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PRESENTE:

KaZaa : The Industry faces the music

23 Mai 2002

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In its March 28, 2002 decision the Amsterdam Court of Appeals overruled a Districts Court's decision that held KaZaa BV was partially responsible for the unauthorized reproduction and distribution of copyright protected music.

In the November 29, 2001 decision the Amsterdam District Court stated that by the provision on its site of a P2P software, KaZaa BV was directly infringing one's copyright.. Nothing new under the sun so far.... The court only reaffirmed what was said before in similar cases brought against pioneer Napster. In the United States Napster's contributory liability was based upon the fact that Napster provided throughout its site facilities enabling direct copyright infringement and that it had actual knowledge that specific infringing material was made available using its system.

However, the Appeals Court decision is a U-turn in file swapping jurisprudence. For the first time ever a Court ruled that the operator of a peer-to-peer system cannot be held liable for the acts committed by its users.

In the first place this is so because KaZaa software not only enables the swapping of audio files, but can also be used for legitimate purposes, such as swapping non- copyright protected files.

In addition, the Court concluded that even if it would be technically possible to recognize copyright protected files, it is not possible to integrate into KaZaa or any other file-swapping technology a technical blocking device e.g. a firewall, that makes the unlawful exchange of files impossible.

Furthermore the Court implicitly recognized that KaZaa BV could not monitor the use of its software. Unlike the technology of P2P founding father Napster, the use of KaZaa does not require central servers, Napster's Achilles heel, under control of the software developer. Once the peer-to-peer software is downloaded on an individual's PC, KaZaa BV is unable to control its usage. On the contrary, if KaZaa BV really could monitor – leaving in the sideline the privacy issues – and control the use, it would not have taken the draconic measure of taking down its own website from which its software could be downloaded.

Most important, the Court held that in so far that copyright concerned use is made of its software, the infringing acts are committed by its users, not by KaZaa. By saying so, the

Court reaffirmed implicitly to the 1984 US Supreme Court Sony decision which stated that seen the substantial non-infringing use, VCR manufacturers cannot be held liable for the potential infringing use that is made of VCRs.

Although the Industry has lost this battle, the war is not over yet. On the one hand, KaZaa, like other file swapping services, is facing lawsuits in the United States. US Courts are not bound by foreign jurisprudence and, as demonstrated in the Yahoo-case, American courts are reluctant in enforcing or in 'copying' European jurisprudence.

On the other hand, the genie is out of the bottle. Seen the nature of the internet one has to ask himself whether suing peer-to-peer operators is not the wrong answer. Maybe the answer should be sought in the machine or/and in a co-operation between the Industry and the P2P operators.

For more information

Read the [court of appeal decision, March 28, 2002](#)

Read the [Amsterdam District Court decision, November 29, 2001](#).

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