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28 March 2002

AMSTERDAM COURT OF APPEAL
Fourth three-judge civil
section

JUDGMENT

in the matter:

The private company with limited liability **KAZAA B.V.**,
established in Amsterdam,
APPELLANT in the principal appeal,
respondent in the cross appeal,
procurator litis: Mr Chr.A. Alberdingk Thijm

against

1.the association VERENIGING BUMA,
2.the foundation STICHTING STEMRA,
both established in Amstelveen,
RESPONDENTS in the principal appeal,
cross-appellants,
procurator litis: Mr E.A.P. Engels

1. The appeal

Hereinafter, parties will be referred to as KaZaA and Buma/Stemra (singular).

By writ, served on December 13 2001, KaZaA, while putting forward its grounds, appealed to the judgment of the president of the Amsterdam District Court passed on November 29 2001, in the counterclaim under cause list number KG 01/2264 OdC in the matter between KaZaA as plaintiff in the main action, defendant in the counterclaim, and Buma/Stemra as defendants in the main action, plaintiffs in the counterclaim.

In its statement of appeal, as in the writ of appeal, KaZaA put forward ten grounds for appeal against the judgment of the court below and concluded that the court set aside this judgement and, passing a new judgment, will in its judgment, which is to have an immediate effect, reject Buma/Stemra's counterclaim, and order it to pay the costs of the proceedings in both instances. At the same time, KaZaA put forward a document containing corrections.

In its respondent's defence on appeal including notice of cross-appeal, Buma/Stemra contested the grounds for appeal, its conclusion being that the judgement in the counterclaim be upheld. Furthermore, on its part it put forward one contention against the judgment in the main action and concluded that this judgment be set aside and that KaZaA's claim be rejected after all, with KaZaA being ordered to pay for the costs of the proceedings in both instances, both in the principal appeal and in the cross appeal.

Next, parties had their procurators litis further set out their views in a court's hearing on February 27 2002, based on written pleadings that were subsequently submitted. On that occasion both parties submitted further documents to the court.

Finally, Buma/Stemra submitted the documents pertaining to this action in both instances to the court, the contents of which are deemed to be included herein, for it to give judgement.

2. Grounds

For the contents of the grounds of appeal the court refers to the notice of appeal and the defence on appeal respectively.

3. Facts

In consideration 1 under the letters a through j the president listed the facts as they have been established in this action. As there is no dispute concerning these facts the court will take these to be true.

4. Evaluation

In the principal appeal

4.1 The present action, insofar as relevant in appeal, concerns the following:

- a) Via its website www.kazaa.com, KaZaA offers a computer program for the exchange of various types of files by the individual users of the Internet. The software distributed by KaZaA via its website is also called peer-to-peer technology. It allows the individual users to offer information independently but also to locate and download information from other individual users (peers).
- b) The KaZaA computer program is used for the exchange of text, image and sound files, among other uses.
- c) Buma/Stemra exercise the right to publish and the right to reproduce, including the right to mechanically reproduce, namely the reproduction of a work of music through recording on sound recording mediums, for nearly the entire copyrighted music repertoire in the Netherlands.
- d) On KaZaA's initiative parties had been discussing a possible licence for the use of music by the users of KaZaA software since October 2000. The license was to be limited to a so-called streaming licence (notice of appeal, explanation ground 1 under 3), i.e. that the users of KaZaA software could only listen to the music. With the present KaZaA program, users can download the music as well.
- e) The discussions referred to above came to nothing, even after the president had granted KaZaA's claim in the main action that Buma/Stemra be ordered to continue negotiations with KaZaA in order to arrive at the intended licence agreement. As KaZaA announced during the appeal hearing it will therefore no longer maintain its claim in the main action.

4.2 In his judgment in the counterclaim, the president granted Buma/Stemra its claim, i.e. he ordered KaZaA to take such measures within 14 days after service of this judgment that no longer, by means of the computer program provided by it, copyright infringing publications and reproductions with respect to musical works that are part of Buma/Stemra's repertoire can take place, on forfeiture of a penalty of NLG 100,000 per day with a maximum of NLG 2,000,000.

4.3 Against this decision and its underlying motivation KaZaA appealed on ten grounds. The grounds can be dealt with as a whole.

4.4 In its appeal, KaZaA submitted the expert opinion of prof.dr.ir. E. Huizer (exhibit 4, hereinafter: Huizer), professor of Internet applications at Twente University, dated February 18 2002, which concerns a number of technological aspects of the Internet and the way in which the KaZaA software works insofar as relevant in the scope of the present action. This report states the following:

Until very recently, all Internet applications functioned in the so-called client-server mode. This means that one system has the role of client (usually the PC of a user) and that this client system initiates a communication with a central system that functions as the server. (...)The main benefit of this client-server approach is that a service can be set up on a server quite easily. A major drawback, however, is the expansion of the Internet (...)an ever-heavier burden on the servers in view of the increasing number of clients. (...)Nonetheless, nothing stands in the way of using existing Internet protocols for client-to-

client communication; this is called 'peer-to-peer'. (...)Some services require a central server by way of support, while other services can rely entirely on peer-to-peer technology, using the Internet infrastructure. (...)

