Neutral Citation [2013] IEHC 204

THE HIGH COURT

COMMERCIAL

[2012 No. 12381 P]

[2012 No. 225 COM]

BETWEEN

EMI RECORDS (IRELAND) LIMITED,

SONY MUSIC ENTERTAINMENT (IRELAND) LIMITED, UNIVERSAL MUSIC IRELAND LIMITED AND

WARNER MUSIC IRELAND LIMITED

PLAINTIFFS

AND

UPC COMMUNICATIONS IRELAND LIMITED,

VODAFONE IRELAND,

IMAGINE TELECOMMUNICATIONS LIMITED,

DIGIWEB LIMITED,

HUTCHINSON 3G IRELAND LIMITED AND

BY ORDER TELEFONICA IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 3rd day of May, 2013

Introduction

1. This is my judgment on the application of a company called Digital Rights Ireland Limited to be appointed as *amicus curiae* to this suit.

2. The application is opposed is opposed by the plaintiffs. The defendants are neutral in respect in respect of it.

The Proceedings

3. The principal relief sought by the plaintiffs is an injunction, pursuant to s. 40(5A) of the Copyright and Related Rights Act 2000 (as amended). They seek an order requiring the defendants to block or otherwise disable access by subscribers to the website "*thepiratebay.org*" (the Pirate Bay) and related domain names, IP addresses and URL's set forth in the schedule to the plenary summons.

4. The plaintiffs are all Irish registered companies. Each one is a member of an international group of companies. For example, the first is the Irish member of the EMI group and the second is the Irish member of the Sony group.

5. The majority of Irish record companies, including the plaintiffs, are members of the Irish Recorded Music Association Limited (IRMA). That entity is the representative body of the record industry. The four major groups of companies which are represented through the plaintiffs in the membership of IRMA supply approximately 78% of the pop music sound recordings to Irish consumers.

6. The defendants are the largest broadband internet service providers in the State supplying between them, together with Eircom, over 85% of all broadband in the State.

7. Each plaintiff has an exclusive licence to make available in the State, whether by way of distribution to retailers or directly to the public *via* the internet, copies of the sound recordings, copyright in respect of which is owned by companies in their individual international group of companies. The Pirate Bay is a large and popular website. It is used for the purpose of making available, without the rightholders' consent, on an enormous scale, works which include the sound recordings in respect of which the plaintiffs are the exclusive licensees or the owners of the copyright. The Pirate Bay operates as a vast directory of copyright material that internet users (which include subscribers to the defendants' internet services) are making available for downloading, copying and onward distribution by other internet users. The directory indicates what material is available and who is making it available. The scale of this infringement of copyright is enormous.

8. The plaintiffs contend that, given the volume of material which is made available via the Pirate Bay website and the number of downloads from it, it is inevitable that a significant number of subscribers to the defendants' internet services are using the website to copy and make available recordings to other internet users.

9. In earlier proceedings before this Court, the court accepted evidence as to the huge scale of the violation of the plaintiffs' property rights which is taking place *via* the Pirate Bay website.

10. The plaintiffs believe that the defendants will not in fact object to being required to block the Pirate Bay websites because of the

notorious scale of the copyright infringement which is taking place there.

Previous Action
11. In earlier proceedings between *EMI Records Ireland Limited & Ors v. UPC Communications Ireland Limited* [2010] IEHC 377, Charleton J. delivered judgment on 11th October, 2010. Those proceedings sought injunctions against the defendant, an internet service provider, to prevent the theft of the plaintiff's copyright material by third parties illegally downloading it over the internet. In dealing with the injunction sought in respect of the activities of the Pirate Bay, the judge said this:-

