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Should P2P Website Operator Be Responsible for the Crime of P2P Downloader under Joint Criminal Enterprise Liability Doctrine? — A Comment on ezPeer and Kuro

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Abstract

Recently, the most important criminal copyright case is Kuro, in which the Kuro operators and a downloader were found guilty as co-perpetrators in the commission of the unauthorized reproduction offense. The Kuro court's decision is important not only because it discusses the issue of the liability of peer-to-peer (P2P) downloader but because it is different from the ezPeer decision concerning the liability of P2P website operators. Unquestionably, the split between the ezPeer and Kuro cases has generated many debates. The focus of inquiry in the article is whether P2P website operators shall be punished as a co-perpetrator in a joint criminal enterprise directed to commit the unauthorized reproduction offense. For purposes of simplicity and clarity it is assumed here that a P2P downloader commits the unauthorized reproduction offense.

This article begins with a discussion of the meaning of "Co-perpetration" within Article 28 of the Taiwan Penal Code, providing an understanding of joint criminal enterprise liability as a background for the following case discussions. In addition to the two requirements, including agreement to reach a common goal

by coordinated co-operation and joint control over the criminal conduct, this article further proposes the following requirements for criminal enterprise liability: (1) the intent to commit with the other perpetrators; (2) the intent to make use of the other perpetrators' commission of an offense; (3) material contribution to the execution of criminal conduct.

Next, this article reviews the opinions of the ezPeer and Kuro cases in determining the criminal joint liability of P2P website operators. It then argues that the Kuro court fails to prove, beyond a reasonable doubt, an agreement between the Kuro operators and a downloader. It concludes that the mere fact that the P2P operators provide P2P services with knowledge of unauthorized reproduction no longer will suffice to generate criminal enterprise liability.

Keywords: P2P services, P2P website operator, co-perpetration, co-perpetrator, joint criminal enterprise liability, unauthorized reproduction