TMCC 1268/2005

HONG KONG SPECIAL ADMINISTRATIVE REGION

IN THE MAGISTRATES' COURT AT TUEN MUN

HKSAR

v

CHAN NAI MING

Before: Colin Mackintosh, Magistrate

Trial: 12-14th October 2005

Verdict: 24th October 2005

REASONS FOR VERDICT

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1. The defendant is before this court facing three charges brought by virtue of section 118(1)(f) of the Copyright Ordinance, Cap 528. of attempting to distribute an infringing copy of a copyright work, other than for the purpose of or in the course of any trade or business, to such an extent as to affect prejudicially the rights of the copyright owner; and three alternative charges of obtaining access to a computer with dishonest intent, contrary to section 161(1) (c) of the Crimes Ordinance, Cap 200.

2. All these charges are denied and a trial has followed in which the bulk of the prosecution evidence, which was quite voluminous, has been adduced without challenge. The principal area of contention in the evidence has concerned the admissibility of certain answers allegedly given under caution to a Customs and Excise officer. That matter was dealt with by way of a voire dire before the trial proper commenced. The defendant testified in that trial within a trial, but not in the trial of the general issue.

Outline of prosecution case.

3. The prosecution allege that the defendant was responsible for distributing three films on the Internet using BitTorrent software which allows for fast and efficient downloading of large digital files such as films. The defendant is alleged to have been the seeder, that is that he installed the films on his computer in *.torrent* files (i.e., files with the extension ".torrent"), that he advertised the existence of those files through newsgroups on the Internet, and that he enabled others to download them. It is alleged that this amounted to distribution or an attempt to distribute. All the films were copyright works, so that their installation in his computer was an infringement of copyright, making them into infringing copies. The distribution of the infringing copies was done to such an extent, it is alleged, as to affect prejudicially the owners of the copyright; or that at least the defendant attempted so to do. In the alternative, the defendant, in advertising the existence of the *.torrent* files containing the films on the newsgroup computers, thereby gained access to those computers with a dishonest intent, that is, with a view to dishonest gain for others.

4. It is the prosecution's case, that a customs officer located the defendant's Internet (IP) address through a newsgroup and downloaded the three films which had been seeded by the defendant. His home address was located and raided. The computer in question, which the defendant was operating at the time of the raid, was seized; and, it is alleged, the defendant made admissions that he was the user of the Internet account in question, under the pseudonym "Big Crook"; and that he had uploaded the *.torrent* files in question.

Outline of the defendant's case.

5. The admissibility of these alleged answers was challenged, and I will

return to that issue in a moment. The interviews were ultimately admitted into the evidence though the defence maintain that no weight should be attached to them, and it is submitted that there is no sufficient proof that the defendant was responsible for the relevant acts alleged by the prosecution. But the main thrust of the defence is to say that even if the defendant's involvement is proved as alleged, the evidence does not establish that the alleged acts amounted to distribution within the terms of section 118(1)(f) of Cap 528. What it amounts to, it is said, is no more than sharing or making available the films in question to those who wanted to download them. The acts were of a different character to distribution. And, in any event, there was no evidence of any prejudicial effect on the copyright owners of any such distribution.

The voire dire

6. A number of customs officers laid ambush outside the defendant's home at about 7 a.m. on the 12th of January 2005. They were armed with a search warrant for the premises. When the defendant's wife left to go to work, they intercepted her and she allowed them to enter the premises. They found the defendant sitting at a computer in the living room. His brother was at another in a bedroom.

7. According to PW1, he asked the defendant his name and the defendant gave it. The reason for the raid was explained and the defendant was cautioned. There was a conversation, which PW1 said that he noted into his pocket notebook within minutes. It is exhibit 32. The defendant acknowledged that he was known as "Big Crook" on the Internet and that he alone was responsible for uploading BitTorrent files to the Internet from genuine copies of the films. No other member of his family was involved. He signed the note, having acknowledged its accuracy in his own writing. He was supplied with a notice to persons in custody and was taken to the Customs and Excise offices, where he made a number of phone calls to a lawyer. Later, having apparently been given a choice as to whether he preferred an interview to be video recorded or recorded in writing, and after he had elected to have a written record, he was interviewed: Exhibit 34. Part of what was said at the scene of arrest was repeated and acknowledged by the defendant; but he thereafter elected to say nothing.

