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Breaking News

Sony cuts 10,000

In an effort to restore profitability Sony has just announced that it will cut approximately 10,000 jobs in the global workforce and sell the majority of its manufacturing plants.

One bad apple?

Recent media reports are suggesting that a component of Apple's iPod may be the subject of a legal challenge. Stay tuned.

Vivendi profit turnaround

Vivendi Universal reported a 49% rise in net income to \$1.62 billion USD for the first half of the year compared with the previous year. That is a massive turnaround from 2002, where it reported one of France's biggest ever corporate losses of reportedly €23.3 billion.

Savannah Hardingham | Articled Clerk

Kazaa! A Big Win For The Film And Music Industries

In a landmark decision heavily invested in and eagerly awaited by the music and film industries, the Federal Court has paved the way for major content providers such as record companies and film studios to prosecute not only direct infringers of their copyrights, but now also indirect infringers.

Key message

... The decision suggests that in order to avoid liability, 'file-sharing' software and website manufacturers and providers may now be under a greater obligation to take steps to prevent, or at least inhibit, their products being used to infringe copyright.

Digitisation – and the internet in particular – have presented a double-edged sword for the music and film industries.

On the one hand, new and more efficient means of product promotion and distribution are now available (indeed it seems that almost everyone has an iPod these days). On the other hand, it has opened a 'Pandora's box' for copyright infringement on a mass scale. The music and film industries have suffered increasingly dramatic losses as 'file-sharing' or 'file-swapping' websites like Napster, Grokster and of course Kazaa gain momentum, allowing users to download or upload perfect digital copies of the latest releases – or even pre-releases – at the click of a button.

With a single rogue copy of a new title, this digital landscape has the potential to obliterate a significant portion of its global market. Security measures against this was best illustrated last year when the promo of the latest U2 album arrived in Australia literally handcuffed to the wrist of a record executive! Whilst Napster and Grokster have been the subject of copyright litigation in the US, Australia – home to the owners of Kazaa – has most recently taken the spotlight.

The Kazaa case facts

On 5 September 2005 Justice Wilcox of the Federal Court of Australia delivered his much anticipated decision in the case of *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* [2005] FCA 1242

(‘the Kazaa Case’). In what was clearly a win for the music and film industries, the Court found in favour of Universal. It held that the respondents, the proprietors of the popular Kazaa peer-to-peer file-swapping website and affiliated software, had authorised its users to infringe copyright and were therefore liable under the Copyright Act 1968 (Cth) (‘the Act’).

In assessing whether a party has authorised another’s copyright infringement in breach of the Act, the Court is required to consider the following factors:

- » the extent (if any) of the person’s power to prevent the doing of the act concerned
- » the nature of any relationship existing between the person and the person who did the infringing act
- » whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

In the Kazaa Case, the Court found that by providing its users with the means to swap copyright works without the approval of the relevant copyright owners, the respondents, who the Court accepted had the power to curtail such infringement, had effectively approved (and even exhorted) such acts. Further, Justice Wilcox considered the warnings against copyright infringement posted on the Kazaa site were ineffective and found that “the respondents have not taken any action to implement... measures [designed to effectively inhibit file-sharing of copyright works as] it would be against their financial interest to do so”. In this regard, Justice Wilcox suggested that the respondents might have employed technical

measures such as filtering, which he thought “would enable the respondents to curtail – although probably not totally to prevent – the sharing of copyright files”.

The decision does not provide a test of general application. However it does suggest that in order to avoid liability under the Act, ‘file-sharing’ software and website manufacturers and providers – and providers of other goods and services that enable consumers’ copyright infringement – may now be under a greater obligation to take steps to prevent, or at least inhibit, their products being used to infringe copyright (eg by users ‘sharing’ copyright works). Additionally, the decision also suggests that a financial interest in allowing infringement or actual encouragement to infringe may also point toward authorisation in breach of the Act.

Conclusion

Although the respondents intend to appeal, the decision, as it stands, seemingly paves the way for further copyright authorisation cases – perhaps against other peer-to-peer providers or maybe even in respect of the gadget de jour.

Essentially, this landmark decision in the ongoing war between content and technology means that providers of technology capable of enabling copyright infringement must be aware of the legal possibility of being sued in an environment where content providers are proactively resolute about protecting their artists’ rights.

