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Date of the judgment (decision)

2011.12.19

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Case Number

2009 (A) 1900

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Reporter

Keishu Vol. 65, No. 9

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Title

Decision concerning the case in which the accused was prosecuted for accessoryship to violation of the Copyright Act on the grounds that he released a file-sharing software program called Winny, which can be used both for legitimate purposes and for the purpose of infringing copyrights, and provided it to many and unspecified persons via the Internet, thereby aiding the principals in infringing the authors' right to effect public transmission of their works, with the use of said software program; the court determined that the accused lacked the intent of accessoryship

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Case name

Case charged for accessoryship to violation of the Copyright Act

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Result

Decision of the Third Petty Bench, dismissed

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Court of the Second Instance

Osaka High Court, Judgment of October 8, 2009

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Summary of the judgment (decision)

In the case where the accused was prosecuted for accessoryship to violation of the Copyright Act on the grounds that he released a file-sharing software program called Winny, which can be used both for legitimate purposes and for the purpose of infringing copyrights, and provided it to many and unspecified persons via the Internet, thereby aiding the principals in infringing the authors' right to effect public transmission of their works, with the use of said software program, given the facts of the case (as described in the text of the decision), namely, (i) it is obvious that the accused did not release and provide Winny while perceiving or accepting a specific and immediate risk of copyright infringement to be committed with the use of it, and (ii) upon releasing and providing Winny, the accused always warned users not to use Winny for the purpose of infringing copyrights, it is difficult to go so far as to find that the accused perceived or accepted a high probability that a wide range of persons would use Winny for the purpose of infringing copyrights to a level where their use

cannot be tolerated as exceptional, so the accused lacked the intent of accessoryship to the crime of violation of the Copyright Act.

(There is a dissenting opinion.)

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References

Article 62, paragraph (1) of the Penal Code, Article 23, paragraph (1) and Article 119, item (i) of the Copyright Act (prior to the revision by Act No. 92 of 2004)

Article 62, paragraph (1) of the Penal Code

A person who aids a principal is a accessory.

Article 23, paragraph (1) of the Copyright Act (prior to the revision by Act No. 92 of 2004)

The author shall have the exclusive right to effect a public transmission of his/her work (including, in the case of automatic public transmission, making his/her work transmittable).

Article 119, item (i) of the Copyright Act (prior to the revision by Act No. 92 of 2004)

A person who falls under any of the following items shall be punished by imprisonment with work for not more than three years or a fine of not more than three million yen:

(i) a person who infringes on the moral rights of author, copyright, right of publication, moral rights of performer or neighboring rights (excluding a person who reproduces by him/herself a work or performance, etc. for private use purposes as provided for in Article 30, paragraph (1) (including the cases where applied mutatis mutandis

pursuant to Article 102, paragraph (1)), and a person who, pursuant to the provisions of Article 113, paragraph (3), commits an act deemed to constitute an act of infringement on the moral rights of author, copyright, moral rights of performer or neighboring rights (including rights deemed to constitute neighboring rights pursuant to the provisions of Article 113, paragraph (4); the same shall apply in Article 120-2, item (iii))).

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Main text of the judgment (decision)

The final appeal is dismissed.

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Reasons

Among the reasons for final appeal argued by the public prosecutor, the reason alleging violation of judicial precedent is irrelevant in this case because the cited judicial precedent addresses a different type of facts, and the rest are assertions of errors in fact finding or unappealable violation of laws and regulations, and none of these reasons can be regarded as a reason for final appeal permissible under Article 405 of the Code of Criminal Procedure.

Having examined the arguments, however, we make a determination by this court's own authority with regard to whether or not the act of the accused to release the file-sharing software program in question and to provide it to many and unspecified persons constitutes accessoryship to the crime of violation of the Copyright Act. Although the judgment in prior instance erred in construing the laws and regulations relating to the constituent elements of accessoryship, we can affirm it as justifiable in

terms of its conclusion that the act of the accused does not constitute accessoryship to the crime of violation of the Copyright Act. The reasons for our conclusion are as follows.

1. The accused developed a file-sharing software program called Winny, and released on the Internet its upgraded versions successively and provided them to many and unspecified persons via the Internet. Two persons were prosecuted as the principals for committing violation of the Copyright Act by using this software program and making the data of videogame software programs, etc., which are categorized 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, paragraph (1) of the Copyright Act), and accordingly, the accused was prosecuted on the grounds that what he had done prior to the principals' commission of the crime, that is, releasing and providing the latest versions of Winny, constitutes accessoryship to the crime of violation of the Copyright Act committed by the principals. According to the findings by the judgment in prior instance as well as the case records, the following facts can be found.

