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Australia to become “nerve centre” for P2P litigation?

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estate databases as well as from using Finn’s trade mark and awarded compensation of 250,000 NOK.

First, the court decided on whether the offering of Supersøk was an infringement of the copyright or the database right of Finn. This involved discussing the nature of the data extracted from Finn’s service and communicated to the user via the server of Supersøk. The court found it obvious that the link created was not a “copy” of the works on Finn’s data base, but was more hesitant with respect to whether this was to be qualified as making the work available to the public (which also is part of the rightholder’s exclusive rights under the copyright act sec 2). Basing itself on an *obiter dictum* in the Supreme Court’s decision on liability for linking regarding napster.no (Supreme Court of Norway, decision of 27 January 2005, CRi 2005, 60 – *Collecting Society of Public Performance (TONO) and reproduction (NBC) of Music et al. v. A*), the court found that it was an infringement.

The court then discussed whether Supersøk reproduced copies of material on Finn’s database. The material requested by the user was communicated through the server of Supersøk, and some codes for displaying the web pages were altered during this process for purely technical reasons. The court held that the pages were not reproduced, and compared the situation to caching, finding the re-coding less extensive. A similar argument was used with respect to the *sui generis* database right. The court was rather hesitant in its arguments concerning processing of personal data using the solution of communicating through Supersøk’s server. However, it did not find that there is any infringement of copyright or the *sui generis* database right.

Second, the court examined the marketing act, which in its first section has a general clause prohibiting actions

which are deemed as unfair trade practices. The court found that a meta-search-service is not an unfair practice as such. However, comparing the meta-search-service to marketing of third party’s reserve parts the court emphasised the aspect of loyalty towards the underlying services. The court found that Supersøk had not been sufficiently loyal, and enumerated several aspects of the service that contributed towards this view, including the search functions being inferior and therefore creating the risk that users would see this as representative for the performance of Finn’s service, generating bad faith.

Third, the court discussed the trade mark act sect 4, as Finn maintained that its logo was displayed in such a way that it was an infringement. The court held that it would be lawful to use the trade mark related to a link to Finn’s service, but that Supersøk in this case had used the trade mark in a context where the objective was to emphasise Notar’s service in connection to Finn’s.

Comments

The Supersøk service was launched with major campaigns, and before the decision mentioned here, an injunction was brought before the courts. Trondheim first instance court ordered Supersøk not to offer access to Finn’s database (14 December 2004). This was appealed to Frostating appeal court, which upheld the prohibition in a decision of 2 March 2005). This was appealed to the Supreme Court, which did not grant a review by a decision of 3 May 2005). During this period, the Supersøk system was amended, in spite of this, the decision presented here is based on a first version of the system. It is expected that the case will be appealed.

Prof. Jon Bing, Oslo. Further information about the author on p. 160.



Updates

Australia to become “nerve centre” for P2P litigation?

The long-running and hotly contested case of *Universal Music Australia v Sharman License Holdings*¹ has finally limped to a close. After almost six years of litigation spanning three continents, the record industry plaintiffs have agreed to settle just weeks before the Full Court was expected to rule on the file sharers’ appeal.

1. History of Proceedings Against Kazaa

The case concerned the liability of a number of defendants for the billions of copyright infringements that have been facilitated by the controversial Kazaa P2P file-shar-

ing software.² The music industry has doggedly pursued Kazaa’s owners. The litigation saga began way back in 2001 when a number of record companies filed suit against Kazaa’s owners and licensees in the

² In the course of the Kazaa litigation Altnet, one of the respondents held liable for authorisation of copyright infringement, claimed that Kazaa’s 60 million users downloaded over three billion files each month. *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*(2005) 65 IPR 289, at 147. Wilcox J noted that while it was theoretically possible for the system to be used to transfer non-infringing files, “in May 2003, Kazaa was being predominantly used for music file-sharing. A reader who had even a general understanding of copyright law would also have realised this necessarily involved copyright infringement on a massive scale.” *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*(2005) 65 IPR 289, at 186. Accordingly it is appropriate to surmise that the number of unauthorised transfers of copyrighted material amounted to billions.

