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January 10, 2007

## **BY HAND DELIVERY**

The Honorable Kenneth M. Karas  
United States District Judge  
Southern District of New York  
500 Pearl Street, Room 920  
New York, NY 10007-1312

Re: Elektra Entertainment Group Inc. et al v. Barker  
SDNY No. 05 CV 7340 (KMK)

Dear Judge Karas:

The Court has scheduled oral argument on defendant's motion to dismiss for January 26<sup>th</sup>. Yesterday, plaintiff's counsel wrote to the Court, enclosing a copy of an opinion in United States v. Shaffer, 06-3415 (10<sup>th</sup> Cir. Jan. 3, 2007) which he contends supports denial of the motion. The Shaffer case, however, is wholly inapposite and has no bearing at all on the pending motion.

First, Shaffer was not a copyright infringement case and did not even involve the construction of the term "distribution" as that word is uniquely defined in the Copyright Act. Under 17 U.S.C. § 106(3), "distribution" is a term of art that applies to the distribution of certain things, to certain recipients, in a certain way, *i.e.*, the "distribut[ion of] copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . ." 17 U.S.C. § 106(3). The Shaffer case did not involve the sale, rental, lease, lending or other transfer of ownership of copyrighted works. Moreover, the court in Shaffer, in divining a definition for the conduct at issue in that case, looked to Black's Law Dictionary and Webster's, not the Copyright Act, for its definition of distribution.

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Second, Shaffer does not hold that merely making files available for distribution without an actual transfer constitutes “distribution”, and there is no inconsistency between the result in Shaffer and the rule that there must be an *actual* transfer of files for there to be distribution. While the Shaffer court noted that the defendant had “freely allowed [other Kazaa users] access to his computerized stash of images and videos and openly invited them to take, or download, those items,” this was mere *dicta* since the record contained evidence of *actual* downloading of files from the defendant’s computer. See Shaffer, supra, at p. 6 (“Mr. Shaffer indicated he knew that other people had downloaded child pornography from him”) (emphasis added). Likewise, the cases cited in the Shaffer opinion also involved actual downloading, not merely making files available. See Shaffer, supra, at pp. 9-10. Indeed, the U.S. Department of Justice, in its Statement of Interest, specifically represented to this Court that it has never sought to prosecute anyone for “making available.” See Statement of Interest, p. 5, fn. 3.

Third, the Shaffer court’s statement that “the placement of items in one’s shared folder involves a conscious effort,” Shaffer, supra, at p. 4, is not only *dicta* but simply incorrect. The defendant in Shaffer “confessed that he kept child pornography in his shared folder in order to win special concessions from Kazaa.” Shaffer, supra, at p. 4. This evidence of volitional conduct by the defendant in Shaffer made unnecessary the court’s blanket suggestion that the placement of items in a shared folder always involves a conscious effort. Indeed, such a suggestion is flat out wrong. In comments filed with the Federal Trade Commission back in 2004, the RIAA itself acknowledged that most P2P users have no idea that files on their *own* computers may become available to others.

As an initial matter, P2P software may, upon installation, automatically search a user’s entire hard drive for content. Files that users have no intention of sharing may end up being offered to the entire P2P network. Continued sharing of personal information is hard to avoid and is facilitated by confusing and complicated instructions for designating shared items. A study by Nathaniel S. Good and Aaron Krekelberg at HP Laboratories showed that “the majority of the users...were unable to tell what files they were sharing, and sometimes incorrectly assumed they were not sharing any files when in fact they were sharing all files on their hard drive.”

See Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues; P2P File-Sharing Workshop – Comment, P034517; Comments of The Recording Industry Association of America (RIAA), November 15, 2004, pp. 8-9 (attached hereto).

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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Morlan Ty Rogers".

Morlan Ty Rogers

attachment

cc: Richard L. Gabriel, Esq. (by e-mail and U.S. mail, w/ attachment)  
Andrew Bridges, Esq. (by e-mail and U.S. mail, w/ attachment)  
Fred von Lohmann, Esq. (by e-mail and U.S. mail, w/ attachment)  
Eric J. Schwartz, Esq. (by e-mail and U.S. mail, w/ attachment)  
Jonathan Zavin, Esq. (by e-mail and U.S. mail, w/ attachment)  
Richard Guida, Esq. (by e-mail and U.S. mail, w/ attachment)

**Peer-to-Peer File-Sharing Technology: Consumer Protection and  
Competition Issues**

**P2P File-Sharing Workshop – Comment, P034517**

Comments of  
The Recording Industry Association of America (RIAA)  
November 15, 2004

providers promote and distribute their file-sharing products as “free,” there is, in fact, a high and undisclosed price to consumers, as detailed below.