(1) Winny is a file-sharing software program that functions to send and receive data with the applied use of peer-to-peer (P2P) technology by which a network of computers is formed in a manner that individual computers act equally, with no central server involved. It is equipped with the function to secure anonymity of the sender (anonymity function), as well as with various functions for searching for files and for sending and receiving file data efficiently, such as the clustering function, multiple downloading function, and automatic downloading function. It can be applied in various fields as it makes it possible to perform the exchange of a variety of data efficiently while maintaining secrecy of communications. However, it can also be used

in a manner that infringes copyrights, as it was done by the principals of this case.

(2) With the goal of technically verifying whether a new file-sharing software program, which ensures both anonymity and efficiency, would be actually operable, the accused launched the development of Winny on April 1, 2002, and released the first trial version of Winny on May 6, 2002, on the website that he had established. The accused subsequently released the upgraded versions of Winny successively, and on December 30, 2002, he released Winny 1.00, the official version of Winny, and then Winny 1.14 on April 5, 2003, at which point he put an end to the development of Winny as a file-sharing software program (Winny 1). After that, with the goal this time of implementing a large-scale bulletin board system (BBS) using P2P technology, on April 9, 2003, the accused launched the development of Winny 2 as a software program designed for this goal. On May 5, 2003, he released the first trial version of Winny 2, and in September 2003, he released other versions of Winny successively, Winny 2.0β6.47 and Winny 2.0β6.6, which were used by the two principals of this case (hereinafter collectively referred to as the "Alleged Versions of Winny"). Although Winny 2 was developed with the goal of implementing a large-scale BBS as mentioned above, it also had almost the same functions as Winny 1 as a file-sharing software program (hereinafter Winny 1 and Winny 2 shall collectively be referred to as "Winny"). Upon releasing Winny, the accused posted a cautionary message on his website, stating "Do not exchange illegal files with the use of these software programs."

(3) B, one of the principals of this case, around September 3, 2003, downloaded and acquired Winny 2.0β6.47 that had been released by the accused, and although B was not eligible for any statutory exceptions, nor did he obtain authorization from the authors, from September 11 to 12, at his residence, using a computer connected to the hard disk that stored the data of 25 titles of video game software programs, which are

categorized as computer program works, and maintaining the computer connected to the Internet, B started up said version of Winny on which said data were contained in a specific folder and ready to be uploaded, and made the data automatically transmittable to many and unspecified Internet users who would access said computer, thereby infringing the authors' right to effect public transmission of their works in violation of the Copyright Act. C, another principal of this case, around September 13, 2003, downloaded and acquired Winny 2.0β6.6 that had been released by the accused, and although C was not eligible for any statutory exceptions, nor did he obtain authorization from the authors, from September 24 to 25, at his residence, using a computer connected to the hard disk that stored the data of two titles of cinematographic works, and maintaining the computer connected to the Internet, C started up said version of Winny on which said data were contained in a specific folder and ready to be uploaded, and made the data automatically transmittable to many and unspecified Internet users who would access said computer, thereby infringing the authors' right to effect public transmission of their works in violation of the Copyright Act.

2. The court in first instance stated that the technology involved in Winny is itself value-neutral and it is inappropriate to stretch the scope of accessoryship with no limit, to the extent that any act of providing such value-neutral technology would be criminalized, and held that whether or not it is unlawful to provide such technology to others, in the end, depends on the actual situation of the use of the technology in society and the provider's perception of such situation, and also on the provider's subjective views upon provision. Based on this reasoning, the court of first instance determined that in the circumstances where most of the files exchanged on the Internet using Winny and other file-sharing software programs were eligible for

copyright protection, such file-sharing software programs including Winny were used in a manner that infringes copyrights, and among them, Winny was recognized in society as a software program that kept users safe from the risk of being captured for copyright infringement and was widely used due to its efficiency and convenient functions. The court then found that the accused, while knowing the actual situation of the use of file-sharing software programs, and Winny in particular, and expecting a new business model to be created with the use of Winny and accepting such way of using it, released the Alleged Versions of Winny on the website that he had established so as to make them available to many and unspecified persons, and this led the principals to commit the charged crime. In conclusion, the court of first instance determined that the act of the accused can be regarded as constituting accessoryship and found the accused guilty of accessoryship to the crime of violation of the Copyright Act, and rendered a judgment sentencing the accused to a fine of 1.5 million yen.

