24(2)(c) of the Act, I determined, expressly or by implication:

86. In respect of count 1 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 1 was as set out in my judgment at [632].

**Correct.**

- (b) That count 1 corresponds with an extradition offence, namely s 98A of the Crimes Act 1961 (a deemed Treaty offence by virtue of s 101B(1)(a) of the Act), for the reasons set out in my judgment at [632]-[635].

**Correct.**

87. In respect of count 2 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 2 was as set out in my judgment at [584].

**Correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act (as stated at [587] of my judgment):

- (i) Section 249 of the Crimes Act 1961, for the reasons set out at [594]-[605] of my judgment.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961, for the reasons set out at [610] of my judgment.

**Correct.**

- (iii) Section 131 of the Copyright Act 1994.

**Not correct.**

- (c) That count 2 corresponds with the following extradition offences:

- (i) Article II.16 of the Treaty, for the reasons set out in my judgment at [538]-[544].

**Correct.**

- (ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [609].

**Correct.**

- (iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [615].

**Correct.**

- (iv) Section 131 of the Copyright Act 1994, for the reasons set out in my judgment at [617] and [627].

**Not correct.**

88. In respect of count 3 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 3 was as set out in my judgment at [628].

**Correct.**

- (b) That count 3 corresponds with an extradition offence, namely art II.19 of the Treaty, for the reasons set out in my judgment at [628]-[631].

**Correct.**

89. In respect of count 4 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 4 was as set out in my judgment at [642].

**Correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

- (i) Section 249 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (iii) Section 131 of the Copyright Act 1994, for the reasons set out at [643] of my judgment.

**Not correct.**

(c) That count 4 corresponds with the following extradition offences:

(i) Article II.16 of the Treaty, for the reasons set out in my judgment at [639]-[641].

**Not correct.**

(ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [639]-[643].

**Correct.**

(iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [639]-[643].

**Correct.**

(iv) Section 131 of the Copyright Act 1994, for the reasons set out in my judgment at [639]-[643].

**Not correct.**

90. In respect of count 5 of the superseding indictment:

(a) That the conduct constituting the offence contained in count 5 was as set out in my judgment at [651]-[652].

**Not correct.**

(b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

(i) Section 249 of the Crimes Act 1961, for the reasons set out at [643]



of my judgment.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (iii) Section 131 of the Copyright Act 1994, for the reasons set out at [643] of my judgment.

**Not correct.**

- (c) That count 5 corresponds with the following extradition offences:

- (i) Article II.16 of the Treaty, for the reasons set out in my judgment at [651].

**Not correct.**

- (ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [651].

**Correct.**

- (iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [651].

**Correct.**

- (iv) Section 131 of the Copyright Act 1994, for the reasons set out in my judgment at [651].

**Not correct.**

91. In respect of count 6 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 6 was as set out in my judgment at [656].

**Not correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

- (i) Section 249 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (iii) Section 131 of the Copyright Act 1994, for the reasons set out at [643] of my judgment.

**Not correct.**

- (c) That count 6 corresponds with the following extradition offences:

- (i) Article II.16 of the Treaty, for the reasons set out in my judgment at [656].

**Not correct.**

- (ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [656].

**Correct.**

- (iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [656].

**Correct.**

- (iv) Section 131 of the Copyright Act 1994, for the reasons set out in my judgment at [656].

**Not correct.**

92. In respect of count 7 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 7 was as set out in my judgment at [659].

**Not correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

- (i) Section 249 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

- (iii) Section 131 of the Copyright Act 1994, for the reasons set out at [643] of my judgment.

**Not correct.**

- (c) That count 7 corresponds with the following extradition offences:

- (i) Article II.16 of the Treaty, for the reasons set out in my judgment at [659].

**Not correct.**

- (ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [659].

**Correct.**

- (iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [659].

**Correct.**

- (iv) Section 131 of the Copyright Act 1994, for the reasons set out in my judgment at [659].

**Not correct.**

93. In respect of count 8 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 8 was as set out in my judgment at [667].

**Correct.**

(b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

(i) Section 249 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

(ii) Section 228 of the Crimes Act 1961, for the reasons set out at [643] of my judgment.

**Correct.**

(iii) Section 131 of the Copyright Act 1994, for the reasons set out at [643] of my judgment.

**Not correct.**

(c) That count 8 corresponds with the following extradition offences:

(i) Article II.16 of the Treaty, for the reasons set out in my judgment at [667]-[668].

**Not correct.**

(ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [667]-[668].

**Correct.**

(iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [667]-[668].

**Correct.**

(iv) Section 131 of the Copyright Act 1994, for the reasons set out in my judgment at [667]-[668].

**Not correct.**

94. In respect of count 9 of the superseding indictment:

(a) That the conduct constituting the offence contained in count 9 was as set out in my judgment at [671].

**Correct.**

(b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

(i) Section 249 of the Crimes Act 1961.

**Correct.**

(ii) Section 228 of the Crimes Act 1961.

**Correct.**

(iii) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

(c) That count 9 corresponds with the following extradition offences:

(i) Article II.16 of the Treaty, for the reasons set out in my judgment at [672].

**Correct.**

- (ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

- (iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

- (iv) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

95. In respect of count 10 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 10 was as set out in my judgment at [671].

**Correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

- (i) Section 249 of the Crimes Act 1961.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961.

**Correct.**

(iii) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

(c) That count 10 corresponds with the following extradition offences:

(i) Article II.16 of the Treaty, for the reasons set out in my judgment at [672].

**Correct.**

(ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

(iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

(iv) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

96. In respect of count 11 of the superseding indictment:

(a) That the conduct constituting the offence contained in count 11 was as set out in my judgment at [671].

**Correct.**



(b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

(i) Section 249 of the Crimes Act 1961.

**Correct.**

(ii) Section 228 of the Crimes Act 1961.

**Correct.**

(iii) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

(c) That count 11 corresponds with the following extradition offences:

(i) Article II.16 of the Treaty, for the reasons set out in my judgment at [672].

**Correct.**

(ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

(iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

(iv) Section 240 of the Crimes Act 1961, for the reasons set out in my

judgment at [674].

**Correct.**

97. In respect of count 12 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 12 was as set out in my judgment at [671].

**Correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

- (i) Section 249 of the Crimes Act 1961.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961.

**Correct.**

- (iii) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

- (c) That count 12 corresponds with the following extradition offences:

- (i) Article II.16 of the Treaty, for the reasons set out in my judgment at [672].

**Correct.**

- (ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

- (iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

- (iv) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

98. In respect of count 13 of the superseding indictment:

- (a) That the conduct constituting the offence contained in count 13 was as set out in my judgment at [671].

**Correct.**

- (b) That the following offences are deemed Treaty offences pursuant to s 101B of the Act:

- (i) Section 249 of the Crimes Act 1961.

**Correct.**

- (ii) Section 228 of the Crimes Act 1961.

**Correct.**

- (iii) Section 240 of the Crimes Act 1961, for the reasons set out in my

judgment at [674].

**Correct.**

(c) That count 13 corresponds with the following extradition offences:

(i) Article II.16 of the Treaty, for the reasons set out in my judgment at [672].

**Correct.**

(ii) Section 249 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

(iii) Section 228 of the Crimes Act 1961, for the reasons set out in my judgment at [672].

**Correct.**

(iv) Section 240 of the Crimes Act 1961, for the reasons set out in my judgment at [674].

**Correct.**

*The eighth question for the Court is whether I erred in law in making determinations 86 to 98 above.*

**See answers above.**

## **B6. The record of the case**

Regarding the record of the case produced by the United States, I determined, expressly or by implication:

99. That the Court can be satisfied that an offence is an offence in the extradition country (USA) if a person described in s 25(3A) of the Act has certified that in his or her opinion the record of case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country (pursuant to s 25(3)(b) of the Act), as set out in my judgment at [527].

**Not correct.**

100. That, on the face of the documents, the record of the case and its supplements had been certified in accordance with s 25 of the Act, as set out in my judgment at [527].

**Correct.**

101. That any challenge to the evidence contained in the record of the case must be more than simply an alternative explanation, as an alternative explanation must be regarded as a trial issue, as set out in my judgment at [528].

**Correct.**

102. That, in order successfully to challenge a prima facie case once it is established by the record of the case, the appellants were required to undermine that evidence to the extent that it can be seen to be unreliable and not safe to go to trial, as set out in my judgement at [528].

**Correct.**

103. That the appellants were entitled to challenge the respondent's evidence in the record of the case, and that such a challenge should be assessed by the Court in accordance with paragraph [54] of the Canadian judgment *United States of America v Ferras* [2006] 2 SCR 77 and paragraph [108] of the Court of Appeal judgment *United States of America v Dotcom* [2013] 2 NZLR 139, as

set out in my judgment at [554]-[555].

**Correct.**

104. That a challenge to the respondent's evidence must go to the reliability of the record of the case as expressed in paragraph [48] of the Canadian judgment *United States of America v Aneja* (2014) 113 WCB 423 (ONCA), as set out in my judgment at [556].

**Correct.**

105. That there is no requirement for a requesting state that utilises the record of the case procedure to preserve all evidence which might or might not be relevant for trial, for the reasons set out in my judgment at [688(iii)].

**Correct.**

106. That the respondent not disclosing the matters set out at [688(vi)] of my judgment does not affect or call into question the reliability of the record of the case.

**Correct.**

107. That the reliability of the record of the case was not affected or called into question by the manner in which the respondent had presented skype conversations in the record of the case or by the respondent not disclosing the provenance of the communications in the record of the case, as set out in my judgment at [688(viii)].

**Correct.**

108. That the reliability of the record of the case is not impugned by the appellants' evidence of translations of communications in the record of the case.

**Correct.**

109. That when inferences are required in order to establish a prima facie case then they are based upon evidence in the record of the case from which it is reasonable to draw those inferences, as set out in my judgment at [688(ix)].

**Correct.**

110. That the evidence of Professor Sallis did not undermine the reliability of the record of the case to an extent that the record of the case evidence was unreliable, as set out in my judgment at [688(x)].

**Correct.**

111. That the appellants' submissions fall well short of undermining the respondent's case or showing it to be unreliable, and that the large body of evidence in the record of the case and its supplements that support the establishment of a prima facie case remained intact, as set out in my judgment at [690].

**Correct.**

*The ninth question for the Court is whether I erred in law in making determinations 99 to 111 above. In particular:*

- (a) Did I correctly state what was required of the appellants in order to challenge the evidence against them?

**See answers above.**

- (b) Was I correct to determine that the reliability of the record of the case had not been impugned by the appellants?

**See answers above.**

**B7. Section 24(2)(d) of the Act**

Regarding s 24(2)(d) of the Act, I determined, expressly or by implication:

*Count 1*

112. That the appellants' trial would be justified in respect of s 98A of the Crimes Act 1961 if the conduct constituting the offence in count 1 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [637]-[638].

**Correct.**

*Count 2*

113. That, to satisfy the conduct requirement of the offence described in art II.16 of the Treaty, there must be prima facie evidence of an agreement to obtain money by dishonestly depriving copyright owners of their rights, as set out in my judgment at [585].

**Correct.**

114. As set out in my judgment at [586], that deceit of the defrauded party is not a necessary element of the art II.16 Treaty offence, and the respondent need only show that the person will be dishonestly deprived. Further, that such dishonest deprivation might occur through the fraudulent interference with another's proprietary right, such as the copyright to a film, music, or literary work.

**Correct.**



115. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 2 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [588]-[593].

**Correct.**

116. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 2 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [606]-[609].

**Correct.**

117. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 2 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [612]-[615].

**Correct.**

118. That the appellants' trial would be justified in respect of s 131 of the Copyright Act 1994 if the conduct constituting the offence in count 2 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [617]-[627].

**Not correct.**

***Count 3***

119. That the appellants' trial would be justified in respect of article II.19 of the Treaty if the conduct constituting the offence in count 3 of the superseding

indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [631].

**Correct.**

*Count 4*

120. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 4 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [644]-[650].

**Not correct.**

121. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 4 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [644]-[650].

**Correct.**

122. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 4 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [644]-[650].

**Correct.**

123. That the appellants' trial would be justified in respect of s 131 of the Copyright Act 1994 if the conduct constituting the offence in count 4 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [644]-[650].

**Not correct.**

*Count 5*

124. That the elements of the alleged offending are the same as those set out in count 2, as stated in my judgment at [652].

**Not correct.**

125. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 5 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [652]-[655].

**Correct.**

126. That the appellants' trial would be justified in respect of s 131 of the Copyright Act 1994 if the conduct constituting the offence in count 5 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [652]-[655].

**Not correct.**

*Count 6*

127. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 6 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [657]-[658].

**Not correct.**

128. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 6 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the

reasons set out in my judgment at [657]-[658].

**Correct.**

129. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 6 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [657]-[658].

**Correct.**

130. That the appellants' trial would be justified in respect of s 131 of the Copyright Act 1994 if the conduct constituting the offence in count 6 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [657]-[658].

**Not correct.**

*Count 7*

131. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 7 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [660]-[661], and [666].

**Not correct.**

132. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 7 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [660]-[661], and [666].

**Correct.**

133. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 7 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [660]-[661], and [666].

**Correct.**

134. That the appellants' trial would not be justified in respect of s 131 of the Copyright Act 1994 if the conduct constituting the offence in count 7 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [662]-[665].

**Not correct.**

*Count 8*

135. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 8 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [669]-[670].

**Not correct.**

136. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 8 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [669]-[670].

**Correct.**

137. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 8 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [669]-[670].

**Correct.**

138. That the appellants' trial would not be justified in respect of s 131 of the Copyright Act 1994 if the conduct constituting the offence in count 8 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [670].

**Not correct.**

*Count 9*

139. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 9 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

140. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 9 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

141. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 9 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

142. That the appellants' trial would be justified in respect of s 240 of the Crimes

Act 1961 if the conduct constituting the offence in count 9 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

*Count 10*

143. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 10 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

144. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 10 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

145. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 10 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

146. That the appellants' trial would be justified in respect of s 240 of the Crimes Act 1961 if the conduct constituting the offence in count 10 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

*Count 11*

147. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 11 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

148. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 11 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

149. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 11 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

150. That the appellants' trial would be justified in respect of s 240 of the Crimes Act 1961 if the conduct constituting the offence in count 11 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**



***Count 12***

151. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 12 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

152. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 12 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

153. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 12 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

154. That the appellants' trial would be justified in respect of s 240 of the Crimes Act 1961 if the conduct constituting the offence in count 12 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

***Count 13***

155. That the appellants' trial would be justified in respect of article II.16 of the Treaty if the conduct constituting the offence in count 13 of the superseding

indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

156. That the appellants' trial would be justified in respect of s 249 of the Crimes Act 1961 if the conduct constituting the offence in count 13 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

157. That the appellants' trial would be justified in respect of s 228 of the Crimes Act 1961 if the conduct constituting the offence in count 13 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

158. That the appellants' trial would be justified in respect of s 240 of the Crimes Act 1961 if the conduct constituting the offence in count 13 of the superseding indictment had occurred within the jurisdiction of New Zealand, for the reasons set out in my judgment at [675]-[677].

**Correct.**

*The tenth question for the Court is whether I erred in law in making determinations 112 to 158 above.*

**See answers above.**

## **C. OTHER ISSUES**

### **C1. Matters for consideration at trial in the United States of America**

I determined that the following matters should not be considered by me as they should be left for consideration at trial in the United States of America:

159. Evidence as to Cloud industry practice, as set out in my judgment at [521].
160. Alternative explanations of evidence adduced by the respondent, as set out in my judgment at [528] and [560(4)].
161. Any analysis of US offences and applicable US law, as set out in my judgment at [529] and [533].
162. Any alternative view of the certification process under s 25 of the Act, as set out in my judgment at [533].
163. Evidence as to technical matters relating to the operations of Megaupload, as set out at [533] and [681]-[682] of my judgment.
164. Any evidence calling into question the opinion given by Mr Prabhu in his certificate and/or affidavit, as set out at [537], [549] and [688(i)] of my judgment.
165. Any US legal evidence as to the State Parties' likely understanding of the meaning of certain listed offences in the Treaty, as set out in my judgment at [544].
166. Any weighing of the merits of the respondent's case against the possible alternative explanations that might be provided by the appellants, as set out in my judgment at [552].
167. Issues with the evidence in the record of the case that were raised by Professor Sallis, as set out at [557] and [688(x)] of my judgment.

168. Inferences other than those submitted by the respondent, as set out at [558] of my judgment.
169. Any allegation of illegality or improperly gained evidence by the respondent, as set out in my judgment at [578(h)].
170. Any issues regarding the appellants' access to clones of their seized devices, as set out at [578(i)] of my judgment.
171. Any issues regarding preservation of evidence that may be required for the appellants' defence, as set out at [578(i)] and [688(iii)] of my judgment.
172. Megaupload's policies prohibiting users from uploading content protected by copyright, Megaupload's takedown policy, and the terms of its rewards programme, as set out in my judgment at [680]-[683].
173. Any alleged impropriety on the part of counsel for the respondent, as set out in my judgment at [688(v)].
174. Whether the translations of the appellants' communications contained in the record of the case are correct, as set out in my judgment at [688(vii)].
175. Whether Mr van der Kolk made the movie "Taken" available to users in countries where it had not been released in breach of the copyright owners proprietary rights, as set out in my judgment at [688(xi)].

The eleventh question for the Court is whether I erred in law in determining that I was not permitted to consider the matters listed at 159 to 175 above.

**No material error.**

## **C2. Matters I did not determine**

*The twelfth question for the Court is whether I erred in law by not determining the following issues raised by the appellants:*

176. Whether the Court has jurisdiction to consider the appellants' eligibility for surrender, in light of non-disclosure by the respondent of material matters when applying for provisional arrest warrants in January 2012. In addition, whether the non-disclosure by the respondent had resulted in:
- (a) A breach of s 21 of NZBORA (the right to be free from unreasonable seizure of the person).
  - (b) A breach of s 18 of NZBORA (freedom of movement).
  - (c) A breach of s 22 of NZBORA (the right not to be arbitrarily arrested or detained).
  - (d) A breach of s 23 of NZBORA (the right to be informed of the reason for detention and the right to be released if the detention is not lawful).

### **There was no material non-disclosure.**

177. How to ascertain the "conduct constituting the offence" in respect of each of the counts in the superseding indictment.

### **This is a necessary step at an extradition hearing.**

178. Whether the respondent had proved copyright or copyright infringement on the basis of the evidence contained in the record of the case, including:
- (a) What evidence was required to be adduced by the respondent in order to establish copyright infringement?

(b) Does the doctrine of transposition extend to copyright/copyright infringement?

(c) If the respondent was allowed to assert or rely on copyright status as a matter of US law, were the appellants entitled to US legal expertise to challenge that evidence?

**These issues required consideration.**

179. Whether the record of the case constituted a "summary" of evidence as required by s 25 of the Act, and the implications in terms of admissibility if it does not.

**The ROC is a summary of the evidence in terms of s 25.**

180. Whether supplementary records of the case are permissible under the Act.

**Supplementary records of the case are permissible.**

181. Whether evidence that is "expected" to be given can be considered to have been preserved for trial.

**Such evidence can be regarded as having been preserved for trial in the light of Mr Prabhu's affidavit pursuant to s 25(3)(a).**

182. Whether or to what extent the Court can rely on conclusory statements contained in the record of the case.

**Conclusory statements cannot be relied on as sufficient to establish essential elements of an offence.**

183. The extent to which any weight can be afforded to purported evidence in a record of the case and, in particular:

(a) Conclusory statements;

- (b) Statements of witnesses with vested interests in the appellants' prosecution;
- (c) Statements of unidentified witnesses;
- (d) Statements of witnesses with undisclosed qualifications;
- (e) Evidence that is merely "expected" to be given.

**A limited weighing of the sufficiency of the evidence is required.**

184. Whether the respondent was entitled to adduce evidence in reply, including:

- (a) Whether the respondent's purported reply evidence was admissible.