> *"In the second paragraph of their prayer for relief, the recording companies ask for a blocking injunction against Pirate Bay. This site is responsible for the great bulk of internet piracy in this country. Mr. Kavanagh, as I have said, described how he used it. To begin illegally downloading copyright material, all that one needs to do is to access Pirate Bay, download the appropriate software from them, search on their website what swarms are active and what tracks are being offered, and then join one of those swarms using the relevant software. Regrettably on a full consideration of this matter, a blocking injunction is not available in Irish law.*
>
> *Were it available, I would grant it. Mr. Harrison, in evidence on behalf of UPC indicated, how, through Eircom, when that access was blocked, he readily found a way through. However, this took him twenty minutes. Professor Nixon offered the opinion that such blocking was futile. I do not agree. In the telecommunications industry it has been noted that where an area moves from access to other areas, such as the Aran Islands to Dublin, or the Aran Islands to New York, by dialling the operator, to direct dial, that the improvement in service causes a leap in usage. This is known as the service improvement jump. It must work in the opposite situation. I would regard it as both educative and helpful to block Pirate Bay were I enabled by the relevant legislation to do so. At the very least, it declares that the activity is illegal. I cannot grant the injunction because I have no legal power to do so."*

12. Later in the judgment, he said:-

> *"In failing to provide legislative provisions for blocking, diverting and interrupting internet copyright theft, Ireland is not yet fully in compliance with its obligations under European law. Instead, the only relevant power that the courts are given is to require an internet hosting service to remove copyright material. Respecting, as it does, the doctrine of separation of powers and the rule of law, the Court cannot move to grant injunctive relief to the recording companies against internet piracy even though that relief is merited on the facts."*

13. In the course of his judgment, Charleton J. also made reference to the fact that legislative intervention would be required, should the legislature see fit, to protect constitutional rights to copyright and to foster the national resource of creativity. He pointed out that the power to block access to internet sites, to disable access, to interrupt a transmission, to divert a transmission and to cut off internet access and control circumstances were clearly provided for in the law of the neighbouring kingdom and are specifically outlined in the law of other European States. They are highly developed in the United States of America. However, such powers were not available in Irish law.

14. Having identified this lacuna, the plaintiffs were obliged to commence proceedings against the State for breach of its obligation to fully implement Article 8(3) of the Copyright Directive 2001/29 (the Directive). On 29th February, 2012, the Minister for Jobs, Enterprise and Innovation, promulgated Statutory Instrument 59 of 2012 which makes express provision for the granting of injunctions against internet service providers pursuant to the provisions of Article 8(3) of the Directive.

15. The availability of relief under this statutory instrument is not dependent on the establishment of liability for copyright infringement on the part of the defendant intermediary. The plaintiffs have made it clear that they are not contending that the defendants are so liable.

16. Given the coming into force of S.I. 59 of 2012, these proceedings have now been commenced seeking the relevant injunctive relief.

The Proposed Amicus Curiae
17. This application is grounded upon an affidavit of T.J. McIntyre who is a solicitor, Associate Dean at the School of Law in University College Dublin and chairman of the applicant. He says that the applicant is "*an Irish human rights body devoted to defending civil, human and legal rights in the digital age*". The applicant was founded in 2005 and is a not for profit undertaking. It is a member of the European Digital Rights Initiative and works with other civil rights groups such as the Irish Council for Civil Liberties.

18. Mr. McIntyre points out that the applicant successfully applied for and was granted *locus standi* in a case called *Digital Rights Ireland Limited v. Minister for Communication & Ors*. In that case, he says that McKechnie J. described the applicant as a sincere and serious litigant and thought that it was appropriate to grant to it an ability to advance arguments on behalf of citizens in general in the nature of an *actio popularis*.

19. Mr. McIntyre says that the applicant has sought to inform public debate in various ways. In October 2011, it organised a conference entitled "*Innovation, Information and the Internet: Modernising Copyright Law*". It also made a joint submission with a number of members of the National Parliament and the solicitors appearing for it in these proceedings to the government's copyright review committee.

20. Insofar as these proceedings are concerned, the applicant says that it has a strong interest in them because of the fact that this is the first time in this jurisdiction that a court will be asked to block a website following the passage of S.I. 59 of 2012. The applicant believes that such an order could have the effect of jeopardising the rights of individuals and undertakings operating in Europe and globally. This legislation may, it is said, provide a mechanism by which parties could apply to the court for reliefs which may limit the rights of others.