United States and the Netherlands.³ This strategy tasted immediate success when the Amsterdam District Court ordered Kazaa to be shut down.⁴ But victory was fleeting. Kazaa’s original owners quickly transferred their assets to a secretive web of companies incorporated in a number of jurisdictions all over the world.⁵ This caused the US litigation

³ An offshoot of the US litigation subsequently produced the seminal decision in *MGM Studios Inc v Grokster Ltd*, 125 S Ct 2764 (2005). This originated as an application for summary judgment that was brought by the two licensees of the Kazaa software.

⁴ *Vereniging Buma and Stichting Stemra v Kazaa BV* (Unreported, Amsterdam District Court, 29 November 2001).

⁵ For a detailed exposition of these arrangements see *Rebecca Giblin-Chen and Mark Davison*, ‘Kazaa goes the way of Grokster? Authorisation of copyright infringement via peer-to-peer networks in Australia’ (2006) 17(1) *AIPJ* 53-76.

¹ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289.

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to proceed extremely slowly, constantly hampered by jurisdictional difficulties and confusion over exactly who it was that was responsible for the software. In a further blow, the Netherlands decision was subsequently overturned on appeal.⁶

Stymied, the recording industry took the battle to Australia. They filed a new lawsuit alleging that a number of defendants, including an Australian-incorporated company, were liable for authorizing the infringements of Kazaa's users. After several years of bitter litigation the Federal Court finally ruled in their favour, holding that several of the companies and individuals behind the software were indeed liable for the copyright infringements of its users.⁷ It issued an injunction that promised to sound the death knell for the software and ordered pecuniary damages to be assessed at a subsequent trial.⁸

2. The Friendly Settlement

In accordance with the settlement agreement the Federal Court in August dismissed the proceedings, making no order as to costs.⁹ As a result the Full Court will not rule on the defendants' appeal. While the rest of the agreement between the parties was not disclosed in the court papers it has been widely reported as involving both a financial payout and changes to the controversial software. The music industry plaintiffs are expected to receive a cash payment of US-\$ 115

million. Some reports suggest that smaller payouts will also be made to members of the software and music industries.¹⁰ In addition, filtering technologies will be introduced to reduce or eliminate unauthorized copying via the controversial software, and Kazaa will be reinvented as a legitimate service.¹¹ In exchange, the defendants will be disentangled from long-running litigation in both Australia and the US.¹²

After the doggedness of the record industry's pursuit, the news of the settlement came as something of a surprise. What could cause them to allow their enemy to slip away at the last moment after spending so much time and money to ensure they could shut it down for good?

a) Finances and User Base

It is highly doubtful that the financial component of the settlement was significant enough to persuade them. Many of the same plaintiffs turned down an offer of almost ten times as much when Napster and Bertelsmann offered a similar deal in 2001.¹³ Instead of accepting the offered US-\$ 1 billion over five years, they chose to crush the Napster service completely. In any event, if the Federal Court's decision had been upheld on appeal the plaintiffs looked set to have received substantial pecuniary damages.

It seems equally unlikely that they were motivated by any ambition to gain control over Kazaa's user base. Although in Kazaa's heyday it was enormous, it has been severely

depleted as users deserted in favour of legitimate services and better sources of unauthorised content. In fact a recent study by Britain-based research firm CacheLogic suggested that the Kazaa network is now only responsible for around 10% of all peer-to-peer traffic.¹⁴ Between the onset and climax of the litigation Kazaa and its users had become almost irrelevant to the larger picture of P2P copyright infringement.

b) Controversy

If the record industry's motivation to settle stemmed from neither the money nor any pressing need to turn Kazaa's remaining users legitimate, it might be that it was spurred by a desire to ensure that the Full Court had no opportunity to overturn the Federal Court's decision. The content of that decision has been comprehensively canvassed in this and other publications, and won't be rehashed here.¹⁵ For these purposes it is sufficient to note that it was particularly controversial in one respect. Secondary liability regimes in the US, UK and Canada require that there be some control over the third party's infringements before liability can accrue (or, in the case of the US, that the defendant have induced those infringements). However as Professors Jane Ginsburg and Sam Ricketson explain, in the Kazaa case the Federal Court suggested that “an entrepreneur who deliberately foregoes control that it could have exercised had it designed its service differently may well be found to have authorised the ensuing infringements in violation of Australian law.”¹⁶ This opens the

6 See *Kazaa BV v Vereniging Buma and Stichting Stemra* No. 1370/01 (Unreported, Amsterdam Court of Appeal, 28 March 2002); upheld by *Vereniging Buma and Stichting Stemra v Kazaa BV* AN7253 Case No. C02/186HR, Supreme Court of the Netherlands (Hoge Raad).