3. Against the judgment in first instance, the public prosecutor appealed by reason of inappropriate sentencing, and the accused also appealed by reason of violation of procedural laws and regulations, errors in fact finding, and errors in the application of laws and regulations. With regard to the allegation of errors in the application of laws and regulations concerning the establishment of accessoryship, the court of prior instance held that accessoryship to be established by means of the act of providing a software program on the Internet is a new type of accessoryship that has never been seen before, so it is necessary to carefully deliberate on whether or not to impose criminal penalty on this type of accessoryship, from the perspective of the principle of legality. The court then stated as follows: "In order to prove that the act of providing a value-neutral software program on the Internet has made it easy for the principal to commit the criminal act, it is not sufficient that the provider of the software program

perceives and accepts the possibility or probability that someone among many and unspecified persons would engage in an unlawful activity with the use of the software program, but accessoryship should be deemed to be established only in the case where the provider has gone further to provide the software program while recommending others to use it exclusively or mainly for the purpose of engaging in an unlawful activity." Based on this reasoning, the court of prior instance found that when the accused released and provided the Alleged Versions of Winny on the Internet, he perceived and accepted the possibility or probability that someone would infringe copyright with the use of them, but the court did not find that he went further to provide the Alleged Versions of Winny while recommending others to use them exclusively or mainly for the purpose of infringing copyright. Accordingly, the court of prior instance concluded that the accused cannot be found guilty of accessoryship, and rendered a judgment quashing the judgment in first instance and pronouncing the accused not guilty.

4. The defense counsels argue that accessoryship provided in Article 62, paragraph (1) of the Penal Code consists of "act of aiding," "intent of aiding," and "causality," and the judgment in prior instance erred in construing the provisions of Article 62 of the Penal Code in that it required "act of recommending the unlawful use" as an additional element that constitutes accessoryship. Therefore, we examine this point, according to the findings by the judgment in prior instance and the case records.

(1) An "accessory" set forth in Article 62, paragraph (1) of the Penal Code refers to a person who, with the intent of contributing to another person's commission of a crime, gives tangible or intangible aid so as to make it easy for such other person to commit a crime (see 1949 (Re) No. 1506, judgment of the Second Petty Bench of the Supreme Court of October 1, 1949, Keishu Vol. 3, No. 10, at 1629). In other words, a person shall

be judged to be an accessory when he/she performs an act that will make it easy for another person to commit a crime, while perceiving and accepting such nature of his/her act, and the principal has actually committed a criminal act. The court in prior instance focused on the peculiar nature of the alleged act of providing the value-neutral software program on the Internet to many and unspecified persons, and considered that accessoryship is established only in the case "where the provider has gone further to provide the software program while recommending others to use it exclusively or mainly for the purpose of engaging in an unlawful activity." However, we cannot find that there is sufficient ground for acknowledging the establishment of accessoryship only in the case where the alleged person has provided the software program to others while recommending the unlawful use, irrespective of the nature of the software program (the likelihood of its being used for an unlawful activity) or the objective situation of the use of the software, so we must say that the court of prior instance erred in construing the provisions of Article 62 of the Penal Code.

(2) It is true that Winny can be used both for legitimate purposes and for the unlawful purpose of infringing copyrights?for this reason, the judgment of first instance and the judgment in prior instance described it as a value-neutral software?, and it is basically left to each user to decide whether he/she will use Winny for the purpose of infringing copyrights or for other purposes. In addition, the method of software development chosen by the accused, i.e. 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. A new software program to be developed will be given a wide range of evaluation in society, and at the same time, the development process needs to be carried out swiftly.

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, the provider has released and provided the software program while perceiving and accepting such possibility, and copyright infringement has actually been committed with the use of said software. In order for such act of providing a software program to constitute accessoryship, there must be not only said 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 (i) 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 (ii) 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.

(3) Looking at this case from the abovementioned standpoint, first of all, it is obvious

that the accused did not release and provide the Alleged Versions of Winny while perceiving or accepting a specific and immediate risk of copyright infringement to be committed with the use of them.