21. The applicant is concerned to ensure that all the issues which are before the court are fully explored and argued. This is particularly so because blocking orders will impact not merely on the parties to this action but also on parties not before the court. These would include Irish internet users and owners and operators of the sites which it is proposed to block. The applicant would seek to put before the court matters which those persons might seek to raise were they themselves directly represented. Mr. McIntyre reiterates the novel nature of this application as a result of the legislative change brought about by S.I. 59 of 2012.

22. Mr. McIntyre goes on to point out that under s. 2 of the European Convention on Human Rights Act 2003, this Court is under a duty to interpret and apply any statutory provision or rule of law insofar as is possible in a manner compatible with the State's

obligations under the European Convention on Human Rights. This, he says, is a duty which exists independently of any point raised by the parties in a matter where non-parties are affected. The applicant is therefore concerned to assist the court in addressing the requirements of the European Convention on Human Rights in the context of internet filtering.

23. He also points out that the court has not yet made any order directing the various entities and individuals who are providing the internet services which the parties to these proceedings may be directed to cease access to, to be notified of this action or to be given the legal right to appear to defend such actions.

24. Mr. McIntyre avers that the applicant can maintain what he describes as a neutral role in assisting the court in matters that might arise and may bring expertise to the case in areas that might not otherwise be available to, or be ventilated by, the parties seeking to protect their own discreet interests. He gives, by way of example, the possible need to highlight to the court where the public interest and wider European legal rights stand to be eroded if a certain form of order was to be made.

25. As already noted, the applicant is a member of European Digital Rights, an international non-profit association formed under Belgian law. As such, Mr. McIntyre believes the applicant can assist the court by highlighting issues which have arisen in other jurisdictions where orders such as those sought by the plaintiffs were the subject of litigation.

26. He goes on to say that the applicant is well placed to assist the court in assessing the public interest and exercising its discretion in respect of the reliefs sought. He calls attention to Article 1(3)(a) of Directive 2009/140/EC of the European Parliament and of the Council amending Directives 2002/21/BC on a common regulatory framework for electronic communications networks and services and 2002/19/EC and 2002/20/EC.

27. Finally, he points out that the applicant's costs incidental to its intervention as an amicus curiae will be borne entirely by itself.

The Opposition
28. Initially there did not appear to be any serious opposition to the joinder of the applicant on the part of the plaintiffs. However, having regard to factual matter which is set forth in an affidavit of Helen Sheehy, Solicitor, they now believe that it would not be appropriate for the applicant to play the role of amicus curiae in these proceedings.

29. In her affidavit, she points out that the applicant has indicated that it can maintain a neutral role in assisting the court and is also of the view that it can represent, in effect, what it believes to the be the public interest in the matter.

30. She avers that when she was first contacted in respect of the proposed application that she wrote to the applicants' solicitors seeking three pieces of information. She sought the identity of its officers, its members and from whence its funding came.

31. In response to this request Ms. Sheehy was informed that the applicant had three officers. They were named as Antoin O Lachtnain, an entrepreneur, Colm Mac Cárthaigh, an engineer with Amazon.com and T.J. McIntyre, the applicants' chairman. It is a company limited by guarantee and there were eight subscribers to the company but their identity was not disclosed. The letter of reply made it clear that the applicant did not seek any particular outcome of the issues between the parties but rather sought to be of assistance to the court. The response did not indicate the source of the applicants' funding. That query was renewed and in addition Ms. Sheehy asked if there was a reason why this query was not answered. No response was received to that letter. Neither was the matter addressed in Mr. McIntyre's affidavit grounding this application. At the hearing, counsel dealt with this question by way of submission.

32. Ms. Sheehy asserts that having regard to certain material which she exhibited in her affidavit that the applicant is not capable of exercising a neutral role in the proceedings.

