

**Media Summary of Amicus Curiae Submissions
by AUSTRALIAN CONSUMERS' ASSOCIATION PTY LTD,
ELECTRONIC FRONTIERS AUSTRALIA &
NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES
[Prepared by the Communications Law Centre]**

Basis of *Amici* Claim

1. The proposed *amici* sought only to make submissions from the perspective of the consumers of Peer-to-Peer ("P2P") technologies. This user-based interpretation includes the legal interests of both the owners and users of copyright who utilise P2P facilities as a means to communicate a broad range of material in various formats. *Amici* support an interpretation of the Copyright Act that will encourage innovation and access to new technologies, consonant with the Objects of the Digital Agenda Act.
2. *Amici* should not and did not want to address contentious factual matters.
3. The *amici* are independent of the interests of the parties and sought only to offer assistance to the Court. No legal or other representative for any party has written the submission in whole or in part. *Amici* are non-profit organisations serving the community interest. They are represented by the Communications Law Centre at Victoria University, pro bono counsel, and paralegal volunteers.
4. Collectively the *amici* represent the consumer interest in accessing a wide range of inexpensive and accessible goods in the digital environment (through both accessing and communicating content digitally) (ACA), the privacy interests of citizens using such technology (CCL), and the interests of technology creators and innovators contributing to the developments of such technologies now and in the future (EFA).
5. This case is a test case, raising new and novel issues. Some of the provisions of the Copyright Act at issue have never been interpreted before. The assistance of impartial experts was put forward as being useful not only because of the novelty of the issues, but also because of the potentially broad economic, social, cultural and political implications of a decision involving legislation that affects communication facilities.
6. All digital technologies are copying technologies; even if copying is not their primary purpose, they operate by making, manipulating and moving copies of pieces of information. A decision in this matter has major ramifications not just for P2P and other communication facilities, but for digital technologies generally.

7. P2P communication facilities such as KaZaa are multi-use general-purpose technologies. They can be used to communicate all manner of data, comprising audio, video, visual and text files in a multitude of digital formats. Such files may be non-copyright files in the public domain, files protected by creative commons or other forms of permissive licence, copyright files that are digitally rights managed, or infringing copies of works or copyright protected subject-matter.
8. P2P technologies have been developed to advance system efficiencies in file transfers using the Internet, and were not generated simply in an attempt to avoid the provisions of copyright law. The present and potential value of Internet-based communication technologies such as P2P is vast, and extends from the cultural realm to the economic realm.

Objects Of The Digital Agenda Act

9. The Objects of the *Digital Agenda Act* recognise that alongside the legislative monopoly conferred by copyright is also the public interest in having access to information. This interest is acute in the era of digital communication and information technology. Copyright monopolies serve not only creators, but also consumers and the public generally, by encouraging creators to produce artistic and scientific works.
10. *Amici* submit that the instant case is unprecedented in that a copyright claim is being used to attempt to regulate the operational functions and distribution of a multi-purpose technology, rather than regulating the use of that technology. The Copyright Act grants rights in relation to protection of the content, not the means of distribution.
11. To require software providers to modify their products in order to control or deter customers' potentially infringing uses involves the introduction of a new legal duty upon unrelated third parties. This is a highly novel claim and seeks to extend the copyright monopoly well beyond the limit granted by Parliament. Copyright law ought not inhibit the development and design of P2P technology, especially so early in the evolution of the technology. To do so will cause great harm to the development of digital technologies and will ultimately harm both the public interest and the interest of copyright holders themselves. This result would run contrary to all of the express objects of the Digital Agenda Act.

Inappropriateness Of Surrogate (Third Party) Enforcement And Disparate Enforcement

12. *Amici* acknowledge that copyright owners have a legitimate interest in preventing infringing use of their intellectual property. However, they submit

that the primary responsibility for preventing infringement rests with the owners of the copyright property themselves.

13. Extension of the scope of application of the Copyright Act by judicial decision to require surrogate enforcement of copyright owners' statutory rights by unrelated third parties, such as P2P developers and providers, is not an appropriate response to legislative and market shortcomings.
14. Further, *amici* submit that the Copyright Act ought not be extended so that software developers and providers are liable for authorisation of infringement by reason of provision by them of software facilities. This would amount to a disparate standard of enforcement if other providers in the complex chain of transactions which concludes with an end-user's infringing act were not also held liable. Telecommunications carriers and ISPs provide the means of communication, the manufacturers of computer hard drives, blank CDs and MP3 devices such as iPods provide the means of storage, while the Microsoft Corporation creates both the "My Shared Drive" facility in the Microsoft Windows Operating System and the "Explorer" web browser that allow KaZaa and other P2P software to operate. Further the creators of MP3 players such as Windows Media and RealPlayer provide the means to access and further reproduce infringing copies of works.

