

LEGAL DEVELOPMENTS

CASE LAW

AUSTRALIA

Federal Court of Australia

Copyright—Secondary Infringement—Peer-to-peer System—Injunctive Relief

On 5 September 2005 the Federal Court of Australia rendered a decision concerning the Kazaa Internet peer-to-peer file sharing system. Available worldwide free of charge, Kazaa enabled users to share any material, mostly copyright-protected musical works. Kazaa was being sued by companies from the music industry for copyright infringement, for failing to take action against its users, whom it knew were infringing. Kazaa was found to infringe, and a provisional order was made to restrain future infringements, yet without unnecessarily intruding on freedom of speech and communication. The continuation of the Kazaa system will not be regarded as a contravention of the order if the system is modified, in a manner agreed by the applicants or approved by the Court.

Decision of the Federal Court of Australia, Wilcox J. – Sydney, 5 September 2005
(*Excerpts taken from the summary of the decision by the Federal Court of Australia*)

[*Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd.*](#)
[2005] FCA 1242

The case concerns the operation of the Kazaa Internet peer-to-peer file-sharing system. This system operates world wide. The Kazaa system is available to users free of charge. Any person with access to the Internet can become a Kazaa user. It enables one user to share with other users any material the first user wishes to share, whether or not that material is subject to copyright, simply by placing that material in a file called ‘My Shared Folder’. The respondents claim the Kazaa system is an example of ‘peer-to-peer’ technology. Counsel for the applicants did not accept that Kazaa is truly a P2P system. They said that, ‘while the software has P2P characteristics, it is now clear that it has many features in common with client/server and centrally indexed systems.’

There are 30 applicants in this case. They include companies associated with the world's major distributors of sound recordings, mostly in the form of compact discs. They distribute sound recordings in Australia. They claim copyright in their respective sound recordings. It is clear that a major proportion of Kazaa's shared blue files are works (mostly musical works) that are subject to copyright. The files are shared without the approval of the relevant copyright owner. It follows that both the user who makes the file available and the user who downloads a copy infringes the owner's copyright.

The applicants overstated their case. It cannot be concluded, as the applicants claimed in their pleadings, that the respondents themselves engaged in communicating the applicants' copyright works. They did not do so. The more realistic claim is that the respondents authorised users to infringe the applicants' copyright in their sound recordings. Section 101 of the Australian *Copyright Act* provides that copyright is infringed by a person who, not being the owner of the copyright and without the licence of the copyright owner, authorises another person to do in Australia an infringing act.

Realistically speaking, the applicants' copyright infringement claim depends entirely on the question whether the respondents, individually and/or jointly, authorised Kazaa users to infringe the applicant's copyright.

Counsel for the applicants tendered documentary material that, they said, demonstrated the respondents' knowledge that the Kazaa system was being used extensively for the purpose of transmitting copyright material. They also said the documents showed the respondents' intended it should be so used; or at least, that they had no wish to curtail that use.

By the end of the trial there was no real dispute about knowledge. I have no doubt that, at all material times, each of the respondents was aware that a major use of the Kazaa system was the transmission of copyright material. Nonetheless, there is dispute about intention.

In short, I find that all the respondents knew the predominant use of Kazaa was for the sharing of copyright-infringing material. None of them had an interest to prevent or curtail that predominant use; if anything, the contrary. Each of the respondents was at least acquiescent in the use of Kazaa for copyright-infringing activities.

It is understandable that the respondents would wish to increase file-sharing. Kazaa is apparently sustained by advertising revenue. It is a fundamental of advertising marketing that price is sensitive to the exposure likely to be achieved by the advertisement. The more shared files available through Kazaa, the greater the attraction of the Kazaa website.

[Respondents] have included on the Kazaa website exhortations to users to increase their file-sharing and a webpage headed 'Join the Revolution' that criticises record companies for opposing peer-to-peer file-sharing. The site went on to extol the advantages of peer-to-peer distribution of data and to argue it was good for 'consumers, artists, producers and developers, labels production companies, libraries and owners and peer-to-peer companies.'

Despite the fact that the Kazaa website contains warnings against the sharing of copyright files, and an end user licence agreement under which users are made to agree not to infringe copyright, it has long been obvious that those measures are ineffective to prevent, or even substantially to curtail, copyright infringements by users.

Counsel for the applicants criticised the fact that, although they knew many users habitually infringed copyright, the respondents have never taken action to enforce the relevant terms of the licence agreement. Perhaps the occasional legal proceeding might be useful '*pour encourager les autres*', if the necessary information could be obtained. However, it is not realistic to believe legal action against individual infringers will stamp out or even slightly reduce, file-sharing infringements of copyright.

There are technical measures [which] would enable the respondents to curtail – although probably not totally to prevent – the sharing of copyright files. The respondents have not taken any action to implement those measures. It is in the respondents' financial interest to maximise, not to minimise, music file-sharing.

From time to time during the hearing of this case, counsel or a witness commented that Kazaa could be used in a non-infringing way. However, it seems unlikely that non-infringing uses would sustain the enormous Kazaa traffic claimed by the respondents. The explanation of that volume of traffic must be a more populist use. The evidence indicates that use is popular music. There is evidence that the Kazaa blue files routinely include a high proportion of the most currently popular sound recordings.

However, I have had to bear in mind the possibility that, even with the best will in the world, the respondents probably cannot totally prevent copyright infringement by users. There needs to be an opportunity for the relevant respondents to modify the Kazaa system in a targeted way, so as to protect the applicants' copyright interests (as far as possible) but without unnecessarily intruding on others' freedom of speech and communication.

The applicants' copyright claim succeeds against six respondents. The six respondents have infringed copyright by first, authorising Kazaa users to make a copy of the said recording and to communicate the recording to the public, in each case without the licence of the relevant applicant; and, second, by entering into a common design to carry out, procure or direct that authorisation. The six respondents threaten to infringe the copyright of the applicants in other sound recordings in the same way.

I have formed some views about the appropriate form of injunctive relief. It is convenient immediately to make the orders. However, I will do so on a provisional basis, in the sense that I will be prepared to reconsider the form of the orders, if so requested by any party.

Subject to that comment, I think it is appropriate to grant an injunction to restrain future infringements of the applicants' copyrights. This injunction should be couched in general terms, reflecting the relevant respondents' general obligation not further to infringe the applicants' copyright. However, I am anxious not to make an order which the respondents are not able to obey, except at the unacceptable cost of preventing the sharing even of files which do not infringe the applicants' copyright. There needs to be an opportunity for the relevant respondents to modify the Kazaa system in a targeted way, so as to protect the applicants' copyright interests (as far as possible) but without unnecessarily intruding on others' freedom of speech and communication. The evidence indicates how this might be done. It should be provided that the injunctive order will be satisfied if the respondents take either of these steps. The steps, in my judgment, are available to the respondents and likely significantly, though perhaps not totally, to protect the applicants' copyrights.

Accordingly, I propose to make an order restraining the infringing respondents from further infringing the applicants' copyright in any sound recordings by authorising the doing in Australia by Kazaa users of any infringing acts, in relation to any sound recording, the copyright of which is held by any of the applicants, without the licence of the relevant copyright owner.

There will be orders providing, in effect, that continuation of the Kazaa Internet file-sharing system will not be regarded as a contravention of the general injunctive order if the system is first modified, in a manner agreed by the applicants or approved by the Court. To allow this to happen, the operation of the injunction will be stayed for two months.