

FROM NAPSTER TO KAZAA: THE BATTLE OVER PEER-TO-PEER FILESHARING GOES INTERNATIONAL

The Recording Industry Association of America (RIAA) may have won its domestic battle against Napster, but as an increasing number of peer-to-peer (P2P) providers crop up overseas, it has become apparent that the file-swapping battle has really just begun. As the recording and movie industries struggle to protect their copyrighted interests abroad, courts, both in the United States and in foreign countries, are being asked to answer difficult questions concerning international jurisdiction and enforcement. This ibrief will further explore these issues, particularly with reference to the RIAA's and Motion Picture Association of America's (MPAA) legal efforts against Kazaa, a foreign-based P2P provider, in an attempt to assess whether copyright in the digital age can survive beyond our shores.

Offshore Peer-to-Peer Providers: An Overview

While Napster may be desperately trying to stay afloat, offshore P2P providers are flourishing. Their increasing popularity is two fold: one, many of the offshore P2P providers facilitate direct user-to-user exchanges (as opposed to transfers through a central server); and two, offshore P2Ps are being set up in specific locations so as to take advantage of less restrictive copyright laws and weaker judicial enforcement mechanisms. Facilitating direct peer-to-peer exchanges offers a layer of legal protection that in some countries is enough to remove liability for copyright infringement.¹ Lee Black, an analyst for Jupiter Research noted, “The file-sharing services’ technology and business models continue to evolve in such as away as to circumvent U.S. legal rulings The fact that it continues to move into international areas will always pose a problem for the industry – these things keep sprouting up, and consumers keep finding the content they want.”²

Kazaa is a prime example of this new offshore P2P phenomenon. Kazaa’s software has been downloaded an estimated 192 million times³ from a site that usually attracts at least 4 million people a day.⁴ Kazaa’s own legal documents estimate that more than 15 million copy-

¹ Anna Wilde Mathews and Charles Goldsmith, *Music Industry Faces New Threats on Web*, WALL ST. J., Feb. 21, 2003, at B1.

² Sandeep Junnarker, *‘Honest Thief’ confronts music industry*, CNET News.com, at <http://news.com.com/2102-1023-985484.html> (Feb. 21, 2003).

³ *Id.*

⁴ Dawn Kawamoto, *New Kazaa software released*, CNET News.com, at <http://news.com.com/2102-1023-984525.html> (Feb. 13, 2003).

protected files are transferred via Kazaa software each month.⁵ This new P2P empire, which is owned by Sharman Networks Ltd., is based in the Pacific island nation of Vanuata and operates out of Australia.⁶ While neither country has yet to consider any copyright infringement charges against it, Kazaa has been sued in several other countries – most notably in the Netherlands and now in the U.S. The resolution of the Netherlands case made recording and movie industry advocates scream in protest. A Dutch appeals court found that Kazaa could not be held liable for consumers’ potentially illegal use of its software.⁷ One journalist characterized this decision as paving the way for the creation of a Dutch “legal haven for file-sharing activities.”⁸ One Dutch proprietor, Pieter Plass, has already launched a website called “The Honest Thief,” which will soon begin distributing licensed file-sharing software and offering legal advice to other P2P providers.⁹ Plass calls his plan “good business,” and he hopes “The Honest Thief will become to file sharing what the Swiss are to banking.”¹⁰

Even if U.S. courts refuse to accept the user-only limited liability defense, the Dutch appeals court decision in the Kazaa case, assuming it is allowed to stand¹¹, proves that there are other courts in other countries that are willing to accept this line of reasoning. Given this current state of affairs, the largely US-based recording and movie industries must first find ways to bring these offshore P2P providers before stricter U.S. courts; and then, assuming copyright infringement judgments are levied against the offshore P2P providers, the industries and the courts must fight another battle to get their judgments enforced.

Acquiring Jurisdiction over Offshore P2P Providers

In January 2003, a Los Angeles federal district court judge held that Kazaa owner Sharman Networks, Ltd. could be joined as a defendant in a lawsuit by various record companies and movie studios against Grokster, Ltd. and other file-swapping networks.¹² Kazaa argued it should not be bound by U.S. law, because its foreign place of incorporation and headquarters prevented the establishment of substantial contact with California residents.¹³ Judge Stephen Wilson disagreed. In his 46-page decision, he wrote, “[g]iven that Sharman’s (Kazaa) software

⁵ *Id.*

⁶ Mathews and Goldsmith, *supra* note 1.