8. The thrust of the challenge to this interview was that the defendant did not give the answers in question, that he was induced to sign the pocket notebook

by the officer telling him that his wife would be allowed to go to work and that he was not given an opportunity to read the note before signing it. He had been alarmed by the sudden raid by a large number of officers who had rushed into the premises and was easily persuaded to sign. It was also said that there were a number of breaches of the rules for the detention and questioning suspects. In particular, that the defendant was not cautioned before being asked for his name and that he was not given a copy of the notebook entry before the interview. It was said that in the interview, the contents of the pocket notebook were misrepresented and the defendant was tricked into writing and signing an acknowledgement of the earlier conversation.

9. I do not intend to rehearse all the evidence here. I applied the ordinary burden and standard of proof in criminal cases to this issue. I carefully considered the issues raised about the events at the defendant's home. I was sure that the customs officers had acted in a proper and professional manner, that the notebook entry had been made at the first available opportunity, that it was accurate, and that it had been shown to the defendant and properly acknowledged by him as an accurate record. I was sure that what was written in the interview record (exhibit 34) in relation to the answers given at the scene was not designed to be a verbatim account: it was simply a report to the effect that the defendant had made an admission which was then expanded by the officer to encompass the general allegations which were being made against the defendant. It did not undermine the evidence of the answers given at the scene. I was sure that there was no substance in the complaint about the provision of a copy of the notebook record to the defendant. As with all issues of admissibility, the prime issue to be determined was the question of voluntariness. If the prosecution has proved beyond a reasonable doubt on the whole of the evidence that an interview was voluntary, the record of it is admissible. If, for any reason, it was not voluntary, the record is inadmissible. If the circumstances in which it was made were oppressive, it must be regarded as having been involuntary. There is also a further safeguard, that a record of a voluntary interview may be excluded if it was obtained by unfairness or trickery.

10. After careful consideration of all the evidence relating to the manner and circumstances in which these interviews were conducted, including the allegations made by the defendant and his evidence, and having due regard for the Rules and Directions on the Questioning of Suspects, I was in no doubt as to

their voluntary nature, and that there were no other grounds upon which I should exercise my discretion to exclude the records.

11. In a slightly unusual turn of events, after I gave my ruling on this issue, I was invited to treat the defendant as a man of clear record, he having a single, ancient and minor conviction on his record. I agreed to do so, and determined that the defendant was entitled to a full character direction as to his credibility as a witness in the course of the voire dire proceedings. I therefore reviewed my decision but reached the same conclusion.

The other evidence

12. The remaining evidence was adduced by admitted facts under section 65C of the Criminal Procedure Ordinance (Exhibit 39), and the production of a bundle of statements under section 65B together with their exhibits.

13. The statements were mostly summarised using the summaries contained in a document marked as Exhibit 40. I do not intend to list them here. One of the witnesses, a forensic computer expert, Kwan Yuk-kwan, was called. His statement was adduced as Exhibit 31. He produced a diagram of the BitTorrent system (Exhibit 41), which set it out in graphic form.

14. This was not a case where the defence were relying on the statutory defences contained within the Ordinance. The prosecution retained the burden of proving the allegations to the usual standard. The defendant was entitled to the benefit of being treated as a man of clear record with regard to the issue of propensity to offend. Credibility was not relevant on the general issue, since he did not testify and such answers as he had given amounted to admissions.

15. This is not the time to give a detailed account of the evidence. It is all to be found in the record, and in the exhibits. It has usefully been summarised by Mr Hayson Tse in his written submissions.

