



**Australian Vice-Chancellors' Committee**  
*the council of Australia's university presidents*

***Peer-to-Peer File Sharing:  
the Legal Landscape***

**November 2003**

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# Peer-to-Peer File Sharing: the Legal Landscape

## 1. Introduction

The music and motion picture industries have declared war on peer-to-peer (P2P) file trading. Universities, both in Australia and overseas, have been a major focus of this campaign. This paper examines the legal landscape relating to P2P file trading. Is it *per se* illegal? Who can be liable? What, potentially, are the penalties?

In Australia, three universities have been subject to Federal Court action by the music industry with a view to seeking evidence that students have been using university systems to engage in unlawful trading of music files.

The copyright liability arising from the use by staff, students and others of university computer systems to engage in P2P file sharing is, potentially, very significant. This activity can, depending on the circumstances, trigger both civil and criminal liability. Universities are actively managing these copyright compliance risks. The AVCC has recently circulated a Resource Paper on Content, IT Systems and the Internet, to assist them in this process. This additional paper is designed to compliment the earlier resource paper. It does not however contain an exhaustive discussion of the law relating to P2P but rather, is intended to answer some of the questions which arise and to explode some of the myths.

If universities are to address the challenge posed by the rise of P2P networks they will need to get the message out to staff and students that use of university systems to engage in practices which infringe copyright exposes the university and the individuals involved to civil and possibly criminal sanctions, and that such use will not be tolerated. It is hoped that this Information Paper will assist universities in that challenging but important endeavour.

**John Mullarvey**  
**Chief Executive Officer**

## 2. What is P2P?

P2P software facilitates the sharing of files between computer users. Files can be shared between users without the need for one user to email a file to another.

One of the earliest P2P file sharing systems was Napster. Users connected to one of a myriad of servers from which they could obtain files which had been made available by other users.

The latest generation of P2P "systems" (eg Grokster, Streamcast, KaZaA) are far less centralized than the old Napster system. There are no centralized servers; rather users download software (typically for free) which effectively turns each user's computer into a separate internet server, thus creating a totally decentralized system.

## 3. Is P2P *per se* unlawful?

P2P is **not** *per se* unlawful.

Generally, there will be no infringement of copyright in merely using P2P software. This is because the software is, in most cases, made available freely by the owners of copyright in circumstances giving rise to an implied licence. Of course, if this is not the case then mere use of the software without license may infringe copyright *in the software*.

Nor will the use of P2P to share files involve a copyright infringement where the owner of copyright in the material being shared has consented to this. For example, academics and students may use P2P to share their work in order that others can provide critical comment. A lecturer might use P2P to make material available to his or her students.

It is the use of P2P to share or trade copyright works *without* the consent or license of the copyright owner that has the potential to give rise to an action for infringement of copyright. The reason for this - as will be discussed in more detail below- is that merely making copyright material available on a server in a form in which it can be accessed by others will, in most cases, amount to an exercise of the copyright owner's right of "communication to the public" as well as an exercise of the reproduction right (ie in making the electronic copy which is communicated to others).

## 4. Copyright law and P2P

### 4.1 Strict liability

The *Copyright Act* 1968 ("the Act") imposes strict liability; there is no requirement to show that an infringement occurred "knowingly" or "willfully". These states of mind will, however, be relevant to damages, which are discussed below.

### 4.2 Rights comprised in copyright

Published musical works, artistic works, sound recordings and cinematographic films are all protected by copyright.<sup>1</sup> Copyright is a bundle of exclusive rights which are granted to the owner.

The owner of copyright in a musical work has the exclusive right to:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public
- make an adaptation of the work

The owner of copyright in a sound recording has the exclusive right to:

- make a copy of the sound recording
- cause the recording to be heard in public
- communicate the recording to the public
- enter into a commercial rental arrangement in respect of the recording

The owner of copyright in a cinematographic film has the exclusive right to:

- make a copy of the film
- cause the film to be heard/seen in public
- communicate the film to the public

Importantly, the rights comprised in copyright include not only the exclusive right **to do** the things set above, but also the exclusive right to **authorize** another person to do any of these things.<sup>2</sup>

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<sup>1</sup> See s 31 of the Act for the nature of copyright in works (including musical works), s 85 of the Act for the nature of copyright in sound recordings, and s 86 of the Act for the nature of copyright in cinematographic films.