Secondly, we examine whether or not it was highly probable that among those who would acquire the Alleged Versions of Winny, a wide range of persons would use the Alleged Versions of Winny for the purpose of infringing copyright, to a level where their use cannot be tolerated as exceptional, and the accused released and provided the Alleged Versions of Winny while perceiving and accepting such high probability. Winny is itself a software program which makes it possible to perform the exchange of a variety of data efficiently while maintaining secrecy of communications, and at the same time, it is a software program which is very convenient to use when one intends to use it in a manner that infringes copyright, as it was done by the principals of this case, because the commission of copyright infringement is difficult to be detected. Then, looking at the objective situation of use at the time of the incident, as pointed out in the judgment in prior instance, there is a wide disparity with respect to the cases of copyright infringement committed with the use of file-sharing software applications, depending on the choice of time or statistical data, so there is no evidence that accurately shows the objective situation of the use of Winny at the time of the incident. However, from the relevant evidence cited in the judgment in prior instance, 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 authorization from the authors. Looking at how the accused provided the Alleged Versions of Winny, he took measures such as posting a cautionary message to prevent users from exchanging illegal files with the use of this software program, but he basically took the approach of releasing the Alleged Versions of Winny on his website, free of charge and

on an ongoing basis, without setting any particular limit to the scope of persons who would be able to download them. In view of these circumstances, we cannot deny that the accused released and provided the Alleged Versions of Winny in the situation where it was highly probable, when viewed objectively, that a wide range of persons would use the Alleged Versions of Winny for the purpose of infringing copyright to a level where their use cannot be tolerated as exceptional.

On the other hand, looking at the subjective view of the accused on this point, we can find that when the accused released and provided the Alleged Versions of Winny, he perceived that some of the users would use the Alleged Versions of Winny for the purpose of infringing copyright or an increasing number of people had come to use them for such purpose, but there is not sufficient evidence to go so far as to find that the accused perceived and accepted that the number of people who would use Winny for the purpose of infringing copyright had increased to a level where their use cannot be tolerated as exceptional, and that it would be highly probable that if he released and provided the Alleged Versions of 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.

In this respect, we can find the following facts: (i) On the thread where the accused announced the development of Winny (hereinafter referred to as the "development thread"), a number of comments were posted by people who were expected with high probability to attempt to use Winny for the purpose of infringing copyright, and the accused made the announcement of the development of Winny and posted comments regarding the development process, while perceiving that his announcement and comments would reach such people. (ii) At the time of the incident, many stories were circulating via the Internet and magazines, etc. to the effect that Winny kept users

safe from the risk of being detected and arrested for criminal charges, and the accused himself read these magazines. (iii) The accused himself downloaded a large amount of files flowing on the Winny network which are presumed to be copyrighted works. In view of these facts, it is evident that at the time of the incident, the accused perceived that if he released and provided the Alleged Versions of Winny, some of those who acquired the Alleged Versions of Winny would use them for the purpose of infringing copyright, and it is also found that the accused perceived that the number of such people was increasing.

However, with regard to the fact mentioned in (i), the announcement of the development and other comments that the accused posted on the development thread somewhat indicate his desire to draw the attention of others, and what is more, this thread was not entirely filled with comments posted by people who were expected with high probability to attempt to use Winny for the purpose of infringing copyright, but there were also comments from those who were against the unlawful use of Winny, and the accused himself posted messages on said thread to request users not to use Winny for the purpose of infringing copyright, such as stating "Needless to say, at present, it is illegal to distribute works of others without their authorization. I would like to ask beta testers not to overstep this rule when participating in the beta test. Please remember that this is an experiment to verify whether Freenet P2P can be put into practical application." In view of these aspects, we cannot say that the accused released and provided Winny, targeting such people who were expected with high probability to attempt to use Winny for the purpose of infringing copyright. It is also found that at the time of the incident, the accused himself posted comments on his website which suggested as if he expected that the spread of the use of file-sharing software would lead to create a new business model that is different from any existing

business models. However, as such new business model that the accused mentioned is imagined on the presupposition that the interest of authors would be properly protected, we cannot find, only because of such comments, that the accused developed or provided Winny for the purpose of spreading illegal copies of works on the Internet and destroying the existing copyright system, nor can we find that he perceived or accepted that Winny would be used mainly for infringing copyright. As for the fact mentioned in (ii), the stories that were circulating via the Internet and magazines, etc. cannot be deemed to accurately convey the objective situation of use at the time of the incident. It is found that at that time, based on such stories, the accused perceived the fact that an increasing number of people were using Winny for the purpose of infringing copyright. However, considering that Winny is not designed to be user-friendly only for the purpose of infringing copyright, we cannot go so far as to find that the accused perceived or accepted the fact that the proportion of people who used Winny for the purpose of infringing copyright had reached some 40%, to a level where their use cannot be tolerated as exceptional, as indicated in the aforementioned relevant evidence. Also with regard to the fact mentioned in (iii) that the accused himself downloaded a large amount of files flowing on the Winny network which are presumed to be copyrighted works, this is only a superficial ground to show that the accused understood the overall situation of the use of Winny at that time. Rather, given the fact that the accused launched the development of Winny with the goal of verifying P2P technology, and he worked on developing various versions of Winny 2, including the Alleged Versions of Winny, with the goal of implementing a large-scale bulletin board system (BBS) using P2P technology, rather than developing a file-sharing software program, we see that the major object of his interest was a technical aspect of the development process, i.e. to find out whether a new file-sharing