**Not admissible but no error because this evidence was immaterial and not relied on.**

- (b) If so, whether the appellants were entitled to make submissions in respect of the respondent's purported reply evidence.

**Not applicable, see above.**

185. Whether there was bad faith on the part of the respondent in terms of overcharging count 4 so as to reach the minimum 4 years' imprisonment requirement.

**No adequate foundation for bad faith allegation.**

186. Whether, by making submissions in reply that relied on US law, the respondent had effectively abandoned its earlier position that the law of the requesting state is irrelevant to extradition proceedings.

**The United States did not abandon its position on the irrelevance of foreign law.**

C3. Evidential basis for factual findings

*The thirteenth question for the Court is whether I erred in law by making the following factual findings on an insufficient evidential basis:*

187. That the appellants have frozen funds or assets located in the United States of America, as stated in my judgment at [459] and [456].

**There are no frozen funds or assets in the United States.**

188. That a US Supreme Court decision, *Caplin & Drysdale, Chartered v United States* 491 U.S. 617 (1989) effectively prevents any of the appellants' restrained funds from being used to meet the legal fees of any US lawyers engaged by the appellants, given a causal nexus between the alleged offending of the appellants and the money in their US bank accounts, as set out in my judgment at [459].

**The restraining order made in the United States has this effect.**

189. That Mr van der Kolk was a party to Mr Dotcom's December 2014 application for release of restrained funds and that Mr van der Kolk also received funds released by order of the New Zealand High Court in April 2015, as stated in my judgment at [465]-[467].

**Not correct.**

190. That the appellants did not seek clarity as to the United States' position regarding released funds until after 24 June 2015, as stated in my judgment at [472].

**Not correct. Clarification was sought on 29 April 2015.**



191. That Professor Sallis appeared as a witness on behalf of Mr Dotcom, as set out in my judgment at [557].

**Not correct. Professor Sallis was called by Messrs Ortmann and van der Kolk.**

192. That Professor Sallis did not address the issue, and was not asked, whether there are appropriately qualified experts in New Zealand, and that the appellants' submission that there are no such experts was unsupported by evidence, as set out in my judgment at [558].

**Not correct.**

**APPENDIX 2**

**CASE STATED**

**MR DOTCOM**

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## A. THE PARTIES' RESPECTIVE CASES

### A1. THE CASE PRESENTED BY THE UNITED STATES

1. At and before the District Court hearing to determine these matters, the respondent set out its case as summarised below:

1.1 That the appellants, as officers and/or users of Megaupload, were complicit in the breach of copyright by the use of Megaupload's services as a cloud storage Internet Service Provider, *inter alia*, through:

- (a) Users would access Megaupload's cloud storage services to upload, store and share copyright protected material.
- (b) The operation of a rewards payment scheme to attract high levels of Internet traffic incentivised copyright infringement.
- (c) The appellants manipulated free viewing time to incentivise the purchase of subscriptions.
- (d) The appellants deceived copyright owners by misrepresenting its attempts to defeat copyright infringement including the abuse tool, the failure to remove an infringing file itself and the failure to remove all identifying Uniform Resource Locator (URL) links to allegedly infringing content.
- (e) The inability to search Megaupload for content was to conceal copyright infringement with the front pages being sanitised.
- (f) The appellants were aware of third party "linking sites" which offset the lack of a search function to provide access to copyright infringing content.
- (g) The appellants arranged fast server capacity to cope with demand for infringing content.

1.2 The respondent sought to present evidence in support of this assertion through the use of the record of case (**ROC**) procedure. The respondent's case was presented through:

- (a) The initial ROC including (using the subject headings employed by the respondent) dated 21 February 2012:

- (i) Summary of evidence.
  - (ii) Rewards program.
  - (iii) Respondents' (now appellants') Roles within Mega.
  - (iv) Top 100.
  - (v) Relationship to "linking sites".
  - (vi) Abuse tool made available to copyright holders.
  - (vii) Undercover activity of Special Agent Poston.
  - (viii) Financial transfers.
- (b) In the First Supplemental ROC dated 3 July 2012:
- (i) Examples of works stored on Mega Sites
  - (ii) Various alleged "repeat infringers" and "unindicted conspirators".
  - (iii) Relationship to "linking" sites.
  - (iv) Movie *Taken*.
  - (v) Intended witnesses.
- (c) In the Second Supplemental ROC dated 18 October 2013:
- (i) General operation of Mega Sites.
  - (ii) Various alleged "repeat infringers" and "unindicted conspirators".
  - (iii) Additional Evidence of ORTMANN's Knowledge.
  - (iv) Additional Evidence of VAN DER KOLK's Knowledge.
  - (v) Terms of Service for Megaupload.com
- (d) In the Third Supplemental ROC dated 13 March 2014:

- (i) Various alleged “repeat infringers” and “unindicted conspirators”.
  - (ii) Examples of works stored on Mega Sites.
- (e) In the Fourth Supplemental ROC dated 13 March 2014:
- (i) Respondents’ (now appellants’) knowledge.
  - (ii) Mega Manager.
- (f) In the Fifth Supplemental ROC dated 9 October 2014:
- (i) Facts to which the US Attorney’s office expects a representative of US government to testify.
  - (ii) Glossary defining meaning of terms used in evidence summarised in ROC.
  - (iii) Various alleged “repeat infringers” and “unindicted conspirators”.
- (g) In the Sixth Supplemental ROC dated 19 February 2015:
- (i) Intention that Andrus Nomm will testify at Trial
  - (ii) Respondents’ (now appellants’) roles within Mega.
- (h) In the Seventh Supplemental ROC dated 28 May 2015:
- (i) Testimony of Andrus Nomm.
- (i) In the Eighth Supplemental ROC dated 20 November 2015:
- (i) Additional Evidence of BATATO and ORTMANN’S: Knowledge of Copyright Infringement.

1.3 Pursuant to s 25(3) of the Extradition Act, a United States Department of Justice prosecutor, Mr Jay Prabhu, has certified both that the evidence has been preserved for trial and that the same evidence justifies prosecution in the United States. Mr Prabhu has certified to these two matters on the following dates:

- (a) On 21 February 2012 (the initial ROC);

- (b) On 3 July 2012 (the First Supplemental ROC);
- (c) On 18 October 2013 (the Second Supplemental ROC);
- (d) On 13 March 2014 (the Third Supplemental ROC);
- (e) On 13 March 2014 (the Fourth Supplemental ROC);
- (f) On 9 October 2014 (the Fifth Supplemental ROC);
- (g) On 19 February 2015 (the Sixth Supplemental ROC);
- (h) On 28 May 2015 (the Seventh Supplemental ROC);
- (i) On 20 November 2015 (the Eighth Supplemental ROC).

1.4 The respondent also called the following witnesses to depose to formal documents related to the application to extradite:

- (a) Fiona Kay Parkes (Court service manager),<sup>159</sup>
- (b) Natalie Pierce (Ministry of Foreign Affairs and Trade),<sup>160</sup>
- (c) Charlotte Haigh (Ministry of Justice),<sup>161</sup>
- (d) Jennifer Lee Spence.<sup>162</sup>

1.5 The respondent submitted that the Counts in the Superseding Indictment correlated to the following extradition offences for the purposes of the Extradition Act:

- (a) Count 1: Conspiracy to Commit Racketeering correlates to Participation in an Organised Criminal Group (s 98A, Crimes Act 1961).
- (b) Count 2: Conspiracy to Commit Copyright Infringement correlates to:
  - (i) Conspiracy to Defraud (Article II (16) of US-NZ Extradition Treaty).

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<sup>159</sup> As to the Provisional Arrest Warrants in respect of each of the then respondents, notices signed by the Minister of Justice pursuant to s 24(3) of the Extradition Act, the letters accompanying each filing of the ROC and its supplements, an affidavit sworn by Nigel McMorran.

<sup>160</sup> Evidence as to the United States being a party to the United Nations Convention against Transnational Organised Crime; requests from the United States Embassy in Wellington to the Ministry of Foreign Affairs and Trade requesting the surrender of the appellants; a bundle of evidence in relation to each appellant plus the First – Seventh Supplemental ROCs.

<sup>161</sup> The notice issued by the Minister of Justice in relation to each of the appellants.

<sup>162</sup> As to the original notice issued by the Minister of Justice in relation to each of the appellants.

- (ii) Accessing computer system for a dishonest purpose (s 249 Crimes Act 1961).
  - (iii) Dishonestly taking or using document (s 228 (b) Crimes Act 1961).
  - (iv) Criminal liability for making or dealing with infringing objects (s 131(1) (c) and (d), Copyright Act 1994).
- (c) Count 3: Conspiracy to commit money laundering correlates to Article II (19) of the US-NZ Extradition Treaty.
- (d) Counts 4 - 8: Discrete acts of criminal copyright infringement correlate to:
- (i) Conspiracy to Defraud (Article II (16) of US-NZ Extradition Treaty).
  - (ii) Accessing computer system for a dishonest purpose (s 249 Crimes Act 1961).
  - (iii) Dishonestly taking or using document (s 228 (b) Crimes Act 1961).
  - (iv) Criminal liability for making or dealing with infringing objects (s 131(1) (c) and (d), Copyright Act 1994).
- (e) Counts 9 – 13: Wire Fraud correlates to:
- (i) Conspiracy to Defraud (Article II (16) of US-NZ Extradition Treaty).
  - (ii) Accessing computer system for a dishonest purpose (s 249 Crimes Act 1961).
  - (iii) Dishonestly taking or using document (s 228 (b) Crimes Act 1961).
  - (iv) Obtaining by deception (s 240 Crimes Act 1961).

1.6 Accordingly, the respondent submitted that the conduct alleged in the ROC and its supplements amounted to the following “extradition offences” for the purposes of the Extradition Act either by way of (and



using the nomenclature in the respondent's written submissions filed with the District Court):

- (a) Article II of the US-NZ Extradition Treaty ("original listed Treaty offences").
- (b) Section 101B(1)(a) of the Extradition Act ("deemed extradition offences").
- (c) Section 101B(1)(c) of the Extradition Act ("deemed extradition offences involving an organised criminal group").

1.7 In relation to the original listed Treaty offences, the respondent submitted, *inter alia*, that:

- (a) The requirement in s 4 of the Extradition Act of criminality in New Zealand did not apply.
- (b) Article II of the US-NZ Extradition Treaty was therefore the agreed gateway for extradition.
- (c) The evidence is to be measured against the Article II offence, not a specific New Zealand or United States offence.
- (d) The meaning of the extradition offences in Article II is determined in accordance with the principles of treaty interpretation and not tied to the detail of national definitions.

1.8 In interpreting Article II of the US-NZ Extradition Treaty with a "liberal interpretation" and pursuant to the authorities,<sup>163</sup> the respondent submitted that the alleged conduct of copyright infringement outlined in the ROC and its supplements fell within Article II.16 in that it amounted to a "conspiracy to defraud" as a matter of law.

- (a) The respondent further submitted, and due to the conspiracy to defraud, that as a matter of law monies received by Megaupload and the appellants via Megaupload was therefore consistent with a conspiracy to launder money within Article II.19 of the US-NZ Extradition Treaty.

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<sup>163</sup>

*Edwards v United States of America* [2002] 3 NZLR 222 (CA); *United States of America v Cullinane* [2003] 2 NZLR 1 (CA).

- (b) In relation to the deemed extradition offences pursuant to s 101B(1)(a), the respondent submitted that as a matter of law the alleged conduct outlined in the ROC and its supplements amounted to participation in an organised criminal group for the purposes of s 98A of the Crimes Act 1961.
- (c) In relation to the deemed extradition offences involving an organised criminal group pursuant to s 101B(1)(c), the respondent submitted that:
  - (i) As a matter of law, the conduct alleged in the ROC and its supplements met the definition of an organised criminal group as defined in the United Nations Convention against Transnational Organised Crime, in that the appellants had the aim of committing the following offences:
    - (aa) Crimes Act 1961, s 228 (“Dishonest use of a document”);
    - (bb) Crimes Act 1961, s 249 (“Accessing computer system for dishonest purpose”);
    - (cc) Crimes Act 1961, s 240 (“Obtaining by deception”); and
    - (dd) Copyright Act 1994, s 131 (“Making or dealing with infringing objects”).
  - (d) The respondent submitted that the Court must draw the inferences most favourable to the prosecution.<sup>164</sup>
  - (e) The respondent submitted that as to each of the alleged extradition offences the ROC and its supplements presented to a *prima facie* standard that the offences had been committed enough to justify committal to trial as if the offences had been committed in New Zealand meeting the standard required by s 24(2)(d) of the Extradition Act for eligibility to surrender.

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<sup>164</sup>

Citing, *inter alia*, *United States of America v Fraser* (2015) BCSC 604.

## **A2. MR DOTCOM'S OPPOSITION**

2. In opposition, Mr Dotcom set out the following case as summarised below:
  - 2.1. That Megaupload and its related websites provided dual use, copyright neutral technology similar to DropBox, YouTube, Flickr and other online businesses providing services to consumers.
  - 2.2. The evidence of Professor Lawrence Lessig, of the Harvard Law School, United States of America, was admitted at the hearing. He opined that there is no doctrine of criminal secondary copyright infringement in the United States and that the evidence relied upon by the respondent would not lead to a successful prosecution under United States criminal law. Further, he opined that any infringement alleged via online video streaming is a misdemeanour only and therefore not extraditable to the United States.
  - 2.3. The evidence of Ms Anja Borchardt, a barrister of Auckland, was led at the hearing. She identified and produced additional relevant communications of relevance between the appellants, and between the appellants and third parties. The communications were specific examples that Mr Dotcom submitted compromised the reliability of the ROC and its supplements on the following general topics:
    - (a) Payment Batch Files;
    - (b) YouTube;
    - (c) Content illegal "per se";
    - (d) Google AdSense;
    - (e) Inconsistencies: assigning different initials to the same user;
    - (f) "Xmas Special";
    - (g) CommerceGate;
    - (h) "Special People": Mistranslation;
    - (i) Rewards Payments;
    - (j) Unreliable Takedown requests;
    - (k) Leaseweb contract;

- (l) Linking sites;
- (m) Unique identifier;
- (n) Direct Delete Access;
- (o) Forbes.com reporter;
- (p) Carpathia warrant;
- (q) Domain Name seizure article;
- (r) "Evil": mistranslation;
- (s) DMCA Compliance acknowledged by content holders;
- (t) Assertion of copyrighted material;
- (u) "Aussies dumb as kiwis";
- (v) Business opportunities with Megaupload.

2.4. Mr Dotcom also called witnesses who identified translation errors in the ROC. The deponents were translation experts and all native speakers of German:

- (a) Hilja Sibylle Ferner;
- (b) Anita Goethans; and
- (c) Sabine Rosemarie Fenton.

2.5. The evidence of Mr David Adam Segal, Executive Director of Demand Progress, of the United States of America, was admitted at the hearing. He opined on:

- (a) The pattern of prosecutorial overreach by the United States Government for and on behalf of the content industry;
- (b) The pattern of unjustified website seizures by the United States Government for and on behalf of the content industry;
- (c) The role of money in the United States political system;
- (d) The real and tangible influence of the content industry in the United States political system;
- (e) The attempts by the content industry to pass legislation in the United States that would directly target foreign websites and

result in a curtailing of freedom of expression on the Internet;<sup>165</sup>

- (f) The level of online and physical protests against this proposed legislation leading to it being stalled;
- (g) Internal content industry emails showing the industry's deliberate strategy to pay for and directly influence the work of State Attorney Generals (coded as "Project Goliath" internally within the content industry); and
- (h) The impact of the current case on the future of the Internet.

2.6 The evidence of Christopher Ian Gibson, a barrister and solicitor of Auckland, was admitted at the hearing. He gave evidence, and produced documentary evidence, of what Mr Dotcom submitted was:

- (a) The undue influence of the content industry in United States politics, including the close personal and professional relationship between Vice President Biden and Senator Chris Dodd as current head of the Motion Picture Association of America;
- (b) Meetings at the White House involving Department of Justice officials, White House staff, members of the content industry, the Vice President, and the President indicating a deliberate strategy to obtain White House cooperation with this prosecution;
- (c) The undue influence of the content industry with the United States Trade Representative including direct influence on the content of the "Notorious Markets" list;
- (d) The over-zealous prosecution at the behest of the content industry including the unreasonable seizure of all of the websites, companies, and products associated with the appellants;

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<sup>165</sup>

Specifically, the the Combating Online Infringements and Counterfeits Act (known as "COICA"); the Protect Intellectual Property Act (known as "PIPA"); the Stop Online Piracy Act (known as "SOPA").

- (e) The influence and access of the content industry to the New Zealand Government, including one-on-one meetings and the then negotiations around the filming of *The Hobbit*;
- (f) The decision to grant Mr Dotcom residence due to “political pressure”;
- (g) The illegal surveillance of Mr Dotcom;
- (h) The unreasonable and unprecedented military style raid of the Dotcom residence on 20 January 2012;
- (i) The withholding of personal and official information from Mr Dotcom.

2.7 Mr Dotcom was unable to call further relevant and admissible technical and legal expert evidence due to the restrictions imposed by the United States, under threat by the United States of civil and potentially criminal liability, on spending restrained funds released by the High Court of New Zealand for the purposes of Mr Dotcom’s legal expenses. Mr Dotcom had sought to lead such evidence to show:

- (a) Technical expertise to render worthless, undermine or seriously detract from the evidence put forward in the ROC or its supplements;
- (b) United States legal expertise necessary to determine the scope of any extradition offence (including to interpret the US-NZ Extradition Treaty);
- (c) United States legal expertise to challenge candour, good faith or the certification of the evidence by Mr Jay Prabhu;
- (d) The actions of authorities or officials in New Zealand, whether acting as agents for the respondent or not, reflecting, *inter alia*, an abuse of process.

2.8 That the pathway to extradition in this case involved determining:

- (a) Whether there is an extradition offence for the purposes of s 24(2)(c) as a matter of law.
- (b) Whether the evidence would justify the person’s trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand pursuant to s 24(2)(d).

- 2.9 As to the first limb of that pathway, Mr Dotcom submitted:
- (a) That the applicant must establish an extradition offence pursuant to s 4 of the Extradition Act.
  - (b) Where there is a treaty between New Zealand and an extradition country in force, ss 4 and 11 of the Extradition Act require “extradition offence” to be interpreted in a way that is consistent with that treaty.
  - (c) Section 101B of the Extradition Act deems certain offences to be listed part of any treaty, in that:
    - (i) The offences listed at s101B(1)(a) are automatically deemed as listed in the treaty.
    - (ii) Section 101B(1)(c) creates a gateway for offences to be deemed as listed in the treaty.
- 2.10 Mr Dotcom reserved his rights on the correctness in law of the Court of Appeal’s decision in *United States of America v Cullinane* [2003] 2 NZLR 1 (CA) and whether s 4 of the Extradition Act was overridden by the terms of the US-NZ Extradition Treaty.
- 2.11 Regardless, and in following *Cullinane*, the alleged conduct did not fall within the correct interpretation of Article II (16) of the US-NZ Extradition Treaty, because:
- (a) *Cullinane* requires that the Article must be interpreted in accordance with customary international law principles of international treaty interpretation as codified in the Vienna Convention on the Law of Treaties;
  - (b) Those principles require that the Court must ascertain the intention of the Parties to the Treaty, in this case the United States and New Zealand, as to the meaning of “conspiracy to defraud” as set out in the Article;
  - (c) Copyright infringement is not expressly listed in Article II, indicating a clear intention by the Parties that copyright infringement did not fall within the ambit of the US-NZ Extradition Treaty;

- (d) Absent an express inclusion, there must be additional evidentiary factors to support its inclusion within the intention of the Parties;
- (e) In this assessment, the Court of Appeal in *Edwards v United States of America* [2002] 3 NZLR 222 (CA) held that the Court must look to the “general legal usage” of the Parties as to the phrase “conspiracy to defraud”;
- (f) In New Zealand, there has never been a prosecution for conspiracy to defraud based on copyright infringement, meaning that there is no evidence as to an intention of New Zealand as a Party to the Treaty to include copyright infringement within the ambit of “conspiracy to defraud”,<sup>166</sup>
- (g) In the United States, the Supreme Court has made clear that copyright infringement can only be prosecuted under copyright specific offences, and not as a species of fraud;<sup>167</sup>
- (h) The English case law on which the respondent relied did not negate the evidence that the United States and New Zealand did not intend that “conspiracy to defraud” would capture copyright infringement;
- (i) Accordingly, on the correct interpretation of the US-NZ Extradition Treaty, “conspiracy to defraud” could not apply to the conduct alleged in the ROC and its supplements.