<sup>2</sup> See s 13 of the Act: the exclusive right to do an act in relation to a work or other subject matter includes the exclusive right to authorize another person to do that act in relation to that work or other subject matter.

The act of making copyright material available on a server in a form in which it can be accessed by members of the public will, generally, amount to an exercise of the copyright owner's right of communication to the public. As discussed above, the new generation P2P effectively turns a user's computer into an internet server. Selected files sitting on the user's computer are able to be accessed remotely by other individuals.

### **4.3 Infringement – who can be liable?**

Liability for copyright infringement can arise in several ways in the university environment. As the examples below illustrate, liability can arise "jointly"; more than one person can be liable for the same act of infringement.

#### **4.3.1 Staff and students personally liable**

A staff member or student who uses P2P to make available online music, films etc without the authorization of the copyright owner is personally liable (in the absence of a defence or exception, as to which see below), even if this activity has been carried out at a university using university computers, servers etc. In May 2003, three Australian students were charged by Australian Federal Police with offences under the Act (see the section below on criminal penalties) for allegedly making hundreds of music files available to be downloaded (although, in that case, not using university systems). The three subsequently pleaded guilty to the offences and are awaiting sentence.

#### **4.3.2 University vicariously liable**

Where a staff member in the example above is acting within the course of his or her employment, the university will also be vicariously liable for any infringement. Such liability *may* arise even though the staff member is acting in a way that he or she has been directed not to.

#### **4.3.3 Authorisation liability**

As discussed above, the rights comprised in copyright include the right to do or *authorize someone else to do* any one of the exclusive rights. A university can be found liable for authorizing the infringing conduct of staff and/or students where the university has provided access to the equipment used to carry out the infringing conduct (eg personal computers, university servers providing internet access) and not taken reasonable steps to ensure that this equipment is *not* used to infringe copyright.

The sparse case law relating to authorization liability does not, unfortunately, provide much assistance in determining what steps a university should take to minimize its risk of being sued. One thing is clear, however. Universities are on notice that students are using university-owned facilities to engage in unlawful P2P file trading, and the courts are unlikely to look kindly upon institutions who fail to take reasonable and practical steps to seek to prevent their systems from being used in this way.

## 4.4 What are the "penalties" for infringement of copyright?

Infringement of copyright is generally a civil (as opposed to criminal matter). While the Act provides for criminal penalties, criminal actions for copyright infringement have, to date, been far less common than civil actions. Having said that, the music industry is increasingly turning to the criminal law to enforce copyright and seek to punish infringers and students have been prosecuted. There is every reason to believe that this practice will continue.

### 4.4.1 Civil remedies

The main civil remedy is damages (s 115(2)). Damages are intended to compensate the owner of copyright for the loss which they have suffered as a result of the defendant's breach. The appropriate measure of damages depends very much on the facts of each case. However, a common measure of damages is the fee which the owner of copyright might reasonably have charged for the use which the defendant has made of the work. Another common measure is loss of sales suffered by the plaintiff. Cases brought in the US – and the damages which have been sought by music companies – illustrate the potential for massive damages awards. The US record industry filed suit recently against four students, seeking hundreds of millions of dollars for alleged P2P file sharing activities. The students each agreed to pay up to \$US 17 500 to settle the lawsuits. A *university* found liable for authorizing the making available online of infringing copies of say hundreds of songs to, say, thousands of individuals, could, potentially, be faced with a damages award representing the licence fee which the owners of copyright could reasonably have charged for these uses. This could amount to hundreds of thousands or even millions of dollars.

