

Yu Peng Hsueh-Shu v Public Prosecutor and another matter
[2011] SGHC 198

Case Number : Magistrate's Appeal No 41 of 2011 (DAC No 000301-307 of 2011) and Criminal Motion No 46 of 2011
Decision Date : 25 August 2011
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Leo Cheng Suan (Infinitus Law Corporation) for the appellant; Kan Shuk Weng and Darryl Soh (Attorney-General's Chambers) for the respondent.
Parties : Yu Peng Hsueh-Shu — Public Prosecutor

Criminal Procedure and Sentencing

Copyright

25 August 2011

Judgment reserved.

Choo Han Teck J:

1 In this appeal, Yu Peng Hsueh-Shu ("the appellant"), pleaded guilty to three charges of copyright infringement preferred against her. The first charge read as follows:

YOU, ... are charged that you, sometime between November 2009 and 6th day of July 2010 at 12.05pm, at No. 1 Rochor Canal Road #03-30, Sim Lim Square, Singapore, did have in your possession for the purpose of distributing infringing copies of visual recordings, at a time when copyright subsists in the works, articles which you knew or ought reasonably to know to be infringing copies of works, to wit, four thousand two hundred and eighty-six (4286) infringing copies of song titles published by Warner Music Singapore contained in 5 external hard disks and you have thereby committed an offence punishable under section 136(2)(b) of the Copyright Act, Chapter 63.

The second and third charges were similar to the first. The number of infringing copies involved in the second charge was three thousand two hundred and seventy-two (3,272), and they were contained in ten external hard disks. The relevant copyright owner was Sony Music Entertainment Singapore Pte Ltd. The third charge concerned eight hundred and seventy-eight (878) infringing copies. They were contained in nine external hard disks and the copyright owner was Ocean Butterflies Music Pte Ltd. The appellant admitted in the statement of facts that the hard disks were inspected by the owners of the copyrighted subject-matter who were the recording companies named in the charges respectively. The recording companies "confirmed that they [*ie* the subject-matter of 'music videos'] were infringing copies." There were thus a total of 24 hard disks and 8,436 infringing copies in the three charges proceeded with. Four other charges which were taken into consideration involved a further 6,407 infringing copies of "visual recordings" and "song titles" contained in 21 hard disks. In the seven charges, there were altogether 14,843 infringing copies contained in 45 external hard disks.

2 Section 136(2) of the Copyright Act (Cap 63, 2006 Rev Ed) ("the Act") stated as the relevant provision in the charges reads:

A person who at a time when copyright subsists in a work has in his possession or imports into Singapore any article which he knows, or ought reasonably to know, to be an infringing copy of the work for the purpose of –

- (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire, the article;
- (b) distributing the article for the purpose of trade, or for any other purpose to an extent that will affect prejudicially the owner of the copyright in the work;
- (c) by way of trade exhibiting the article in public,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 for the article or for each article in respect of which the offence was committed or \$100,000, whichever is the lower, or to imprisonment for a term not exceeding 5 years or to both.

The trial judge imposed a custodial sentence on the appellant. She received six months' imprisonment in respect of the first and second charges, and one month's imprisonment in respect of the third charge. The imprisonment terms of the first and second charges were ordered to run concurrently, and the imprisonment term for the third charge was to run consecutively, making an aggregate of seven months' imprisonment. Counsel for the appellant, Mr Leo Cheng Suan, submitted that the sentence was manifestly excessive. He submitted that the trial judge erred in law because she seemed to have assumed each "infringing copy" to be an "article" and thus passed sentence on the assumption that there were 8,435 articles. Mr Leo argued that the term "article" in s 136(2)(b) of the Act should refer to each hard disk rather than the individual copyrighted subject-matters that were stored in the hard disks. He relied on the case of *Public Prosecutor v Poh Kim Video Pte Ltd* [2004] 1 SLR(R) 373 ("*Poh Kim Video*"). In that case, an issue which arose was whether 18 video compact discs, which contained a pirated film drama series, sold in a single boxed set should be regarded as 18 articles or one article. On appeal to the High Court, Yong CJ upheld the trial judge's view that each boxed set should be considered as one article. The relevant portion of the judgment (at [26]) reads as follows:

While no definition of "article" is provided in the Copyright Act, it was evident from a plain reading of s 136(2) that an "article" is any "infringing copy of the work". Taking this into account, I was of the view that there is nothing in the Copyright Act that prevents the court from regarding a box set of a single drama series as an "article" for the purposes of sentencing. I disagreed with TS Laser's contention that the court was bound to regard each VCD in the box as an "article". In light of the legislature's decision not to provide a definition of "article" in the Copyright Act, each case must be considered on its own facts. ...