Although the precise technical specifications of KaZaA (...)were not made public, much can be deduced simply by downloading and installing the application. Then, one can see quite easily which protocols KaZaA actually uses and when it seeks contact with a KaZaA bv web server. As becomes apparent, the program will only call on a web server in the following instances:

- Auto update; here, the software checks if a more recent version is available. This more recent version may or may not be installed by the user. Auto update can be disabled.
- Start list of Super nodes; when starting up, the KaZaA client retrieves a list of so-called Super nodes.
- Security. (...)

All of the above are additional services. The user can disable the first two. The security, however, cannot be disabled by the user (that easily). It turns out, however, that KaZaA clients are functioning very well for locating and exchanging files, even now that KaZaA bv has switched off the support of all three of the above services on the web server. What isn't clear, however, is whether in this case there is any form of security at all.

To speed up the peer-to-peer exchange of information, certain peers (KaZaA clients) will be elevated to a Super node on the Internet (whether temporarily or not). The selection is determined by the bandwidth and the availability of the computer that runs the KaZaA software. Thus, a KaZaA client can be elevated to Super node in the peer-to-peer communication and will thus function as a meeting point for KaZaA clients in the vicinity. Such a Super node mediates in searches, so that other KaZaA clients that have a certain file can be found fast. Next, the file in question can be retrieved directly from that KaZaA client. (...)If one first installs KaZaA, a list of most recently known Super nodes is installed along with it (...).If one starts up KaZaA after the installation, the list is used to contact a Super node. In the unlikely event that no Super node from that list is available, the program will contact the KaZaA bv web server in order to update the list using recent data (...).though the KaZaA bv web server provides very useful additional services, it is not indispensable. (...)

KaZaA and music

Is KaZaA exclusively suited for the exchange of music files? Absolutely not. KaZaA is particularly well suited for certain types of files containing metadata and it is user-friendly. This does include MP3, a popular format for the exchange of music. However, KaZaA is also used for the exchange of Microsoft Word files. Furthermore, apart from the exchange of music, the exchange of jokes is also very popular among KaZaA users.

KaZaA is very well suited as a communication tool for communities that are autonomous, that do not want to make use of a central service but that still have to exchange files. Examples would be:

- Freelance photographers
- Real estate agents
- Citizens who want to publish things

(...)

Couldn't KaZaA be amended in such a way that it recognises copyrighted works and that it would subsequently refuse to communicate such works? This would definitely be possible if such files would be recognisable as such in an unambiguous way. However, there is no globally standardised way of marking copyrighted files as such.

And even if there was such a standard, it could still not prevent the illegal exchange of copyrighted files. Those who break the law by exchanging such files now are already aware of the unlawful nature of their acts. For such users it is pretty easy to veil the marking using a simple program and to thus circumvent a technological blockage of the exchange

Conclusions

(...)

The KaZaA application does not depend on any intervention by KaZaA bv. The program is expanded and functions even better by means of the services provided by KaZaA plus it can be better controlled that way. These services, however, are not necessary for the locating and exchanging of files. Putting an end to these services may well result in the fact that unlawful use does not abide, but that it becomes more difficult to detect and trace. (...)

With the present state of standardisation it is not possible to technically detect which files are copyrighted and which are not. Thus, it is not possible for KaZaA (or any other software) to incorporate a blockage against the unlawful exchange of files.

During the appeal hearing Huizer added to this that after the KaZaA website was closed down he has found that this closing down hardly had any effect at all on the number of users of the KaZaA program.

- 4.5 Huizer's findings and conclusions were not contested by Buma/Stemra, at least not sufficiently. Further to these conclusions Buma/Stemra merely states (appeal pleading section 4) that KaZaA 'no doubt (can) meet the claim'. In this context, Buma/Stemra refers to its statement of counterclaim, under 4.1, penultimate page. There it is stated that KaZaA may intervene but fails to do so, which becomes apparent from the following:

- Disclaimer KaZaA (exhibit 8 KaZaA)

'Upon receipt of your Notice we will promptly attempt to inform the identified KaZaA users of your allegations via the email address he or she has submitted to us. If we do not receive a proper answer from the user within two weeks, we have the right to terminate his or her account.'

- Exhibit 2s, in which KaZaA promises to stop short any 'possible infringements'.

- From the very start this has been the basic assumption (cf. inter alia Letter of Intent, exhibit 2d1, 1 under 2-4) that a record will be kept of the use of works of music with the aid of its system, which implies that KaZaA knows what is actually happening.

