JAPAN

Supreme Court rules in P2P copyright case

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Takanori Abe and Michiko Kinoshita

P2P network
Source: http://en.wikipedia.org/wiki/Peer-to-peer

Peer-to-peer (P2P) software programs such as Napster and Grokster make it possible to exchange data efficiently. However, these software programs are constantly used in a manner that infringes copyright and lawsuits against the developers and distributors of P2P file-sharing software have been filed under copyright laws all over the world. Napster was granted a preliminary injunction and shut down its service, and thereafter declared bankruptcy. Grokster faced a lawsuit as well and reached a compromise by shutting down its service.

Winny is a P2P file sharing software program developed in Japan. It had also been used in a manner that infringes copyright by some users as in other P2P software programs. We discuss a case where the developer of Winny was prosecuted on the grounds of constituting accessoryship to the crime of Copyright Act violation. Our firm was a member of the defence counsel of the accused, the developer of Winny.

Summary of the case

Dr Isamu Kaneko developed Winny, released it on the internet and provided it to many and unspecified persons via the internet. Two persons were prosecuted as the principals for committing violation of the Copyright Act by using Winny and making the data of videogame software programs or movie programs, etc, which are categorised as copyrighted works, automatically transmittable to the public or internet users, thereby infringing the authors' right to effect public transmission of their works (Article 23(1) of the Copyright Act). Accordingly, Kaneko was prosecuted on the grounds that releasing and providing Winny constituted being an accessory to the crime of Copyright Act violation committed by the principals.

The Kyoto District Court found Kaneko guilty of being an accessory to the crime of Copyright Act violation, and rendered a judgment sentencing Kaneko to a fine of ¥1.5 million ($12,500). The Osaka High Court overturned the judgment and acquitted him. The Supreme Court dismissed the final appeal and the acquittal became final and binding.

Supreme Court

Although the Supreme Court dismissed the final appeal in its decision of December 19 2011, it stated the detailed reason by the court's own authority with regard to why the act of the accused does not constitute being an accessory to the crime. Its reasoning is as below.

Winny is a value-neutral software which can be used both for legitimate purposes and the unlawful purpose of infringing copyright, and it is basically left to each user to decide whether he/she will use Winny for the purpose of infringing copyright or for other purposes. In addition, the method of software development chosen by the accused (releasing a software program under development and providing it to many and unspecified persons on the internet free of charge, and proceeding with the development while hearing opinions of users) is not an unusual approach for software development but it is rather accepted as a rational approach. Therefore, in order to avoid causing an excessive chilling effect to activities for developing such software programs, providing a software program should not be regarded as constituting an act of aiding copyright infringement only because there is a general possibility that the software program would be used for the purpose of infringing copyright and the provider perceives and accepts that possibility.

For the act of providing a software program to constitute being an accessory, there must be not only the general possibility but further the specific circumstances where the software program is used in a manner that infringes copyright, and it is also required that the provider perceives and accepts such circumstances. More specifically, it is appropriate to construe that the provider's act of releasing and providing the software program should be regarded as constituting an act of aiding copyright infringement only in the case:

1) where a person has released and provided a software program while perceiving and accepting a specific and immediate risk of copyright infringement to be committed with the use of the software program, and such copyright infringement has actually been committed; and
2) where in light of the nature of the software program, the objective situation of use of the software program, and the method of providing it, it is highly probable that among those who acquire the software program, a wide range of persons will use the software program for the purpose of infringing copyright, to a level where their use cannot be tolerated as exceptional, the provider has released and provided the software while perceiving and accepting such high probability, and the principal has actually committed copyright infringement with the use of the software program.

In this case, we cannot deny that the accused released and provided Winny in the situation where it was highly probable, when viewed objectively, that a wide range of persons would use Winny for the purpose of infringing copyright to a level where their use cannot be tolerated as exceptional because it is at least presumed that some 40% of the files that were flowing on the Winny network were copyrighted works and they were exchanged among users without authorisation from the authors.

However, upon releasing and providing Winny, the accused posted a cautionary message on his website to request users not to exchange illegal files with the use of this software program and also posted the same comment on the development thread, thus he always warned users not to use Winny for the purpose of infringing copyright. In view of these circumstances, we find it difficult to go so far as

to find that the accused perceived or accepted a high probability that if he released and provided Winny, a wide range of persons would use them for the purpose of infringing copyright, to a level where their use cannot be tolerated as exceptional.

For the reasons stated above, we should say that the accused lacked the intent necessary to be an accessory to the crime of Copyright Act violation.

Comparison with similar cases overseas

Lawsuits against the developers and distributors of P2P file sharing software under the Copyright Act are usually filed as a civil action in western countries and a criminal action like this case is rarely filed.

In the Netherlands, the Supreme Court rendered a judgment in December 2003 holding that distributing P2P file sharing software KaZaA to the public was lawful.

In the United States, although it is not a case of P2P, prior to the Napster and Grokster cases, there was a case where it was argued whether distribution of Sony Betamax video tape recorder (VTR) constituted contributory infringement to infringements by recording television broadcastings by Betamax users (*Sony Corp of Am v Universal City Studios, Inc*, 464 US 417 (1984)). The US Supreme Court ruled that contributory infringement liability will not reach the manufacturer of a device so long as the device is "capable of substantial non-infringing uses".

Although in the *Napster* case (*A&M Records, Inc v Napster, Inc*, 239 F3d 1004 (9th Cir 2001)) Napster was judged to be held liable as a contributory infringer, it was mostly because the P2P system in Napster was a central control system which gave it the ability to control the infringing activity of its users. On the other hand, with regard to Grokster, which did not have a centralised server and allowed users to trade files directly between each other, the Supreme Court announced that it was necessary that the object of promoting a device's use to infringe copyright was shown (*Metro-Goldwyn-Mayer Studios Inc v Grokster, Ltd*, 545 US 913 (2005)).

The structure of Winny is similar to that of Grokster. According to the judgment in the *Grokster* case, the developer of Winny should not even subject to civil liability unless he has the object of promoting a device's use to infringe copyright. Nevertheless if the court imposes a criminal liability on him rather than a civil liability like the Kyoto District Court, there is an excessive chilling effect on developing software programs and Japan would lag behind the rest of the world. From this viewpoint, it is reasonable as to be consistent with the global standard that the Japanese Supreme Court requires not only the general possibility but also the specific circumstances where the software program is used in a manner that infringes copyright, and the provider's perception and acceptance of such circumstances, becoming concerned about chilling effect on activities for developing software programs. Further, the judgment has been seen to have prevented the weakening of the international competitiveness of software developers in Japan.