software program or large-scale BBS with the use of P2P technology would be actually operable. In fact, Winny 2 is designed with a structure wherein the IP addresses of those who opened threads on a BBS can be easily identified, which means that the development efforts were not made while putting emphasis only on the anonymity function. As mentioned above, upon releasing and providing various versions of Winny 2, including the Alleged Versions of 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 the Alleged Versions of 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.

(4) For the reasons stated above, we should say that the accused lacked the intent of accessoryship to the crime of violation of the Copyright Act, so the judgment in prior instance is justifiable in that it found the accused not guilty of accessoryship to the crime of violation of the Copyright Act.

5. Therefore, according to Article 414 and Article 386, paragraph (1), item (iii) of the Code of Criminal Procedure, the decision has been rendered in the form of the main text by the unanimous consent of the Justices, with the exception that there is a dissenting opinion by Justice OTANI Takehiko.

The dissenting opinion by Justice OTANI Takehiko is as follows.

I disagree with the conclusion of the majority opinion and consider that the accused of this case is guilty of accessoryship to the crime of infringement of the right of public transmission, which is a type of copyright. Therefore, I hereby express my dissenting

opinion.

1. The facts of the case are indicated in detail in Section 1 of the majority opinion. The characteristic aspect of the act of providing a file-sharing software program called Winny, due to which the accused is charged for aiding the principals' commission of copyright infringement, is that the software program itself is technically useful in that it makes it possible to perform the exchange of a variety of data efficiently while maintaining secrecy of communications, and at the same time, because of its efficiency and its anonymity function in particular, it is also likely to infringe copyrights, which is a legal interest, depending on how it is used (these features are two sides of the same coin), and that the software program is provided to many and unspecified persons, with no limit to the scope of persons to whom it is provided.

A question arises as to whether or not the act of providing this kind of software program is punishable as an act of aiding by facilitating or encouraging the principal's act of infringing copyright (right of public transmission) by unlawfully uploading files through infringing use of the software program. In order to punish the act of providing as accessoryship, it is not sufficient that the act of providing entails a general or abstract possibility of copyright infringement, but punishability as accessoryship may be acknowledged only if the act of providing is performed in the situation where there is a specific and higher level of probability that the principal will use the software program in an infringing manner. On this point, my view and understanding are basically the same as those of the majority opinion.

2. More specifically, the act of providing Winny does not itself involve any risk of infringement of legal interest as long as it is used for a legal purpose, but if the usefulness of Winny is abused and it is used in an infringing manner, the act of providing it takes on the realistic risk of infringement of legal interest and becomes

illegal (in this sense, this act can be deemed to be a value-neutral act). Whether or not the act of providing a software program involves any risk of infringement of legal interest depends on the specific purpose of use or manner of use, that is, for what purpose and for what subject users will use the software program. A mere possibility of infringing use cannot be recognized as such risk, and only in the case where there is a specific and higher level of probability that users will use the software program not legally but in an infringing manner, the act of providing itself takes on the realistic risk of infringement of legal interest and it is deemed to be illegal and punishable.

And whether or not it is probable that users will use the software program in an infringing manner needs to be examined both from the aspect of the possibility that each user will use the software program in an infringing manner, and in light of the fact that the software program is provided to many and unspecified persons, from the aspect of the possibility that any one or more of those persons will use it in an infringing manner. When estimating the former possibility, the major points to be considered would be whether or not the provided software program, in view of its nature and features or the manner of providing it, can be easily used for infringing copyright (right of public transmission) and is likely to induce infringement, and whether or not there is any means to check the infringing use. As for the latter possibility, if a software program which entails the possibility of infringing use is made available to more people who intend to use it in an infringing manner, the higher the realistic risk of infringement of legal interest becomes (both in terms of quantity and probability), and in this respect, matters such as the manner of providing the software program and the scope of persons to whom it is to be provided should be taken into consideration. Furthermore, in the objective situation where infringing use actually has taken place quite often, the continued provision of a software program that is

likely to be used in an infringing manner will increase the risk of infringement of legal interest, so the objective situation of use would be an important point to be considered in the course of examining the aforementioned high probability.

