

Music Industry In Global Fight On Web Copies

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Published: October 7, 2002

Having vanquished the music swapping service Napster in court, the entertainment industry is facing a formidable obstacle in pursuing its major successor, KaZaA: geography.

Sharman Networks, the distributor of the program, is incorporated in the South Pacific island nation of Vanuatu and managed from Australia. Its computer servers are in Denmark and the source code for its software was last seen in Estonia.

KaZaA's original developers, who still control the underlying technology, are thought to be living in the Netherlands -- although entertainment lawyers seeking to have them charged with violating United States copyright law have been unable to find them.

What KaZaA has in the United States are users -- millions of them -- downloading copyrighted music, television shows and movies 24 hours a day.

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How effective are United States laws against a company that enters the country only virtually? The answer is about to unfold in a Los Angeles courtroom.

A group of recording and motion picture companies has asked a federal judge to find the custodians of KaZaA liable for contributing to copyright infringement and financially benefiting from it. If the group wins, it plans to demand an immediate injunction. Sharman would then have to stop distributing KaZaA or alter the program to block copyrighted material, which it says is not possible because of how its technology works.

Sharman asked the court last week to dismiss the case, asserting that because the company has no assets or significant business dealings in the United States, the court has no jurisdiction over it. Moreover, the company said, because the Internet does not recognize territorial boundaries, anything Sharman does with KaZaA at the behest of a judge in Los Angeles would affect 60 million users in over 150 countries. Arguments are scheduled for Nov. 18.

"What they're asking is for a court to export the strictures of U.S. copyright law worldwide," said Roderick G. Dorman, a lawyer for Sharman. "That's not permitted. These are questions of sovereignty that legislatures and diplomats need to decide."

Legal experts say the Los Angeles judge, Stephen V. Wilson of Federal District Court, may well decide his court has jurisdiction over Sharman because Americans download software from its

Web site and the company makes money from showing them advertisements.

The struggle over how to apply sometimes conflicting national laws to a medium that pays little mind to geographic boundaries is likely to remain at the heart of the lawsuit, if it proceeds. While there is broad international agreement on what constitutes direct copyright infringement, the penalty for those who enable others to infringe has not yet garnered such consensus.

None of the entities being sued in association with KaZaA distribute copyrighted material themselves. Instead, the software enables millions of people to search for files on each other's personal computers when they are connected to the Internet. When a KaZaA user types the name of an artist or title into a search box, a list of matching files that other users have placed in a "shared" folder on their hard drives appears on the screen. The user can then click on an item to download a copy.

Under the copyright law of most countries, people who use software like KaZaA to download copyrighted material from each other would almost certainly be liable for infringement. The conflict is over whether distributing software that makes it easy for people to break the law is itself a copyright violation.

"The question is whether there is liability in making it possible to infringe," said Jane C. Ginsburg, a professor at Columbia University who teaches international copyright law. "If there are genuine markets for the software in different countries, it could be very difficult to figure out which law to apply."

In the Napster case, a federal appeals court in San Francisco found that the company was likely to be held liable for violating United States copyright law and ordered it to stop operating until the case could go to trial. Napster has since filed for bankruptcy and its service has been defunct for more than a year.

An appeals court in the Netherlands, however, ruled earlier this year that it was legal to distribute the KaZaA software there. "Insofar as there are acts that are relevant to copyright, such acts are performed by those who use the computer program and not by KaZaA," a translation of the court's ruling provided by Sharman's lawyers says.

That case is on appeal to the highest court of the Netherlands, but music industry lawyers say it has little bearing on the KaZaA case in Los Angeles, even if it is upheld. The global reach of the Internet, they say, does not take away the right of the United States to enforce its laws when they have an impact on its citizens, within its borders.

"The copyright industries around the world are not going to stand still and let other companies build businesses off the sweat of their brow simply because they're willing to set up shop in some other country," said Matt Oppenheim, a lawyer for the Recording Industry Association of America.