⁷ Junnarker, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Mathews and Goldsmith, *supra* note 1.

¹² Declan McCullagh, *Judge: Kazaa can be sued in U.S.*, CNET News.com, at <http://news.com.com/2102-1023-980274.html> (Jan. 10, 2003).

¹³ *Id.*

has been downloaded more than 143 million times, it would be mere cavil to deny that Sharman engages in a significant amount of contact with California residents.”¹⁴ He also noted that “many, if not most, music and video copyrights are owned by California-based companies.”¹⁵ This kind of purposeful availment reasoning, whereby an off-shore provider avails (or subjects) itself to U.S. jurisdiction by actively (and purposefully) promoting itself to American users and providing technology for the illegal copying of America entertainment goods, is easily applicable to any number of offshore P2P providers that service U.S. customers who in turn download U.S. entertainment goods. However, this is only the first and perhaps easiest battle that the RIAA and MPAA will fight in their legal efforts against offshore P2P providers.

Getting Around the Direct P2P Exchange Protection

As previously discussed, Kazaa escaped liability in the Netherlands, because it was deemed not responsible for the potentially illegal use of its software by consumers.¹⁶ Kazaa’s direct peer-to-peer exchange allows for such a line of reasoning. By contrast, earlier P2P programs, like Napster, whose software channels user uploads and downloads through a central file-exchange server, are directly connected to the illegal act, and thus more clearly liable for participating in and facilitating copyright infringement. This distinction, however, may not be enough to release Kazaa and other direct P2P providers from the kind of vicarious or contributory infringement liability that was applied in the Napster case. As one Professor notes,

Digital file-sharing technology necessarily implicates copyright law because every digital file may be considered a fixed copyrighted work. The transmission of the file to another person would qualify as a reproduction, distribution, and possibly a performance of the copyrighted work. . . . By applying the legal principles of contributory and vicarious infringement, the Napster court has expanded liability to those who develop and distribute P2P file-sharing systems and tools.¹⁷

Generally, contributory infringement liability arises when the “plaintiff can show that the defendant had knowledge of the infringing activities that occurred through the defendant’s Web site,” and that it was “reasonable to expect the defendant to have knowledge of the infringing activities.”¹⁸ Additionally, “plaintiff must show substantial participation by the defendant in

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Mathews and Goldsmith, *supra* note 1.

¹⁷ Grace J. Bergen, *The Napster Case: The Whole World is Listening*, 15 TRANSNAT’L LAW. 259, 271 (2002).

¹⁸ Howard P. Goldberg, *A Proposal for an International Licensing Body to Combat File Sharing and Digital Copyright Infringement*, 8 B.U. J. SCI. & TECH. L. 272, 282 (2002).

furthering the spread of the infringing materials.”¹⁹ The “substantial participation” requirement is usually satisfied “when the defendant knows or has reason to know of the infringing material and does not take action to remove the infringing works from its site.”²⁰ These laws would not directly apply to Kazaa, as they did to Napster, because Kazaa does not run a central server through which infringing material is passed. However, a court could choose to read these provisions broadly so as to include Kazaa’s continued distribution of software that it knows (or should reasonably know) is being used for infringing purposes as constituting “substantial participation.” In this respect, it is difficult to argue that Kazaa is very different from Napster, which the court concluded, “knowingly encourages and assists the infringement of plaintiffs’ copyrights.”²¹

Vicarious liability against Kazaa, or any direct P2P software provider, would be a harder sell. For vicarious liability, it must be shown first that “the [defendant] online service provider had the ‘right and ability’ to control any potentially infringing activities,” and second, that the “online provider obtain[ed] some type of financial benefit from the infringing activities of its users.”²² A company that merely distributes software, rather than running a central server, can only control “potentially infringing activities” in so far as it can control the distribution of its software. It would seem in this case that the only possible control would be not distributing the software at all (which would be the ideal outcome for the RIAA and MPAA). However, if Kazaa can show that its software can be used for non-infringing uses, then it seems unduly harsh to completely ban distribution of its software. As noted, it would also have to be shown that Kazaa eventually intends to profit from its software distribution.