3. Thus, in order to acknowledge punishability of the act of providing performed by the accused, which has the characteristics as described in 1 above, it is required that the software program is provided in the situation where a specific and higher level of probability of the infringing use can be objectively recognized. This is an illegality element and may also be a constituent element, both of which constitute punishability of an act of aiding. Hence, as a subjective element required for constituting accessoryship (intent of aiding), the alleged accessory must have perceived and accepted such high probability (as for the identity of the principal, it is sufficient if the alleged accessory perceived and accepted said high probability at a level of what is called general intent).

The judgment in prior instance took one more step forward and further stated that in order to prove that such a value-neutral act as the one disputed in this case constitutes accessoryship, the alleged accessory must have "recommended" the infringing use. However, as pointed out in Section 4(1) of the majority opinion, it is impossible to accept a view that this type of accessoryship which could constitute a crime even when the principal crime is not committed is established only in the case where the alleged accessory has performed such a positive action.

Similarly, as a subjective element of accessoryship, it is sufficient if the alleged accessory is found to have perceived and accepted said high probability, and it is not further required that he/she had the positive intention or aim of encouraging the principal to commit a criminal act.

4. Now, I will examine this case from the viewpoints explained above. (i) Winny,

developed by the accused, was not the only software program that is categorized as a file-sharing software program, but Win-MX and other software programs in this category were also available, so Winny was not necessarily indispensable to infringe copyright, the right of public transmission, on the Internet. However, through the research efforts of the accused, Winny has become more efficient (with the multiple downloading function, the automatic downloading function, and the mechanism wherein unauthorized downloading of files of copyrighted works for private use purposes, which was not illegal at the time of the incident, would immediately lead to uploading those files, which now constitutes an illegal form of public transmission), and the anonymity function has also been attached to it (e.g. a mechanism wherein after a file is relayed, it becomes difficult to track the position information (key information) of the point from which the file was sent). As a result, Winny is so easy to use in an infringing manner despite the warning message posted for checking such use and also so tempting toward using it in an infringing manner, that users would be encouraged to engage in infringing use. (ii) Looking at the manner of providing Winny, it is provided to many and unspecified persons widely and with no limit, and anyone can access Winny at any time without submitting an application or obtaining consent for use, without any restriction on use. (iii) The objective situation of use is as mentioned in Section 4(3) of the majority opinion: there is no evidence that accurately shows the situation of the use of Winny at the time of the incident (2003), but from the relevant evidence cited in the judgment in prior instance, 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 authorization from the authors.

Given all of these circumstances, at least with regard to the act of releasing and providing the Alleged Versions of Winny that was performed in September 2003, it is

sufficiently possible to recognize the "high probability" of infringing use objectively, in light of the easiness of the infringing use of the software program provided, the nature and features of the software program that are likely to encourage such use, and the manner of providing the software program with no limit to the scope of persons to whom it was provided, as well as the abovementioned objective situation of use.

I would additionally mention that said proportion of the files which are presumed to have been involved in the infringing use, some 40%, is estimated partly based on the survey on copyright infringement, targeting the 1.2 million sample of file information (keys) that were circulating on Winny at a certain point in time, which showed that some 40% of these files were pure copies of commercially available copyrighted works such as music files and DVDs. This means that, even on the sampling basis, as many as some 400,000 pure copies of commercially available copyrighted works were circulating. This cannot be regarded as an exceptional situation of the infringing use of Winny. In addition, according to another survey conducted by a certain association with regard to about 20,000 items of file information (keys), which was examined by the court of prior instance, about 50% of them were copyrighted works of video, music, and game software, and about 90% of these works are presumed to have been used without authorization (judgment in prior instance, page 20). Although an accurate number of Winny users cannot be ascertained, there is also a survey that indicates that about 3% of all Internet users (presumed to be slightly more than 30 million at the time of the incident) used file-sharing software programs (judgment in first instance, page 15), and about one-third of them used Winny most frequently. If the rate of use is substituted for the volume (number) of users, one can presume that Winny was used in an infringing manner by a great number of people to a level where their use cannot at all be considered to be exceptional, even while taking into consideration the defective

aspects of these surveys as argued by the defense counsels. As these surveys include a survey conducted in 2006, two and a half years after the incident, in consideration of the increase in the number of users of file-sharing software programs during this period, one must necessarily revise the estimate downward to a certain degree in order to presume the situation at the time of the incident based on these data. Nevertheless, the presumption explained above basically seems valid.