Guidance from Comparable Jurisdictions

15. The *amici* attempted to highlight the importance and desirability of comity with decisions handed down in comparable jurisdictions, and submitted that particular consideration ought be given to the following principles developed in comparable jurisdictions (UK, USA and Canada):
 - A test in authorisation of general purpose technology / capacity for substantial non-infringing use. Thus, where the product or technology is capable of substantial or commercially significant non-infringing uses, actual, rather than constructive knowledge, should be required before authorisation is found.
 - A legal presumption that there is authorisation of use of the facility for a lawful purpose only, unless rebutted. *Amici* submitted that such an approach is in keeping with the structure of the Copyright Act, and with the Objects of the Digital Agenda Act to balance the interests of *creators and investors in new online technologies, promote certainty for information technology industries and promote new technologies*. Innovation is inherently commercially risky, it requires substantial capital and other investment. Such risks will not be taken in the Australian market without legal certainty. Australian creators and investors in new technologies will be encouraged in their efforts to innovate and release new products if

supported by the presumption in copyright law that they had only authorised lawful use of those products.

- Protection for the value of user privacy. The balancing of intellectual property rights enforcement with privacy rights can easily be forgotten, especially when those whose privacy may be affected are not parties. The Amici submitted that actions such as monitoring the content of communications and the identification of end-users, would impermissibly breach users' privacy interests which are protected by both the Privacy Act 1988 and the Telecommunications Act 1997.
- Promotion of new technologies. *Amici* submitted that to hold the providers of communication facilities in the digital environment as authorising infringement will potentially operate as a massive disincentive against the many legitimate uses of this technology and against the development of future technologies.

16. While the Court indicated it would not be swayed by international jurisprudence, it would still consider and decide what weight to give the *amici* submission on the interpretation of the Australian legislation.
17. Internet codes of conduct from a variety of comparable countries support the view, that there is a global standard of reasonable steps for online communication facility providers. Whilst preserving and protecting free exchange of ideas and information, this standard requires the providers to inform their users with clear and concise information and warnings about copyright infringement in order to enable users to exercise a responsible choice about their use of the facility. None of the parties referred to these codes of practice and the Court indicated that it would not receive the introduction of this point by the amici.

Remedies

18. Preventing the distribution of P2P facilities would impact upon many important public interests and ultimately lead to a suppression of innovation and competition. This may result in fewer and costlier products in the marketplace for Australian consumers.
19. Additionally, preventing the provision and distribution of P2P facilities may result in providers of similar facilities choosing to discontinue provision of innovative communication facilities.

20. The Court heard much evidence on the efficacy, or otherwise, of filters in a P2P facility such as KaZaa. The *amici* submitted that a filter which captures non-infringing content is a major public interest concern because it will impede the ability of consumers to access material, and therefore conflicts with the Object of the Digital Agenda Act to *promote reasonable access to copyright material online*. Also it could impede the right of copyright holders to communicate their works to the public by improperly blocking the transmission of their content. This is likely to have a negative effect on copyright owners, such as unpublished authors and musicians without access to recording deals, who wish to, but cannot reliably use the P2P facility to communicate their content.
21. *Amici* submitted that a remedy, such as specific notice and warnings for end users which is directed at ensuring responsible end-use and deterrence through education would be in keeping with the Objects of the Digital Agenda Act to *promote reasonable access to copyright material online, promote new technologies, promote certainty for information technology industries and end users of copyright materials and provide a balancing of interests*.
22. An economic model recently posed by Prof Lawrence Lessig in relation to the transfer of music files in the digital environment is useful:¹

File sharers share different kinds of content. We can divide these different kinds into four types.

A. There are some who use sharing networks as substitutes for purchasing content. Thus, when a new Madonna CD is released, rather than buying the CD, these users simply take it. ...

B. There are some who use sharing networks to sample music before purchasing it. Thus, a friend sends another friend an MP3 of an artist he's not heard of. The other friend then buys CDs by that artist. The net effect of this sharing could increase the quantity of music purchased.

C. There are many who use sharing networks to get access to copyrighted content that is no longer sold or that they would not have purchased because the transaction costs off the Net are too high. This use of sharing networks is among the most rewarding for many. Songs that were part of your childhood but have long vanished from the marketplace magically appear again on the network ...

D. Finally, there are many who use sharing networks to get access to content that is not copyrighted or that the copyright owner wants to give away.

¹ Lawrence Lessig, *Free Culture* (2004) at 68-73, citations within text omitted.

How do these different types of sharing balance out? Let's start with some simple but important points. From the perspective of the law, only type D sharing is clearly legal. From the perspective of economics, only type A sharing is clearly harmful. Type B sharing is illegal but plainly beneficial. Type C sharing is illegal, yet good for society (since more exposure to music is good) and harmless to the artist (since the work is not otherwise available). So how sharing matters on balance is a hard question to answer – and certainly much more difficult than the current rhetoric around the issue suggests.

We start to answer this question by focusing on the net harm, from the standpoint of the industry as a whole, that sharing networks cause.

The “net harm” to the industry as a whole is the amount by which type A sharing exceeds type B. If the record companies sold more records through sampling than they lost through substitution, then sharing networks would actually benefit music companies on balance.

...

One benefit is type C sharing – making available content that is technically still under copyright but is no longer commercially available. This is not a small category of content. There are millions of tracks that are no longer commercially available. And while it's conceivable that some of this content is not available because the artist producing the content doesn't want it to be made available, the vast majority of it is unavailable solely because the publisher or the distributor has decided it no longer makes economic sense to the company to make it available.

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Finally, and perhaps most importantly, file-sharing networks enable type D sharing to occur – the sharing of content that copyright owners want to have shared or for which there is no continuing copyright. This sharing clearly benefits authors and society.

Communications Law Centre

Date: 23 March, 2005