2.12 The requirements of s 101B(c) of the Extradition Act were not met, in that the definition of an organised criminal group under the United Nations Convention against Transnational Organised Crime was not fulfilled and the gateway to deem the offences could not be met. Accordingly, the following offences could not be deemed to be part of the US-NZ Extradition Treaty:

- (a) Crimes Act 1961, s 228 (“Dishonest use of a document”);

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<sup>166</sup> Mr Dotcom submitted that the Crown’s reliance on *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA) was misplaced in that this was a case concerning Anton Piller orders and the application of any potential privilege. It was not an example of conspiracy to defraud being used to prosecute copyright infringement.

<sup>167</sup> *Dowling v United States* 473 US 207 (1985); *United States v LaMacchia* 871 F Supp 535 (D Mass 1994); *United States v Alusgair* 256 F Supp 2d 306; *United States v Rothberg* 22 F Supp 2d 1009.



- (b) Crimes Act 1961, s 249 (“accessing a computer system for a dishonest purpose”);
- (c) Crimes Act 1961, s 240 (“obtaining by deception”); and
- (d) Copyright Act 1994, s 131 (“making or dealing with infringing objects”)

2.13 In the alternative, assuming *arguendo* that the requirements of s 101B(c) of the Extradition Act were met, such that these offences could be deemed to be a part of the US-NZ Extradition Treaty, these offences are not made out as a matter of law, because:

- (a) Copyright law is *sui generis* meaning that any rights or remedies relating to copyright infringement can flow only from the Copyright Act 1994.
- (b) Accordingly, the Crimes Act offences cannot apply to an allegation of copyright infringement.
- (c) The respondent failed to show the copyright interest being protected under the Copyright Act 1994 in relation to the conduct alleged in the ROC in its supplements. Specifically, the respondent did not:
  - (i) Show the specific copyright interest and/or infringement by the uploading and sharing of copyright protected items over the Internet.
  - (ii) Particularise on a work-by-work basis the nature of the alleged breaches as required by law.<sup>168</sup>
- (d) Parliament intended that the transmission of files over the Internet be protected, in terms of copyright, under the right of communication.
- (e) A breach of the right of communication does not fall within the criminal offence of s 131 of the Copyright Act 1994. Accordingly, there is no criminal conduct.

<sup>168</sup>

*Holdfast NZ Ltd v Henkel KGaA* [2007] 1 NZLR 336 (CA); *Henkel KGaA v Holdfast NZ* [2006] NZSC 102, [2007] 1 NZLR 577 (SC).

- (f) Regardless, the respondent is unable to show the following elements are made out under s 131 of the Copyright Act 1994:
  - (i) Possession;
  - (ii) Distribution;
  - (iii) Exhibition in public.
- (g) Accordingly, none of the alleged conduct set out in the ROC and its supplements qualify, as a matter of law, to satisfy the elements of s 131 of the Copyright Act 1994.
- (h) Further, in relation to both the Crimes Act offences and the allegations under the Copyright Act, the appellants are entitled to avail themselves of the safe harbour protection in the Copyright Act.<sup>169</sup> Megaupload operated as an Internet Services Provider as defined in that Act. The safe harbour protection clearly applied and prevented a prosecution or a finding of a prima facie case.

2.7 Regardless of the submission that copyright is *sui generis* such that the Crimes Act offences cannot satisfy the test in s 24(2)(c) of the Extradition Act as a matter of law, Mr Dotcom submitted that the following Crimes Act offences could not be made out on the conduct alleged in the ROC and its supplements:

- (a) Section 228 (“Dishonest use of a document”);
- (b) Section 249 (“Accessing computer system for dishonest purpose”); and
- (c) Section 240 (“Obtaining by deception”).

2.8 As a matter of law, the alleged conduct did not make out participation in an organised criminal group for the purposes of s 98A of the Crimes Act 1961 as the respondent was unable to make out an objective to commit an underlying offence. Therefore, s 101B(1)(a) of the Extradition Act was not met.

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<sup>169</sup>

Sections 92B, 92C, and 92E.

2.9 Mr Dotcom submitted that the certification of Mr Prabhu from the United States Department of Justice was made in bad faith and therefore in breach of s 25 of the Extradition Act due to:

- (a) Mr Prabhu's direct knowledge that the evidence maintained on servers seized by the Department of Justice has been destroyed and/or is deteriorating and is thus not preserved for trial, including exculpatory evidence.
- (b) The lack of a doctrine of criminal secondary copyright infringement in the United States.
- (c) The fact that video streaming infringing copyright protected material is a misdemeanour only in the United States and therefore not extraditable.

2.10 Mr Dotcom submitted that the evidence contained in the ROC and its supplements was inadmissible due to:

- (a) The said breach of good faith by the respondent.
- (b) The ROC and its supplements in its totality being unreliable and insufficient as shown by the evidence of Ms Borchardt (showing the compromised, selective and biased nature of the ROC and its supplements) and the three translation experts (showing translation error examples indicative of unreliability).
- (c) Separately, the Eighth Supplemental ROC was filed after the respondent had closed its case rendering it inadmissible *per se*.

2.11 Mr Dotcom submitted that the respondent had breached its duty of candour by:

- (a) The certification of the ROC and its supplements in bad faith.
- (b) The failure to disclose the lack of a doctrine of criminal secondary copyright infringement in the United States.
- (c) Relying on evidence of video streaming when such conduct is not extraditable under United States law and the failure to disclose the same.
- (d) The omission and exclusion of evidence in the ROC and its supplements that would render worthless, undermine or

seriously detract from the case presented by the United States.

2.12 Mr Dotcom submitted that the approach of the respondent as to inferences was incorrect. The correct approach was that the inference must be impelling and not the one most favourable to extradition.<sup>170</sup>

2.13 In the alternative, Mr Dotcom submitted that there were mandatory restrictions against his surrender under s 7 of the Extradition Act, in that:

- (a) The evidence showed the undue political influence in both the United States and New Zealand of the content industry.
- (b) Mr Dotcom held and represented the political opinion of an open and free Internet contrary to the interests of the content industry.
- (c) Mr Dotcom would be prosecuted and/or prejudiced in the United States on account of this political opinion.

2.14 Also in the alternative, Mr Dotcom submitted that there were discretionary restrictions against surrender under s 8 of the Extradition Act, in that:

- (a) It would be unjust or oppressive in Mr Dotcom's circumstances to surrender him up for extradition to the United States including the application by the United States of the fugitive disentitlement doctrine.
- (b) The Court should exercise its discretion in Mr Dotcom's favour.

### **A3. STAY APPLICATIONS**

3.1 Prior to the hearing to determine these matters, the following stay applications were filed:

- (a) The appellants' joint application for stay dated 14 June 2015 (Stay 1).

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<sup>170</sup>

See *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

- (b) The appellants' joint application for stay dated 21 August 2015 (Stay 2).
  - (c) Mr Dotcom's application for stay dated 16 September 2015 (Stay 3).
- 3.2 The appellants requested that each of the stays be heard and determined prior to or, failing that, at the outset of the eligibility hearing.
- 3.3 In support of Stay 1, the appellants, *inter alia*:
- (a) Submitted that the respondent's opposition in the United States on the release of restrained and forfeited funds in reliance on *Caplin & Drysdale Chartered v United States* 491 U.S. 617 (1989) prevented the appellants from retaining the required technical or legal experts.
  - (b) Expert technical evidence was required to:
    - (i) show relevant, standard cloud storage industry practice so as to establish that the evidence in the ROC and its supplements was unreliable, insufficient and not capable of supporting the inferences contended for by the respondent.
    - (ii) show breach(es) of the duty of candour and good faith by the respondent.
  - (c) Expert United States legal evidence was required to:
    - (i) assist the Court in interpreting "extradition offence" under the Extradition Act; and
    - (ii) establish that the evidence in the ROC and its supplements was unreliable, insufficient and not capable of supporting the inferences contended for by the respondent; and
    - (iii) show breach(es) of the duty of candour and good faith by the respondent.

- (a) Led evidence from Mr Ira Rothken, a United States attorney, on, *inter alia*:
  - (i) United States law to the effect that Mr Prabhu's certification of the ROC could not have been given in good faith and was in breach of the duty of candour; and
  - (ii) the type and approximate cost of legal and technical expertise necessary for the respondents to adequately defend their case;
- (b) Filed and led evidence from Mr Dotcom of the effect of the respondent's position on overseas legal expenses on his ability to mount an effective defence to the eligibility proceeding.

3.4 In opposition to Stay 1, the respondent submitted:

- (a) there was no jurisdiction for the eligibility Court to hear an application for stay; and
- (b) a stay was not justified.

3.5 In support of Stay 2, the appellants:

- (c) submitted that the various pleaded actions of New Zealand authorities, whether acting as agents for the respondent or otherwise, amounted to, *inter alia*, an abuse of process;
- (d) filed evidence and intended to lead further evidence from witnesses summonsed in relation to this application;
- (e) in support of the application, Mr Ira Rothken, a United States attorney, gave evidence of, *inter alia*:
  - (i) United States law to the effect that Mr Prabhu's certification of the ROC could not have been given in good faith and was in breach of the duty of candour; and
  - (ii) the type and approximate cost of legal and technical expertise necessary for the respondents to adequately defend their case;

- (f) in support of the application, Mr Dotcom gave evidence of the effect of the respondent's position on legal expenses on his ability to mount an effective defence.
- 3.6 In support of Stay 3, Mr Dotcom submitted:
- (a) That the prosecution in the United States was commenced for an improper purpose;
  - (b) actions in New Zealand by officials and/or authorities, whether acting as agents for the respondent or otherwise, amounted to, *inter alia*, an abuse of process; and
  - (c) Mr Dotcom intended to call at least a further ten witnesses in relation to Stay 3 in addition to the witnesses relied on by the appellants overall for Stay 2.
- 3.7 In opposition to both Stays 2 and 3, the respondent filed a "preliminary objection" objecting to the Court having jurisdiction to hear and determine both applications upon the grounds that Stays 2 and 3:
- (a) raised issues that have no direct connection with the Court's function under s 24 of the Extradition Act and, as such, it was outside the eligibility Court's jurisdiction to consider the factual allegations in Stays 2 and 3; and
  - (b) even if the eligibility Court had jurisdiction, the Court should decline to hear Stays 2 and 3 on the basis that the allegations, if proved, could not come up to the high threshold for staying the proceeding.

## **B. DETERMINATIONS IN THE DISTRICT COURT**

I made the determinations, expressly or implicitly, as set out in my written judgment dated 23 December 2015 and as further particularised below.

### **B1. STAY APPLICATIONS**

#### *Jurisdiction*

- 4.1 The effect of *Police v D* [1993] 2 NZLR 526 (CA) and *Bujak v Republic of Poland* [2008] 2 NZLR 604 is that an extradition Court should not look beyond the charges and the evidence before it to see

if a prima facie case has been made out. It should venture no further. [442]

- 4.2 That the extradition Court has jurisdiction to hear a stay application based on an allegation of abuse of the Court's processes. [443]-[449]

*Test*

- 4.3 The test to be applied by the extradition Court on an application for stay on the ground of abuse of process is:

- (a) Decide whether the conduct alleged to constitute an abuse has been clearly identified.
- (b) If that is established, is the conduct complained of capable of amounting to an abuse of process?
- (c) If it is, are there reasonable grounds for finding that such conduct occurred?
- (d) If so, would that abuse prevent the Court from conducting a fair hearing?
- (e) Recognise that the granting of a stay is an extreme remedy given only in the clearest of cases when it is necessary to maintain the integrity of the judicial system. [454]

- 4.4 When considering whether the conduct complained of is capable of amounting to an abuse of process, the eligibility Court needs to consider whether such conduct would violate those fundamental principles of justice which underlie the community's sense of fair play or decency. [455]

- 4.5 The common law rights for natural justice and rights of the appellants under the New Zealand Bill of Rights Act 1990 must also be considered in conjunction with the need to prevent any abuse of the eligibility Court's processes. [455]

*Stay 1*

- 4.6 The appellants' 14 July 2015 application to stay the eligibility hearing on the grounds of abuse of process claimed that their ability to conduct a proper defence to the extradition application had been prejudiced by restrictions on their funding for legal expenses due to



the conduct of the respondent in obtaining restraining and forfeiture orders from the US District Court over specified assets of the appellants. [456]

- 4.7 The appellants submitted that natural justice was not afforded to them when they were served with the respondent's submissions on 8 June 2015 given the uncertainty over the funding of US counsel, which was considered necessary due to the respondent making references to US law in its submissions. [481]
- 4.8 The appellants submitted that the United States, as the requesting country in this extradition application, breached its duty of candour and good faith in respect of its evidence on US law and its certification that there is sufficient evidence to justify prosecution of the appellants in the US. [484]
- 4.9 The appellants submitted that they required expert evidence as to the relevant intentions of the State Parties to the NZ-US Extradition Treaty at the time the Treaty was signed by the Parties in 1970 for the purposes of determining whether there is a prima facie case for the commission of the alleged extradition offences in this case. [487]
- 4.10 The respondent, in support of its interpretation of the Treaty, relied on international case law that pre-dated the execution of the Treaty in 1970. [489]
- 4.11 The appellants' submitted that expert evidence relating to Mega's infrastructure, operations, processes, compliance audits and the general cloud storage industry practice was necessary to raise alternative reasonable inferences. [504]
- 4.12 The appellants submitted that the actions and conduct of the respondent amounted to an abuse of process and consequently a fair eligibility hearing could not be held, which was in breach of the natural justice principles in s 27 of the New Zealand Bill of Rights Act 1990 ("**NZBORA**"). [515]
- 4.13 The Court can be satisfied that an offence is an offence in the extradition country if a person described in s 25(3A) of the Act has certified that in his or her opinion the ROC discloses the existence of

evidence that is sufficient under the law of the exempted country to justify a prosecution in that country. [527]

- 4.14 On the face of the documents, the ROC and its supplements have been so certified pursuant to s 25(5) and, on the face of it, the respondent has established a prima facie case that the alleged offences are extradition offences in the USA. [527]
- 4.15 Nowhere in the Act is there a requirement that the Court undertake any analysis of the US offences and applicable law, which are matters for the Courts in the US. [529]
- 4.16 The appellants having had successive disclosure of the ROC and its later supplements commencing from early 2012, most, if not all, issues likely to arise during the eligibility hearing would have been apparent for a long time. [532]
- 4.17 The appellants have had adequate time to prepare for the eligibility hearing because they had over three months to prepare responses to any submissions made by the respondent they might not have anticipated. [532]
- 4.18 Implicitly, that, in order to succeed on the stay application, it was necessary for the appellants to show that the respondent had acted illegally by freezing the appellants' overseas assets. [533]
- 4.19 No submission has been made by any of the appellants that the respondent acted illegally by taking the actions it took to freeze the appellants' overseas assets. [533]
- 4.20 No evidence was produced by the appellants that questioned the certification process of the ROC and its supplements. [533]
- 4.21 The appellants submitted that if the respondent released back to the appellants sufficient of the assets the respondent has had legally frozen, then the appellants would be able to pay for legal advisers and technical experts who might produce evidence that would dispute the evidence in the ROC and supplements. [533]
- 4.22 At best, evidence that would dispute the evidence in the ROC and supplements would only provide an alternative point of view as to the correctness of the certification process, the applicable US law, and on technical matters, all of which are issues for trial. [533]

- 4.23 The stay application was sought to either stay the eligibility hearing, or to grant an adjournment, until the respondent allows the release of money for the appellants to look for evidence that might be useful for their defence trial, which is not a basis for granting a stay. [534]
- 4.24 In order to show a breach of the duty of candour, in addition to showing that either or both of the affidavit of an officer of the investigating authority and the certificate by a person described in s 25(3A) have not been given in good faith or misstate the US law, the appellants had to show that there is content in the affidavit or certificate that it is so in error that the eligibility hearing could not have been conducted in a fair manner. [535]
- 4.25 Implicitly, finding that the eligibility hearing could be conducted in a fair manner notwithstanding that the appellants were precluded from briefing overseas expert and technical evidence. [535]
- 4.26 That must remain the position unless the certificate was shown to be wrong to the extent that it would have been unfair to conduct the eligibility hearing based upon the ROC evidence covered by that certificate. [535]
- 4.27 The appellants submitted that the respondent breached its duty of candour and good faith on the basis of evidence given by Mr Rothken and Professor Lessig that they disagreed with Mr Prabhu's view on US law. [536]
- 4.28 That Mr Rothken and Professor Lessig had a different view of US law was not sufficient for the eligibility Court to disregard the certificate produced pursuant to s 25(5). [537]
- 4.29 It was not within the jurisdiction of the eligibility Court to rule upon competing views of US law. That is a matter for trial in the US court. [537]
- 4.30 Holding a different view of the law did not amount to bad faith on the part of Mr Prabhu or a breach of the duty of candour, nor did it undermine or invalidate the ROC. [537]
- 4.31 The counts in the ROC relating to copyright fell within the description of "conspiracy to defraud" in article II.16 of the Treaty. [538]-[544]

- 4.32 At best, any US legal evidence that might be obtained by the appellants would only provide an alternative argument, which is a matter for trial, not a basis for a stay application. [544]
- 4.33 Pursuant to s 144 of the Evidence Act 2006 expert evidence on US law is admissible but was not shown to be relevant. [544]
- 4.34 *USA v McVey*<sup>171</sup> is authority for evidence of foreign law not being admitted by an extradition Court in New Zealand. [544]
- 4.35 An extradition Court's responsibility is to determine whether alleged conduct would constitute a crime if committed in the requested country and falls within the description of that crime in the Treaty. Evidence of foreign law is not relevant to that process. [544]
- 4.36 No double criminality assessment is required under s 101B. [545]-[548]
- 4.37 To have granted a stay or an adjournment to allow the appellants time and money to analyse the evidence and legal views of Mr Prabhu due to a perceived possibility that they might have shown that the respondent has breached its duty of candour, is to ignore s 25(5). [549]
- 4.38 Evidence that disagreed with Mr Prabhu's assessment of US law was a trial issue. [549]
- 4.39 The appellants' submissions were effectively that the appellants were entitled to US legal expertise to examine the US offence. [549]
- 4.40 The views of the appellants' witnesses that disagree with Mr Prabhu's assessment of US law are a trial issue. [549]
- 4.41 The Court was being asked by the appellants to:
- (a) overlook that a grand jury have issued an indictment for the appellants;
  - (b) assume that the prosecutor may have incompetently or dishonestly brought the charges;
  - (c) find the Federal Court of the United States of America have misapplied American law; and

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<sup>171</sup> *USA v McVey* [1992] 3 SCR 475.