5. As mentioned in 3 above, as a subjective element required for accessoryship, the accessory must have the intent of aiding, in the form of perceiving and accepting such high probability as objectively recognized. The majority opinion, in its conclusion, does not find the intent of aiding on the part of the accused, explaining that it is difficult to go so far as to find that the accused perceived or accepted a high probability that a wide range of persons would use the software program in question for the purpose of infringing copyrights, to a level where their use cannot be tolerated as exceptional. In my view, the accused of this case can be found to have perceived and accepted the high probability of the infringing use, and this is the essential reason why I dissent from the majority opinion.

(1) As for the probability of infringing use, the accused, as the developer of the software program, must have perceived that the software program was easily used in an infringing manner and was likely to encourage such infringing use because of its usefulness, and that the software program was provided to a wide and unlimited scope of persons. With regard to the objective situation of use, the accused may not have perceived the actual situation of use on a statistical basis, that is, about 40% of the use of the software program was conducted in an infringing manner, because no accurate survey of use was available at the time of the incident. However, in light of the factors pointed out in Section 4(3) of the majority opinion, namely, (i) the comments posted by

users on the thread where the accused announced the development of the software program, which imply their attempt of infringing use, (ii) his access to magazine articles and other information concerning the infringing use of Winny, which were available at the time of the incident, and (iii) the records of his downloading of files of copyrighted works, I should say that the accused perceived that Winny was being used in an infringing manner and its use was spreading to a considerably wide range of users (to a level where their use cannot be tolerated as exceptional).

The circumstances pertaining to the perception and acceptance of the accused in respect of the situation of the infringing use, as pointed out by the majority opinion, may be worthy of careful consideration as the factors leading to denying that the accused perceived the probability of the infringing use. However, even taking into consideration these circumstances as well as the characteristics of the personality of the accused, i.e. his orientation as a researcher and developer, that is, his inclination and devotion to achieving usefulness, the positive side of research and development, and on the other hand, his lack of attention and carelessness to the negative side, the infringing use which could occur as a side effect, I would say that all of these are not enough to deny that the accused perceived the high probability of infringing use. If the accused continued to provide the software program while perceiving such objective situation concerning the high probability of the infringing use, he should basically be found to have also accepted the high probability of the infringing use.

(2) As mentioned above, in the process of determining whether or not there is the intent of aiding in the case where such act of providing technology as the one disputed in this case is both technically useful and likely to cause infringement of legal interest, and where the technology is provided to many and unspecified persons, if it is construed that the intent of aiding is found only where the alleged accessory has a

positive intention or aim of infringing legal interest in addition to an intent of aiding in general, such construction has no sufficient ground and I cannot help but hesitate to agree with it.

In agreement with the majority opinion, I do not find such a positive intent of infringement in the accused as alleged by the public prosecutor, for instance, wishing for the spread of illegal copies of works with the use of Winny or developing and providing Winny mainly for the purpose of making it available for infringing use. I am willing to acknowledge that the accused engaged in developing and providing the software program mainly for the purpose of making it possible to perform the exchange of a variety of data efficiently while maintaining secrecy of communications.

As the factors for judging that the accused lacked the intent of aiding, the majority opinion point out the circumstances such as that the accused posted comments on the development thread to express his intention of developing and providing the software program, he expected a new business model to be created with the use of the software program on the presupposition that the interest of authors would be properly protected, and he posted a message to warn users not to use the software program in an infringing manner. All of these circumstances may be understandable as the grounds for finding that the accused lacked a positive intention of infringing legal interest, but they are not necessarily inconsistent with or contradictory to the view that he perceived and accepted the risk of infringement of legal interest. Rather, one would infer that because he perceived the risk that his act of providing the software program would lead to infringement of legal interest, he posted a warning message to express that such infringing use was not what he intended or aimed and was contrary to his true intention. While issuing such message, the accused still engaged in the act of providing without taking any measures to check the infringing use, so in this respect,

he should inevitably be found to have perceived and accepted the high probability of the infringing use.

6. For the reasons stated above, I consider it possible to find that the act of the accused meets the constituent requirements for accessoryship and he had the intent of aiding. Meanwhile, since the defense counsels seemingly also argue that his act should be substantially exempt from legal liability, I would like to give some comments on this point as well.

As explained above, it is found that the accused developed and provided Winny mainly for the purpose of pursuing technical usefulness, that is, improving the efficiency and anonymity of P2P-based file-sharing software programs and making it possible to perform exchanges of a variety of data efficiently while maintaining secrecy of communications. The method of software development chosen by the accused, i.e. proceeding with development while providing a software program to many and unspecified persons and hearing users' opinions, does not seem to be particularly unreasonable.