Finally, liability for Kazaa could be pursued under the 1998 Digital Millennium Copyright Act (DMCA).²³ As Howard Goldberg notes, “The primary purpose [of the DMCA] is to restrict technologies that facilitate the digital copying of protected materials.”²⁴ It does this by “outlawing the circumvention of copy protection systems and prohibiting the removal or alteration of copyright management information.”²⁵ Technically, the DMCA more closely applies to actual devices and processes that are used to crack copy-protection codes/devices that are on

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 278.

²² *Id.* at 282.

²³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA].

²⁴ Goldberg, *supra* note 18, at 285.

²⁵ Goldberg, *supra* note 18, at 286.

CDs, DVDs, etc. However, software programs, such as Kazaa, that facilitate the direct transfer of infringing materials, could fall under Section 1201(b)(1)(A)'s prohibition against:

traffic[king] in any technology, product, service, device, component, or part thereof that is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in work or a portion thereof.²⁶

Kazaa, and other P2P provider, software does not actually break copy protection code, but it does facilitate the transfer and distribution of illegal copies, thus indirectly circumventing copy protection. In essence, it actually makes circumvention easier since a user does not have to employ often complicated decryption software or devices. Rather, a user can just download the P2P software and directly acquire an already decrypted copy from another user. Granted this is stretching the DMCA language, but this stretch would seem to fall squarely within the purposes and intentions of the legislation, namely to "restrict technologies that facilitate the digital copying of protected materials."²⁷

The Enforcement Problem

Since there are ways to gaining jurisdiction over, and judgment against, offshore P2P providers like Kazaa, it would seem that the battle is all but won. Unfortunately, for the recording and movie industries, the toughest battle may turn out to be getting any kind of judgment enforced so as to make an effective dent in the P2P culture. First, given that offshore P2P providers tend to scatter their assets outside the U.S., it may be exceedingly difficult for U.S. courts to find domestic assets to seize.²⁸ Second, if a court orders shutting down or blocking access to the infringing site, making that happen may be next to impossible. Where U.S. domestic assets are not available to use as negotiating collateral, shutting down a foreign based P2P provider would almost certainly have to involve cooperation and pressure from the foreign P2P provider's home country government, usually in the form of a court order.²⁹ However, when that home country does not see a problem with the P2P provider's activities, such as with Kazaa, then getting that country's cooperation is unlikely. The U.S. government may even be increasingly reluctant to lobby on behalf of the entertainment industry, as the federal government is currently under pressure from certain powerful technology companies, including Apple Computer, Microsoft, Dell Computer, Cisco Systems, Hewlett-Packard, and Intel, that are upset

²⁶ DMCA, 17 USCA § 1201(b)(1)(A).

²⁷ Goldberg, *supra* note 24.

²⁸ John Borland, *Ruling bolsters file-traders' prospects*, CNET News.com, at <http://news.com.com/2100-1023-870396.html> (Mar. 28, 2002).

with what they see as the entertainment industry's attempt to control the progress of technology.³⁰ The RIAA and MPAA could also have difficulty in asserting claims under the Berne Convention³¹, the World Trade Organization's TRIPS Agreement³², or the World Intellectual Property Organization (WIPO) Copyright Treaty³³ as these conventions and agreements are among governments, so the same government enforcement problems discussed above would still exist.

The recording and movie industries' remaining option for enforcing decisions against offshore P2P providers is preventing access to infringing P2P providers. This kind of action requires some difficult burden shifting to already overburdened parties, particularly Internet Service Providers (ISPs) and universities. Some ISPs and universities are being asked to block particular file-swapping sites' IP addresses and turn over information on users who have frequently accessed and transferred files through P2P sites. In January 2003, a U.S. District Court held that under § 512 of the DMCA, Verizon Communications had to turn over the name of an alleged P2P pirate that had used Kazaa to share hundreds of music recordings.³⁴ Section 512 allows copyright owners to subpoena ISPs for subscriber information.³⁵ Verizon challenged the constitutionality of the section, arguing that ISPs are only conduits and do not host potentially infringing servers.³⁶ An amicus brief filed on Verizon's behalf also argued that § 512 violates the right to online anonymity.³⁷ Judge Bates, however, was not persuaded, and he ruled in the RIAA's favor, concluding "the subpoena authority of section 512 applies to all service providers within the coverage of the act, including Verizon."³⁸ Verizon has since challenged the decisions, citing the "substantial good will harm" that will come to their ISP business if they are forced to reveal the identity of its subscribers.³⁹ Needless to say, if Verizon's reluctance to reveal the

²⁹ *Id.*

³⁰ Declan McCullagh, *Tech firms fight copy-protection laws*, CNET News.com, at <http://news.com.com/2102-1023-981882.html> (Jan. 23, 2003).

³¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last amended Sept. 28, 1979, 828 U.N.T.S. 221.

³² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

³³ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997).

³⁴ Declan McCullagh, *ISP ordered to identify Kazaa user*, CNET News.com, at <http://www.msnbc.com/news/862375.asp> (Jan. 21, 2003).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Roy Mark, *Verizon, RIAA Trade Claims of Harm*, Internetnews.com, at <http://dc.internet.com/news/print.php/1583621> (Feb. 13, 2003).

identity of a copyright infringing Kazaa user is an indication of ISPs general unwillingness to carry the burden of enforcing judgments against offshore P2P providers, then the RIAA and MPAA are facing an uphill struggle with a very uncooperative partner.

Are universities a less reluctant copyright enforcer? Last year, the RIAA approached over 2000 university presidents and encouraged them to crack down on music piracy.⁴⁰ Since then, many universities have either threatened students with honor code sanctions or slowed down internet connection speeds into dorm rooms in an effort to deter online piracy.⁴¹ These actions, however, have not gone without protest. “[M]any educators are ambivalent about being forced into the role of intellectual-property police.”⁴² They worry that fear of falling victim to a Napster-like lawsuit may be pushing some schools to “become so aggressive they’re compromising intellectual freedom on campus.”⁴³ As Virginia Rezmierski, an adjunct professor at the University of Michigan’s Gerald R. Ford School of Public Policy, explained, “The minute you agree you’re responsible, you have no alternative but to monitor. A, you can’t do it. And B, . . . it’s absolutely destructive to the university, because it creates a chilling environment when we want to have an environment of openness and creativity.”⁴⁴ Monitoring isn’t completely impossible, but it can be expensive, and its effectiveness is still debatable. As Jack McCredie, UC-Berkeley’s Assistant Vice-Chancellor of Information Technology, commented, “[t]he students are saying, ‘Ok. I’m going to break the law. What are they going to do to me?’ Until we get a right solution to this, its just going to be two sides against each other, and a lot of us in the middle.”⁴⁵ In short, this battle between the entertainment industry and offshore P2P providers, like Kazaa, involves more than just the immediate parties, particularly when it comes to enforcing judgments levied by U.S. courts.

Conclusion

The recording and movie industries’ battle against file-sharing is far from over. On the contrary, it’s just beginning. Presently, US entertainment giants are facing off against offshore P2P providers, such as Sharman Networks Ltd.’s Kazaa, that provide a different kind of service from Napster and a whole new set of jurisdictional, legal and enforcement problems. Foreign courts may have been persuaded by the direct peer-to-peer defense, as advanced by Kazaa in the

⁴⁰ Dawn C. Chmielewski, *Colleges ambivalent about anti-piracy role*, SiliconValley.com, at <http://www.siliconvalley.com/mld/siliconvalley/5205893.htm> (Feb. 18, 2003).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Dutch appeals court, but U.S. courts seem poised to flex stricter U.S. copyright laws against these foreign companies that are substantially connected to U.S. internet users and U.S. entertainment interests. Even so, Roderick Dorman, a lawyer for Sharman Networks, Ltd. asked the toughest remaining problem for the U.S. entertainment industry – “[h]ow are they going to enforce [a judgment]?”⁴⁶ Without U.S. assets to seize, the recording and movie industries are left with few options, namely government cooperation, DMCA Section 512 requests to ISPs and pressuring universities – all of which have garnered formidable concern and resistance. As the Kazaa case progresses through the U.S. courts, it remains to be seen who will emerge the victor in this new international copyright battle. Ultimately, we may be left asking ourselves whether the death bell for copyright in the digital age originated in the halls of our U.S. courts or if it was ringing long before in the halls of courts abroad.

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⁴⁶ Mathews and Goldsmith, *supra* note 1.