33. She exhibited material from an internet site forming part of a campaign called "*Stop SOPA*". This was a campaign to seek to dissuade the relevant minister from enacting S.I. 59 of 2012. She highlights that the "*Stop SOPA*" internet site contains a number of statements which the plaintiffs describe as "quite extreme and completely inaccurate". These include assertions that the relevant statutory instrument would represent "*a radical new law*" and that "*your civil rights and free access to the internet are under threat*". It is also alleged that the statutory instrument which was then under consideration was a "*similar proposal*" to the "stop online piracy act" in the United States. The plaintiffs take the view that the statutory instrument in question gives effect to clear EU legislation which had (as was pointed out by Charleton J. in the *EMI* case) been incorrectly transposed in this jurisdiction. It is said that there is no comparison between the United States legislation and the relevant statutory instrument. Neither is the statement contained on the website that the statutory instrument "*means judges can order ISPs to block access to sites like YouTube, Facebook and Twitter where an individual user from anywhere in the world is sharing infringing material*" accurate. A contribution on the website from one "*S. McGarr*" describes the decision to introduce the statutory instrument as:-

> *"A very bad decision because it will not solve the legal problem of uncertainty which the government say they want to address with this law. They have introduced a law which is likely to be successfully challenged and in the meantime will create nothing but further uncertainty".*

Mr. McGarr continues:-

> *"It is a bad decision because the law is being enacted without a vote of the Oireachtas. This law will potentially impact on the freedoms to do business and to free expression of every company and citizen in the country. The need for primary legislation has never been clearer."*

He continues:-

> *"It is a bad decision because it ignores the unanimous concerns of Irish internet experts. From the Irish Internet Service Providers' Association (whose members include Google), to Blacknight Hosting, to ALTO, all have said that the Statutory Instrument is not appropriate. Only yesterday Google spoke out against Internet censorship."*

He also describes the Minister's decision to enact the statutory instrument as a "*disgraceful decision*".

34. The website describes the Stop SOPA Ireland Campaign as a "*public interest campaign from McGarr Solicitors*". The website goes on to state "*If you are a member of the media looking for background, quotes or commentary, the following campaigners offer a mix of anti-SOPA viewpoints*". Amongst the persons listed are Simon McGarr of McGarr Solicitors who are the solicitors acting for the applicant on this application and T.J. McIntyre, its' chairman.

35. Ms. Sheehy also avers that the plaintiffs reviewed the personal website of Mr. McIntyre, (www.tjmcintyre.com). It contains postings by him concerning S.I. 59 of 2012. None of them are supportive of the statutory instrument. In a contribution of 25th January, 2012, Mr. McIntyre invites those who are worried by the then proposed statutory instrument to support the "*Stop SOPA*" campaign.

36. Mr. McIntyre also publishes on his website details of how to circumvent blocking orders made by the United Kingdom Courts.

37. Arnold J. in his judgment in the case of *Twentieth Century Fox & Ors v. B.T.* [2011] EWHC 1981 (Ch) said that he was of the view that whilst there were measures by which a block could be circumvented that it was neither necessary nor appropriate for him to describe those measures in his judgment. In addition, Ofcom in the United Kingdom, in its report on internet blocking decided that it was appropriate to redact the sections dealing with the technical means by which circumvention can be achieved. However, Mr. McIntyre published the entire redacted section on his website which effectively provides a guide on how to circumvent blocking orders of the United Kingdom Courts.

38. Ms. Sheehy also calls attention to a comment which is contained on the website of the solicitors acting for the applicant, Messrs McGarr. The institution of these proceedings was noted on that website in a posting of 7th December, 2012. The website states that "*the commencement of these proceedings will come to (sic) no surprise to anyone who followed the Stop SOPA Ireland campaign at the beginning of this year*". On the same entry it is stated:-

> *"On the last day of February this year, the Government gave them [the plaintiffs] their ideal law.*
>
> *We may be seeing, on the 17th December of this year, the first of the predicted applications to block Ireland's users from accessing particular websites.*
>
> *If so- and the applicants are successful- it is difficult to imagine that it will be the last."*

39. Whilst the plaintiffs acknowledge the entitlement of the applicant and its solicitors to hold their opinions and to express them they cannot accept that the applicant can maintain a neutral role in assisting the court given what I have outlined. Neither can they see how it would be possible for the applicant to assist the court in making an assessment of the public interest in an impartial manner.