Nearly three million people typically use the KaZaA Media Desktop software at any given time, collectively providing access to half a billion files, Sharman said, roughly double Napster's usage at its peak. In addition to music, KaZaA makes it possible to trade other digital files, including pictures, text and video.

Although a vast majority of files exchanged with the software appear to be copyrighted works, people also use it to trade material that is not subject to copyright restrictions. For that reason, critics have said that banning it would unnecessarily restrict speech and technological innovation. They say Hollywood is simply trying to avoid the daunting process of pursuing individual users, and a potential public relations backlash from suing its own customers.

But the entertainment industry has so far prevailed in all of its legal actions against companies based in the United States that they have accused of contributing to infringement. Napster, Aimster and Audiogalaxy have either shut down or altered their services. Sharman's assertion that it cannot change its software to screen out copyrighted material, entertainment lawyers suggest, has more to do with the advertising revenue it would lose once people could no longer

download popular music and movies than with technological reality.

Two other companies whose software enables file trading are named in the Los Angeles case. But one of those, StreamCast Networks, the distributor of a program called Morpheus, is based in the Nashville suburb of Franklin. The other, Grokster, is incorporated in the West Indies but is owned by a California family.

The difference with Sharman is that even if the entertainment companies win their lawsuit, the enforcement of any judgment may rely entirely on legal authorities in other nations, and their cooperation is not assured. Last year, for instance, a federal court in San Jose, Calif., declined to honor the judgment of a court in France that prohibited Yahoo from displaying Nazi materials to French citizens visiting its auction Web site. The court said the First Amendment principles of the United States trumped the French ruling, and it would not be enforced.

The Sharman case may well raise again the unsettled question of whether Internet companies should be forced to adhere to the laws of every country whose citizens have access to their Web sites.

Some copyright experts object to that notion, on pragmatic grounds and because they say it contradicts the Jeffersonian principle that governments derive their powers from the consent of the governed. But the alternative, for a company to be bound only by the laws of the country where it is headquartered, could lead to a race to incorporate in countries whose laws are the most lax.

Sharman officials have said that the company is registered on Vanuatu because of its favorable tax conditions, and that it will abide by the laws of Australia. Australia is one of nearly 150 countries that have signed the Bern Convention for the Protection of Literary and Artistic Works, which sets minimum levels of copyright protection.

Jurisdictional issues aside, Sharman's lawyers say that their software is fundamentally different from Napster's because the company's servers do not control a central index of what files reside on which of its users' computers. The company says that even if it ceased operations entirely, people who already have the software would be able to exchange files.

The Hollywood companies suing Sharman dispute the assertion that it has no control over the network of people who use it. Meanwhile, they are still sorting out who owns what with respect to the KaZaA program, and what continent they are on.

Nikki Hemming, the chief executive of Sharman, which is based in Sydney, Australia, is scheduled to meet with the entertainment industry's lawyers soon to give a deposition, though at the request of her lawyers, the meeting will probably take place in Canada. Niklas Zennstrom and Janis Friis, who developed the software, are being sought in Europe. And according to a lawyer for the record industry, the programmers in Estonia who once possessed a copy of the program's source code told a judge there last week that they no longer had it, but they would not say where it was.

Chart: "Software With Reach" KaZaA is one of the file-sharing programs that has gained users after Napster's demise. Graph tracks the top file-sharing applications (listed below) from Jan. 2001-June 2002: NAPSTER AUDIOGALAXY SATELLITE MORPHEUS KAZAA MEDIA DESKTOP Although KaZaA's distributor, Sharman Networks, is being sued in the United States over accusations of copyright infringement, the company's operations are based around the world. Map of the world highlights the locations of the following countries: NETHERLANDS -- Original developers DENMARK -- Server computers ESTONIA -- Software's programmers LOS ANGELES -- Site of lawsuit VANUATU -- Incorporation of Sharman Networks AUSTRALIA -- Sharman Networks' managers (Source: comScore Media Metrix [application user data])(pg. A6)

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