16. The essence of the BT system is the efficient delivery of packets of digital information, which, when put together, create a large file such as a film which can then be viewed.

17. The evidence established that the BitTorrent system starts with an uploader putting a film onto a computer linked to the Internet: this is known as the seeder computer. That film can, as in this case, be from a genuine DVD or

VCD. The uploader creates a *.torrent* file on the seeder computer, which contains, amongst other things, the contact information for the seeder computer, its IP address. The *.torrent* file is not a copy of the film.

18. The next step is for the existence of the *.torrent* file to be published on the Internet, usually (as in this case) through a newsgroup. The uploader also activates the *.torrent* file of the seeder computer, which connects it to what is called a tracker server. The tracker server is a computer which is responsible for linking downloaders with the seeder computer and with each other. The downloaders obtain the IP address of the seeder computer from the *.torrent* file published in the newsgroup. The tracker server identifies the seeder as a computer which has the whole of the film installed, i.e., a complete file.

19. The first downloader downloads the *.torrent* file to his computer, activates it and thereby connects through the tracker server to the seeder computer and the download then proceeds.

20. Downloading is by means of "packet switching", whereby a large file like a film is broken down into small packets of digital information, which are sent from one computer to another. The first download from the seeder computer goes to a downloader computer which has activated the *.torrent* file and accessed the seeder through the tracker server. Assuming, as in the present case, that there are a number of downloader computers, they will receive packets from the seeder computer and from other downloaders. In other words, the second and subsequent downloaders will take packets from the seeder, from the first downloader and from each other. They will also upload packets to other downloaders, including those from which they are receiving packets. The packets are transferred as required between all the computers linked through the tracker server. When a downloader has a complete file, the digital packets are automatically arranged in the correct order for viewing the film. If it remains connected through the tracker server, such a computer can become a seeder.

21. It is however essential that during downloading process, the original seeder computer remains connected to the Internet. Even if all the connected downloaders have between them got all the necessary packets which together would make a viewable film, the seeder computer, with the whole file installed, must remain connected, at least until one of the downloaders itself has a whole file.

22. The evidence also established that on 10th January 2005, customs officer Chan Tsz-lai browsed a movie newsgroup in Hong Kong, and saw a reference to Big Crook having uploaded a file to the BitTorrent newsgroup, which related to a film called "Daredevil". There were images of inlay cards from the film, which had a picture of a statuette superimposed onto them and a *.torrent* file. The *.torrent* file was downloaded and activated by the officer and showed the seeder's IP address, where the source seed was located, which was in fact the defendant's computer. Forty other downloaders soon joined. The officer downloaded the film, as did two of the other downloaders, before the connection was broken.

23. On the 11th January 2005, the same procedure was followed with two other films called "Red Planet" and "Miss Congeniality". A full copy of each of the films was acquired by the customs officer and two other downloaders in respect of the film Red Planet. All the downloaded copies of the films were confirmed to be infringing copies.

24. The IP address led to defendant's home and the raid which I have earlier described. He was the account holder of the IP address. The computer being used by the defendant was referred to as "M1". Adjacent to it was a camera, which had been used to make the images of the inlay cards and the statuette. Amongst the discs seized from the vicinity of the computer, were the three which contained the films which are referred to in the charges. They were genuine copies of copyright works.

25. Forensic examination of the computer confirmed, amongst other things, that it had been used to store the relevant three copyright works, to make *.torrent* files of them, to activate the *.torrent* files and to store the images of the inlay cards. There was also evidence of communication with the movie newsgroup.

26. This is only a brief summary of the relevant evidence. Taken together with the defendant's admissions, it proved that the defendant had used the computer (M1) to make infringing copies from the three genuine VCD movies, that he had thereafter made *.torrent* files relating to those movies, and that he had made photo images of the inlay cards and stored them on the computer by using the camera seized from his home. He had, by e-mail, sent the *.torrent* files, and the inlay images to the BitTorrent newsgroup. The *.torrent* files were activated.