Stuart Gibson | Partner
Savannah Hardingham | Articled Clerk

Defamation: Beware of Risks

Sexual scandal and the like always attracts interest but can often end up in the defamation courts. Recent allegations against Shane Warne and the release of Mark Latham's new book call to mind the importance of careful reporting by the Press.

Key message

...writers and publishers need to remain aware of the pitfalls of defamation... being dragged into a defamation case can be a lengthy, costly and gruelling process.

What is defamation?

A statement is defamatory if it:

- » lowers a person in the estimation of right-thinking persons
- » exposes a person to hatred, contempt or ridicule
- » causes a person to be shunned or avoided.

Mere repetition of a defamatory statement can also give rise to a fresh cause of action in defamation. An instance could be where a sports radio network announcer repeats the defamatory comment of a listener/caller.

Generally speaking, four elements need to be satisfied when considering whether or not a person has been defamed:

- » was the statement actually published or broadcast?
- » did the statement identify the person?
- » if the person was identified, is the statement actually defamatory (as per above factors)?
- » if the statement was published, identifies the person and was defamatory – what defences are available?

The law of defamation is generally restricted to individuals, however, groups of people can bring claims for defamation in circumstances where each individual claimant is identifiable from the publication complained of. Therefore, the narrower the class and the more specific the allegation, the more likely it is that readers could identify the individual as being a member of that group.

Damages/risks in publishing defamatory material

In Australia, defamation awards for damages are 'at large'. That is, they are at the discretion of the judge/jury. However, whilst there are 'guides' as to the likely awards for damages in defamation cases based on previous decisions, those guides are not used as precedents by any means. Clearly, the more grave the defamation the more likely the award will be higher.

A related consideration is the legal costs in bringing or defending a defamation claim. Often they can exceed the award of damages. It is particularly so where there is an element of truth in the defamation or if the claimant has a bad reputation.

Interlocutory injunctions

In the past it has been relatively difficult to obtain an interim injunction preventing the publication of a defamatory statement.

This is because the court has often held that it is in the 'public interest' that there be freedom of speech. However, in circumstances where the private activities of a public figure are published it can lead the Court to the granting of an interlocutory injunction. This occurred in the case of *Chappell v Channel Nine Proprietary Limited*, where the Court had cause to consider a television broadcast of defamatory matter concerning Greg Chappell, the former Australian Cricket Test Captain. Chappell sought an interlocutory injunction restraining Channel Nine Pty Ltd from broadcasting a story purportedly based on

articles published in the Melbourne 'Truth' newspaper. The articles drew upon statutory declarations made by one Ms Samantha Hickey, in which apparently she recounted details of an alleged sexual relationship with Chappell. Chappell emphatically denied the material in the article.

In that case, the Court held that the private activities of a public figure did not constitute a matter of public interest and hence granted the injunction.

Defences

Australian law recognises legitimate aims such as exposing illegality and hypocrisy, and that certain authors and publishers should be free to express their views. A number of defences are therefore available to those accused of defamation, which are set out below.

Justification: defence of truth

The defendant must prove truth or substantial truth of a defamatory statement.

The defendant does not have to prove the truth of every single allegation complained of, provided that the thrust of the allegation can be proven.

Fair comment

If the defamatory statement is in the form of an opinion on a matter of public interest, the defence of 'fair comment' may be available. However the comment must be based on facts truly stated, in order that readers can make up their own minds, and they must be honestly believed. This defence is not available where the defamatory statement is published maliciously.

Malice is usually equated to be with some form of ill will towards the claimant or with an improper motive at the time of publication. This is often difficult to prove.

Privilege

The defence of absolute privilege is available (irrespective of truth) in respect of statements made in Parliament or during the course of judicial proceedings.

The defence of qualified privilege is available where there is a legitimate interest or duty in publishing a statement and the recipient has a corresponding interest or duty in receiving it. A classic example is where a prospective employer is provided with a CV of a prospective employee, which is defamatory of that prospective employee.

Australian law recognises a number of different categories where this defence applies.

Conclusion

Being dragged into a defamation case can be a lengthy, costly and gruelling process for all involved. It is therefore important that writers and publishers of all types of material are aware of the pitfalls of defamation and resist the urge to publish any such defamatory material without having assessed the risks of doing so, particularly where the subject of the statement has the resources and wherewithal to sue.

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