

## Winny Case

A P2P Software Copyright Case in Japan—Impact on the Information Society and Legal Analysis

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### 1. Introduction

#### 1.1 Overview of Winny Case

On May 31, 2004, various news was reported on the Web including the following item.<sup>1</sup>

***Popular software creator indicted for copyright piracy***

*Monday, May 31, 2004 at 14:00 JST*

*TOKYO—The creator of the popular Internet file-sharing software program "Winny" was indicted Monday on a charge of assisting copyright violations, in the first such indictment in Japan.*

*Isamu Kaneko, 33, an assistant at a graduate school at the University of Tokyo, created the peer-to-peer file-sharing program which is available on the Internet free of charge. He was indicted for facilitating two computer users to illegally upload copyrighted materials, including movies and video games, on the Internet last September so that other users could download them for free. (Kyodo News)*

This is a newspaper article concerning the indictment of Isamu Kaneko, the developer of the file-sharing software known as "Winny."<sup>2</sup>

The news that Mr. Kaneko was arrested on May 10, 2004 and indicated on May 30 was reported widely in Japan in various media including television, newspapers, and magazines. These reports caused considerable shock and alarm among software developers and legal scholars as Mr. Kaneko, a software engineering researcher at a prominent university, had developed and made available software that used peer-to-peer (P2P) technology, but he had not engaged in any unlawful file sharing of MP3 formatted music or other files whatsoever.

Other software engineering researchers and software engineers felt great apprehension that if the development of software such as Winny could be unlawful and subject to criminal sanction, it would not be possible to continue with development of software that applied the latest Internet technologies. Consequently, they supported Mr. Kaneko.<sup>3</sup>

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<sup>1</sup> <http://www.japantoday.com/e/?content=news&cat=2&id=300463>

<sup>2</sup> See also conversation between Laurence Lessig and Nobuo Ikeda  
<http://www003.upp.so-net.ne.jp/ikeda/Lessig-Ikeda.html>

<sup>3</sup> Japan Times editorial, Copyright ethics for the digital age, 3 June 2004  
<http://202.221.217.59/print/opinion/ed2004/ed20040603a1.htm>

In an extremely short period, a support organization was formed and substantial sums of money were donated to the organization to support Mr. Kaneko.<sup>4</sup> In addition, a large team of defense lawyers was formed, something not often seen in Japan in similar cases.

The first public hearing in this matter was held on September 1, 2004. Mr. Kaneko, pled not guilty. Details of the hearing were also reported on the Web.<sup>5</sup>

***Creator of file-sharing software pleads not guilty to piracy***

*Wednesday, September 1, 2004 at 12:57 JST*

*KYOTO—The creator of a program for anonymous file-sharing over the Internet pleaded not guilty on Wednesday at the Kyoto District Court to the charge that he developed the software knowing it would facilitate Internet piracy.*

*Isamu Kaneko, 34, who developed the Winny peer-to-peer file-sharing program, is the first person in Japan to stand trial for creating software that can be used for the unauthorized reproduction of movies and video games over the Internet. Winny allows users to swap files without revealing their IP addresses which identify the locations of their computers on the Internet. (Kyodo News)*

## 1.2 Applicable laws

Mr. Kaneko was accused of aiding and abetting the infringement of copyrights by other person. Applicable provisions in the Penal Code and Copyright Law of Japan are as follows:

### **Penal Code of Japan**

**Article 62.** (Assistance)

1 A person who assists a principal shall be an accessory.

2 A person who instigates an accessory shall be punished as a accessory to the crime.

**Article 63.** (Commutation to accessory)

Penalty for an accessory shall be less severe than the penalty for a principal.

### **Copyright Law<sup>6</sup>**

**Article 23.** (Rights of public transmission etc.)

(1)The author shall have the exclusive right to make the public transmission of his work (including the making transmittable of his work in the case of the interactive transmission).

(2)The author shall have the exclusive right to communicate publicly, by means of a receiving apparatus, his work of which the public transmission has been made.