His computer was kept online with the tracker server, and therefore the customs officer and other downloaders could receive full copies of the films in question from the computer M1.

27. Kwan Yuk-kwan confirmed in his live evidence that the seeder computer had to undertake the necessary "establishing steps" before any other computer could join in. After they joined, all their data would originate from the infringing copy of the seeder computer even if, with regard to some of it, it came via another downloader. It was however, essential for the uploader (the defendant) to activate the *.torrent* file and remain connected, so that the original data from the file containing the film could be split into packets and sent out to the various downloaders. It was only because downloader computers were themselves running BitTorrent software that they could download from the seeder. The witness agreed that it was the decision of the operator of the downloader computer to obtain the file in question from the seeder, and it was that action which commenced the flow of data to the downloader computer. Downloading from the seeder would not be possible if the seeder computer was turned off or the BitTorrent software was closed or otherwise blocked.

28. Evidence was also given of a number of e-mails emanating from the seized computer, M1. For the purposes of determining the defendant's liability on charges 1 - 3, I treat these e-mails with caution, and I have placed no weight on them.

Distribution

29. Extensive arguments have been presented on the first issue of whether the defendant's conduct, once established, could be said to amount to distribution of an infringing copy. I might say that there is no suggestion that the activities the subject of this trial were being done for the purpose of, or in the course of, or in connection with, any trade or business. Neither is there any issue that the copy of each film, once installed on the defendant's computer, was an infringing copy. Each charge is as alleged as an attempt to commit the offence. The prosecution say that the object of alleging an attempted offence is primarily the issue of "prejudice", an issue to which I shall return.

30. The term "distributes" is not defined anywhere in the Ordinance. There has, I am told, been no previous prosecution under this sub-section so there is no

judicial authority directly on point. I have been referred to certain overseas cases to which I have had regard. It is suggested that if the court finds any ambiguity in the terms of the section 118(1)(f), it should look to the available legislative materials and it should also have regard to section 19 of the Interpretation and General Clauses Ordinance, Cap. 1. Of course, I do have regard to that section; but I find no ambiguity in the terms of section 118(1)(f), which uses ordinary language in a clear manner. The question, it seems to me, is whether the conduct described falls within it.

31. Mr Francis for the defendant has argued that the defendant has simply made the films available for others to download. He submits that the term distribution, as it appears in the sub-section, imports a positive act. He says that at the time of the downloading, the acts were those of the downloaders, not the defendant, whose role at that stage was entirely passive. What was done was not a distribution by the defendant. He did no more than leave his computer in a state whereby others, if they chose to do so, could access it and take material from it. Mr Francis points to other sections in the Ordinance, where there is specific reference to the issue of copies or to making available such copies (see, for example, section 22 (1), acts restricted by copyright). The use of the word, "distributes" in section 118(1)(f) denotes something different, he argues. At all times, after the publication of the *.torrent* file on the newsgroup website, the seeder computer remained passive and it was not therefore, distributing the material. No criminal offence was committed by the defendant, even though there may be some civil liability to the copyright owner.

32. I have considered these submissions but I find that they cannot be sustained. I am in no doubt that the acts of the defendant did amount to distribution within the ordinary meaning of that word and within the meaning of that word as it appears in the relevant sub-section.

33. The defendant loaded the files into his computer, he created the *.torrent* files, he created the images of the inlay cards and imprinted them with his logo, the statuette; he published the existence of the *.torrent* files, and the name of the films in question, on the newsgroup, so that others would know where to go to download. He said, in effect, "Come here to get this film if you want it." He activated the *.torrent* file, so as to enable others to download. He kept his computer connected and the BitTorrent software active to allow the downloading

to take place. The downloading involved the dissemination of the data comprising the infringing copies. His acts were an essential part of the downloading process and were continuing throughout the downloading, even if he had not been sitting at the computer at all times. These acts were an integral part of the enterprise of downloading the infringing copies to other computers. This amounted to distribution. I might add, that given that the intention of the defendant, inevitably inferred from his acts, was to distribute the infringing copies; and given that his acts were more than merely preparatory to such a distribution, he was, at the very least, attempting to distribute.