40. The plaintiffs also point out that Mr. McIntyre in his affidavit made no reference at all to the rights of creators, composers, artists, performers, publishers or producers.

41. Ms. Sheehy also deals with that part of Mr. McIntyre's affidavit where he indicated that the applicant would seek leave to put before the court matters which Irish internet users and the owners and operators of sites which it is proposed to block would raise, if they themselves were directly represented. She points out, however, that there is no dispute raised by any defendant in the proceedings as to the fact that the Pirate Bay website is unlawfully distributing copyright material and that those who use that website to make that material available to download it are infringing copyright.

42. Finally she points out that insofar as there are human right issues as identified by Mr. McIntyre, these have already been the subject matter of consideration by the court in judgments in *EMI & Ors v. UPC* of 10th October, 2012 and *EMI & Ors v. Eircom* of 27th June, 2012. She also says that it has been made clear by correspondence received on behalf of some of the defendants that a substantial number of issues going to such matters as freedom of expression and the right to do business will be brought to the attention of the court by the parties to the litigation. As for Directive 2009/140, that has also been considered by the court in *EMI v. Eircom* of 27th June, 2012.

43. It is in these circumstances that the plaintiffs take the view that the applicant, far from being neutral, is a highly partisan entity unsuited to the role of amicus curiae. Furthermore, they contend that the parties before the court have already intimated that they will be addressing the issues which the applicant seeks to raise and thus its participation will be of no assistance to the court. Any argument that the blocking of access to the Pirate Bay website would in some way amount to an infringement of the rights of the operators of that website or of internet subscribers has been the subject of consideration by courts in this jurisdiction and elsewhere and has not met with judicial approval. Ms. Sheehy also believes that the joinder of the applicant would add to the duration of the proceedings with the incurring of additional costs.

Jurisdiction

44. There is no dispute but that there is an inherent jurisdiction in the court to appoint an *amicus curiae*. This question was addressed by Keane C.J. in *H.I. v. Minister for Justice, Equality and Law Reform* [2004] 1 ILRM 27, where he said:-

> *"While there are no statutory provisions or rules of court providing for the appointment of an amicus curiae, save in the case of the Human Rights Commission, the court is satisfied that it does have an inherent jurisdiction to appoint an amicus curiae where it appears that this might be of assistance in determining an issue before the court. It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a bona fide interest in the issue before the court which cannot be characterised as a meddlesome busy body. As the experience in other common law jurisdictions demonstrates, such an intervention is particularly appropriate at the national appellate level in cases with a public law dimension.*
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> *It is, at the same time, a jurisdiction which should be sparingly exercised. Clearly, the assistance to be given to an appellate court will be confined to legal arguments and supporting materials. It is not necessary to consider the circumstances in which it would be appropriate for the High Court to appoint an amicus curiae. It is sufficient to say that, as was pointed out in United States Tobacco Company v. Minister for Consumer Affairs (1988) 83 A.L.R. 79, the position of an amicus curiae is quite different from that of an intervener. It was said in that case that an amicus curiae, unlike an intervener, has no right of appeal and is not normally entitled to adduce any evidence.*
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> *In the present case, an issue of public law arises and the judgment of the court may affect parties other than those now before the court. The court was satisfied that the UNHCR might be in a position to assist the court by making written and oral submissions on the question of law certified by the High Court and, accordingly, appointed it to act as amicus curiae and, for that purpose, to make oral and written submissions."*

Applicable Principles
45. Having accepted that there is a jurisdiction to make an order of the type sought, I now turn to a consideration of the case law which sets forth principles which the court ought to apply in deciding whether or not to do so.