- (d) overlook the comity required between the Treaty partners to give effect to their treaties. [550]
- 4.42 Implicitly, that there were no lawful grounds for the Court to overlook the matters I set out at [550].
- 4.43 That the appellants' submissions, taken at their highest, were that, if experts in industry practice and on technical matters could have been engaged by them, evidence could have been provided at the eligibility hearing that could have provided alternative explanations as to the operations of Mega or, put another way, that an innocent explanation might have been given to the evidence from which the respondent drew an inference of criminal behaviour. [551]
- 4.44 The availability of an alternative, even if prevented from being presented and considered, innocent explanation of evidence in the ROC is not enough for the Court to grant a stay or an adjournment. [552]
- 4.45 It is not the role of the Court to weigh the merits of the respondent's case against the possible alternative explanation that might be provided by the appellants. That is the role of the trial court. [552]
- 4.46 A competing explanation of the respondent's evidence is not a sufficient basis for granting a stay. The appellants' challenge must go to the reliability of the ROC. [556]
- 4.47 Implicitly, that the overseas expert evidence sought by the appellants was merely a "competing explanation" (at [556]) rather than a challenge that goes to the reliability of the ROC.
- 4.48 Mr Dotcom produced Professor Philip Sallis as an expert witness. [557]
- 4.49 The appellants' submission that only experts based in the United States have the necessary expertise to challenge the evidence in the ROC was a bare submission unsupported by evidence. [558]
- 4.50 The expert evidence sought by the appellants was only necessary to raise alternative reasonable inferences and, as such, was a trial matter not relevant to the eligibility hearing. [558]

- 4.51 There was no evidence to suggest that if the experts sought were consulted they would undermine the ROC to the extent that it would be unreliable. [558]
- 4.52 The appellants' submission that the overseas expert evidence sought by the first respondent to challenge whether the respondent had discharged its duty of candour was largely a re-running of the disclosure case decided upon by the Supreme Court in *Dotcom v USA*. [559]
- 4.53 That:
- (a) The respondent is not required to produce all the evidence in the ROC it has available to it;
  - (b) It is not required to produce evidence which might be useful to the appellants;
  - (c) It does have a duty of candour and good faith to produce evidence which might destroy or seriously undermine the ROC;
  - (d) The appellants have not established a breach of the duty by the respondent. At best, it is submitting an alternative explanation that might be available, which is a trial matter; and
  - (e) A stay or an adjournment should not be granted for the claimed need for technical expertise. [560]
- 4.54 The eligibility Court is bound by the decision in *Ortmann & Ors v The District Court at North Shore* [2015] NZHC 901 that ongoing funding or representation difficulties would be unlikely to justify further adjournments. [561]
- 4.55 The appellants had more than sufficient time and resources to prepare for the eligibility hearing if they were so minded. [562]
- 4.56 That there is no barrier for a stay or adjournment of the eligibility hearing on the basis of delay or distraction. [563]
- 4.57 That no evidence was adduced of intent on the part of the United States to starve the appellants into submission. [565]
- 4.58 It was not shown that any of the legal steps taken by the respondent were wrongly taken so as to achieve the alleged purpose. [565]

- 4.59 Implicitly, that it was necessary to show that the steps taken by the respondent were wrongly taken. [565]
- 4.60 There was no evidence that the appellants were starved of funds and there was evidence of funds having been released to the appellants for the funding of their legal defence pursuant to decisions of the High Court. [565]
- 4.61 The appellants had funding available to them far above and beyond the funding that most litigants would have available to them". [565]
- 4.62 A stay should not be granted on the basis of submissions that there is a risk of an adverse decision to the appellants from the eligibility hearing, and their rights of appeal limited to questions of law. To do so would amount to ignoring the provisions of the Act. [568]
- 4.63 A stay should not be granted on the basis of submissions that the respondent has had full access to the New Zealand legal system to advance its objectives, including the advantage provided to the respondent by having a privileged status under Mutual Assistance on Criminal Matters Act and the Act, as these do not affect the fairness of the eligibility hearing. [569]-[570]
- 4.64 The January 2012 search, seizure and arrests do not affect the fairness of the eligibility hearing. [570]
- 4.65 There is no basis for granting a stay application on any of the grounds advanced whether separately or together. [571]

*Stays 2 and 3*

- 4.66 Stays 2 and 3 were declined because none of the abuse of process grounds alleged in the applications affected the fairness of the eligibility hearing or (implicitly) were such that that it would undermine public confidence in the integrity of the criminal justice system if the eligibility hearing went ahead ([577]-[579]), including:
- (a) That Mr Dotcom was not being prosecuted due to political considerations because:
    - (i) there is no direct evidence of a linkage between the donations and meetings and the prosecution and extradition;

- (ii) there is no basis on which to infer such a linkage;
  - (iii) even if there was, if law enforcement agencies in the United States were of the view that crimes had been committed by the appellants for which they could stand trial in the United States, they are entitled to seek their extradition notwithstanding the initial impetus to prosecute; and
  - (iv) their motives to seek extradition do not affect the fairness of the eligibility hearing. [578(a)]
- (b) Whether Mr Dotcom was granted residence in New Zealand contrary to standard immigration policy in order to provide a pathway to extradition has already been the subject of decisions of the District Court and High Court on 23 May 2014<sup>172</sup> and 17 October 2014<sup>173</sup> respectively, the District Court and High Court have already found that there was no evidential linkage between the granting of residence to Mr Dotcom, and the eligibility proceedings and there was no new evidence to change these findings. [578(b)]
- (c) For the reasons set out at [531]-[571] of my judgment, it was not necessary or relevant for the appellants to be able to fund overseas counsel, and legal and technical experts, for the Court to conduct the eligibility hearing. [578(c)-(f)]
- (d) The United States' assertion of extraterritorial jurisdiction to regulate the internet is irrelevant to the eligibility hearing. [578(g)]
- (e) In respect of the gathering of intelligence and/or investigative material relating to Mr Dotcom:
- (i) The search and seizure of investigative material from Mr Dotcom had already been dealt with by the District Court<sup>174</sup> and the High Court;<sup>175</sup>

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<sup>172</sup> *USA v Dotcom* (North Shore DC, CRI 2012-092-1647, 23 May 2014, Judge Dawson).

<sup>173</sup> *Dotcom v USA* [2014] NZHC 2550 (Simon France J).

<sup>174</sup> *USA v Dotcom* (North Shore DC, CRI 2012-092-1647, 23 May 2014, Judge Dawson).

<sup>175</sup> *Dotcom v USA* [2014] NZHC 2550 (Simon France J).



- (ii) To the extent this related to the unlawful gathering of evidence by the GCSB, then this is already before the High Court in proceeding CIV-2013-404-2168 and it is appropriate for the issue to remain there;
  - (iii) It is not appropriate for the eligibility Court to take over the matter and reach any decision on it; and
  - (iv) Allegations of illegality or improperly gained evidence are trial issues, not eligibility hearing issues. ([578(h)])
- (f) The denial of access to the appellants to the seized devices is also a trial issue and does not prevent the conduct of a fair eligibility hearing. [578(i)]
- (g) Whether the United States' failed to preserve evidence, and attempted to frustrate the first respondent and/or Megaupload Limited's attempts to preserve evidence, are also trial issues and did not prevent a fair eligibility hearing. [578(j)]
- (h) The methods and tactics used by the authorities to arrest Mr Dotcom and subsequently are not relevant to the eligibility hearing and do not impact on the fairness of the hearing. [578(k)]
- (i) The steps taken by the authorities purportedly under MACMA were not shown to impact upon the conduct of a fair eligibility hearing. [578(l)]
- (j) The alleged public humiliation of Mr Dotcom and his family, and trauma to their children, did not amount to an abuse of process affecting the fair conduct of the eligibility hearing. [578(m)-(n)]
- (k) There is no evidence that collateral or related litigation in New Zealand or overseas has affected the fair conduct of the eligibility hearing and, in any event, it is not appropriate for the Court to intervene and the Court does not have jurisdiction to intervene. [578(o)]
- (l) That there is no conflict, or apparent conflict, of interest on the part of Crown Law. [578(p)]

4.77 In dismissing Stay 3, it was not necessary for me to determine whether:

- (a) Whether Mr Dotcom was granted residence in New Zealand in order to provide a pathway to extradition.
- (b) The United States was, by way of the criminal prosecution of the appellants, asserting extraterritorial jurisdiction to regulate the internet.
- (c) Intelligence and/or investigative material relating to Mr Dotcom had been unlawfully or improperly obtained.
- (d) The appellants had been unlawfully denied access to their seized devices.
- (e) The United States failed to preserve evidence, and attempted to frustrate the first respondent and/or Megaupload Limited's attempts to preserve evidence. [578(j)]
- (f) The methods and tactics used by the authorities to arrest Mr Dotcom and subsequently were unlawful or otherwise improper. [578(k)]

*Stay Conclusions*

4.78 In summary, and including the foregoing, I determined the following in relation to the Stay applications:

- (a) None of the three applications for Stay would be heard in advance of the hearing.
- (b) The appellants' joint application for stay dated 14 June 2015 should be dismissed. [571]
- (c) The respondent's preliminary objection to:
  - (i) the appellants' joint application for stay dated 21 August 2015; and
  - (ii) Mr Dotcom's application for stay dated 16 September 2015;

being heard as part of the eligibility hearing was successful.

- (d) The appellants' joint application for stay dated 21 August 2015 should be dismissed. [579]
- (e) Mr Dotcom's application for stay dated 16 September 2015 should be dismissed. [579]

**B2. SECTION 24(2)**

- 5.1 The extradition court is required, under s 24(2) of the Extradition Act, to be satisfied that:
  - (a) The offence is an extradition offence in the extradition country;
  - (b) The evidence would justify the person's trial if the conduct constituting the offence had occurred in New Zealand. [526]
- 5.2 The extradition court can be satisfied that the offence is an extradition offence in the extradition country if a person described in s 25 (3A) of the Extradition Act certifies that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country. [527]
- 5.3 The principal purpose of the eligibility hearing is as set out in s 24(2)(d), to decide if the evidence in the ROC and supplements would justify the appellants' trial if the conduct constituting the offences had occurred in New Zealand's jurisdiction. [529]
- 5.4 The extradition court has the discretion to reject evidence that is manifestly unreliable, but is not required to weigh the evidence before it. [18]
- 5.5 The requirements of natural justice as set out by Elias CJ in *Dotcom v United States of America* [2014] 1 NZLR 355 apply. [21]
- 5.6 The role of the extradition court is as described in the Canadian judgment of *United States of America v Mach* [2006] ONSC 4832. [537]
- 5.7 Competing views of the law of the United States is a matter for trial and not for the jurisdiction of the extradition court. [537]
- 5.8 The proceeding did not breach the appellants' right to natural justice pursuant to s 27 of the New Zealand Bill of Rights Act 1990. [534] - [564]

**B3. SECTION 24(2)(a) AND (b)**

6.1 The respondent had produced the necessary supporting documentation pursuant to s 24(2)(a) and (b).

**B4. SECTION 24(2)(c)**

7 In respect of the legal test required pursuant to s 24(2)(c) of the Extradition Act, I determined, either explicitly or implicitly, the following:

7.1 The conduct alleged against the respondents in the ROC and its supplements qualifies as a “conspiracy to defraud” as defined in Article II.16 of the US – NZ Extradition Treaty and thus qualifies as an “extradition offence” for the purposes of s 24(2)(c) of the Extradition Act. [538] – [534]

7.2 The conduct alleged against the respondents in the ROC and its supplements qualifies as “money laundering” under Article II.19 of the US – NZ Extradition Treaty and thus qualified as an “extradition offence” for the purposes of s 24(2)(c) of the Extradition Act. [630] – [631]

7.3 The role of the extradition court in relation to s 101B of the Extradition Act is to determine whether the conduct alleged falls within that defined in the United Nations Convention against Transnational Organised Crime. [548]

7.4 Section 101B of the Extradition Act does not contain a double criminality requirement. [547]

7.5 The assessment under s 101B in this case is of criminality against offences in New Zealand, and not an assessment of US law. [548]

7.6 The following offences are deemed to be included in the US – NZ Extradition Treaty pursuant to s 101B(1)(c) of the Extradition Act:

- (a) Crimes Act 1961, s 228 (“Dishonest use of a document”);
- (b) Crimes Act 1961, s 249 (“Accessing computer system for dishonest purpose”);
- (c) Crimes Act 1961, s 240 (“Obtaining by deception”); and
- (d) Copyright Act 1994, s 131 (“Making or dealing with infringing objects”). [545] – [548]

7.7 The conduct alleged against the appellants constituted as a matter of law the following deemed offences for the purposes of s 24(2)(c) of the Extradition Act and pursuant to s 101B(1)(a) and s 101B(1)(c):

- (a) Crimes Act 1961, s 228 (“Dishonest use of a document”) (at [587] (Count 2));
- (b) Crimes Act 1961, s 249 (“Accessing computer system for dishonest purpose”) (at [587] (Count 2));
- (c) Crimes Act 1961, s 240 (“Obtaining by deception”) (at [95]);
- (d) Crimes Act 1961, s 98A (“Participation in an Organised Criminal Group”); and
- (e) Copyright Act 1994, s 131 (“Making or dealing with infringing objects”) (at [587] (Count 2)).

7.8 Specifically, and on a count-by-count basis, I determined that the counts in the Superseding Indictment amounted to the following:

- (a) In respect of count 1:
  - (i) That the conduct constituting the offence contained in count 1 is as set out in my judgment at [632].
  - (ii) That the conduct alleged under count 1 corresponds to the “extradition offence” of s98A of the Crimes Act 1961. [632] to [635]
- (b) In respect of count 2:
  - (i) That the conduct constituting the offence contained in count 2 is set out in my judgment at [584].
  - (ii) That the following offences are deemed to be listed in the US-NZ Extradition Treaty pursuant to s 101B of the Extradition Act (at [587]):
    - (aa) Section 249 of the Crimes Act 1961. [594] – [605]
    - (bb) Section 228 of the Crimes Act 1961. [610]
    - (cc) Section 131 of the Copyright Act 1994.

- (ii) That count 2 corresponds with the following extradition offences:
  - (aa) Article II.16 of the US-NZ Extradition Treaty. [538] - [544]
  - (bb) Section 249 of the Crimes Act 1961. [609]
  - (cc) Section 228 of the Crimes Act 1961. [615]
  - (dd) Section 131 of the Copyright Act 1994. [617] to [627]
  
- (c) In respect of count 3:
  - (i) That the conduct constituting the offence contained in count 3 is as set out in my judgment at [628].
  - (ii) That count 3 corresponds with an extradition offence, being Article II.19 of the US-NZ Extradition Treaty. [628]-[631]
  
- (d) In respect of count 4:
  - (i) That the conduct constituting the offence contained in count 4 is as set out in my judgment at [642].
  - (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:
    - (aa) Section 249 of the Crimes Act 1961. [643]
    - (bb) Section 228 of the Crimes Act 1961. [643]
    - (cc) Section 131 of the Copyright Act 1994. [643]
  - (iii) That count 4 corresponds with the following extradition offences:
    - (aa) Article II.6 of the US – NZ Extradition treaty. [639] – [641]

(bb) Section 249 of the Crimes Act 1961. [639] – [643]

(cc) Section 228 of the Crimes Act 1961. [639] – [643]

(dd) Section 131 of the Copyright Act 1994. [639] – [643]

(e) In respect of count 5:

(i) That the conduct constituting the offence in count 5 was as set out in my judgment at [651] – [652].

(ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

(aa) Section 249 of the Crimes Act 1961. [643]

(bb) Section 228 of the Crimes Act 1961. [651]

(cc) Section 131 of the Copyright Act 1994. [643]

(iii) That count 5 corresponds with the following extradition offences:

(aa) Article II.16 of the US – NZ Extradition Treaty. [651]

(bb) Section 249 of the Crimes Act 1961. [651]

(cc) Section 228 of the Crimes Act 1961. [651]

(dd) Section 131 of the Copyright Act 1994. [651]

(f) In respect of count 6:

(i) That the conduct constituting the offence in count 6 was as set out in my judgment at [656].

- (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:
    - (aa) Section 249 of the Crimes Act 1961. [643]
    - (bb) Section 228 of the Crimes Act 1961. [643]
    - (cc) Section 131 of the Copyright Act 1994. [643]
  - (iii) That count 6 corresponds with the following extradition offences:
    - (aa) Article II.16 of the US – NZ Extradition Treaty. [656]
    - (bb) Section 249 of the Crimes Act 1961. [656]
    - (cc) Section 228 of the Crimes Act 1961. [656]
    - (dd) Section 131 of the Copyright Act 1994. [656]
- (g) In respect of count 7:
- (i) That the conduct constituting the offence in count 7 was as set out in my judgment at [659].
  - (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:
    - (aa) Section 249 of the Crimes Act 1961. [643]
    - (bb) Section 228 of the Crimes Act 1961. [643]
    - (cc) Section 131 of the Copyright Act 1994. [643]
  - (iii) That count 7 corresponds with the following extradition offences:
    - (aa) Article II.16 of the US – NZ Extradition Treaty. [659]



(bb) Section 249 of the Crimes Act 1961. [659]

(cc) Section 228 of the Crimes Act 1961. [659]

(dd) Section 131 of the Copyright Act 1994. [659]

(h) In respect of count 8:

(i) That the conduct constituting the offence contained in count 8 was as set out in my judgment at [667].

(ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

(aa) Section 249 of the Crimes Act 1961. [643]

(bb) Section 228 of the Crimes Act 1961. [643]

(cc) Section 131 of the Copyright Act 1994. [643]

(iii) That count 8 corresponds to the following extradition offences:

(aa) Article II.16 of the US – NZ Extradition Treaty. [667] – [668]

(bb) Section 249 of the Crimes Act 1961. [667] – [668]

(cc) Section 228 of the Crimes Act 1961. [667] – [668]

(dd) Section 131 of the Copyright Act 1994. [667] – [668]

(i) In respect of counts 9 – 13:

(i) That the conduct constituting the offence contained in counts 9 – 13 was as set out in my judgment at [671].

(ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty:

- (aa) Section 249 of the Crimes Act 1961.
- (bb) Section 228 of the Crimes Act 1961.
- (cc) Section 240 of the Crimes Act 1961. [674]
- (iii) That counts 9 – 13 correspond with the following extradition offences:
  - (aa) Article II.16 of the US – NZ Extradition Treaty. [672]
  - (bb) Section 249 of the Crimes Act 1961. [672]
  - (cc) Section 228 of the Crimes Act 1961. [672]
  - (dd) Section 240 of the Crimes Act 1961. [674]

## **B5. DUTY OF CANDOUR**

- 8.1 It was open to the appellants to show that the certificate and/or affidavit pursuant to s 25(3) of the Extradition Act had been given in bad faith or misstated the law of the United States. [535]
- 8.2 The appellants, though, must go on to show that there is content in the affidavit or certificate that it is so in error that the eligibility hearing cannot be conducted in a fair manner, and that will remain the position unless the certificate is shown to be wrong to the extent that it would be unfair to conduct the eligibility hearing based on the ROC evidence covered by that certificate. [535]
- 8.3 For Mr Prabhu to hold an opinion on United States law that is different to Mr Rothken or Professor Lessig does not amount to bad faith on the part of Mr Prabhu or a breach of the duty of candour, nor does it undermine or invalidate the ROC. [537]
- 8.4 To challenge the evidence of Mr Prabhu to show a breach of the duty of candour is to ignore the controlling effect of s 25(5) of the Extradition Act. [549]
- 8.5 The appellants submissions that the expert evidence of US based experts would challenge the respondent's candour in its ROC is a

rerunning of the disclosure case decided upon by the Supreme Court in *Dotcom v USA* [2014] 1 NZLR 355 (SC). [559]

- 8.6 As set out at [560]:
- (a) The respondent is not required to produce all the evidence in the ROC it has available to it;
  - (b) The respondent is not required to produce evidence which might be useful to the appellants;
  - (c) The respondent does have a duty of candour and good faith to produce evidence which might destroy or seriously undermine the ROC;
  - (d) The appellants had not established a breach of the duty of candour. At best, they had submitted an alternative explanation that might be available, which is a trial matter.
- 8.7 That it is for the requesting state to decide which material it will rely upon at the eligibility hearing, but that is subject to the duty of candour of good faith. [684]
- 8.8 The requesting state has a duty to disclose evidence which renders worthless, undermines or seriously detracts from the evidence upon which the requesting state has placed reliance pursuant to the Supreme Court in *Dotcom v USA* [2014] 1 NZLR 355. [684] – [685]
- 8.9 That disagreements as to opinion of United States law between the evidence of Professor Lessig and Mr Prabhu do not amount to breaches of the duty of candour and good faith. [688(i)]
- 8.10 That the appellants' arguments as to whether or when the respondent had fully disclosed its case did not amount to a breach of the duty of candour and good faith. [688(ii)]
- 8.11 The duty of candour and good faith does not require the respondent to preserve all data which might or might not be relevant for trial. [688(iii) – (iv)]
- 8.12 It is not the Court's role to consider the alleged impropriety of the respondent's counsel in relation to any alleged denial and/or frustration of access to personal and official information as it relates to the duty of candour and good faith. [688(iv)]

- 8.13 As set out in my judgment at [688(iv)] the ongoing and repetitive allegations of conduct previously rejected by the Courts or being appropriately dealt with in other litigation does not amount to a breach of the duty of candour and good faith.
- 8.14 The respondent did not breach the duty of candour and good faith because it was not required to disclose:
- (a) All investigations undertaken by whom and when
  - (b) A full summary of all evidence obtained
  - (c) The identity and qualifications of proposed witnesses
  - (d) Full transcripts of skype communications
  - (e) How qualitative figures in the ROC have been obtained.
- [688(vi)]
- 8.15 The respondent is not required to identify how evidence was obtained. [688(viii)]
- 8.16 Submissions that the respondent has selectively picked its evidence are just submissions and do not amount to evidence that there is a basis for finding a breach of the duty of candour and good faith. [688(viii)]
- 8.17 The evidence of Professor Sallis is an alternative view that might be applicable at trial. It does not establish a breach of the duty of candour and good faith. [688(x)]
- 8.18 The submissions around alleged misrepresentations by the respondent in the laying of count 4 do not amount to a breach of the duty of candour and good faith. [688(xi)]
- 8.19 The respondent did not breach the duty of candour and good faith in the manner in which the provisional warrants for arrest were applied for and obtained. [688(xii) – (xiii)]
- 8.20 The claim of novelty issues being raised in this case does not establish a breach of the duty of candour and good faith. [688(xiv)]

- 8.21 The case is not novel due to its similarities with *Griffiths v USA* [2004] FCA 789 and *The Twentieth Century Fox Film Corporation v Newzbin* [2010] EWHC 608 (Ch). [688(xiv)]
- 8.22 All of the appellants' submissions on the duty of candour and good faith have been considered but not all referred to in my judgment. They have been raised mainly for matters upon which the appellants and respondent have different points of view, a relitigation of matters already decided upon by New Zealand courts, or are accusations about matters of no relevance to the eligibility hearing. [689]
- 8.23 None of the submissions made individually or submissions made considered in their entirety come close to establishing a breach of the duty of candour and good faith. [689]
- 8.24 Differences of opinion, disputing minor matters of evidence and making accusations without an evidential background do not provide any basis for establishing a breach of the duty. [690]

*Preservation of evidence*

- 8.25 The respondent has provided the affidavits and certificates required under s 25(3)(a) and s 25(3)(b) of the Act and they were respectively sworn and certified validly and in good faith. [688(i)]
- 8.26 The differing views of Mr Prabhu and Professor Lessig as to the correct interpretation of US law, including the significance of whether illegal downloading of copyright material took place or merely streaming, do not amount to a breach of the duty of candour and good faith. [688(ii)]
- 8.27 The United States did not fail to disclose its case as required and, if it had so failed, this would not amount to a breach of the duty of candour and good faith. [688(ii)]
- 8.28 The first respondent submits that since January 2012 the servers of the Mega group have been unplugged from a power source and therefore not running and not being maintained. The submission is that the data on the servers will corrupt over time and much of the

data will have been lost to the respondents should they wish to access it to defend themselves at trial. [688(iii)]

- 8.29 The obligation upon the respondent for the eligibility hearing was to provide the affidavit pursuant to s 25(3)(a) and that affidavit has been provided. [688(iii)]
- 8.30 The affidavits filed by the respondent purportedly in accordance with s 25(3) confirm that the respondent has preserved for use at trial **all** the evidence set out in the ROC. [688(iii)]
- 8.31 There is no requirement that all data which might or might not be relevant for trial has been preserved. [688(iii)].
- 8.32 Implicitly, the “evidence” referred to in s 25(3)(a) of the Act is the evidence relied upon by the respondent only, not evidence that the appellants may wish to rely upon including exculpatory evidence. [688]
- 8.33 Implicitly, the eligibility Court is not required to look behind the fact that a purported affidavit for the purposes of s 25(3)(a) is on its face sworn.
- 8.34 Should it be the case that the respondents require evidence from any data that is lost, that does not constitute a breach of the duty of candour and good faith. [688(iii)]
- 8.35 Loss of users’ data does not constitute a breach of the duty of candour and good faith. [688(iii)-(iv)]
- 8.36 If Mr Dotcom’s various requests for personal and official information under the Privacy Act 1993 and the Official Information Act 1982 have been frustrated through unlawful withholding of information (in toto and by redaction), and his requests were transferred to Crown Law as part of a deliberate litigation strategy to deny Mr Dotcom access to evidence, and this was done on behalf of the respondent, this does not establish a breach of the duty of candour and good faith. [688(v)]

8.37 The ROC (and, implicitly, its supplements) are not unreliable for failing to set out the following information:

- (a) all investigations undertaken by whom and when;
- (b) a full summary of all evidence obtained;
- (c) the identity and qualifications of proposed witnesses;
- (d) full transcripts of skype communications; and
- (e) how qualitative figures in the ROC have been obtained;

because the respondent is not required to disclose this information. There is therefore no breach of the duty of candour and good faith by the respondent. [688(vi)]

8.38 In respect of Mr Dotcom's submission that the respondent had provided incorrect translations in the ROC, and omitted material so to deliberately create a different and more sinister impression, and had thereby breached the duty of candour and good faith:

- (a) the eligibility Court is not in a position to decide which translation is correct or more correct than the other;
- (b) the eligibility does not need to decide which translation is correct or more correct than the other; and
- (c) even if the translation obtained by the first respondent was assumed to be the correct translation, there remains more than sufficient evidence to establish a prima facie case. [688(vii)]

8.39 In respect of Mr Dotcom's submission that the reliability of the ROC is seriously compromised, and the duty of candour and good faith breached, as a result of:

- (a) the respondent having failed to provide context of communications relied upon;

- (b) the respondent having included a collection of skype and email communications without identifying the means by which they were obtained;
- (c) there being no way of knowing whether these communications were obtained lawfully or unlawfully;
- (d) some of the evidence having been obtained from cloned hard drives found to have been removed from New Zealand unlawfully in *Attorney-General v Dotcom*,<sup>176</sup>
- (e) the respondent having omitted key passages from the communications in order to convey an entirely different meaning;

the respondent was not required to identify how its evidence was obtained and the submission that the respondent has selectively picked its evidence does not amount to evidence that there is a basis for finding a breach of the duty of candour and good faith. [688(viii)]

8.40 The issues raised in *Attorney-General v Dotcom*<sup>177</sup> have already been dealt with by the Court of Appeal and, implicitly, do not establish a breach of the duty of candour and good faith. [688(viii)]

8.41 There is no breach of the duty of candour and good faith arising from the respondent's reliance on inferences because, where inferences are required in order to establish a prima facie case, such inferences are based upon evidence in the ROC from which it is reasonable to draw those inferences. [688(ix)]

## **B6. RECORD OF CASE AND ITS SUPPLEMENTS**

9.1 The Court can be satisfied that an offence is an offence in the extradition country if a person described in s 25(3A) of the Extradition Act has certified that in his or her opinion the ROC discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country. [527]

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<sup>176</sup> *Attorney-General v Dotcom* [2014] NZCA 19 at [114]

<sup>177</sup> *Attorney-General v Dotcom* [2014] NZCA 19 at [114]



- 9.2 On the face of the documents the ROC and its supplements have been certified pursuant to s 25(5). [527]
- 9.3 Following certification of the ROC, on the face of it, the respondent had established a prima facie case that the alleged offences were extradition offences in the USA. [527]
- 9.4 Any challenge to the evidence must be more than an alternative explanation, which is a matter for trial. [528]
- 9.5 To successfully challenge a prima facie case once it is established by the ROC required the appellants to undermine that evidence to the extent it can be seen to be unreliable and not safe to go to trial. [528]
- 9.6 The appellants were entitled to challenge the respondent's evidence in the ROC at the eligibility hearing in accordance with paragraph [54] of *United States of America v Ferras* [2006] 2 SCR 77 and paragraph [108] of the Court of Appeal judgment in *United States of America v Dotcom* [2013] 2 NZLR 139 (CA). [554] – [555]
- 9.7 A challenge of the evidence must go to reliability, as set out at paragraph [48] of *United States of America v Aneja* (2014) 113 WCB 423 (ONCA). [556]
- 9.8 There is no requirement that the appellant has preserved all data which might or might not be relevant for trial. [688(iii)]
- 9.9 The failure by the appellant to disclose:
- (a) All investigations undertaken by whom and by when
  - (b) A full summary of evidence obtained
  - (c) The identity and qualifications of proposed witnesses
  - (d) Full transcripts of skype conversations
  - (e) How qualitative figures in the ROC have been obtained
- does not make the ROC unreliable, as there is no obligation on the respondent to disclose this information. [688(vi)]
- 9.10 The respondent's obligation in presenting its evidence in the ROC is fully described in *Dotcom v USA* paragraphs [153] and [190]. [688(vi)]

- 9.11 Evidence as to incorrect translations does not undermine the reliability of the ROC as set out at paragraph [688(vii)] of my judgment.
- 9.12 Failure to identify how evidence was obtained does not lead to a finding of unreliability as the respondent was under no obligation to so identify the sources or methods used in obtaining the evidence. [688(viii)]
- 9.13 When inferences are required in order to establish a prima facie case then they are based upon evidence in the ROC and its supplements from which it is reasonable to draw those inferences. [688](ix)]
- 9.14 The evidence of Professor Sallis did not undermine the ROC to an extent that the evidence in the ROC is unreliable. [688(x)]
- 9.15 The appellants' submissions fell well short of undermining the respondent's case or showing it to be unreliable, such that the large body of evidence in the ROC and its supplements that support the establishment of a prima facie case remain intact. [690]
- 9.16 The ROC satisfied the requirements of s 25(3)(a) and s 25(3)(b) of the Extradition Act (at [482] – [483]; [527] – [528] and [535 – [537]).
- 9.17 Section 25(5) of the Extradition Act required that I accept the certification of the ROC. [527]
- 9.18 The Eighth Supplemental ROC was admitted.

**B7. SECTION 24(2)(d)**

- 10.1 The evidence summarised in the ROC and its supplements would, according to the law of New Zealand, justify Mr Dotcom's trial in New Zealand if the conduct constituting the alleged offences had occurred within the jurisdiction of New Zealand for the purposes of s 24(2)(d) of the Extradition Act.<sup>178</sup>
- 10.2 In respect of count 1 of the superseding indictment:

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<sup>178</sup>

See [589]; [593]; [609]; [615]; [617]; [627]; [631]; [638]; [650]; [655]; [658]; [666]; [670]; [674] and [677].

- (a) That the conduct alleged under count 1 was as set out in my judgment at [632].
- (b) That the conduct alleged under count 1 would have constituted a prima facie case of an offence under s 98A of the Crimes Act 1961, had it occurred in New Zealand.<sup>179</sup> [638]

10.3 In respect of count 2 of the superseding indictment:

- (a) That the conduct alleged under count 2 was as set out in my judgment at [584].
- (b) That the conduct alleged under count 2 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:
  - (i) Section 249 of the Crimes Act 1961; [609]<sup>180</sup>
  - (ii) Section 228 of the Crimes Act 1961; [615]<sup>181</sup>
  - (iii) Section 131(1)(c) of the Copyright Act 1994; [617]<sup>182</sup>
  - (iv) Section 131(1)(d)(ii) of the Copyright Act 1994; [617] and
  - (v) Section 131(1)(d)(iii) of the Copyright Act 1994. [617]
- (c) That the conduct alleged under count 2 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty 1970. [593]<sup>183</sup>

10.4 In respect of count 3 of the superseding indictment:

- (a) That the conduct alleged under count 3 was as set out in my judgment at [628].

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<sup>179</sup> "All of the elements of the offence in s 98A have been satisfied to a prima facie standard by the applicant and the respondents are therefore eligible for surrender on count 1."

<sup>180</sup> "The alleged conduct in count 2 correlates with the offences in both s249(1) and s249(2). There is sufficient evidence to base a prima facie case against the respondents under s249(1) and s249(2) of the Crimes Act 1961,

<sup>181</sup> "The respondents are therefore eligible for surrender under the Act under s228(b) due to the correlation of that section with the conduct alleged in count 2."

<sup>182</sup> "The evidence in the ROC supports the conduct alleged in count 2. The same alleged conduct translates to breaches of s131(1)(c) and of s131(1)(d)(ii) or (iii) [of the Copyright Act 1994]".

<sup>183</sup> "The evidence is sufficient to find that a prima facie case is established against each of the respondents on count 2 under Art II.16 of the Treaty and the respondents accordingly eligible for surrender on count 2."

- (b) That the conduct alleged under count 3 constituted a prima facie case of ‘conspiring to launder money’ as set out in Article II.19 of the US – NZ Extradition Treaty. [631]<sup>184</sup>

10.5 In respect of count 4 of superseding indictment:

- (a) That the conduct alleged in count 4 was as set out at [642] of my judgment.
- (b) That the conduct alleged under count 4 would have constituted a prima facie case of the following offences, had it occurred in New Zealand: [650]<sup>185</sup>
  - (i) Section 249 of the Crimes Act 1961;
  - (ii) Section 228 of the Crimes Act 1961;
  - (iii) Section 131(1)(c) of the Copyright Act 1994;
  - (iv) Section 131(1)(d)(ii) of the Copyright Act 1994; and
  - (v) Section 131(1)(d)(iii) of the Copyright Act 1994.
- (c) That the conduct alleged under count 4 constituted a prima facie case of ‘conspiracy to defraud’ as set out in Article II.16 of the US – NZ Extradition Treaty. [650]

10.6 In respect of count 5 of the superseding indictment:

- (a) That the conduct alleged under count 5 was as set out in my judgment at [651] – [652].
- (b) That the conduct alleged under count 5 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:
  - (i) Section 228 of the Crimes Act 1961 (incorrectly referred to as the “Copyright Act” in my judgment) (at [655])<sup>186</sup>; and

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<sup>184</sup> “The respondents are therefore eligible for surrender on count 3 under Article II.19 of the Treaty.”

<sup>185</sup> “The evidence adduced by the applicant is sufficient to establish a prima facie case on each of the sections, and Art II.16 of the Treaty. The respondents are therefore eligible for extradition under count 4.”

(ii) Section 131(d)(ii) of the Copyright Act 1994. [655]<sup>187</sup>

10.7 In respect of count 6 of the superseding indictment:

- (a) That the conduct alleged under count 6 was as set out in my judgment at [656].
- (b) That the conduct alleged under count 6 would have constituted a prima facie case of the following offences, had it occurred in New Zealand, specifically:
  - (i) “The same conclusion can therefore be reached as in paragraph [626] herein that the respondents are eligible for extradition in count 6.” [658]

10.8 In respect of count 7 of the superseding indictment:

- (a) That the conduct alleged under count 7 was as set out in my judgment at [659].
- (b) That the conduct alleged under count 7 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:
  - (i) Section 249 of the Crimes Act 1961; [666]<sup>188</sup> and
  - (ii) Section 228 of the Crimes Act 1961. [666]
- (c) That the conduct alleged under count 7 constituted a prima facie case of ‘conspiracy to defraud’ as set out in Article II.16 of the US-NZ Extradition Treaty 1970. [666]<sup>189</sup>

10.9 In respect of count 8 of the superseding indictment:

- (a) That the conduct alleged under count 8 was as set out in my judgment at [667].

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<sup>186</sup> “There is sufficient evidence to establish a prima facie case pursuant to s228 Copyright Act [sic] that there was a dishonest use of documents (in the form of copyright infringing digital files) that resulted in the respondents obtaining a pecuniary advantage.”

<sup>187</sup> “There is also sufficient evidence to establish a prima facie case pursuant to s131 Copyright Act that there was a distribution of copyright infringing objects ....”

<sup>188</sup> “The evidence produced at this hearing does establish a prima facie case for count 7 pursuant to s249 and 228 of the Crimes Act and pursuant to Art II.16 of the Treaty so as to render the respondents eligible for surrender.”

<sup>189</sup> Ibid.

- (b) That the conduct alleged under count 8 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:
  - (i) Section 249 of the Crimes Act 1961; [670]<sup>190</sup> and
  - (ii) Section 228 of the Crimes Act 1961. [670]
- (c) That the conduct alleged under count 8 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty. [670]

10.10 In respect of counts 9 – 13 of the superseding indictment:

- (a) That the conduct alleged under counts 9 – 13 was as set out in my judgment at [671].
- (b) That the conduct alleged under counts 9 – 13 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:
  - (i) Section 249 of the Crimes Act 1961; [672]<sup>191</sup> and [677]
  - (ii) Section 228 of the Crimes Act 1961; [672] and [677]<sup>192</sup>
  - (iii) Section 240 of the Crimes Act 1961; [674]<sup>193</sup> and [677]
- (c) That the conduct alleged under counts 9 -13 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty 1970. [672] and [677]<sup>194</sup>

<sup>190</sup> “[T]he evidence does establish a prima facie case for count 8 pursuant to ss 249 and 229 of the Crimes Act and pursuant to Art II.16 of the Treaty so as to render the respondents eligible for extradition.”

<sup>191</sup> At [672]: “[T]he alleged specific acts of fraud [under counts 9 – 13] are captured by s249 and s228(b) of the Crimes Act as set out in the earlier counts.” At [677]: “The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents. The respondents are therefore eligible for extradition under counts 9 to 13.”

<sup>192</sup>

Ibid.

<sup>193</sup>

At [674]: “The alleged conduct satisfies the elements of an offence under [sic] 240 and qualifies as a deemed Treaty offence.” At [677]: “The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents. The respondents are therefore eligible for extradition under counts 9 to 13.”

<sup>194</sup>

At [672]: “The alleged conduct translates to a Treaty offence under Art II.16.” At [677]: “The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents. The respondents are therefore eligible for extradition under counts 9 to 13.”

## **B8. RESTRICTIONS ON SURRENDER**

11 In respect of the restrictions on surrender, I determined, either explicitly or implicitly, that

11.1 That s 7(a) of the Extradition Act must be narrowly construed such that the offence itself must have been political, rather than the circumstances surrounding the alleged offending.

11.2 Implicitly, that Mr Dotcom's extradition from New Zealand is truthfully sought in respect of an extradition offence, rather than for political motives.

11.3 Implicitly, that the issue of Internet governance is not a political one.

11.4 That a difference in opinion as to the operation of the Internet does not amount to a political opinion for the purposes of the restrictions on surrender. [698]

11.5 Implicitly, that the application of the fugitive disentitlement doctrine against Mr Dotcom did not result in any prejudice or any unjust outcome for the purposes of either the mandatory or discretionary restrictions on surrender.

