

doctrine regarding assignment of operating assets and the civil law doctrine regarding the contract interpretation. According to this position, in the case where the parties agree that the assignee does not assume the liability to refund overpayments in an agreement on assignment of operational assets, the only possible instances where the assumption of liability will be deemed effective is through the application of specific legal provisions such as the responsibility of the assignee of business operations (continuation of use of the firm name: art.17 of the Commercial Law Act, art.22 of the Companies Act; advertisement of assignment of obligations: art.18 of the Commercial Law Act, art.23 of the Companies Act), the right to demand avoidance of fraudulent act (art.424 of the Civil Code) and the principle of disregard of the corporate fiction.

The present ruling has received attention as one of the disputes concerning the right to demand refund of overpayments. Nevertheless, the judgment contains some theoretical inconsistencies with regard to the understanding of assignment of business operations. This issue is also heavily discussed among the law-makers in connection with the anticipated revision of the commercial law and civil law. Further developments at both legislative and doctrinal levels are awaited.

(on 8 December 2012)

8. Supreme Court Decision on the 'Winny' Case

Decision of the Supreme Court from 19 December 2011, KEISHU Vol. 65, No. 9, Item 1380

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I.

The defendant has been indicted on a charge of abetting breach of the Copyright Act (a crime of infringing rights by enabling public

transmission; Article 119 of the Copyright Act) for actions of releasing the file-swapping software Winny on a network and, while knowing that the software was being used for copyright infringement (enabling public transmission for possible right infringement), providing the further improved software Winny 2 on a network. At the end of 2011, Supreme Court made a decision (Supreme Court judgment of December 19, 2011, Criminal Case Law vol. 65, no. 9, page 1380) upholding the original judgment (Osaka High Court judgment of October 8, 2009, Quarterly KEIJI-BENGO (criminal defense) no. 61, page 182), in which such an act was held not guilty.

In this case, the issue was whether or not the act of providing software (referred to as a neutral action in the study of academia), which can be used for both legal purposes and illegal purposes (copyright infringement), constitutes a crime of abetting an illegal action. It is important and remarkable in the fact that the final decision upheld the judgment of innocence.

II.

In order to punish the defendant as an aiding, it is first necessary that an illegal action by the principal offender exists (Article 62, paragraph 1). In this case, all judgments since the first trial found that the two principal offenders who used Winny 2 made it possible, without obtaining the permission of the copyright holders, for game software and movies to be automatically and publicly transmitted via the Internet and thereby infringed the copyright holders' rights of public transmission.

It is also necessary to be able to evaluate that the actions of a defendant "aided" those principals.. This was the main point of contention in this case. The judgment of the first trial related to this case (Kyoto District Court judgment of December 13, 2006, HANREI TIMES no. 1229, p. 105) discussed the matter as follows. The technology of Winny itself is significant in that it can be applied to a variety of fields, the software itself is neutral, and the question of whether or not the act of providing such technology externally has "illegality" as an action of abetting depends on the actual state of use in a technological society, the awareness of that, and the subjective situation when it is provided. Under such a general theory, the defendant's action was conducted in an actual state of use in which a significant portion (more than 90 percent) of the files that use file-sharing

software, such as Winny, on the Internet are subject to copyrights, and the use is being done broadly in the situation of copyright infringement. In addition, the defendant acknowledged the same crime of abetment with an awareness of this (the penalty was a fine of JPY 1.5 million).

III.

However, the appeal trial overturned this judgment and found the defendant innocent. That judgment discussed the case as follows. In order to constitute a crime of abetment for using file-sharing software, such as Winny 2, it is necessary that the defendant recommended and provided software for people to use either solely or mainly for the purpose of copyright infringement and, in this case, that cannot be acknowledged. It also cannot be ignored that this judgment differed from the judgment of the first trial in that it found the percentage of use of Winny 2 for copyright infringement to be approximately 40%.

IV.

This judgment was appealed by the public prosecutor, but the appeal was dismissed. The decision argued as follows. This decision is premised on the fact that it is possible for Winny 2 to be used for legal purposes as well, and whether or not it is used for an illegal action is left up to the principal offender, while on the other hand the method of software development is rational, and should not atrophy. Based on that, this decision discussed the general theory that it is necessary for abetting either a situation in which the software provider uses such software (1) while being aware of and allowing the specific copyright infringement that is to be made, makes it public and then such copyright infringement is actually made or a situation (2)-1 in which not exceptional person who obtained the software uses it with high probability for copyright infringement, and (2)-2 the provider is aware of and allows this when he makes it public.

Based on that, this decision found that objectively there was a situation that fulfilled the requirements of (2)-1 (approximately 40% of the files uploaded using Winny infringed copyrights), but denied (2)-2. It also found that it is difficult to acknowledge that, when making public and providing Winny 2, the defendant was aware of the situation. But the defendant did not allow to abet a crime of violating copyright law. It should be noted that in this judgment, Judge Otani had a dissenting opinion that

agreed with the framework of (1) and (2) but explained that the allowance should be affirmed, and the defendant should be found guilty.

This judgment has very important meaning both from the view of criminal law and of copyrights law.

(on 9 December 2012)

9. Appropriation of Excess Payment to the Principal — In the Case of Multiple Debts

Judgment of the Second Petty Bench of the Supreme Court dated 18.01.2008 (MINSHU Vol.62, No. 1, p.28)

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Overview of the facts

(i) On September 3, 1990, X concluded a basic agreement I with consumer credit company Y, and based on that agreement, X borrowed and repaid money during the time up to July 19, 1995. When a calculation is made with the amount in excess of the limit appropriated to the principal, the amount of overpayment at that time comes to JPY 429,657 (α). (ii) On June 8, 1998, X concluded basic agreement II with Y, and based on that agreement, X borrowed and repaid money during the time up to July 7, 2005. When a calculation is made with the amount in excess of the limit appropriated to the principal, the amount of overpayment at that time comes to JPY 272,973 (β). (iii) X argued that (α) should of course be appropriated to the credit principal under basic agreement II and asked Y to restitute the JPY 687,802 (γ), which was the amount of overpayment calculated on that premise.

The first trial (April 19, 2006 Nagoya District Court judgment) judged that basic agreement I and basic agreement II are separate transactions; therefore, the right to claim restitution for the unjust enrichment that