46. The first of the cases is *O'Brien v. Personal Injuries Assessment Board (No. 1)* [2005] 3 I.R. 328. That was a case in which the applicant brought judicial review proceedings arising, in part, from the refusal by the respondent Board to deal with the applicant's solicitor in respect of an application made by him to that Board. The Law Society of Ireland asked to be joined as amicus curiae on the basis that the case raised important issues of principle that were of concern to the solicitor's profession as a whole. Finnegan P., having referred to the decision in *H.I.*, from which I have just quoted, identified a number of relevant considerations.

47. The first was whether the applicant "*has a bona fide interest and is not just acting as a meddlesome busy body*".

48. Second, Finnegan P. identified that O'Brien's case had "*a public law dimension*" and that the Law Society "*has not just a sectional interest, that is the interest of its members, but a general interest which should be respected and to which regard should be had.*"

49. It is clear from the passage which I cited from Keane C.J. in the *H.I.* case that that judge did not consider the circumstances in which it would be appropriate to appoint an *amicus curiae* to a court of trial. That issue fell to be dealt with by Finnegan P. who reviewed a number of relevant English decisions which had led to *amici curiae* being appointed in trial courts. Finnegan P. decided to join the Law Society in circumstances where his decisions would affect the rights of a considerable number of litigants and the solicitor's profession as a whole.

50. The issue arose again in the case of *Doherty v. South Dublin County Council* [2007] 1 I.R. 246. There, the Equality Authority asked to be joined as amicus curiae in proceedings taken by members of the travelling community against the respondent County Council and others. The State respondents objected to the application on the basis that the Equality Authority did not have statutory authority to act as amicus curiae. The High Court overruled those objections and its decision was affirmed by a majority in the Supreme Court. That court held that the Equality Authority did have statutory power to act in such a role. Macken J., however, dissented. While she was in a minority, the comments which she made on the principles to be applied on the joinder of an *amicus curiae* are of relevance. That was also the view of Clarke J. who specifically so observed in *Fitzpatrick v. F.K.* [2007] 2 I.R. 406. Indeed, he summarised the observations of Macken J. in this regard as follows (at 415):-

> *"it seems clear that amongst the important factors to be taken into account are:-*
>
> *(a) whether the proposed amicus curiae might be reasonably said to be partisan or, on the other hand, to be largely neutral and in a position to bring to bear expertise in respect of an area which might not otherwise be available to the court; and*
>
> *(b) the stage which had been reached in the proceedings with particular reference to a distinction between trial courts and appellate courts."*

Clarke J. went on:-

> *"In addition, it seems to me that a factor of particular importance should be the extent to which it may be reasonable to assume that the addition of the party concerned as an amicus curiae might be said to bring to bear on the legal debate before the courts on an issue of significant public importance, a perspective which might not otherwise be placed before the court. In similar vein it seems to me appropriate for the court to consider whether there is a risk that an issue of significant public importance might be debated in circumstances where there may not be an equality of arms."*

51. Clarke J. then developed the two factors which he distilled from the judgment of Macken J. As to the first, he said as follows:-

> *"The first of the two criteria identified by Macken J. in Doherty v. South Dublin County Council [2006] IESC 57, [2007] 1 I.R. 246 concerns the distinction between a partisan and a neutral amicus curiae . As is noted in her judgment, the courts in other common law jurisdictions, which have developed principles in respect of the criteria to be applied in allowing parties to be joined as amicus curiae , have, to an extent, moved away from the principle that such parties should be entirely neutral and have permitted, in certain circumstances, parties to be appointed who could be expected to adopt a partisan role in the proceedings. However that is not to say that the role likely to be played is not, nonetheless, an important factor to be taken into account. It was pointed out by counsel for the plaintiffs and, in particular, counsel for the second defendant, that the bodies who have been appointed in this jurisdiction have been public bodies charged either under statute or otherwise with a public role. The role of the Equality Authority speaks for itself. Similarly the United Nations High Commissioner for Refugees is charged with international public obligations under the United Nations treaties. The reason why Finnegan P. was persuaded to join the Law Society in O'Brien v. Personal Injuries Assessment Board (No. 1) [2005] 3 I.R. 328 stemmed from the public role of the Law Society under its legislation as regulator of the solicitors' profession.*
>
> *I am not persuaded that the joining of an amicus curiae is confined to such bodies. However it seems to me that the fact that the body seeking to be joined is charged in either domestic or international law with a public role in the area which is the subject of the litigation concerned is a factor of some significance to be taken into account."*