11.6 Accordingly, no mandatory or discretionary restrictions on surrender apply to Mr Dotcom. [695] – [697]

## **B9. MATTERS FOR TRIAL**

12 I determined, either explicitly or implicitly, that a number of matters were not for the extradition court to determine and were matters for trial in the United States. These matters included:

12.1 Expert evidence on general industry practice evidence is relevant to trial defences, not to an eligibility proceeding. [520]

12.2 An alternative explanation of the evidence in the ROC and supplements must be regarded as a trial issue. [528]

12.3 Nowhere in the Act is it a requirement that the eligibility Court should undertake any analysis of the US offences and applicable law and such analysis is a matter for the Courts in the USA. [529]

- 12.4 No evidence has been produced that questions the certification process of the ROC and supplements. [533]
- 12.5 Legal and technical expert evidence that disputed the evidence in the ROC and its supplements would, at best, only provide an alternative point of view as to the correctness of the certification process, the applicable US law, and on technical matters, all of which are issues for trial. [533]
- 12.6 The differences in view on US law between, on the one hand, Mr Rothken and Professor Lessig and, on the other, Mr Prabhu, are matters for trial. [537]
- 12.7 At best, any US law evidence as to whether the counts in the ROC relating to copyright come within the description of “conspiracy to defraud” in Art II.16 in the Treaty would only provide an alternative argument, which is a matter for trial. [544]
- 12.8 The opinions of the appellants’ witnesses that disagree with Mr Prabhu’s assessment of US law is a trial issue. [549]
- 12.9 Weighing the merits of the respondent’s case against the possible alternative explanations that might be provided by the appellants is the role of the trial court. [552]
- 12.10 Evidence that would raise alternative reasonable inferences is a matter for trial. [558], [560]
- 12.11 Any allegation of illegality or improperly gained evidence by the applicant or its agents is a trial issue. [578(h)].
- 12.12 Whether the respondent denied the appellants access to exculpatory material is a trial issue. [578(i)]
- 12.13 Whether the respondent breached its duty to preserve evidence, and then frustrated the attempts of Mr Dotcom and/or Megaupload Limited to preserve that evidence, is a trial issue. [578(j)]
- 12.14 Whether Megaupload’s terms and conditions, and their provisions in relation to prohibiting the uploading of unauthorised content



(including content protected by copyright), are evidence of the appellants' absence of intent to breach copyright owners' rights, are issues for trial. [680]

12.15 Whether the following are evidence of the appellants' absence of intent to breach copyright owners' rights are matters for trial:

- (a) Megaupload's takedown mechanism;
- (b) direct delete functionality for copyright holders;
- (c) absence of a search tool by which users could search all content stored on the site;
- (d) absence of control over linking sites;
- (e) refusal to pay for traffic to Mega from linking sites; and
- (f) inability to determine whether content was infringing. [681]-[682]

12.16 Whether the fact that the terms and conditions of Megaupload's rewards programme for premium account holders required uploaders to honour copyright is evidence of the appellants' absence of intent to breach copyright owners' rights is a matter for trial. [683]

12.17 Any disagreement between Mr Prabhu and Professor Lessig on the interpretation of US law is a matter for trial. [688(i)]

12.18 The significance of the fact that the ROC alleges that illegal downloading of copyright material took place, rather than merely streaming, is a trial issue. [688(i)]

12.19 Whether the affidavit pursuant to s 25(3)(a) of the Act confirms in good faith that the applicant has preserved for use at trial all the evidence set out in the ROC is an issue for trial. [688(iii)]

12.20 Whether the respondents require evidence from any data that is lost is a fair trial issue for the US Court to consider. [688(iii)]

12.21 Differences in translation of evidence in the ROC and its supplements are trial issues. [688(vii)]

12.22 Whether Mr van der Kolk made the movie “Taken” available to users in countries where it had not been released in breach of the copyright owners’ proprietary rights is a trial issue. [688(xi)]

#### **B.10 MATTERS I DID NOT DETERMINE**

13 To the extent that I did not determine any matter raised by any party to the proceeding, I determined that it was irrelevant to the decision given (at [699]), including:

13.1 Whether the Court had jurisdiction to hear the eligibility hearing in light of the material non-disclosure leading up to the granting of the provisional arrest warrants. In addition, whether the non-disclosure by the respondent had resulted in:

- (a) A breach of s 21 of NZBORA (the right to be free from unreasonable seizure of the person).
- (b) A breach of s 18 of NZBORA (freedom of movement).
- (c) A breach of s 22 of NZBORA (the right not to be arbitrarily detained).
- (d) A breach of s 23 of NZBORA (the right to be informed of the reason for detention and the right to be released if the detention is not lawful).

13.2 How to ascertain the “conduct constituting the offence” in respect of each of the counts in the Superseding Indictment.

13.3 As to copyright, whether the respondent had proved copyright or copyright infringement on the basis of the evidence contained in the ROC and its supplements, including:

- (a) What evidence was required to be adduced by the respondent in order to establish copyright infringement?
- (b) Does the doctrine of transposition extend to copyright/copyright infringement?
- (c) If the respondent was allowed to assert or rely on copyright status as a matter of United States law, were the appellants entitled to United States legal expertise to challenge, render

worthless, undermine or seriously detract from that assertion and/or reliance?

13.4 Further, as to copyright, I did not determine:

- (a) The basis for any copyright infringement including any restricted acts.
- (b) Whether Parliament intended to criminalise via s 131 of the Copyright Act 1994 any breach of the right of communication found in s 16 of the Copyright Act.
- (c) Whether Parliament intended that the transmission of files over the Internet fell within any offence under s 131 of the Copyright Act 1994.
- (d) Whether copyright law is *sui generis* meaning that the Crimes Act offences are inapplicable.

13.5 Whether the ROC and its supplements constituted a “summary” of evidence as required by s 25 of the Extradition Act, and the implications in terms of admissibility if it does not.

13.6 The reliability of representative translation errors in the ROC and its supplements highlighted to me by the appellants apart from the singular translation point I determined at [688 (vii)].

13.7 Whether evidence that is “expected” is reliable and/or preserved for trial.

13.8 Whether or to what extent the Court can rely on conclusory statements in the ROC and its supplements.

13.9 The specific requirements of the ROC in order to be reliable and/or sufficient.

13.10 Whether the respondent was entitled to adduce evidence in reply, including:

- (a) Whether the respondent’s purported reply evidence was admissible.

(b) If so, whether the appellants were entitled to make submissions in respect of the respondent's purported reply evidence.

13.11 Whether there was bad faith on the part of the respondent in terms of over-charging count 4 so as to reach the minimum 4 years' imprisonment requirement.

13.12 How Mr Dotcom was complicit in the discrete acts of infringement alleged through counts 4-8 of the Superseding Indictment.

13.13 The impact of the position in United States law that online video-streaming is a misdemeanour only on:

(a) The duty of candour;

(b) The requirement of good faith; and

(c) A substantial amount of the evidence outlined in the ROC and its supplements concerning online video-streaming.

13.14 The correct test for the role of inferences in an eligibility hearing.

13.15 Whether, by making submissions in reply that relied on United States law, the respondent had effectively abandoned its earlier position that the law of the requesting state is irrelevant to an extradition proceeding.

#### **B.11 ELIGIBILITY FOR SURRENDER**

13.16 Pursuant to s 24(1) of the Extradition Act, the appellants are all eligible for surrender on all thirteen counts in the superseding indictment. [701]

#### **C. QUESTIONS FOR THIS COURT**

14 The question for the opinion of the court is whether the determinations in my judgment as set out at paragraphs 4.1–13.16 above, were erroneous in point of law, including but without limiting the correctness of my determinations as just described, in particular:

**C1. STAY APPLICATIONS**

14.1 Did I correctly characterise, and did I address, the appellants' grounds for the applications for stay?

**No material error.**

14.2 Did I correctly describe the jurisdiction of the District Court in terms of considering applications to stay extradition proceedings for abuse of process?

**No material error.**

14.3 Did I correctly articulate the test to determine whether there is an abuse of process such that extradition proceedings can or should be stayed?

**No material error.**

14.4 Was I correct to refuse to hear the appellants' applications for stay prior to or (at the latest) at the outset of the eligibility hearing?

**Yes.**

14.5 Was I correct to dismiss the appellants' applications for stay? In particular:

(a) Did I correctly apply the test for abuse of process and stay of proceedings?

**No material error.**

(b) Was I correct that the appellants had not, in the context of the stay applications, proven that the respondent had breached its duty of candour and good faith?

**Yes.**

(c) Was I correct that the evidence of copyright infringement amounted to a "conspiracy to defraud" under Article II.16 of the US-NZ Extradition Treaty?

**Yes.**

(d) Was I correct that no double criminality requirement arose under s 101B of the Extradition Act?

**No.**

(e) Was I correct that the law of a requesting state is irrelevant to extradition proceedings?

**Yes.**

(f) Was I correct that the appellants had adequate time and notice to prepare for the hearing?

**Yes.**

(g) Was I correct that the evidence of Mr Prabhu could not be contradicted?

**No.**

(h) Was I correct that the evidence in the ROC and its supplements could not be contradicted in this case?

**No.**

(i) Was I correct that the factors at [550] of my judgment could not be displaced by any evidence the appellants could produce?

**No.**

14.6 Was I correct to grant the respondent's preliminary objection to the applications for stay dated 21 August 2015 and 16 September 2015 being heard during the eligibility hearing and therefore not hear the appellants in relation to those applications including the witnesses the appellants wished to call?

**Yes.**

14.7 Having upheld the respondent's preliminary objection, and declined to hear Stays 2 and 3, was I correct to nevertheless substantively determine Stays 2 and 3 without having heard evidence or submissions on the merits.

**No such error made.**

**C2. SECTION 24(2)**

15.1 Did I correctly determine the role of the extradition court?

**No.**

15.2 Did I correctly set out the matters of which I was required to be satisfied under s 24 of the Extradition Act?

**No.**

15.3 Was I correct to find that the eligibility Court is not required to weight the evidence found to be admitted?

**No.**

15.4 Did I correctly interpret and apply the requirements of natural justice and s 27 of the NZBORA?

**Yes.**

**C3. SECTION 24(2)(a) AND 24(2)(b)**

16.1 Was I correct to determine that the respondent had presented the requisite documentation pursuant to s 24(2)(a) and 24(2)(b) of the Extradition Act?

**Yes.**

**C4. SECTION 24(2)(c)**

**Extradition offences**

17.1 Was I correct that, for the eligibility Court to be satisfied that the alleged conduct amounting to the US offences are “extradition offences” for the purposes of s 4 of the Extradition Act, the alleged conduct in each count needs to translate into an extradition offence by way of either:

(a) Article II of the Treaty (i.e. an offence originally listed in the Treaty);

**Yes.**

- (b) Section 101B(1)(a) of the Act (a deemed extradition offence);  
or

**Yes.**

- (c) Section 101B(1)(c) (a deemed extradition offence involving an organised criminal group as defined in Art 2(a) of TOC)? [580]

**Yes.**

17.2 Did I correctly identify the gateway requirements of s 101B(1)(c) of the Extradition Act which must be satisfied for an offence to be deemed to be listed in Article II of the US – NZ Extradition Treaty. In particular, was I correct to find that:

- (a) section 101B does not import any double criminality requirement; [547]

**No.**

- (b) the role of the eligibility Court is to determine whether the alleged conduct falls within s 101B as that conduct is defined in the United Nations Convention on Transnational Organized Crime; [548] and

**Yes.**

- (c) the assessment by the eligibility Court is of criminality against offences in New Zealand under s 101B, not an assessment of US law? [548].

**Yes.**

17.3 Did I correctly apply the gateway requirements of s 101B(1)(c) of the Extradition Act in finding that the following offences were deemed to be listed in Article II of the US – NZ Extradition Treaty:

- (a) Crimes Act 1961, s 228 (“Dishonest use of a document”);<sup>195</sup>

**Yes.**

- (b) Crimes Act 1961, s 249 (“Accessing computer system for dishonest purpose”);<sup>196</sup>

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<sup>195</sup> See [587], [610] (Count 2).

<sup>196</sup> See [587] (Count 2).



**Yes.**

- (c) Crimes Act 1961, s 240 (“Obtaining by deception”); and

**Yes.**

- (d) Copyright Act 1994, s 131 (“Making or dealing with infringing objects”).<sup>197</sup>

**No.**

17.4 In particular, on a count-by-count basis by reference to the counts in the Superseding Indictment, was I correct to determine:

(a) In respect of count 1:

- (i) That the conduct constituting the offence contained in count 1 is as set out in my judgment at [632]?

**Yes.**

- (ii) That the conduct alleged under count 1 corresponds to the “extradition offence” of s98A of the Crimes Act 1961? [632] to [635]

**Yes.**

(b) In respect of count 2:

- (i) That the conduct constituting the offence contained in count 2 is set out in my judgment at [584]?

**Yes.**

- (ii) That the following offences are deemed to be listed in the US-NZ Extradition Treaty pursuant to s 101B of the Extradition Act (at [587]):

- (aa) Section 249 of the Crimes Act 1961? [594] – [605]

**Yes.**

- (bb) Section 228 of the Crimes Act 1961? [610]

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<sup>197</sup> See [587] (Count 2).

**Yes.**

(cc) Section 131 of the Copyright Act 1994?

**No.**

(iii) That count 2 corresponds with the following extradition offences:

(aa) Article II.16 of the US-NZ Extradition Treaty?  
[538] - [544]

**Yes.**

(bb) Section 249 of the Crimes Act 1961? [609]

**Yes.**

(cc) Section 228 of the Crimes Act 1961? [615]

**Yes.**

(dd) Section 131 of the Copyright Act 1994? [617] to  
[627]

**No.**

(c) In respect of count 3:

(i) That the conduct constituting the offence contained in count 3 is as set out in my judgment at [628]?

**Yes.**

(ii) That count 3 corresponds with an extradition offence, being Article II.19 of the US-NZ Extradition Treaty?  
[628]-[631]

**Yes.**

(d) In respect of count 4:

(i) That the conduct constituting the offence contained in count 4 is as set out in my judgment at [642]?

**Yes.**

(ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

(aa) Section 249 of the Crimes Act 1961? [643]

**Yes.**

(bb) Section 228 of the Crimes Act 1961? [643]

**Yes.**

(cc) Section 131 of the Copyright Act 1994? [643]

**No.**

(iii) That count 4 corresponds with the following extradition offences:

(aa) Article II.6 of the US – NZ Extradition treaty? [639] – [641]

**No.**

(bb) Section 249 of the Crimes Act 1961? [639] – [643]

**Yes.**

(cc) Section 228 of the Crimes Act 1961? [639] – [643]

**Yes.**

(dd) Section 131 of the Copyright Act 1994? [639] – [643]

**No.**

(e) In respect of count 5:

- (i) That the conduct constituting the offence in count 5 was as set out in my judgment at [651] – [652]?

**No.**

- (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

- (aa) Section 249 of the Crimes Act 1961? [643]

**Yes.**

- (bb) Section 228 of the Crimes Act 1961? [651]

**Yes.**

- (cc) Section 131 of the Copyright Act 1994? [643]

**No.**

- (iii) That count 5 corresponds with the following extradition offences:

- (aa) Article II.16 of the US – NZ Extradition Treaty? [651]

**No.**

- (bb) Section 249 of the Crimes Act 1961? [651]

**Yes.**

- (cc) Section 228 of the Crimes Act 1961? [651]

**Yes.**

- (dd) Section 131 of the Copyright Act 1994? [651]

**No.**

- (f) In respect of count 6:

- (i) That the conduct constituting the offence in count 6 was as set out in my judgment at [656]?

**No.**

- (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

(aa) Section 249 of the Crimes Act 1961? [643]

**Yes.**

(bb) Section 228 of the Crimes Act 1961? [643]

**Yes.**

(cc) Section 131 of the Copyright Act 1994? [643]

**No.**

- (iii) That count 6 corresponds with the following extradition offences:

(aa) Article II.16 of the US – NZ Extradition Treaty? [656]

**No.**

(bb) Section 249 of the Crimes Act 1961? [656]

**Yes.**

(cc) Section 228 of the Crimes Act 1961? [656]

**Yes.**

(dd) Section 131 of the Copyright Act 1994? [656]

**No.**

- (g) In respect of count 7:

- (i) That the conduct constituting the offence in count 7 was as set out in my judgment at [659]?

**No.**

- (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

(aa) Section 249 of the Crimes Act 1961? [643]

**Yes.**

(bb) Section 228 of the Crimes Act 1961? [643]

**Yes.**

(cc) Section 131 of the Copyright Act 1994? [643]

**No.**

- (iii) That count 7 corresponds with the following extradition offences:

(aa) Article II.16 of the US – NZ Extradition Treaty? [659]

**No.**

(bb) Section 249 of the Crimes Act 1961? [659]

**Yes.**

(cc) Section 228 of the Crimes Act 1961? [659]

**Yes.**

(dd) Section 131 of the Copyright Act 1994? [659]

**No.**

- (h) In respect of count 8:

- (i) That the conduct constituting the offence contained in count 8 was as set out in my judgment at [667]?

**Yes.**

- (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty pursuant to s101B of the Extradition Act:

- (aa) Section 249 of the Crimes Act 1961? [643]

**Yes.**

- (bb) Section 228 of the Crimes Act 1961? [643]

**Yes.**

- (cc) Section 131 of the Copyright Act 1994? [643]

**No.**

- (iii) That count 8 corresponds to the following extradition offences:

- (aa) Article II.16 of the US – NZ Extradition Treaty? [667] – [668]

**No.**

- (bb) Section 249 of the Crimes Act 1961? [667] – [668]

**Yes.**

- (cc) Section 228 of the Crimes Act 1961? [667] – [668]

**Yes.**

- (dd) Section 131 of the Copyright Act 1994? [667] – [668]

**No.**

- (i) In respect of counts 9 – 13:

- (i) That the conduct constituting the offence contained in counts 9 – 13 was as set out in my judgment at [671]?

**Yes.**

- (ii) That the following offences are deemed to be listed in the US – NZ Extradition Treaty:

- (aa) Section 249 of the Crimes Act 1961?

**Yes.**

- (bb) Section 228 of the Crimes Act 1961?

**Yes.**

- (cc) Section 240 of the Crimes Act 1961? [674]

**Yes.**

- (iii) That counts 9 – 13 correspond with the following extradition offences:

- (aa) Article II.16 of the US – NZ Extradition Treaty? [672]

**Yes.**

- (bb) Section 249 of the Crimes Act 1961? [672]

**Yes.**

- (cc) Section 228 of the Crimes Act 1961? [672]

**Yes.**

- (dd) Section 240 of the Crimes Act 1961? [674]

**Yes.**



## Deemed offences

### *Copyright Act 1994, section 131*

17.5 Was I correct in determining that the conduct alleged against the appellants fell within s 131 of the Copyright Act 1994, in particular:

(a) Was I correct in determining, implicitly, that s 131 of the Copyright Act 1994 deals with the transmission and making available of digital files over the Internet?

**No.**

(b) Was I correct in determining, implicitly, the meaning of “object” for the purposes of s 131 of the Copyright Act 1994?

**No.**

(c) Was I correct in determining, implicitly, that a work-by-work analysis was not required under s 131 of the Copyright Act 1994?

**Not applicable.**

(d) Was my interpretation of “possesses” for the purposes of s 131(1)(c) of the Copyright Act 1994 correct?<sup>198</sup>

**No.**

(e) Was my interpretation of “distributes” for the purposes of s 131(1)(d)(iii) of the Copyright Act 1994 correct?<sup>199</sup>

**No.**

(f) Was my interpretation of “exhibits in public” for the purposes of s 131(1)(d)(ii) of the Copyright Act 1994 correct?<sup>200</sup>

**No.**

(g) Was I correct in finding that the safe harbours provided for in the Copyright Act 1994 (ss 92B, 92C, and 92E) do not apply to the conduct alleged?<sup>201</sup> Specifically:

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<sup>198</sup> See [617] (Count 2); [650] (Count 4).

<sup>199</sup> See [617] (Count 2); [650] (Count 4); [655] (Count 5).

<sup>200</sup> See [617] (Count 2); [650] (Count 4).

<sup>201</sup> See [621] – [627].

- (i) Was I correct to determine, implicitly, that Megaupload did not meet the statutory definition of Internet Service Provider in order for the protection of s 92B not to apply?