7 *Universal Music Australia Pty Ltd v Sharm License Holdings Ltd*(2005) 65 IPR 289, at 489–490.

8 *Universal Music Australia Pty Ltd v Sharm License Holdings Ltd*(2005) 65 IPR 289, at 15.

9 The consent orders in this case are available online. To access them, navigate to http://www.fedcourt.gov.au/ecourt/ecourt_esearch_slide.html. Scroll down and accept the offered terms of access. On the following menu, click on “Search by File Number, Name or Application Type”. Select the prefix “NSD”, then enter the sequence number of 110 and the year 2004. Click the search button at the bottom of the field. At the far right of the line labelled “intellectual property” there is a link that is labelled O followed by a number in brackets. Click that link. All of the orders that have been made in the Kazaa case will be listed. To see the text of the consent orders, select the order made by Justice Branson on 4 August 2006.

10 See for example, *Ted Bridis*, “Kazaa” makers settle piracy lawsuits’ *Seattle Post Intelligencer*, [http://seattlepi.nwsource.com/business/1700AP_Downloading_Music.html?source=nyipj], (28 July 2006) accessed at 1 August 2006; ‘Record industry, Kazaa settle music case’ *The Age*, <http://www.theage.com.au/news/National/Record-industry-Kazaa-settle-music-case/2006/07/27/1153816326356.html>, (27 July 2006) accessed at 29 July 2006.

11 ‘Record industry, Kazaa settle music case’ *The Age*, [<http://www.theage.com.au/news/National/Record-industry-Kazaa-settle-music-case/2006/07/27/1153816326356.html>], (27 July 2006) accessed at 29 July 2006.

12 ‘Record industry, Kazaa settle music case’ *The Age*, [<http://www.theage.com.au/news/National/Record-industry-Kazaa-settle-music-case/2006/07/27/1153816326356.html>], (27 July 2006) accessed at 29 July 2006.

13 Reported at *John Borland*, ‘Napster offers recording industry \$1 billion’ *CNet News.com*, [<http://news.com.com/2100-1023-252862.html?legacy=cnet>], (20 February 2001) accessed at 30 March 2005.

14 ‘Kazaa hit by file-sharing ruling’ *BBC News*, [<http://news.bbc.co.uk/2/hi/technology/4214810.stm>], (5 September 2005) accessed at 15 September 2005.

15 For comprehensive explanations and analyses of that decision, see *Rebecca Giblin-Chen* and *Mark Davison*, ‘Kazaa goes the way of Grokster? Authorisation of copyright infringement via peer-to-peer networks in Australia’ (2006) 17(1) *AIPJ* 53-76; *Jane C Ginsburg* and *Sam Ricketson*, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling’ (2006) 2(11) *Media and Arts Law Review* 1; *Graeme W. Austin*, ‘Importing Kazaa—Exporting Grokster’ (2006) 22 *Santa Clara Computer & High Technology Journal* 577.

16 *Jane C Ginsburg* and *Sam Ricketson*, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling’ (2006) 2(11) *Media and Arts Law Review* 1, at 23.

Amended Data Protection Act

possibility that “facilitators of online infringements may now be more vulnerable in Australia than the US.”¹⁷

3. Impact on Authorisation Liability

The Kazaa precedent is of even more value to content interests when it is understood that the Australian authorization law is not necessarily limited to Australian facilitators. The Copyright Act 1968 (Cth) provides that authorisation liability accrues where one “authorizes the doing in Australia” of an infringing act.¹⁸ This may be sufficiently broad to cover situations where a person outside the country has authorized infringing conduct to occur within it. As Ginsburg and Ricketson explain, “[t]his could mean that a KaZaa-like operation located outside Australia, such as Grokster or Streamcast, might be found to ‘authorise’ the communication to the public in Australia if Australian subscribers use the Grokster or Streamcast software to make works on their hard drives available to web surfers inside or outside Australia.”¹⁹ This could potentially give rise to liability even where a defendant’s conduct was lawful where it actually took place. Accordingly, Ginsburg and Ricketson hypothesize that “[a]ssuming personal jurisdiction could be obtained over the off-shore P2P providers... then Australia could become the litigation nerve centre for future P2P controversies wherever the providers may be located.”²⁰