52. It is to be noted that the entity which sought to be joined in *Fitzpatrick's* case was the Watch Tower Bible and Tract Society of Ireland, the body which represents Jehovah's Witnesses in Ireland. The Society wished to be heard in the case which was taken by the Coombe Hospital authorities in respect of a patient who was a Jehovah's Witness and declined blood transfusion treatment following a postpartum haemorrhage.

53. As to the second criterion identified by Macken J. which concerned the stage that the proceedings had reached at the time when the application to join was made, he said this:-

> *"It seems clear from the authorities that an amicus curiae will more readily be joined at the stage of a final appellate court. The reasons for this are obvious. Proceedings at trial are likely to involve significant issues concerning the facts of the individual case. Even where a case may be said to be a 'test case', where it may be likely that general principles will be defined, nonetheless the jurisprudence of the courts in this jurisdiction makes it clear that issues of constitutional*

importance are only likely to be decided when it is necessary on the facts to decide them. The extent to which it may become necessary to decide issues of principle in any particular case will depend on the facts of that case. Questions of the standing of a claimant or, indeed, the possibility of the application of a 'reverse standing' test as identified will inevitably focus on the facts of an individual case.

It is obvious, therefore, that an amicus should not be permitted to involve itself in the specific facts of an individual case. It is only after those facts have been determined that the extent to which issues of general importance may remain for decision will be clear. That is far more likely to be the case at the appellate rather than the trial level. It is not clear at this stage the extent to which there may be a dispute as to the facts of this case which might be material to any of the considerations of the court. It is certainly true to say that there appears to be a complaint made on behalf of the first defendant, and supported by the society, as to the precise way in which the issues in her case were dealt with by the plaintiffs on the day in question. It certainly could not be said that this case is a 'pure test case' in which it is highly unlikely that any issues concerning the facts of the individual case would be relevant. While I am not persuaded that there is an absolute bar to parties being joined as amicus curiae at trial level, I believe that the circumstances in which it would be appropriate so to do should, ordinarily, be confined to cases where there is no significant likelihood that the facts of an individual case are likely to be controversial or to have a significant effect on determining what issues of general importance may require to be determined."

54. I return for a moment to the views expressed by Macken J. in *Doherty's* case. She said:-

"In those jurisdictions where an amicus curiae is more common, the amicus remains at all times a 'friend of the court'. Of significance, I believe, is the long established jurisprudence, well considered also in academic writings, that a clear distinction is drawn between an amicus curiae at appellate level and at trial court level. This distinction is of utmost importance…. even though the role of amicus curiae over the years has become more partisan than was originally the case, that partisan role may be accepted at the final appellate level but not at trial court level."

55. Finally, as is clear from both the judgments of Macken J. and Clarke J., a further consideration which the court must bear in mind is whether the joinder of the party as an amicus is likely to bring to bear on a case involving an issue of significant public importance, a perspective or resources that might not otherwise be available.

Objection In Limine

56. The plaintiffs say that the court has not been made aware of what is the nature or interest of the applicant. It has declined to disclose who are the subscribers to its memorandum of association. It has declined to identify its funder or funders. In such circumstances, it is said that the court cannot entertain an application for the appointment of a person or entity as a friend of the court if there is an unwillingness to disclose who in truth is sought to be appointed to that role.

57. Whilst it is correct to say that the source of the applicant's funding was not disclosed either in correspondence prior to this application being brought or in the affidavit of Mr. McIntyre, during the hearing, it's counsel, by way of submission rather than evidence, disclosed that it is derived from modest donations from members of the public.