In view of these points, there may be some room in this case to discuss whether or not the act of the accused should be substantially exempt from legal liability, if his act is deemed to be allowable according to the generally accepted social standards while comprehensively taking into account the relevant factors such as the purpose of the act, the appropriateness of the means chosen, comparison as to infringement of legal interest, and policy-based consideration, or allowable from the viewpoint of the law system as a whole.

It is true that in this case, it is the persons prosecuted as the principals who actually committed copyright infringement, and the accused, by providing Winny, only provided the principals with one means for their commission of the crime. Furthermore, Winny

was not the only file-sharing software program that was available as such means, and Win-MX was used more frequently as P2P-based software. Thus, the act of the accused to provide Winny had a weak effect in causing copyright infringement or infringement of legal interest, so there may be a view that the accused cannot be held liable in tort under civil law. In this sense, it may be possible to find him guilty only of a minor crime.

However, although the software program may not play a significant role in committing each act of infringement, in light of the nature and the method of provision of the Alleged Versions of Winny, i.e. they can be easily used in an infringing manner and they are provided to many and specified persons with no limit, the Alleged Versions of Winny are likely to provoke a large number of copyright infringement cases, and in reality, such infringing use frequently took place as explained above. Thus, in terms of infringement of legal interest, it may be possible to consider that the Alleged Versions of Winny entail such level of risk that cannot be overlooked in society. In this context, the legal interest that might be infringed should be protected by imposing imprisonment with work (at the time of the incident, imprisonment with work for not more than three years) against infringement.

On the other hand, the act of developing and providing the software program performed by the accused has been evaluated as being useful to a certain extent in the Internet society. However, in this technical field, progress in technological development takes place rapidly, so it is considerably difficult to obtain an objective evaluation based on adequate verification in the relevant field.

Such features of the Alleged Versions of Winny, i.e. usefulness and likelihood of infringement of legal interest, may not be suitable for relative comparison of legal interest. As usefulness of the Alleged Versions of Winny is already taken into

consideration in the phase of discussing the high probability of infringing use as the element to constitute accessoryship, it seems to be inappropriate to take this point into consideration again in the course of discussing the issue of substantial exemption from liability.

(In connection with the aforementioned aspect of policy-based consideration, it is found, as explained above, that Winny, the software program developed and provided by the accused, is technically useful for the distribution of information on the Internet, and the accused engaged in developing and providing it mainly for the purpose of pursuing such usefulness. When it comes to promotion and advancement of technical usefulness in the field of information distribution, dealing with the risk of infringement of other kinds of legal interest, which could occur as a side effect, by immediately imposing criminal penalty, could result in excessive restriction on the development of innovative technologies and impedance to technological advancement, and could ultimately cause a chilling effect on technological development in other fields. Viewing the situation and giving consideration from this perspective, a careful and restrained attitude is required for criminalizing the act of providing technology that has only served as a means for the principal to commit infringement of legal interest and punishing it as accessoryship. This consideration may lay behind the conclusion drawn by the majority opinion that decided not to punish the accused. In this case, before the accused received any complaint from authors or other right holders or any official alarm was given to file-sharing software program providers in general in society, the law execution authorities set about investigation and carried out compulsory investigation in response to the accusation, and then prosecuted the accused on the presupposition that he provided the software program for the purpose of spreading copyright infringement. Seeing such developments of the case, I would say that the authorities

somewhat lacked consideration to this point and acted too hastily. In addition, there are also circumstances in favor of the accused, such as that he did not have any intent of making profit, and he quickly closed the website where Winny was made available to the public, after he was advised by the law execution authorities.

At the same time, if the activities of developing and providing technology in a certain field put too much emphasis on pursuing a benefit, this could, as a side effect of such benefit, cause infringement of other kinds of legal interest. Hence, as long as the developer of technology intends to provide the technology widely in society with no limit to users, he/she should proceed with development while giving due consideration to this aspect, as his/her responsibility in society as a developer. In my view, for the reasons stated in 1 to 5 above, the accused is found guilty of accessoryship, and the aforementioned circumstances in favor of him should be sufficiently taken into account in determining his sentence for accessoryship, including commutation.)

7. For the reasons stated above, I consider that the judgment in prior instance should inevitably be quashed.

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Presiding Judge

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Justice OKABE Kiyoko

Justice NASU Kohei

Justice TAHARA Mutsuo

Justice OTANI Takehiko

Justice TERADA Itsuro

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note_other

(This translation is provisional and subject to revision.)