Yong CJ went on to explain why the court thought that TS Laser's argument was untenable. He explained that a single drama series could be released in different versions. One version of the drama series may be recorded on 18 discs while another version of exactly the same may be recorded on five discs instead. I agree with Yong CJ that it is irrelevant how many discs were used to store the same pirated drama series. The number of discs did not affect the offender's culpability since in either instance the offender intended to distribute each drama series as one boxed set and the consumer would have intended to purchase just that.

3 I agree with *Poh Kim Video* when it states that what constitutes an "article" for the purposes of s 136(2) is a question of fact because the existence of the infringing copies and articles must be proven as matters of fact. But what "article" means in s 136(2) is a matter of legal interpretation as well because the provision states "any article which he knows ... to be an infringing copy of the

work". On the face of it, the just quoted relates an "article" to an "infringing copy". The question that arises by implication is whether an infringing copy is the article or are there instances in which an article may comprise several infringing copies. What is clear is that an "article" must contain an "infringing copy". That is, "infringing copy" is a definitional element of "article". The term "infringing copy" is an abstract noun. It acquires a corporeal form only in relation to a "work", "sound recording", "cinematograph film", "television or sound broadcast" or a "published edition of a work": s 7(1) of the Act. There cannot be infringing copies of anything else apart from the subjects enumerated in s 7(1). The phrase "infringing copy" is a reference to such a subject, or, in the terminology of the Act, the "subject-matter". When the categories of subjects in which copyright can subsist need to be expanded, the new subjects will be added by legislation. What each category means and includes may sometimes require explanation. This is one such instance. Even in its corporeal form, an infringing copy may not be readily identified. What, for example, is the infringing copy an infringement of in this case? The proper construction of the term "article" in s 136(2) will depend on the way that question is answered. The charges in this case alleged that the appellant possessed infringing copies of "visual recordings" and "song titles". In the statement of facts, the same subject was also referred to as "music videos", but these three terms do not necessarily mean the same thing. Since infringing copies can only exist in relation to a subject that is specified for in the Act, the copyrighted subject that constitutes the offence in this case must fall within those categories of subject.

4 The Act makes a clear distinction between original "works" comprising literary, dramatic, musical and artistic works in Part III of the Act on the one hand, and "subject-matter other than works" in Part IV of the Act on the other hand. These latter classes of subjects are not referred to as works in the Act, and there is no requirement that Part IV subjects must be original. The duration of their copyright protection is also different from works. Copyright in "subject-matter other than works" is a copyright which subsists independently of, and does not affect or detract from, copyright in original works: s 117 of the Act. Thus, an infringement of the copyright in a sound recording may also constitute an infringement of copyright in the musical work and literary work embodied in the record as well. Furthermore, a record that sounds like another may not have infringed a sound recording copyright even though it might have been an infringing copy of the musical and literary work copyrights which subsist in the recorded music. The infringing copies in this case must be a reference to "sound recordings" even though they were variously described in lay terms. The recording companies which ascertained the legitimacy of the subject-matter in the hard disks are not necessarily the relevant copyright owners of the literary and musical works that may subsist independently in each sound recording. The distinction is important and must be clearly stated and either proved or admitted. From the statement of facts, the court could only be certain that the recording companies were the owners of the sound recording copyrights and no more. Hence, the charges should have used the term "sound recordings" instead of "works"; and s 136(2) read with s 136(5) of the Act for the offence to be clearly stated.