**Article 120bis.** (Penal Provision)

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<sup>4</sup> FreeKaneko.com -- Free Isamu Kaneko  
<http://www.freekaneko.com/en/index.html>

<sup>5</sup> <http://www.japantoday.com/e/?content=news&cat=2&id=310710>

<sup>6</sup> [http://www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html)

The following shall be punishable by imprisonment for a term not exceeding one year or a fine not exceeding one million Yen;

- (i) any person who transfers to the public the ownership of, or lends to the public, manufactures, imports or possesses for transfer of ownership or lending to the public, or offers for the use by the public, a device having a principal function for the circumvention of technological protection measures (such a device includes such a set of parts of a device as can be easily assembled) or copies of a program having a principal function for circumvention of technological protection measures, or transmits publicly or makes transmittable such program;
- (ii) any person who, as a business, circumvents technological protection measures in response to a request from the public;
- (iii) any person who, for profit-making purposes, does an act considered to constitute an infringement on moral rights of authors, copyright, moral rights of performers or neighboring rights under the provisions of Article 113, paragraph (3).

### **1.3 Aims of this paper**

In this paper, I would like to explain some of the legal issues raised by the Winny Case, present a short analysis on the basis of Japanese law, and discuss my opinion on how to consider P2P file sharing software.

## **2. Legal Issues**

The Winny Case raises a number of legal issues, which I have summarized as follows.

- (a) Japan's Criminal Code contains provisions that impose penalties on persons who aid and abet another in the performance of criminal conduct. Mr. Kaneko, however, did not develop Winny to assist another person in the performance of criminal conduct.
- (b) When Mr. Kaneko developed Winny, it was not possible that he presumed the existence of any specific offender.
- (c) Winny is general-purpose file sharing software that uses P2P technology and is not intended to be used for the purpose of violating the copyrights of others.

### **2.1 Issue (a): Intent to Infringe**

With respect to the first point (a), the prosecutors made the following assertion: "It is clear that the defendant developed Winny with the intent of assisting individuals who violate copyrights. The basis for this is the statement by the defendant on Japan BBS service channel 2 that he will design and create anonymous P2P file sharing software in order to bring down the current system of copyrights."

### **2.2 Issue (b): Independent Aiding and Abetting**

The second point (b) raises the following additional issues.

- (i) According to generally-accepted criminal law theory in Japan, for aiding and abetting to constitute a crime, there must be a specific offender who is aided and abetted.
- (ii) There are no cases in Japan in which the crime of aiding and abetting was found to exist and a criminal sanction imposed with respect to conduct that aided and abetted a person who could not be specifically identified.
- (iii) When Mr. Kaneko developed Winnie, he was not able to know who would use Winnie and how it would be used. Even after Winnie was distributed on the Internet, Mr. Kaneko could not know who the specific users are as Winnie included powerful anonymity and encoding functions.

If Mr. Kaneko were to be found guilty, it would be the first case in Japan to find that the crime of aiding and abetting can be formed independently with regard to conduct that aids and abets an unidentified offender.

### **2.3 Issue (c): Misuse of a Device or Computer Software**

I believe that that significance of the third point (c) is clear—if the creation of general purpose tools can constitute the crime of aiding and abetting, the manufacture of most articles will be criminal conduct. For example, a cooking knife has the potential to be used to commit murder, and in fact there are many homicides in which a cooking knife is used as a weapon. No one believes, however, that simply because a knife can be used to commit homicide that the manufacturer of a cooking knife is guilty of aiding and abetting murderers.

## **3. Analysis and My Opinion**

### **3.1 Issue (a): Intent to Infringe**

The first issue is primarily one of proof.

### **3.2 Issue (b): Independent Aiding and Abetting**

The second issue is one of legal theory. If the traditional theory of criminal law I discussed earlier is correct, then Mr. Kaneko must be not guilty.

There also exists, however, the opinion that it is sufficient if there is a general awareness of the criminal conduct as aiding and abetting, without identification of a specific offender. If the court adopts this theory, then it is possible that Mr. Kaneko will be found guilty.

