Internet Liability in the Courts

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WORLD INTELLECTUAL PROPERTY ORGANIZATION

Treaty Provisions

- WCT Art. 8, agreed statement:

"...the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention."

- All Treaties:

Contracting states undertake to adopt ... the measures necessary to ensure the application

Infringing Web Sites

- Notice and take-down
  - USA solution specifically for copyright infringements
  - EU general solution for all categories of unlawful content
  - Requires factual possibility for service operator to take down
  - Requires procedures for disputed cases

Peer-to-Peer (P2P)

- No central server storing works
- Infringing making available is done by the individual users
- Computer programs supplied by commercial entities, e.g. financed by advertisements
- Question of contributory or vicarious liability

Liability

- Vicarious liability, strict liability for acts done by people under supervision or control of the liable party
- Contributory liability: one who supplies the means to infringe and knows (or should know) of the use to which the means will be put can be held liable for contributory liability

The Betamax Case

- US Supreme Court: one who distributes infringement-enabling device will not be liable if it is "widely used for legitimate, unobjectionable purposes". The device merely needs to be capable of substantial non-infringing use in order to escape liability (*Sony Corp. of America v. Universal City Studies,* 464 US 417 (1984)).

The Napster Case

- Central database helped users track the desired material
- Court: if possible to segregate and prevent infringing uses, mere capacity of non-infringing uses does not exculpate entire system *(A&M Records, Inc f Napster Inc,* 239 F 3d 1004 (9th Cir 2001))

The Grokster Case

- Apparently no central database
- The Sony standard does not apply if defendant is actively inducing copyright infringement. If defendant intended the devise to be used for infringement, normal law of tort applies *(MGM Studios, Inc v Grokster ltd 125 S Ct 2764 (2005)).*

The Dutch KaZaa Case

- Plaintiff had failed to demonstrate that KaZaa was able to control the infringing activities of its customers *(Vereniging Buma, Stichting Stemra v KaZaa BV,* Hoge Raad decision of December 19, 2003, AN7253, Case No. C02/186HR

The Australian KaZaa Case

- KaZaa was in bad faith and its preventive measures were ineffective
- KaZaa had not taken any action to use available measures to curtail infringement, and not doing so was in their financial interest
- KaZaa had indirectly encouraged infringement

Thank you

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