

A suspected computer virus creator was arrested

29 January 2008

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[Short comment]

A Japanese graduate school student was arrested on a copyright infringement charge on 24 January 2008. He was suspected of creating a computer virus named 'Harada Virus'.

His suspected behavior was deemed to be as an attempt or preparation of obstruction of other's computer system. However why was he arrested due to the Copyright Act?

The current Penal Code has some provisions on the obstruction of business, but no provision on any attempt and preparation of obstruction. Article 233, 234 and 234-2 of the Penal Code of Japan provides:

Article 233. (Damage to Credit; Obstruction of Business)

A person who damages the credit or obstructs the business of another by spreading false rumors or by the use of fraudulent means shall be punished by imprisonment with work for not more than 3 years or a fine of not more than 500,000 yen.

Article 234. (Forcible Obstruction of Business)

A person who obstructs the business of another by force shall be dealt with in the same manner as proscribed under the preceding Article.

Article 234-2. (Obstruction of Business by Damaging a Computer)

A person who obstructs the business of another by interfering with the operation of a computer utilized for the business of the other or by causing such computer to operate counter to the purpose of such utilization by damaging such computer or any electromagnetic record used by such computer, by inputting false data or giving unauthorized commands or by any other means, shall be punished by imprisonment with work for not more than 5 years or a fine of not more than 1,000,000 yen.

Japan had signed the European Council Cybercrimes Convention (Convention on Cybercrime (CETS No.185)) and the Japanese Diet (Parliament) had agreed with the Convention and ratified it already. Article 6 and Article 11 of the Convention provides:

Article 6 – Misuse of devices

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right:

a the production, sale, procurement for use, import, distribution or otherwise making available of:

i a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5;

ii a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed,

with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5; and

b the possession of an item referred to in paragraphs a.i or ii above, with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5. A Party may require by law that a number of such items be possessed before criminal liability attaches.

2 This article shall not be interpreted as imposing criminal liability where the production, sale, procurement for use, import, distribution or otherwise making available or possession referred to in paragraph 1 of this article is not for the purpose of committing an offence established in accordance with Articles 2 through 5 of this Convention, such as for the authorised testing or protection of a computer system.

3 Each Party may reserve the right not to apply paragraph 1 of this article, provided that the reservation does not concern the sale, distribution or otherwise making available of the items referred to in paragraph 1 a.ii of this article.

Article 11 – Attempt and aiding or abetting

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 2 through 10 of the present Convention with intent that such offence be committed.

2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, an attempt to commit any of the offences established in accordance with Articles 3 through 5, 7, 8, and 9.1.a and c. of this

Convention.

3 Each Party may reserve the right not to apply, in whole or in part, paragraph 2 of this article.

However, any amendment of the Penal Code has never done yet, because the Democratic Party has not agreed with the Penal Code amendment bill which was proposed by the Japanese government.

Due to this, he is not guilty under the Penal Code.

On the other hand, his computer virus had been delivered widely which was deployed in other's digital contents (digital photos, graphics or paintings). This might be regarded as an infringement of other's copyright of such content. Thus, the Japanese police arrested him on the copyright infringement. Article 119 of the copyright act of Japan provides:

Article 119. (Penalty)

A person with respect to whom either of the following items applies shall be punishable by imprisonment with work for a term not more than five years or by a fine of not more than five million Yen, or by both:

- (i) a person who infringes on the moral rights of author, copyright, right of publication, moral rights of performer or neighboring rights (excluding, however, a person who reproduces by himself a work or performance, etc. for private use purposes as provided for in Article 30, paragraph (1) (including cases where applied mutatis mutandis pursuant to provisions of Article 102, paragraph (1)); 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)); and a person who commits an act deemed to constitute an act of infringement on a copyright or neighboring rights pursuant to the provisions of Article 113, paragraph (5);
- (ii) a person who, for profit-making purposes, causes the automatic reproducing machine provided for in Article 30, paragraph (1), item (i) to be used to reproduce works or performance, etc., when such act of reproduction constitutes an infringement on a copyright, right of publication or neighboring rights.

I believe that this case is a rare case. If he created pure computer virus which was not deployed in

other's digital content, then he may be not guilty under the Copyright Act as well.

[Reference]

Translations of Laws and Regulations (in compliance with Standard Bilingual Dictionary)

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Japanese police arrest computer virus maker on copyright charges

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