Damages will not be awarded where the defendant is able to show that it was not aware, and had no reasonable grounds for suspecting, that the act constituting infringement was an infringement of copyright (s 115(3)). Generally speaking, it will not be enough to claim the benefit of this provision that the defendant was merely ignorant of the law. This co-called "innocence" provision might, however, be available in a case where the defendant believed, wrongly but reasonably, that he or she was licensed to do the things which amounted to the infringement.

A court can award additional damages where the defendant has acted in flagrant disregard of the rights of the owner of copyright (eg a deliberate and calculated infringement, including an infringement which took place after the receipt of a "cease and desist letter), where the infringement involved the conversion of the work from analogue to digital form or where the defendant has benefited by reason of the infringement.

The other civil remedies are injunction restraining the defendant from continuing to engage in the infringing conduct and an account of profits (which is typically sought as an alternative to damages where the benefit to the defendant exceeds any damage suffered by the plaintiff).

#### 4.4.2 Criminal penalties

As discussed above, the music industry is turning increasingly to criminal sanctions to protect its copyright. Public campaigning by the industry here and overseas also appears to be having *some* success in causing P2P file trading to be viewed by the police as "theft" and thus criminal in nature. This can be expected, over time, to bring about a softening of the traditional prosecutorial reluctance to bring the criminal law to bear on what has traditionally been seen as a matter of private property rights best enforced by the owners of copyright.

Relevantly, criminal penalties can apply when a person: sells or lets for hire; by way of trade offers or exposes for sale or hire; or imports into Australia for the purpose of distributing for trade or any other purpose to an extent that will affect prejudicially the owner of copyright, an article which the person knows or ought reasonably to know is an infringing copy of a work or other subject matter in which copyright subsists (s 132).

While no Australian court has considered whether P2P file trading is capable of coming within any of these prohibited categories, such a finding is very much a possibility. Importantly, criminal liability can arise without the need for money to change hands.

The maximum penalty for a person who is guilty of a criminal offence is \$60 500 or five years imprisonment in respect of **each infringing article**. A corporation (such as a university) may be fined up to \$302 500 in respect of **each infringing article**.

#### 4.5 What defences and exceptions apply?

##### 4.5.1 Mere conduit

Section 39B of the Act provides that a person who provides facilities for making, or facilitating the making of, a communication is not taken to have authorized any infringement of copyright *merely* because another person uses the facilities so provided to infringe copyright. The stated intention of the drafters of this provision was to "clarify" the position regarding the liability of carriers, carriage service providers and others (eg universities) who provide such facilities. In fact, the provision has done little to clarify the legal position. Arguably, it does no more than state the common law position regarding liability for authorising copyright infringement.

In its submission to the Federal Government's Review of the Digital Agenda amendments to the Act, the AVCC urged the Government to amend s39B to set out an appropriate immunity for facilities providers such as universities. In the meantime, the question of what, if any, protection is afforded to universities by way of s 39B remains uncertain.

##### 4.5.2 Fair Dealing

The Act contains certain specific fair dealing exceptions. Relevantly, these are fair dealing for the purpose of research or study and fair dealing for the purpose of criticism and review. Unlike the US, we have no general "fair use" exception to copyright. Unless the use falls within one of the purposes set out in the Act, it will not fall within the fair dealing exceptions. This means, for example, that there is generally no right under Australian copyright law to make a back-up copy of a CD which you have purchased.

The use of P2P networks to share copyright works between users *might* – depending on the circumstances - fall within one of the fair dealing exceptions. It is important to keep in mind, however, that the relevant purpose is the purpose of the person doing the copying/communicating, and not that of the person accessing or receiving the work. This means that the fair dealing exceptions can generally *not* be relied on to make copyright material available to the public.

#### **4.5.3 Statutory licence**

In theory, the use of P2P to make material available to students pursuant to the educational statutory licences contained in Parts VA and VB of the Act raises no copyright problems. However, as it is a condition of reliance on each of the statutory licences that material is not made available to members of the public generally, it would be necessary to ensure that the software being used to facilitate the file sharing did not cause those files to be made generally available.