58. Second, it is said that this applicant has no public law role. It is a very different entity to those who have been made *amici curiae* in this jurisdiction in the past. It is argued that it comes nowhere close even to the unsuccessful applicant in the Fitzpatrick case where that applicant claimed to be representative of the adherents to a particular religious faith.

59. It is argued that I ought to decide this application by reference to these two issues alone and to dismiss the application *in limine*.

60. I do not propose to adopt that course. I am not convinced that those two issues of themselves must necessarily mean that this application should fail at the threshold.

61. Nonetheless, these matters may be taken into account in the exercise of my discretion. I attach little if any weight to the former, but the latter is of some significance.

Findings

62. The applicant cannot be equated with bodies which to date have been joined as amici. It is not charged in either domestic or international law with a public role in the area which is the subject of this litigation.

63. A reading of the affidavit grounding this application would suggest that the applicant is a neutral body wishing to assist the court from that standpoint of neutrality. But the investigations carried out on behalf of the plaintiffs and deposed to in the affidavit of Ms. Sheehy have cast an altogether different light on the position. It is clear that the applicant's solicitors have been conducting what they call a "*public interest campaign*" with one of them identified as a press contact on the "Stop SOPA" campaign. Their website made their views clear that the Minister ought not to sign into law S.I. 59 of 2012. When he had done so, the decision was described as a disgraceful one.

64. Mr. McIntyre addressed members of the public on his website and asked for support for the campaign being conducted under the Stop SOPA banner. I think it is particularly significant and somewhat disturbing that his website contained a redacted section of the UK Ofcom report showing a way of circumventing blocking orders made by the United Kingdom Courts.

65. It is difficult in these circumstances to see how the applicant could be regarded as a neutral party. I am unable to do so.

66. I also take into account the injunction of Keane C.J. that this jurisdiction should be "*sparingly exercised*" and the limited circumstances in which an amicus may be appointed in a court of trial as distinct from an appellate court. I do not believe that the applicant here has demonstrated circumstances which would warrant its appointment at trial court level.

67. Neither do I believe that the participation of the applicant would provide to the court a perspective on matters of principle or public importance which would not otherwise be available to it. A good deal of attention was given to this factor by the applicant in arguing in favour of its joinder to this litigation. It did so by reference to the suggestion that the effect of an injunction or blocking order would impact not merely on the parties to the suit but also on those not before the court. That contention has to be seen in the light of the factual position which has emerged to date.

68. In that regard, there is no dispute but that the operators of Pirate Bay are involved in copyright infringement. Proceedings against them in other jurisdictions as well as this provide ample evidence of that. Second, there has never been any dispute but that Irish

internet users who avail themselves of Pirate Bay are also involved in copyright infringement.

69. If it is the intention of the applicant to contest either of the factual matters dealt with in the preceding paragraph, then it will be seeking to involve itself in the factual aspects of the proceedings and there is no role for an *amicus curiae* in that regard.

70. Insofar as reliance is placed upon the fact that this is a test case in relation to what is described as a "*novel statutory power*", I am of opinion that that argument is not made out. It is undoubtedly true that this is the first time that a court in this jurisdiction is being asked to make orders authorised by S.I. 59 of 2012. But that statutory instrument does no more than give effect to Article 8.3 of the Copyright Directive of 2001 in respect of which there is now a body of case law both in the European Court of Justice, the United Kingdom Courts and to a limited extent, the Irish courts.

71. Insofar as the court may be required to conduct a balancing exercise or to direct a person be notified of the substantive application, I am of opinion that it can do so well within the parameters of the litigation as constituted at present. I am satisfied that the court will, at trial, have full submissions made to it on the relevant legal authorities. If dissatisfied with the material put before it, the court can seek from the present parties any additional assistance which it may need. I do not believe that the relevant Directives require the appointment of an amicus curiae. Even if they did, I do not believe that the current applicant would be an appropriate entity to fulfil that role.

72. This application is refused.