34. I am sure that it would be straining the language to breaking point to conclude that the defendant's acts did not constitute, or might not have constituted, a distribution of the films which are the subject of the charges. This was not merely "making available" the BitTorrent files. These were positive acts by the defendant, leading to the distribution of the data. He intended that result. In no way can the defendant's involvement in the downloading of this material be properly described as passive. The fact that the recipients of the packets of data, originating from the defendant's computer, might have received it by indirect routes does not alter the nature of the defendant’s act of distribution.

Prejudice.

35. I turn to the question of whether the prosecution has proved that the defendant distributed to such an extent as to affect prejudicially the owner of the copyright. Again, the phrase "affect prejudicially" is not defined in the Ordinance but it is clearly wide in scope.

36. In relation to the three charges, the evidence established that soon after each of the *.torrent* files had been published on the newsgroup, 30 to 40 computer users became involved in the downloading process. In the first two cases (charges 1 and 2) the customs officer and two others each obtained a full copy of the film. In the other case (charge 3), the evidence showed that only the customs officer obtained a full copy of the film.

37. Prejudice in this context is not necessarily restricted economic prejudice, though that is the obvious area at which attention is directed. It might be said that (for example in the case of Miss Congeniality, charge 3,) the distribution of one copy to a customs officer, who would never otherwise have bought it, in the

context of local sales since release in 2001 of over 50,000 copies, barely amounted to significant prejudice. If that is a correct analysis, then given that the intention of the defendant must have been to distribute much more widely than simply to one downloader, his acts amounted to an attempt to distribute to such an extent as to affect prejudicially the owner of the copyright, within the context of section 159G(1) of the Crimes Ordinance, Cap 200. It is inevitable that distribution to 30 or 40 or more downloaders would involve prejudice to the copyright owners through unauthorised distribution of their intellectual property and lost sales. And though lost sales, in the context of the evidence in this case, might be small, nevertheless, such losses would amount to a prejudicial effect.

38. Potential lost sales are not the only measure of prejudice. There is, for instance, the movie rental market to be considered. And copyright owners plainly suffer prejudice from such piracy as this beyond simply their sales figures. The widespread existence of counterfeits tends to degrade the genuine article and undermines the business of copyright owners.

39. This was not a distribution of an infringing copy amongst a few friends. It was a distribution in a public open forum where anyone with the appropriate equipment could obtain an infringing copy from the defendant. The technology has developed to such a point that the prejudice to the copyright owners when their films are distributed in this fashion is, in my judgment, manifest. And these were attempts to commit the offences even if the completed offences had not been committed.

40. It follows that each of charges 1 to 3 has been proved. It is not necessary therefore for me to deliver verdicts on charges 4, 5 and 6. However, it is appropriate, in all the circumstances, for me to record that I am in no doubt that the defendant's act in publishing the *.torrent* file on the newsgroup computer, which thereby made it possible for the seeder computer to upload infringing copies to others, did amount to obtaining access to a computer with a view to a dishonest gain for another. The gain in question was the obtaining of a complete infringing copy of the film. The gain was dishonest in that it was obtained by avoiding the inevitable payment for genuine copy of the film. *R. v. Ghosh* [1982] QB 1053, lays down a two part test for dishonesty which has equal application here. Was the defendant's conduct dishonest by the standards of reasonable and honest people? The answer is yes, because he was deliberately and improperly

depriving the copyright owners of their pecuniary rights. Did the defendant realise that it was dishonest by those standards? The answer is undoubtedly affirmative.

41. However, in the light of my verdicts on charges 1-3, I deliver no verdicts on charges 4-6.

Representation:

Mr Hayson K S Tse, Department of Justice, for the prosecution;

Mr Paul Francis, solicitor, of Messrs Tang, Wong & Cheung, instructed by the Duty Lawyer Service, for the defence.