While illegal file-sharing has had a severely damaging and much-publicized effect on the music and other entertainment industries, computer users, as well as entire companies and businesses, are increasingly harmed by the actions of illicit P2P networks. The unaccountability of the providers of these applications ensures the continued proliferation of dangers such as viruses, spyware, and the unknowing disclosure of sensitive personal material.

#### **A. Personal Information**

P2P services, by their very nature, are dependent upon users not only downloading, but providing material on their computers for others to access. To facilitate this two-way sharing, P2P services often configure their software to share content by default. What users often do not know is that they may be sharing their tax returns, financial records, health records, business records, email, and other personal and private material. The availability of such information threatens security and facilitates identity theft.

As an initial matter, P2P software may, upon installation, automatically search a user’s *entire* hard drive for content. Files that users have no intention of sharing may end up being offered to the entire P2P network.<sup>10</sup> Continued sharing of personal information is hard to avoid and is facilitated by confusing and complicated instructions for

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<sup>10</sup> “Music Downloading, File-Sharing and Copyright,” Pew Internet & American Life Project, July 2003; see “File-sharing: A Fair Share? Maybe Not,” FTC Consumer Alert, July 2003. (“If you don’t check the proper settings when you install the software, you could open access not just to the files you intend to share, but all other information on your hard drive.”)

designating shared items.<sup>11</sup> A study by Nathaniel S. Good and Aaron Krekelberg at HP Laboratories showed that “the majority of the users...were unable to tell what files they were sharing, and sometimes incorrectly assumed they were not sharing any files when in fact they were sharing all files on their hard drive.”<sup>12</sup> Distributors of file-sharing software are clearly aware of the likelihood of such inadvertent sharing. Greg Bildson, COO of LimeWire, said that “more can be done to warn users when they are about to share large numbers of files.... For users that don’t know what they are doing, file-sharing applications need to be a little more bulletproof.”<sup>13</sup>

As one news site has pointed out, available information goes beyond the relatively benign home shopping list or personal résumé. “Military members take their personal computers into a theater of operations and then return from those areas without removing sensitive information from their hard drives.”<sup>14</sup> This unintended sharing affects not only individual consumers, but also potentially our national security.

## **B. Pornography**

In addition to the dissemination of personal information, users also run the risk of being inadvertently exposed to pornography on these systems. In an August 5, 2004 letter to file-sharing association P2P United, 47 U.S. Attorneys General noted that a “substantial and ever-growing use of P2P software is as a method of disseminating pornography, including child pornography.”<sup>15</sup> In fact, a 2003 study by Palisade Systems

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<sup>11</sup> See Letter to FTC from Senators Leahy, Hatch, Boxer, Stevens, and Smith, 5/4/04 (“Senator Letter 5/4/04”).

<sup>12</sup> “Usability and privacy: a study of Kazaa P2P file-sharing,” Good and Krekelberg, 6/5/02.

<sup>13</sup> “What’s in Your Shared Folder?” Slyck.com, 7/30/04.

<sup>14</sup> *Id.* (quoting commentator from [www.SeeWhatYouShare.com](http://www.SeeWhatYouShare.com))

<sup>15</sup> Letter to P2P United from 47 U.S. Attorneys General, 8/5/04 (“AG Letter 8/5/04”).

**Comment Number:** OL-100026  
**Received:** 11/15/2004 10:18:22 PM  
**Organization:** Recording Industry Association of America (RIAA)  
**Commenter:** Steven Gottlieb  
**State:** DC  
**Agency:** Federal Trade Commission  
**Rule:** Notice Announcing Public Workshop and Requesting Public Comment and Participation  
**Docket ID:** Not yet available  
**Attachment:** [OL-100026.pdf](#) [Download Adobe Reader](#)

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**Comments:**

Supplemental exhibit materials were physically delivered by 5:00 p.m. on November 15, 2004. Attempts will be made to deliver them electronically.