**No.**

- (ii) Was I correct to determine, implicitly, that the reference in s 92B(2)(c) to protection for Internet Service Providers not being subject to any “criminal sanction” does not prevent a prosecution under s 131 of the Copyright Act 1994?

**Not applicable.**

- (iii) Was I correct to determine, implicitly, that Parliament, in enacting the safe harbour provisions, did not intend for Internet Service Providers to be able to rely on the safe harbour provisions in the Copyright Act 1994?

**No.**

- (iv) Was I correct to determine that the reference to “without more” in s 92B is interpreted by reference to s 92C?

**Yes.**

- (h) Was I correct in determining that I did not need to identify the evidence I found to be admissible, sufficient and reliable?

**No such error made.**

- (i) Was I correct in determining that I did not need to identify the facts that I found to be established?

**No such error made.**

- (j) Was I correct in determining that I did not need to identify what inferences could be drawn, or how, from any established fact?

**No such error made.**

- (k) Was I correct in determining that I did not need to analyse the evidence as found by me (if any) as it related to an individual appellant when I was considering the case against that particular appellant?

**No such error made.**

- (l) Was I correct in determining that any established facts as found by me (if any) proved a prima facie case that the appellants had committed an offence under s 131 of the Copyright Act 1994?

**No.**

*Crimes Act 1961*

- 17.6 Was I correct in determining, implicitly, that copyright may be protected under the Crimes Act 1961?

**Rights of copyright holders are created and protected by the Copyright Act 1994, not the Crimes Act 1961. This does not mean that cases of fraud arising out of copyright infringement cannot be prosecuted under the Crimes Act if the relevant conduct falls within those provisions.**

- 17.7 Was I correct to determine, implicitly, that the reference in s 92B(2)(c) to protection for Internet Service Providers not being subject to any “criminal sanction” does not prevent a prosecution under the Crimes Act 1961

**Yes.**

*Dishonest use of a document (Crimes Act 1961, s 228)*

- 17.8 Did I correctly determine that the conduct alleged against the appellants fell within s 228 of the Crimes Act 1961,<sup>202</sup> in particular:

- (a) Was I correct in determining that I did not need to identify the evidence I found to be admissible, sufficient and reliable?

**No such error made.**

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<sup>202</sup>

See [615] (Count 2); [650] (Count 4); [655] (Count 5); [666] (Count 7); [670] (Count 8); [672] (Counts 9 – 13).

- (b) Was I correct in determining that I did not need to identify the facts that I found to be established?

**No such error made.**

- (c) Was I correct in determining that I did not need to identify what inferences could be drawn, or how, from any established fact?

**No such error made.**

- (d) Was I correct in determining that I did not need to analyse the evidence as found by me (if any) as it related to an individual appellant when I was considering the case against that particular appellant?

**No such error made.**

- (e) Was I correct in determining that any established facts as found by me (if any) proved a prima facie case that the appellants had committed an offence under s 228 of the Crimes Act 1961?

**Yes.**

*Accessing computer system for dishonest purpose (Crimes Act 1961, s 249)*

17.9 Did I correctly determine that the conduct alleged against the appellants fell within s 249 of the Crimes Act 1961,<sup>203</sup> in particular:

- (a) Was I correct in determining that I did not need to identify the evidence I found to be admissible, sufficient and reliable?

**No such error made.**

- (b) Was I correct in determining that I did not need to identify the facts that I found to be established?

**No such error made.**

- (c) Was I correct in determining that I did not need to identify what inferences could be drawn, or how, from any established fact?

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<sup>203</sup> See [609] (Count 2); [650] (Count 4); [666] (Count 7); [670] (Count 8); [672] (Counts 9 – 13).

**No such error made.**

- (d) Was I correct in determining that I did not need to analyse the evidence as found by me (if any) as it related to an individual appellant when I was considering the case against that particular appellant?

**No such error made.**

- (e) Was I correct in determining that any established facts as found by me (if any) proved a prima facie case that the appellants had committed an offence under s 249 of the Crimes Act 1961?

**Yes.**

*Obtaining by deception (Crimes Act 1961, s 240)*

17.10 Did I correctly determine that the conduct alleged against the appellants fell within s 240 of the Crimes Act 1961,<sup>204</sup> in particular:

- (a) Was I correct in determining that I did not need to identify the evidence I found to be admissible, sufficient and reliable?

**No such error made.**

- (b) Was I correct in determining that I did not need to identify the facts that I found to be established?

**No such error made.**

- (c) Was I correct in determining that I did not need to identify what inferences could be drawn, or how, from any established fact?

**No such error made.**

- (d) Was I correct in determining that I did not need to analyse the evidence as found by me (if any) as it related to an individual appellant when I was considering the case against that particular appellant?

**No such error made.**

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<sup>204</sup> See [674]; [677] (Counts 9 – 13).

- (e) Was I correct in determining that any established facts as found by me (if any) proved a prima facie case that the appellants had committed an offence under s 240 of the Crimes Act 1961?

**Yes.**

*Participation in an organised criminal group (Crimes Act 1961, s 98A)*

17.11 Did I correctly determine that the conduct alleged against the appellants satisfied the requirements of participating in an organised criminal group for the purposes of s 98A of the Crimes Act 1961,<sup>205</sup> in particular:

- (a) Was I correct in determining that I did not need to identify the evidence I found to be admissible, sufficient and reliable?

**No such error made.**

- (b) Was I correct in determining that I did not need to identify the facts that I found to be established?

**No such error made.**

- (c) Was I correct in determining that I did not need to identify what inferences could be drawn, or how, from any established fact?

**No such error made.**

- (d) Was I correct in determining that I did not need to analyse the evidence as found by me (if any) as it related to an individual appellant when I was considering the case against that particular appellant?

**No such error made.**

- (e) Was I correct in determining that any established facts as found by me (if any) proved a prima facie case that the appellants had committed an offence under s 98A of the Crimes Act 1961?

**Yes.**

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<sup>205</sup> See [638] (Count 1).

## **Treaty offence**

### *“Conspiracy to defraud”*

17.12 Did I identify the correct approach to the interpretation of Article II.16 of the US - NZ Extradition Treaty?<sup>206</sup>

**Yes.**

17.13 Did I apply the correct approach to the interpretation of Article II.16 of the US - NZ Extradition Treaty?

**Yes.**

17.14 Did I correctly determine that copyright infringement fell within the treaty offence of “conspiracy to defraud” under Article II.16 of the US - NZ Extradition Treaty,<sup>207</sup> in particular:

(a) Was I correct in determining that I did not need to identify the evidence I found to be admissible, sufficient and reliable?

**No such error made.**

(b) Was I correct in determining that I did not need to identify the facts that I found to be established?

**No such error made.**

(c) Was I correct in determining that I did not need to identify what inferences could be drawn, or how, from any established fact?

**No such error made.**

(d) Was I correct in determining that I did not need to analyse the evidence as found by me (if any) as it related to an individual appellant when I was considering the case against that particular appellant?

**No such error made.**

(e) Was I correct in determining that any established facts as found by me (if any) proved a prima facie case that the

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<sup>206</sup> See [538] – [544].

<sup>207</sup> See [593] (Count 2); [650] (Count 4); [666] (Count 7); [670] (Count 8); [672] (Counts 9 – 13).

appellants had committed the treaty offence of conspiracy to defraud?

**Yes.**

**C5. DUTY OF CANDOUR**

18.1 Did I correctly determine the scope of the respondent's duty of candour?<sup>208</sup>

**Yes.**

18.2 Did I correctly determine that the respondent had discharged its duty of candour in this case?

**Yes.**

**C6. RECORD OF CASE AND ITS SUPPLEMENTS**

19.1 Did I correctly determine that the ROC was admissible, including:

(a) Did I correctly determine the requirements of s 25(3)(a) of the Extradition Act?<sup>209</sup>

**Yes (at [482]).**

(b) Did I correctly apply the requirements of 25(3)(a) of the Extradition Act?

**Yes.**

(c) Did I correctly determine the requirements of s 25(3)(b) of the Extradition Act?<sup>210</sup>

**Yes (at [482]).**

(d) Did I correctly apply the requirements of s 25(3)(b) of the Extradition Act?

**No.**

19.2 Did I correctly determine the test as to the reliability of the ROC?

**No.**

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<sup>208</sup> See [689].

<sup>209</sup> See [482] – [483]; [527] – [528]; [535] – [537].

<sup>210</sup> See [482] – [483]; [537] – [528]; [535] – [537].



19.3 Did I correctly apply the test as to the reliability of the ROC?

**No.**

19.4 Did I correctly state what was required of the appellants in order to challenge the evidence against them?

**No.**

19.5 Did I correctly apply what was required of the appellants in order to challenge the evidence against them?

**No.**

19.6 Was I correct to determine that the reliability of the ROC had not been impugned by the appellants?

**Yes.**

19.7 Did I correctly determine the test as to sufficiency of the ROC?

**No.**

19.8 Did I correctly apply the test as to sufficiency of the ROC?

**No.**

19.9 Did I correctly determine the law on the drawing of inferences from any established fact(s) in the context of an eligibility hearing?

**Yes.**

19.10 Did I correctly apply the law on the drawing of inferences from any established fact(s) in the context of an eligibility hearing?

**Yes.**

19.11 If so, were the inferences drawn by me correct in the circumstances?

**Yes.**

**C7. SECTION 24(2)(d)**

20.1 Did I correctly interpret the role of the extradition court under s 24(2)(d)?

**Yes.**

20.2 Did I correctly apply the role of the extradition court under s 24(2)(d)?

**Yes.**

20.3 Did I correctly determine that the evidence established a prima facie case for any of the found extradition offences?

**Yes.**

20.4 In particular, on a count-by-count basis by reference to the counts in the Superseding Indictment, was I correct to determine:

(e) In respect of count 1 of the superseding indictment:

(i) That the conduct alleged under count 1 was as set out in my judgment at [632].

**Yes.**

(ii) That the conduct alleged under count 1 would have constituted a prima facie case of an offence under s 98A of the Crimes Act 1961, had it occurred in New Zealand. [638]<sup>211</sup>

**Yes.**

(f) In respect of count 2 of the superseding indictment:

(i) That the conduct alleged under count 2 was as set out in my judgment at [584].

**Yes.**

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<sup>211</sup>

“All of the elements of the offence in s 98A have been satisfied to a prima facie standard by the applicant and the respondents are therefore eligible for surrender on count 1.”

(ii) That the conduct alleged under count 2 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:

(aa) Section 249 of the Crimes Act 1961; [609]<sup>212</sup>

**Yes.**

(bb) Section 228 of the Crimes Act 1961; [615]<sup>213</sup>

**Yes.**

(cc) Section 131(1)(c) of the Copyright Act 1994; [617]<sup>214</sup>

**No.**

(dd) Section 131(1)(d)(ii) of the Copyright Act 1994; [617] and

**No.**

(ee) Section 131(1)(d)(iii) of the Copyright Act 1994. [617]

**No.**

(iii) That the conduct alleged under count 2 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty 1970. [593]<sup>215</sup>

**Yes.**

(g) In respect of count 3 of the superseding indictment:

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<sup>212</sup> "The alleged conduct in count 2 correlates with the offences in both s249(1) and s249(2). There is sufficient evidence to base a prima facie case against the respondents under s249(1) and s249(2) of the Crimes Act 1961,

<sup>213</sup> "The respondents are therefore eligible for surrender under the Act under s228(b) due to the correlation of that section with the conduct alleged in count 2."

<sup>214</sup> "The evidence in the ROC supports the conduct alleged in count 2. The same alleged conduct translates to breaches of s131(1)(c) and of s131(1)(d)(ii) or (iii) [of the Copyright Act 1994]".

<sup>215</sup> "The evidence is sufficient to find that a prima facie case is established against each of the respondents on count 2 under Art II.16 of the Treaty and the respondents accordingly eligible for surrender on count 2."

- (i) That the conduct alleged under count 3 was as set out in my judgment at [628].

**Yes.**

- (ii) That the conduct alleged under count 3 constituted a prima facie case of ‘conspiring to launder money’ as set out in Article II.19 of the US – NZ Extradition Treaty. [631]<sup>216</sup>

**Yes.**

(h) In respect of count 4 of superseding indictment:

- (i) That the conduct alleged in count 4 was as set out at [642] of my judgment.

**Yes.**

- (ii) That the conduct alleged under count 4 would have constituted a prima facie case of the following offences, had it occurred in New Zealand: [650]<sup>217</sup>

(aa) Section 249 of the Crimes Act 1961;

**Yes.**

(bb) Section 228 of the Crimes Act 1961;

**Yes.**

(cc) Section 131(1)(c) of the Copyright Act 1994;

**No.**

(dd) Section 131(1)(d)(ii) of the Copyright Act 1994; and

**No.**

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<sup>216</sup> “The respondents are therefore eligible for surrender on count 3 under Article II.19 of the Treaty.”

<sup>217</sup> “The evidence adduced by the applicant is sufficient to establish a prima facie case on each of the sections, and Art II.16 of the Treaty. The respondents are therefore eligible for extradition under count 4.”

(ee) Section 131(1)(d)(iii) of the Copyright Act 1994.

**No.**

(iii) That the conduct alleged under count 4 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty. [650]

**No.**

(i) In respect of count 5 of the superseding indictment:

(i) That the conduct alleged under count 5 was as set out in my judgment at [651] – [652].

**No.**

(ii) That the conduct alleged under count 5 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:

(aa) Section 228 of the Crimes Act 1961 (written as the Copyright Act in my judgment in error) (at [655])<sup>218</sup>; and

**Yes.**

(bb) Section 131(d)(ii) of the Copyright Act 1994. [655]<sup>219</sup>

**No.**

(j) In respect of count 6 of the superseding indictment:

(i) That the conduct alleged under count 6 was as set out in my judgment at [656].

**No.**

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<sup>218</sup> "There is sufficient evidence to establish a prima facie case pursuant to s228 Copyright Act [sic] that there was a dishonest use of documents (in the form of copyright infringing digital files) that resulted in the respondents obtaining a pecuniary advantage."

<sup>219</sup> "There is also sufficient evidence to establish a prima facie case pursuant to s131 Copyright Act that there was a distribution of copyright infringing objects ...."

(ii) That the conduct alleged under count 6 would have constituted a prima facie case of the following offences, had it occurred in New Zealand, specifically:

(aa) “The same conclusion can therefore be reached as in paragraph [626] herein that the respondents are eligible for extradition in count 6.” [658]

**Yes.**

(k) In respect of count 7 of the superseding indictment:

(i) That the conduct alleged under count 7 was as set out in my judgment at [659].

**No.**

(ii) That the conduct alleged under count 7 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:

(aa) Section 249 of the Crimes Act 1961; [666]<sup>220</sup>  
and

**Yes.**

(bb) Section 228 of the Crimes Act 1961. [666]

**Yes.**

(iii) That the conduct alleged under count 7 constituted a prima facie case of ‘conspiracy to defraud’ as set out in Article II.16 of the US-NZ Extradition Treaty 1970. [666]<sup>221</sup>

**No.**

(l) In respect of count 8 of the superseding indictment:

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<sup>220</sup> “The evidence produced at this hearing does establish a prima facie case for count 7 pursuant to s249 and 228 of the Crimes Act and pursuant to Art II.16 of the Treaty so as to render the respondents eligible for surrender.”

<sup>221</sup> Ibid.

- (i) That the conduct alleged under count 8 was as set out in my judgment at [667].

**Yes.**

- (ii) That the conduct alleged under count 8 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:

- (aa) Section 249 of the Crimes Act 1961; [670]<sup>222</sup>  
and

**Yes.**

- (bb) Section 228 of the Crimes Act 1961. [670]

**Yes.**

- (iii) That the conduct alleged under count 8 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty. [670]

**No.**

- (m) In respect of counts 9 – 13 of the superseding indictment:
  - (i) That the conduct alleged under counts 9 – 13 was as set out in my judgment at [671] and [675].

**Yes.**

- (ii) That the conduct alleged under counts 9 – 13 would have constituted a prima facie case of the following offences, had it occurred in New Zealand:

- (aa) Section 249 of the Crimes Act 1961; [672] and [677]<sup>223</sup>

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<sup>222</sup> “[T]he evidence does establish a prima facie case for count 8 pursuant to ss 249 and 229 of the Crimes Act and pursuant to Art II.16 of the Treaty so as to render the respondents eligible for extradition.”

<sup>223</sup> At [672]: “[T]he alleged specific acts of fraud [under counts 9 – 13] are captured by s249 and s228(b) of the Crimes Act as set out in the earlier counts.” At [677]: “The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents. The

Yes.

(bb) Section 228 of the Crimes Act 1961; [672] and [677]<sup>224</sup>

Yes.

(cc) Section 240 of the Crimes Act 1961; [674] and [677]<sup>225</sup>

Yes.

(iii) That the conduct alleged under counts 9 -13 constituted a prima facie case of 'conspiracy to defraud' as set out in Article II.16 of the US – NZ Extradition Treaty 1970. [672] and [677]<sup>226</sup>

Yes.

## **C8. RESTRICTIONS ON SURRENDER**

21.1 Did I correctly determine the legal test under s 7 of the Extradition Act?<sup>227</sup>

Yes.

21.2 If so, did I correctly apply the test under s 7 of the Extradition Act?

Yes.

21.3 Did I correctly determine the legal test applicable under s 8 of the Extradition Act?<sup>228</sup>

Yes.

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respondents are therefore eligible for extradition under counts 9 to 13.”

<sup>224</sup>

ibid.

<sup>225</sup>

At [674]: “The alleged conduct satisfies the elements of an offence under [sic] 240 and qualifies as a deemed Treaty offence.” At [677]: “The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents. The respondents are therefore eligible for extradition under counts 9 to 13.”

<sup>226</sup>

At [672]: “The alleged conduct translates to a Treaty offence under Art II.16.” At [677]: “The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents. The respondents are therefore eligible for extradition under counts 9 to 13.”

<sup>227</sup>

See [695] – [697].

<sup>228</sup>

See [695] – [697].



21.4 If so, did I correctly apply the test under s 8 of the Extradition Act?

**Yes.**

**C9. MATTERS FOR TRIAL**

22.1 Was I correct to determine that the matters at paragraphs 12.1-12.22 above were matters for trial, not for the eligibility Court?

**No material errors.**

**C10. MATTERS I DID NOT DETERMINE**

23.1 To the extent I did not determine any matters (including without limitation those matters at paragraphs 13.1-13.15 above and in relation to Stays 2 and 3), as opposed to determining that they were matters for trial, was I correct to not determine those matters and, in particular, was I correct to find that such matters were irrelevant.

**No material errors.**

**C.11 ELIGIBILITY FOR SURRENDER**

23.2 Was I correct to determine that the appellants are all eligible for surrender on all thirteen counts in the superseding indictment?

**Yes.**

**APPENDIX 3**

**CASE STATED**

**UNITED STATES OF AMERICA**

**CASE STATED ON APPEAL FROM DETERMINATION OF DISTRICT  
COURT<sup>229</sup>**

*Section 69 Extradition Act 1999*

No

In the High Court of New Zealand

Auckland Registry

In the Matter of an appeal from the determination of the District Court at North Shore

Between the United States of America

And Kim Dotcom, Bram van der Kolk, Finn Batato and Mathias Ortmann.

The United States of America sought the surrender of Kim Dotcom, Bram van der Kolk, Finn Batato and Mathias Ortmann from New Zealand to the United States of America under Part 3 of the Extradition Act 1999 in relation to the following offences being all 13 counts in the United States superseding indictment (which is incorporated by reference as part of this case stated) namely:

Count one: conspiracy to commit racketeering in violation of Title 18, United States Code, Section 1962(d).

1. Count two: conspiracy to commit copyright infringement, in violation of Title 18, United States Code, Section 371.
2. Count three: conspiracy to commit money laundering, in violation of Title 18, United States Code, Section 1956(h).
3. Count four: criminal copyright infringement by distributing a copyrighted work being prepared for commercial distribution on a computer network, and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(d)(2), and Title 17, United States Code, Section 506(a)(1)(C).

