

Hong Kong court delivers first criminal conviction for BitTorrent user

Chan Nai-Ming has been convicted by a Hong Kong magistrates' court of three charges of attempting to distribute infringing copies of films, contrary to Section 118(1)(f) of the Copyright Ordinance. Chan has now been sentenced to three months in prison. This is believed to be the first criminal conviction of a [BitTorrent](#) user in the world.

Using the popular peer-to-peer file transfer computer program, BitTorrent, Chan created and uploaded to a newsgroup “.torrent” data files for three Hollywood films: *Daredevil*, *Miss Congeniality* and *Red Planet*. Customs officers were able to download successfully a full copy of each of the three films using the .torrent files. Chan's internet protocol address was obtained from the files, which also revealed his home address. A raid was subsequently carried out on January 12 2005.

The prosecution maintained that Chan's acts amounted to distribution, or an attempt to distribute, infringing copyrighted works to such an extent as to affect prejudicially the copyright owners, thereby contravening Section 118(1)(f) of the Copyright Ordinance. This section applies to acts not carried out in the course of or in connection with any trade or business.

Chan argued that his acts did not amount to distribution of copyrighted works under Section 118(1)(f) and at most amounted to sharing or making available copies to those who wished to download them. Such acts are of a different nature from the act of distribution and would only attract civil liability. He further argued that there was no evidence of any prejudicial effect caused to the copyright owners.

The court upheld each of the three charges of attempting to distribute infringing copyrighted works. The magistrate came to the following conclusions:

- ♦ Chan's acts amounted to at least an attempt to distribute infringing copyrighted works under Section 118(1)(f). The magistrate rejected Chan's arguments that he had simply made the films available for others to download and that he did not actively send the films to others. The magistrate held that the series of acts, namely copying the films into his computer, creating and uploading the .torrent files and the images of the film inlay cards on the newsgroup, in effect said to internet users “come here to get this film if you want it”. By keeping his computer connected to the Internet and the BitTorrent software active, Chan enabled downloading to take place. These acts were considered to constitute distribution of, or at the very least an attempt to distribute, infringing copies of the three films stored in Chan's computer.
- ♦ Chan's acts had prejudicially affected the copyright owners as they had potentially lost revenue from sales and rentals of the films. This was not a distribution of an infringing copy amongst a few friends: it was a distribution through a public internet newsgroup where anyone with appropriate equipment could obtain an infringing copy from Chan.

Chan also faced three alternative charges of obtaining access to the newsgroup computer servers with dishonest intent, contrary to Section 161(1)(c) of the Crimes Ordinance. The magistrate took the view that Chan's acts also offended this section but, since the first three charges had been proved, offered no verdict on these alternative charges.

Chan was sentenced to three months' imprisonment for each of the three charges of attempting to distribute infringing copyrighted works. The prison terms are to run concurrently. Chan lodged an appeal and has subsequently been released on bail.

The maximum penalty for distributing infringing copies of copyright works is four years imprisonment and a fine of HK\$50,000 for each infringing copy.

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