4. Outlook

The perception that the Australian law is more plaintiff-friendly than that of other Western jurisdictions is still in its infancy. It may well turn out to be a mare’s nest. However, given the difficulties that have been experienced by those pursuing secondary liability litigation against P2P companies in the US, content interests will undoubtedly be keen to foster the development. One way of doing so might be to ensure no court has the opportunity to overturn the decision while it is still fresh. While a favourable Full Court decision would have been of even more value than the first instance decision, that first instance decision would have become worthless if it had been overturned. When these circumstances are considered, the record industry’s decision to settle

the matter begins to make a lot more sense.

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Further information about the author on p. 160.

Switzerland: Amended Data Protection Act

In spring 2006 the Swiss Parliament has partially revised the Federal Data Protection Act of 1992 for the first time. The amended statute is expected to become effective in spring 2007. The approved revision constitutes the end of a quite long legislative process; even from the presentation of the bill by the Federal Council in February 2003 it has lasted more than three years until its ratification by the Parliament; opposition has particularly been raised from the business sector which was afraid of too extensive obligations imposed on enterprises owning large data collections. Generally speaking, the substantive amendments taking into account the experiences of the last 15 years must be considered as relatively remote. The main points of the revision of the Data Protection Act can be summarized as follows:

1. Purpose of Data Collection

Art. 4 of the Act is amended in order to specify the purpose of data collections. The law now requires that the concerned person must be aware of such purpose. If an approval to the data processing of the concerned person is legally foreseen, such data processing is only authorized if sufficient information has been given to the concerned person; in case of sensitive data or personal data profiles, an explicit agreement is mandatory. The amendment is designed to increase transparency.

2. Cross-Border Data Transfer

The already existing provision on the cross-border transfer of data (Art. 6) is now specified in respect of countries which do not provide for an adequate data protection of the concerned person; as far as the member countries of the European Union are concerned, the competent authorities of Switzerland and the EU have established by a letter exchange that a comparable level of

data protection exists meaning that the new provision (only) applies for example in respect of cross-border data transfers to the United States or to countries in the Middle and Far East. The adequate level of protection can be reached by the conclusion of a specific agreement, by individual approval or if the transfer relates to the execution of an already existing contract or is required by public interest; furthermore, data can be exchanged within a group of companies. The amendment leads to a higher degree of legal certainty.

3. Transparency

A major objective of the revision of the Data Protection Act consists in the improvement of transparency. Apart from the identifiable purpose of the data processing and of increased explicit approvals by the concerned persons, the disclosure of adequate information is particularly important if the data processing covers specifically sensible personal data or personal data profiles; in such cases, detailed information needs to be given by the data processing enterprise (Art. 7a of the Act).

4. Outsourcing of Data Processing

The new provision on the conditions for a valid outsourcing of the data processing to a third party takes up the contents of the already existing provision and specifies in a general sentence that the third party is bound by the same rules as the principal and that legal and contractual secrecy duties must be observed (Art. 10a of the Act).

5. Certification Proceedings

The probably most important new provision is Art. 11 of the Act intro-

¹⁷ Jane C Ginsburg and Sam Ricketson, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling’ (2006) 2(11) *Media and Arts Law Review* 1, at 23.

¹⁸ *Copyright Act 1968*(Cth), s 36(1), s 101(1).

¹⁹ Jane C Ginsburg and Sam Ricketson, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling’ (2006) 2(11) *Media and Arts Law Review* 1, at 24.

²⁰ Jane C Ginsburg and Sam Ricketson, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling’ (2006) 2(11) *Media and Arts Law Review* 1 citing Graeme W. Austin, ‘Importing Kazaa-Exporting Grokster’ (2006) 22 *Santa Clara Computer & High Technology Journal* 577.