- 4.6 As to the above, the following

- In its disclaimer KaZaA stipulates before the text as quoted by Buma/Stemra, if relevant, that it will intervene on the conditions that KaZaA receives a notification of the alleged illegal content and that the illegal materials must be identified, including at least the name of the user and the IP address via which the materials are offered. It did not state that Buma/Stemra has met or can meet these conditions.

- Exhibit 2s is an e-mail message dated July 26 2001 sent by KaZaA's procurator litis to Buma/Stemra. This e-mail, which was drawn up in Dutch, did not contain any promise to stop short 'possible infringements'.

- It may be true that in the Letter of Intent the basic assumption was that a record would be kept of the use of works of music with the aid of the KaZaA system, but Buma/Stemra fails to take into account that to this end KaZaA would first have to design a new program and then convince its users to actually install this new version (see for example explanation ground 8 under 2). Such users cannot be forced to do this, as also becomes apparent from Huizer's opinion under 'Auto update'.

- 4.7 Furthermore, Buma/Stemra pleads that the new KaZaA operator is capable of checking the use of its program. The court cannot verify whether this is a just plea, if only because in the course of the proceedings it was not concluded that the two computer programs in question are identical. Fact is that KaZaA has always contested that it was capable of ending the exchange of music files (most recently in the appeal pleading under 11). The court for the moment assumes this to be correct, especially since it is a fact that KaZaA has closed down its website further to the president's ruling. It may be assumed that it would not have done so had it been in its power to meet the president's ruling in any other way.

- 4.8 The above implies that the counterclaim cannot be granted as it is plausible

that it is not possible for KaZaA to take measures after service of this judgment that no longer, by means of the computer program provided by it, copyright infringing publications and reproductions with respect to musical works that are part of Buma/Stemra's repertoire can take place. Buma/Stemra holds the view (appeal pleading under 4) that the alleged incapability of entirely fulfilling the judgment is a matter that must be dealt with in an enforcement dispute. Such a dispute, however, must be preceded by the question whether the counterclaim can be granted at all and this question is under dispute in the present appeal, as also becomes apparent from ground VIII.

- 4.9 Furthermore, the court will point out that KaZaA justly contests the president's consideration that it must be put first that by giving its users the opportunity of downloading music files by means of its computer program without a license, KaZaA acts contrary to copyright. 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. Providing the means for publication or reproduction of copyrighted works is not an act of publication or reproduction in its own right. Also, it is not true, that is for the moment it cannot be assumed to be true, that the KaZaA computer program is exclusively used for downloading copyrighted works. In its appeal, KaZaA presented a large number of examples (exhibits 17 and 18) of works that were distributed by means of KaZaA either with the author's permission or that are part of the public domain, or that are not copyrighted or of which the distribution is permitted under a legal limitation to copyright. In his expert opinion, Huizer also gives examples of other uses. Buma/Stemra claims (defence on appeal under ground 2) that the sole, that is the sole essential function of the KaZaA computer program is to allow users to exchange copyrighted works, however, this claim, which KaZaA contested with good reasons, was not further substantiated. That these 'other' uses lack true meaning (defence on appeal under ground 5) may undoubtedly be true for Buma/Stemra, but that does not mean to say that it holds true for these 'other' users. Thus, Buma/Stemra's claim cannot be allowed at this point. On these grounds KaZaA's offering the litigious computer program cannot be considered as unlawful.

- 4.10 The appeal therefore succeeds. The grounds do not require individual consideration. The judgment as passed in the counterclaim must be set aside and Buma/Stemra's claim must be rejected. Buma/Stemra, being the party against whom the matter has been decided, is ordered to pay the costs of the proceedings in the counterclaim as well as the costs of the principal appeal.

In the cross-appeal

- 4.11 During the appeal hearing, KaZaA withdrew its claim that the negotiations be continued. This causes the ground in the cross-appeal which contests the order given in the main action that Buma/Stemra must continue the negotiations to be successful. The judgement as passed in the main action must be set aside. KaZaA is ordered to pay the costs of the proceedings in the cross-appeal, estimated by Buma/Stemra at nil.

5. Judgment

The court:

In the principal appeal

sets aside the judgment of the court below as passed in the counterclaim and, passing a new judgement,

rejects Buma/Stemra's claim after all;
orders Buma/Stemra to pay the costs of the counterclaim proceedings as well as the costs of the principal appeal, up to this judgment estimated by KaZaA at € 703.36 and € 2,608.57 respectively;

in the cross appeal

sets aside the judgment of the court below as passed in the main action, and, passing a new judgment,

rejects KaZaA's claim after all;

orders KaZaA to pay the costs of the proceedings in the main action as well as the costs of the cross appeal, estimated by Buma/Stemra at € 897.12 and nil respectively;

in the principal and in the cross appeal

declares the order for costs to have immediate effect.

This judgment was passed by *meesters* Coeterier, Cornelissen and Sorgdrager and was delivered in open court on March 28 2002.