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<sup>229</sup> Extradition Regulations 1999, Schedule, Form EA 10

4. Count five: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
5. Count six: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
6. Count seven: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
7. Count eight: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
8. Count nine: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
9. Count ten: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
10. Count eleven: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
11. Count twelve: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
12. Count thirteen: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.

Kim Dotcom, Bram van der Kolk, Finn Batato and Mathias Ortmann defended the proceedings, and after hearing the parties and the evidence adduced by them, on 23 December 2015, I made the following determination that: Kim Dotcom, Bram van der

Kolk, Finn Batato and Mathias Ortmann are eligible for surrender to the United States on all 13 counts in the United States superseding indictment, namely:

13. Count one: conspiracy to commit racketeering in violation of Title 18, United States Code, Section 1962(d).
14. Count two: conspiracy to commit copyright infringement, in violation of Title 18, United States Code, Section 371.
15. Count three: conspiracy to commit money laundering, in violation of Title 18, United States Code, Section 1956(h).
16. Count four: criminal copyright infringement by distributing a copyrighted work being prepared for commercial distribution on a computer network, and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(d)(2), and Title 17, United States Code, Section 506(a)(1)(C).
17. Count five: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
18. Count six: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
19. Count seven: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).
20. Count eight: criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement in violation of Title 18, United States Code, Sections 2 and 2319(b)(1), and Title 17, United States Code, Section 506(a)(1)(A).

21. Count nine: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
22. Count ten: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
23. Count eleven: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
24. Count twelve: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.
25. Count thirteen: fraud by wire, and aiding and abetting of fraud by wire, in violation of Title 18, United States Code, Sections 2 and 1343.

Within 15 days after the determination, the United States of America filed in the office of the District Court at North Shore a notice of intention to appeal by way of case stated for the opinion of this Honourable Court on a question of law only; and I therefore state the following case:

**It was proved upon the hearing that:**

26. On 13 January 2012, the Ministry of Foreign Affairs and Trade received diplomatic notes from the United States Embassy in Wellington requesting the provisional arrest of the respondents for the purpose of extradition.
27. In response to that request, Crown Law (on behalf of the appellant), filed with the North Shore District Court an application dated 17 January 2012 for the provisional arrest of the respondents, together with the appropriate supporting documentation.
28. On 18 January 2012, the North Shore District Court issued provisional arrest warrants for the respondents under s 20 of the Act.
29. On 20 January 2012, the respondents were arrested by the New Zealand Police.

30. On 28 February 2012, the appellant, via a diplomatic representative, delivered four formal requests to the Ministry of Foreign Affairs and Trade for the surrender of the four respondents for extradition to the United States.
31. These formal requests were then transmitted to the Ministry of Justice. Upon receipt of these formal requests to surrender from the appellant the then Minister of Justice, the Honourable Judith Collins, gave written notification of such matters, dated 1 March 2012, to the North Shore District Court under s 23(4) of the Act.

**I determined that:**

***Count 2***

*Treaty Article II.16*

32. There is an abundance of evidence that Mr Ortmann and Mr van der Kolk administered a rewards programme for the Mega group from September 2004 until July 2011. This enabled subscribers to earn rewards, including cash payments, if there was a high level of traffic through the URL links associated with their accounts. This operated as an incentive to upload popular works and to post links on third party linking sites so they would be widely accessible. There is also an abundance of evidence in the ROC that works that infringed the right of copyright owners were uploaded and in demand. There is evidence that traffic to copyright infringing material substantially drove the growth of the Mega business and this was known and encouraged by Messrs Ortmann, van der Kolk, and Dotcom.
33. It can be inferred that Mr Batato had knowledge of the Mega business model and participated in a conspiracy through promoting the Mega business as its marketing manager.
34. There is a prima facie case that the respondents did share a common intention to:
- 34.1 obtain popular content knowing that much of it was infringing content by offering rewards;

- 34.2 encourage widespread access to that material by rewarding uploaders for the traffic they generated; and
  - 34.3 maintain the availability of copyright infringing content.
35. There is evidence that the Mega businesses obtained large profits (passed on to the respondents by their respective drawings) from the unauthorised use of copyright content which prejudiced the property rights of the copyright owners. There is evidence that the respondents knew that the copyright owners were so prejudiced.
36. Inferences can be drawn from the evidence that Messrs Dotcom, Ortmann and van der Kolk agreed:
- 36.1 They would attract popular copyright infringing files by offering rewards;
  - 36.2 They would pay uploaders whose content attracted substantial traffic, irrespective of whether that content infringed copyright;
  - 36.3 They would fix free viewing times on Megavideo with a view to exploiting the popularity of commercial movies subject to copyright, thereby maximising the incentive to purchase subscriptions;
  - 36.4 They would not delete or remove all access to files subject to DMCA takedown notices;
  - 36.5 They would disguise the hosting of infringing files by manipulating the front pages of their sites, suppressing the identities of users on public pages, concealing the hosting of videos longer than 10 minutes, and populating Megavideo front pages with user-generated content unlawfully reproduced from YouTube;
  - 36.6 They would conduct their auditing procedures to allow infringing content to be hosted;
  - 36.7 They would take steps to frustrate the “justice system” in the event of legal action against them;



- 36.8 They would expedite the mass distribution of infringing files by copying the most popular content to Cogent servers and converting video files into a form which enabled more rapid distribution;
  - 36.9 They would showcase the availability of high definition copyright movies;
  - 36.10 They would frustrate the efforts of copyright owners to have infringing content taken down;
  - 36.11 They would deceive copyright owners about the action they took in response to takedown notices;
  - 36.12 They would encourage the activities of repeat infringers and shelter them from detection by copyright owners; and
  - 36.13 They would disguise the hosting of infringing content by making Megaupload non-searchable and strictly limiting the searchability of the Megavideo site. At the same time, they would exploit third party linking sites as a means of making infringing content available to internet users.
37. It can also be inferred that Mr Batato joined the business in 2007 and:
- 37.1 Participated with knowledge that Mega unlawfully exploited traffic to the large volumes of infringing content it hosted;
  - 37.2 Appreciated that Mega needed to conceal the extent of infringing content it hosted, by restricting or preventing direct searching of its holdings;
  - 37.3 Appreciated that traffic to infringing content was conducted on a large scale through the medium of third party linking sites;
  - 37.4 Encouraged users to find infringing content using third party linking sites;
  - 37.5 Directly advanced the conspiracy by selling Megaclick advertising to websites he knew were engaged in copyright infringement; and

- 37.6 Assisted the activities of repeat infringers by providing them with advertising services on Mega sites.
38. There is evidence of conduct from which it may be reasonably inferred that each of the respondents was a member of this conspiracy. Mr Batato joined the Mega business after the time the applicant alleges the conspiracy began. That does not exculpate Mr Batato as there is evidence of conduct from which it may reasonably be inferred that he joined the conspiracy after it was already operating. He may have played a smaller role than the other respondents but that does not exclude him from the alleged offending. The evidence is sufficient to find that a prima facie case is established against each of the respondents on count 2 under Art II.16 of the Treaty and the respondents accordingly eligible for surrender on count 2.

*Section 249 Crimes Act 1961*

39. The USA and New Zealand are both parties to TOC. Any offence encapsulated by s 101B(1)(c) is deemed to be an offence under the Treaty.
40. The respondent group is greater than 3 people as the allegations are against 7 persons who were officers in the Mega businesses, 4 of whom are the respondents in this eligibility hearing.
41. All four respondents are in New Zealand.
42. There is evidence to support the elements of the offences under s 249, that:
- 42.1 The respondents directly or indirectly accessed a computer system.
- 42.2 They obtained a pecuniary advantage, benefit, or valuable consideration, or caused loss to any other person.
- 42.3 The obtaining or causing was done dishonestly, or by deception and without claim of right.
43. It is not in dispute that:
- 43.1 Mega was an online cloud storage business using a complex server network computer system.

- 43.2 The Mega sites were operated by a very powerful computer system capable of handling a very large traffic flow and shared a “back-end database” giving access to all files.
  - 43.3 The respondents were all senior officers of Mega. Mr Ortmann and Mr van der Kolk were responsible for the programming and technical design of the system. They were also involved in the running of the site, including interrogating the database, administering the rewards system, processing takedown notices and editing the front pages. Mr Dotcom oversaw the running of the computer system and the uses to which it was put. He frequently issued directions about the operations of the website to Mr Ortmann and Mr van der Kolk.
  - 43.4 Mr Batato controlled advertising work on the Mega sites.
44. There is evidence to support:
- 44.1 Mr Dotcom and Mr Batato having indirect if not direct access to the Mega computer system.
  - 44.2 The respondents accessed other computer systems, such as their acquisition of the YouTube videos.
  - 44.3 They knowingly distributed copyright infringing material through their own computer system by accessing a user’s computer system.
  - 44.4 The Mega computer system was run with the dishonest purpose of attracting, storing and then obtaining income from the traffic of content subject to copyright.
  - 44.5 They knew they had no claim of right to copyright protected content.
  - 44.6 They trafficked the copyright protected content so as to obtain income from it.
  - 44.7 They were aware that their activities would result in a financial loss to the copyright holder or, at the very least, prejudice their property rights.

44.8 Their business model amounted to an illegal conspiracy under art II.16 of the Treaty.

45. The alleged conduct in count 2 correlates with the offences in both s 249(1) and s 249(2). There is sufficient evidence to base a prima facie case against the respondents under s 249(1) and s 249(2) of the Crimes Act 1961.

***Count 5***

46. This alleged offending concerns acts of distribution of copyright infringing content for a 180 day period up to and including 19 January 2012. The alleged conduct translates into deemed Treaty offending under ss 249 and 228 Crimes Act, s 131 Copyright Act, and Art II.16 of the Treaty as in count 4.

47. The elements of the alleged offending are the same as those set out in count 2.

48. The appellant has adduced evidence of Mega having possession of a number of movies in breach of the property rights of the copyright owner. It has also adduced evidence of the scale usage of the copyright infringing material and the actions taken in response to takedown notices. These include:

48.1 Unique file of “Lord of the Rings”:

48.1.1 More than 100 URL links to this infringing file;

48.1.2 89 links still active and publicly available in 2012;

48.1.3 Viewed at least 250 times;

48.1.4 At least 4 links removed after takedown notification.

48.2 Two unique files embodying “Twilight Saga: Breaking Dawn – Part 1”:

48.2.1 In two files;

48.2.2 The first file viewed at least 32,000 times from Mega sites;

48.2.3 The second file viewed at least 18,000 times;

- 48.2.4 At least 17 URL links to first file;
  - 48.2.5 16 of those links still active in 2012;
  - 48.2.6 At least 12 links to the second file;
  - 48.2.7 11 of those links still active in 2012;
  - 48.2.8 At least 1 link to each file removed for copyright infringement.
- 48.3 Unique file of “Happy Feet Two”:
- 48.3.1 Viewed more than 1,000 times;
  - 48.3.2 More than 100 URL links;
  - 48.3.3 74 of those links still active in 2012;
  - 48.3.4 At least 4 links removed after takedown notifications.
- 48.4 Unique file of “Puss in Boots”:
- 48.4.1 Viewed at least 10,000 times;
  - 48.4.2 More than 150 URL links;
  - 48.4.3 More than 119 of those links still active in 2012;
  - 48.4.4 At least 14 URL links removed for takedown notification.
- 48.5 Unique file of “Bored to Death” episode:
- 48.5.1 Viewed at least 1,800 times;
  - 48.5.2 More than 145 URL links;
  - 48.5.3 136 of those links still active in 2012;
  - 48.5.4 At least 3 links removed for takedown notification;

- 48.5.5 Abuse tool and email notification of infringement. 20 new links created after email notification in November 2011, resulting in 6 further views.
- 48.6 Unique file of "Dungeon Siege III" (software)
  - 48.6.1 More than 45 URL links;
  - 48.6.2 34 of those links still active in 2012;
  - 48.6.3 7 URL links removed after takedown notification.
- 49. Some of the unique files have had links disabled for copyright infringement, but the file and other links have been retained so that access to the copyright infringing content could and did continue. It is submitted that this is indicative of a course of behaviour from which a dishonest interest can be inferred. The action of removing a link to mollify a copyright owner but keeping the file with, in some cases many, links to it did little to abate the loss to a copyright owner and enabled the Mega business to continue to profit from the copyright infringing content.
- 50. There is sufficient evidence to establish a prima facie case pursuant to s 228 Copyright Act that there was a dishonest use of documents (in the form of copyright infringing digital files) that resulted in the respondents obtaining a pecuniary advantage.
- 51. There is also sufficient evidence to establish a prima facie case pursuant to s 131 Copyright Act that there was a distribution of copyright infringing objects and the respondents knew the Mega business was being run as a vehicle to distribute the copyright infringing files.
- 52. A prima facie case is therefore established under count 5 so as to render the respondents eligible for extradition.

***Count 7***

- 53. In count 7, this alleged offending concerns acts of distribution of copyright infringing content for a period of 180 days up to and including 16 August

2008. The same Treaty offences apply as in count 6 (see para [560]) and the only remaining issue for count 7 is to decide if a prima facie has been established.

54. The appellant has adduced evidence that:

54.1 “Cloverfield” (motion picture), downloaded up to 506,535 times;

54.2 “Meet the Spartans” (motion picture) downloaded up to 144,174 times;

54.3 “The Forbidden Kingdom” (motion picture) downloaded tens of thousands of times;

54.4 An episode of “Prison Break” (television programme) downloaded tens of thousands of times.

55. In particular:

55.1 Two particular copyright infringing files, each with a single unique MD5 hash (Parts One and Two) embodying “The Forbidden Kingdom”:

55.1.1 Part One downloaded at least 99,000 times from the Mega sites;

55.1.2 Part Two downloaded at least 97,000 times;

55.1.3 At least 6 URL links pointed to Part One;

55.1.4 At least 3 of those links were still active and publicly available in January 2012;

55.1.5 At least 7 URL links pointed to Part Two;

55.1.6 At least 4 of those links were still active and publicly available in January 2012.

55.1.7 Mega removed at least one link for each part of the movie after infringement notification by the copyright owner.

55.2 A particular copyright infringing file with a single, unique MD5 hash embodying an episode of the television series “Prison Break”:

55.2.1 Was viewed at least 94,000 times and viewed at least 500 times from Mega sites.

55.2.2 More than 55 Mega URL links pointed to this file;

55.2.3 48 of those links were still active and publicly available on Mega sites in January 2012;

55.2.4 At least 8 links were removed after infringement notification by or on behalf of the copyright owner.

55.3 A particular copyright infringing file with a single, unique MD5 hash embodying an episode of the motion picture “Hancock”:

55.3.1 Was downloaded at least 160,000 times and viewed at least 530 times from Mega sites;

55.3.2 More than 200 Mega URLs linked to this file;

55.3.3 164 of those links were still active and publicly available on Mega sites in January 2012;

55.3.4 At least 30 of the URL links were removed after infringement notification by or on behalf of the copyright owner, including two emails dated 9 August 2008;

55.3.5 After that date, more than 150 new Mega URL links were created, through which 4,000 downloads and 170,000 views occurred.

56. On 20 August 2003 s 131A of the Copyright Act came into force. It says:

Despite s 14 of the Summary Proceedings Act 1957, an information in respect of an offence against s 131 may be laid at any time within 3 years of the time when the matter of the information arose.

57. It was then repealed on 1 July 2013.



58. The evidence produced at this hearing does establish a prima facie case for count 7 pursuant to ss 249 and 228 of the Crimes Act and pursuant to Art II.16 of the Treaty so as to render the respondents eligible for extradition.
59. The offences alleged in count 7 are within a period when s 131A of the Copyright Act 1994 was in force. Under s 24(2)(d) of the Act this Court must be satisfied that the evidence produced would, according to the law of New Zealand, justify a person's trial if the offence had occurred within the jurisdiction of New Zealand. On that basis, the respondents would not be eligible for surrender based on s 131.
60. Section 11 of the Act says that the provision of this Act must be construed to give effect to the Treaty. The appellant submits that a domestic time limit is not a bar to determining eligibility for a Treaty offence and it was a continuous offence up until January 2012.
61. With respect to the appellant's submission, I do not agree. Section 131A is quite specific and does not allow for any exceptions. It is clear that the alleged offending in count 7 is not within the jurisdiction of this Court under s 131 according to the law of New Zealand. Count 7 is also framed for a specific period up to the end including 16 August 2008. It does not lay a charge of continuous offending after that date. The respondents are therefore not eligible for surrender on count 7 pursuant to s 131.

### ***Count 8***

62. In count 8, the US grand jury charges that the respondents for the 180 days up to and including 31 October 2007, in the Eastern District of Virginia and elsewhere, wilfully infringed copyrights, for the purposes of commercial advantage and private financial gain, from the YouTube.com platform, by reproducing and distributing by electronic means during the 180-day period at least 10 copies and phonorecords of one or more copyrighted works which had a total retail value in excess of US\$2,500.
63. The alleged conduct translates into the same deemed Treaty offences as count 2 herein. The remaining issue for count 8 is whether the applicant's evidence establishes a prima facie case.

64. The appellant alleges a mass acquisition of YouTube videos in 2007. The ROC provides evidence that at least 10 copies of copyright infringing material were reproduced and distributed by a Mega site. It also provides evidence of at least 10 YouTube videos from 2007 were still available on Mega sites in January 2012 and the YouTube videos had been viewed thousands of times. There is also evidence that when the copyright owners of those clips discovered them on Mega sites and complained that they were deceived about the action taken in response to the complaint. There is also evidence that the uploading of the copyright infringing material was performed or directed by at least 3 of the respondents in this hearing.
65. The evidence does establish a prima facie case for count 8 pursuant to ss 249 and 228 of the Crimes Act and pursuant to Art II.16 of the Treaty so as to render the respondents eligible for extradition.
66. For the same reasons given in paragraphs 62-64 above, count 8 must fail with respect to the charge pursuant to s 131 of the Copyright Act.

**Documents incorporated in this case stated**

67. The Record of the Case together with its supplements and my judgment dated 23 December 2015 form part of this case stated.

**The questions for the opinion of this Court are whether my decision was erroneous in point of law, and in particular:**

68. In relation to count 5, was I correct to refer to s 228 Copyright Act 1994 in paragraph [655] (as reproduced in paragraph 52 of this case stated) or should this have been a reference to s 228 Crimes Act 1961?

**This was intended to be a reference to s 228 of the Crimes Act 1961.**

69. In relation to count 5, having determined that the alleged conduct translated into deemed treaty offending under s 249 of the Crimes Act 1961, was the only reasonable conclusion available to me that there was sufficient evidence to establish a prima facie case pursuant to s 249 of the Crimes Act 1961? **Yes.** Alternatively, was I correct not to determine that, in relation to s 249 of the

Crimes Act 1961, there was sufficient evidence to satisfy s 24(2)(d) of the Extradition Act? **No.**

70. In relation to count 5, having determined that the alleged conduct translated into treaty offending under Article II.16 of the Treaty, was the only reasonable conclusion available to me that there was sufficient evidence to establish a prima facie case under Article II.16 of the Treaty? **Not applicable because count 5 does not translate to a Treaty offence under art II.16.** Alternatively, was I correct not to determine that, in relation to article 11.16 of the Treaty, there was sufficient evidence to satisfy s 24(2)(d) of the Extradition Act? **Not applicable.**
71. In relation to count 7, was I correct to determine that the respondents were not eligible for surrender under s 131 of the Copyright Act 1994 by reason of the operation of the limitation period in s 131A of the Copyright Act 1994? **No.**
72. In relation to count 8, was I correct to determine that the respondents were not eligible for surrender under s 131 of the Copyright Act 1994 by reason of the operation of the limitation period in s 131A of the Copyright Act 1994? **No.**

April 2016

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District Court Judge