5 The use of lay terms in the charge and statement of facts shows that items alleged to be literary, dramatic, musical, artistic "works" or "subject-matter other than works" can be easily mixed up with each other. The stated categories help us to be more precise in recognising the types of things we can have intellectual property rights in, but they retain an element of arbitrariness. For example, when one "movie title" is pirated by reproducing it on one storage disc for sale, there is in law an infringing copy in relation to each of the various copyrightable subject-matters that comprise the movie, namely, the cinematograph film, the dramatic work, the sound recording, the musical work and possibly others. I think that it is not reasonable, correct, or fair to regard that one storage disc as four infringing articles. It is fairer to say that there is only one infringing article, the storage disc itself. The fairness of this interpretation can be appreciated from the perspective of the parties, and what they would have had in mind in a transaction that involved the sale of a hard disk such as those in this case; matching the intention of the offender and that of the buyer or consumer. The buyer

and seller alike would clearly have intended to be trading in the "articles" and not the "infringing copies". The understanding that an article must be construed from the offender's perspective is also reflected in language of s 136(2) which uses the terms "sell", "let for hire", "offer or expose for sale or hire", "distribute" or "exhibit in public" in relation to the article. Those acts described can only be carried out with respect to the thing, that is, the article that the offender deals with the consumer. Of course, the thing that is being dealt with need not always be visible to the eye. In a case where a pirate sells individual copyrighted songs online, the article will be each of the songs in the electronic form. In this context, therefore, it seems clear that the terms "infringing copy" and "article" in s 136(2) may not be one and the same, and that is where *Poh Kim Video* sensibly declared that what an article is in each case is a matter of fact. In the present case, it is incorrect to treat each infringing copy of a sound recording as an article in itself. This is consistent with the verdict in *Poh Kim Video*, where the offender sold units of boxed sets of discs which each stored a pirated drama series. Here, the appellant's plan was to distribute units of karaoke players which each contained a hard disk which stored infringing copies of sound recordings. The article that was being distributed was the individual hard disk which contained infringing copies of sound recordings. The infringing copies of sound recordings were not and could not have been distributed in any other way by the appellant.

6 I disagree, however, with the *dictum* in *Poh Kim Video* where Yong CJ had suggested that it was inappropriate to require the court to sentence offenders based on the number of infringing video compact discs (the storage medium in that case) in all cases for two reasons. The first was the point I made above, distinguishing an article from the infringing copy. Secondly, Yong CJ thought that (at [28]):

[S]uch an approach would be entirely inappropriate in copyright offences where two or more infringing works are captured on a single VCD. In such cases, the court would be bound to sentence the offender based on one article only and the maximum fine which could be imposed is \$10,000. The court's hands should not be tied in such a manner, particularly since developments in digital technology have now made it possible for a single hard disk to contain hundreds of infringed works.

The deputy public prosecutors, Ms Kan Shuk Weng and Mr Darryl Soh, adopted this *dictum* in their submissions. They fear that an offender would simply store many infringing copies of copyrighted subject-matter on one hard disk and distribute that hard disk. That argument does not recognise that there may in fact already be several copyrighted works or other subject-matter present in a single product such as a "movie" or, in our case, a "music video". If a pirated movie, made up of at least four infringing copies, which is stored in a single disc is regarded as one article, the presence of a further pirated movie on the same disc to give rise to conceptually eight infringing copies should not cause the disc to be construed as two articles. It is true that if all other circumstances were identical, an offender who distributes a disc containing two pirated movies is more culpable than an offender who distributes a disc which contains only one pirated movie. But the elements of the offence must not be mixed up with an assessment of the offender's degree of culpability at once. They must be considered in turn. Hence, both offenders in the example would have distributed only one article, but the one who copied two movies on the disc may receive a heavier punishment than the other offender who copied only one movie.

7 The legislative policy behind the copyright offences is to punish and deter copyright infringements that are committed for commercial benefit. Given this policy and the plain wording of s 136(2), the proper focus in defining the key element of the offence, the term "article", must be the mode by which the infringing copies are traded since that is how the offender derives his profit. A prosecution under s 136(2) is not an exercise to determine the precise number of copyrights that had

been infringed by rationing the punishment proportionally to the number of infringing copies although when the number of articles is established, the value of the copyrighted subject-matter in each article may be a relevant sentencing consideration as it may determine the extent of prejudice suffered by the copyright holders. The profits derived from the trade of each article may also be relevant to the offender's culpability. The owners of the precise copyrights in each article will not be prejudiced by the criminal law's approach which takes into account the offender's characteristics when assessing culpability for sentencing. The offences were not created to vindicate their private rights in the first place. The copyright owners can seek compensation through a civil action for that.