### **3.3 Issue (c): Misuse of a Device or Computer Software**

The theory that leads to the conclusion that the manufacturer of an ordinary cooking knife can be found guilty of aiding and abetting homicide; it is an extremely odd theory and is incorrect. It is possible, however, that a person who manufactures knives solely for the purpose of killing people can be guilty of aiding and abetting homicide. Accordingly, in the case of P2P file sharing software,

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our inquiry should not be whether the software is used solely for the purpose of file sharing, but what type of software can be considered to be created primarily for unlawful purposes.

A comparison of other software with all or some functions that are similar to those of Winny is as follows.

	Transfer function of MP3 files to another users	Retrieve function of MP3 files from other computer systems	Automatic indexing function of MP3 files among current computer network
Winny	Yes	Yes	permanently generated
KaZaa <sup>7</sup>	Yes	Yes	permanently generated
Morpheus <sup>8</sup>	Yes	Yes	permanently generated
Amister <sup>9</sup>	Yes	Yes	permanently generated
Napster <sup>10</sup>	Yes	Yes	permanently generated
MS Messenger	Yes	depends on shared folders	?
Skype	Yes	?	?
Google search	Yes	Yes	temporarily generated
Yahoo search	Yes	Yes	temporarily generated

As can be seen from this comparison, Microsoft Messenger and Google Search also have software or tools generally determined in cases around the world to be lawful that are similar to the functions of the P2P file sharing software that is claimed to be unlawful in this case.

All of these software applications or tools have one point in common: they do not have complete functions for automatically identifying unlawful and lawful files and for automatically removing unlawful files based on search results.

A shared element of the software or tools that are claimed to be unlawful is the continuous and permanent formation of indexes to create databases of the files that are the subject of searches.

It is believed that the current fundamental standard for determining if P2P software or tools are unlawful can be obtained from this. It is to be found in the following four points.<sup>11</sup>

- (i) Does the software or tool have a function to automatically and permanently form indexes to

<sup>7</sup> BMG Canada Inc. v. John Doe (appealed)  
<http://www.canlii.org/ca/cas/fct/2004/2004fc488.html>  
LJN-nummer: AN7253 Zaaknr: C02/186HR  
<http://www.rechtspraak.nl/uitspraak/frameset.asp?ljn=AN7253>

<sup>8</sup> Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al. CV 01-08541-SVW (PJWx)  
<http://news.findlaw.com/hdocs/docs/mgm/mgmgrokster42503ord.pdf>

<sup>9</sup> In re: AIMSTER COPYRIGHT LITIGATION, 334 F.3d 643  
[http://homepages.law.asu.edu/~dkarjala/cyberlaw/InReAimster\(9C6-30-03\).htm](http://homepages.law.asu.edu/~dkarjala/cyberlaw/InReAimster(9C6-30-03).htm)

<sup>10</sup> NAPSTER, INC., a corporation, v. A & M RECORDS, INC., a corporation, 239 F.3d 1004 (9th Cir. 2001)  
<http://news.findlaw.com/hdocs/docs/napster/napster/nspttrsuppm032601.pdf>

<sup>11</sup> See also, What Peer-to-Peer Developers Need to Know about Copyright Law by Fred von Lohmann, December 2003  
[http://www.eff.org/IP/P2P/p2p\\_copyright\\_wp.pdf](http://www.eff.org/IP/P2P/p2p_copyright_wp.pdf)

create databases of the files that are the subject of searches?

(ii) Does the software or tool have a function to search automatically pointers or links to unlawful files within the databases of files that are the subject of searches?

(iii) Does the software or tool have a function to delete automatically pointers or links to unlawful files when they are found in the database of files that are the subject of searches or to issue a warning to the user?

(iv) If there are technological reasons why the functions in (ii) or (iii) cannot be implemented, is a warning message provided to the user to the effect that the software or tools are not to be used for unlawful purposes in an understandable format?

It is not clear at this time whether Winnie can pass these two tests.

#### **4. Conclusions**

The Winnie case is taking place in Japan, but it raises many legal issues that will be shared by other cases around the world that examine the legality of P2P file sharing software. Consequently, it is possible that the Winnie case will have an impact on the decisions of courts in other countries deciding similar cases.

I believe that the method used to analyze the third issue will be generally applicable to other cases concerning the legality of P2P file sharing software.