



Australian decision could mean the end of the Kazaa revolution

On 5th September 2005, Justice Wilcox of the Australian Federal Court handed down a landmark decision finding Kazaa, the operators of the world's largest file-sharing system, liable for authorising copyright infringements by Australian users of the system

At its height, Kazaa users exchanged an estimated three billion files per month, nearly all of which were infringing music files. These were the kinds of figures that saw Kazaa hailed as the successor to Napster, shut down by legal action in the US.

The proceedings were brought by thirty recording companies including Sony BMG, Universal, Warner, EMI and Festival Mushroom against the operators of Kazaa, Sharman Networks, Sharman License Holdings, LEF Interactive and their joint venture partner, Altnet Inc, Brilliant Digital Entertainment, its Australian subsidiary and four of their key executives: CEOs Nicola Hemming and Kevin Bermeister; and chief technical officers Phil Morle and Anthony Rose.

The case began in February 2004 with the grant and simultaneous execution of civil search and seizure (*Anton Piller*) orders at 12 premises across three states, including the offices of Sharman and Altnet, the homes of Hemming and Bermeister, three universities and ISPs. This was to date the largest ever execution of such orders in Australia, the aim of which was to capture and preserve a live snapshot of the Kazaa system in operation.

The matter went to trial within a record nine months and was heard over three weeks during November and December last year.

Online environment

The case tested the reach of copyright laws in the online environment and the Court found that even within the decentralised or partly decentralised architecture of the Kazaa system, the operators had the capability to curtail, if not prevent, the massive infringements of copyright taking place on the system by implementing keyword and other filters. Kazaa already incorporates filters for adult content and the same technology could be used to block copyright-protected music

files. No action was taken to implement this capability because it would have been against the company's financial interests to do so, given that the success of the system depended on the increased sharing of unlicensed music files.

Far from taking measures to prevent or minimise infringements on the system, its operators were found to have encouraged users to share more files. A key part of the record companies' evidence was Kazaa's Join the Revolution campaign which appeared on its websites and in newspapers around the world. The Court found that the effect of this was to encourage young users to think it cool to defy the record companies by ignoring copyright constraints.

The Court found that the operators were also well aware that the predominant use of the system was the transmission of infringing music files. They had even commissioned consumer research, the results of which showed that Kazaa was considered to be a "free music system" and that it would be difficult or impossible to transition users from infringing uses to non-infringing uses of the system.

Even though Altnet claimed it only operated a part of the system that supplied non-infringing gold files, it was found to have been a co-principal in the operation of Kazaa and to have failed to take any steps to reduce the incidence of copyright infringement on the system. The Court found that Altnet was seeking to feed-off searches for infringing blue files, and share in Kazaa's advertising revenue, conduct which made it at least acquiescent in the use of Kazaa for copyright-infringing activities.

The Court also determined that it would have been obvious to the Kazaa operators that the limited copyright warnings they published on the Kazaa websites were completely ineffective. Another significant finding was that the Kazaa operators had modified the system to reduce their ability to control the activities of Kazaa users, presumably with the intention of seeking to rely on this as part of their defence against allegations of copyright infringement.

Australian common law principles relating to authorisation of copyright infringement were codified in 2000. On the basis of those principles, the Court ruled that Sharman

Networks, LEF Interactive, Altnet, Brilliant Digital Entertainment and their CEOs were liable for authorising infringements of copyright by Kazaa users when copyright files were made available or downloaded on the system.

Kazaa attempted to claim the benefit of safe harbour defences available to suppliers of online facilities but these were rejected by the Court on the basis that Kazaa did more than just provide facilities; it had taken active steps to encourage use of the system for infringing purposes.

International implications

Wilcox J made orders requiring Kazaa to shut down its service unless it is able to implement filters for new and existing users within two months. Kazaa claimed that because of the nature of the Kazaa system, the activity of Australian Kazaa users could not be isolated. In the circumstances, the effect of the Australian Federal Court orders will not be confined to Australia and users outside Australia will also have to receive the modified Kazaa software.

The Australian Federal Court's decision represents the first time that a final ruling has been obtained anywhere in the world in relation to the legality of a global peer-to-peer file-sharing service after a fully contested trial.

Although there are differences between Australian and US copyright law in this area, there are parallels between the findings concerning encouragement of copyright infringement by users in the Australian decision and the reasoning applied by the US Supreme Court in the recent *Grokster* decision that remitted cases against peer-to-peer operators in the US for trial.

The decision stands as a valuable international precedent in relation to secondary liability for copyright infringement in the digital space, and it has very serious implications for internet business models or service providers which rely for their business on the copyright infringing activity of their users.

Michael Williams (Partner) and **Siabon Seet** (Senior Lawyer) of Gilbert + Tobin Lawyers, Sydney, Australia, acted on behalf of the record companies in the Kazaa proceedings mwilliams@gtlaw.com.au sseet@gtlaw.com.au