8 For the purposes of sentencing, the trial judge referred to *Public Prosecutor v Yeo Wei Kian* [2007] SGDC 55 and *Public Prosecutor v Mohd Hapiz b Tahir* [2007] SGDC 40 to justify a custodial sentence. Imprisonment terms of nine months and five months were handed down in the two cases respectively. However, they were different from the present in material ways. First, there was a strong element of wilfulness in those cases which called for a custodial sentence. In *Yeo Wei Kian*, the offender was part of a syndicated operation. In *Mohd Hapiz b Tahir*, the offender made planned efforts to evade detection by the authorities when transporting the infringing articles. Secondly, there was a far greater number of infringing articles in those cases, namely 2,602 articles (some of which were also the subject-matter of a trademark infringement charge) and 695 articles respectively. In my view, the sentence in this case was manifestly excessive because the court seemed to have proceeded on the assumption that the article was the infringing copy of the copyrighted subject-matter instead of the hard disk. The trial judge also noted the fact that the appellant's distribution of the karaoke players containing the hard disks despite knowing six months before her arrest that the hard disks were infringing articles. That seemed to the judge to be an aggravating factor. But the appellant's profit-mindedness or greed cannot be an aggravating factor in itself because s 136(2) criminalises the distribution of infringing articles "for trade". Thus the appellant's intention to profit is a necessary feature of the offence. What would have constituted an aggravating factor would be the manner in which an offender carried out his business. In this case, the appellant was a sole retailer. There was no evidence that she was part of a syndicate engaging in piracy. Her business operations were also a legitimate one apart from the distribution of the relevant karaoke players. In addition, the usual mitigating factors were present, such as she had no antecedents and she was cooperative with investigations and remorseful for her actions, which the judge noted. Since the usual sentence that had been imposed for a copyright infringement offence where the number of articles was small and there were no aggravating factors was a fine (*Public Prosecutor v Chew Alleng* (MA 248/1993, unreported) and *Cherng Chiu Yung v Rahman bin Haji Omar* (MA 16/1997, unreported)), the custodial sentence was manifestly excessive. Finally, the facts were that the hard disks were all seized at the same time. Hence, the appellant can properly be said to be in possession for the purposes of distributing all the 45 hard disks containing the 14,843 infringing copies of sound recordings at the material time. One single charge could thus have been preferred, setting out the total number of hard disks and the total number of infringing copies. This would have the effect of exposing the appellant to a maximum fine of \$100,000 or to imprisonment for up to five years or both. However, because the prosecution laid seven charges and proceeded with three of them, the appellant became liable to a maximum fine of \$300,000 or to 15 years' imprisonment or both. Sentencing is probably more art than science. If that be so, one may lay greater store in contemporary art and match the sentence with the public policies of the day, but it may be wise to steer clear from abstract art. The court's best guide in such circumstances is to have regard to the totality principle. This seems to have been the view of the court below when it imposed a total of seven months' imprisonment because it took into account all the infringing copies. That was why the first two charges carried six months' imprisonment and the third charge carried only one month's imprisonment. Given the fact that that account was based on the assumption that each infringing copy is an article, as well as considering a neutral factor as aggravating, the sentences should be varied.

9 I note that the usual tariff where there is a small number of infringing items is between \$400 to 600 per article. However, because the appellant's profit margin for distributing each article was in the range of \$100 to \$250, and the number of infringing copies found in them is high, the fine imposed per article here must be substantially higher. I also note that a fine of \$2,000 per article was imposed in *Poh Kim Video*, where the profit derived from the sale of each boxed set of drama series and the infringing copies in each article are presumably much lower. Taking also into account the other factors I mentioned above, I would impose a fine of \$4,000 per article.

10 For the reasons above, the appeal is allowed. The sentence of imprisonment is set aside and the sentence is varied to fines as follows: DAC 301-2011 – \$20,000 and in default one month imprisonment; DAC 302-2011 – \$40,000 and in default one month's imprisonment; and DAC 305-2011 – \$36,000 and in default one month's imprisonment, making a total fine of \$96,000 for the three charges.

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