



## Sending out a message

### ⊗ Jail sentence for P2P file-sharer in Hong Kong

**Is the three month sentence handed down to Chan Nai-ming by the Hong Kong Court a landmark ruling ask Margaret Tofalides and Gary Fearn, Addleshaw Goddard**

**T**he jailing of a Hong Kong man for illegally sharing films over the internet has been portrayed by some as a landmark victory in the fight against online copyright infringement. In reality, the impact of the case on peer-to-peer (P2P) piracy is less certain.

Chan Nai-ming, a 38-year-old unemployed man, used the BitTorrent P2P file-sharing network under the name "Big Crook". He was jailed by Hong Kong Magistrate Colin Mackintosh for three months on 7 November 2005 for illegally distributing three films ("Miss Congeniality", "Daredevil" and "Red Planet") using the BitTorrent system.

The case is the latest in a line of P2P copyright cases, but it is the first time that a user of the popular BitTorrent software has been prosecuted and convicted – and, reportedly, the first P2P custodial sentence.

Mr Chan was prosecuted under Hong Kong's Copyright Ordinance. According to the Ordinance, the prosecution needed to demonstrate, in the absence of a commercial motive, that Mr Chan "distributed" copyrighted materials without the owner's permission, "to such an extent as to affect prejudicially" the copyright owner.

Magistrate Mackintosh held it was irrelevant that Mr Chan did not profit from

the file-sharing: he was guilty of illegally distributing the files, violating copyright law and causing financial loss to the film's owners.

### **A piracy hotspot**

Not just Hong Kong, but China as a whole has historically been a hotspot for music and film piracy. The most popular Chinese search engine, **Baidu.com**, has been accused of helping copyright infringers. In September 2005, it was ordered by a Beijing court to block links to pirated copies of songs owned by record company Shanghai Push and to pay US\$8,400 in compensation. The company is also being sued by industry giants Universal, EMI, Warner and Sony BMG.

The Record Industry Association of America (RIAA) is a vocal critic of China. Testifying before a House of Representatives committee in 2003, RIAA's Senior Vice President Joseph Papovich said: "The Chinese government must acknowledge the nexus between market access and fighting piracy. The vacuum caused by China's market barriers will always be filled by pirates who, by the nature of their illegal activities, do not adhere to legitimate market rules."

Against this background, the government of Hong Kong welcomed the decision in *Chan* as proof of its commitment to addressing the problem of copyright piracy. Commerce, Industry and Technology Secretary John Tsang said it "should have a big deterring effect on copyright infringement".

The immediate reaction to the case seemed to confirm this view, with Hong Kong's customs department reporting an 80% drop in illegal film distribution over the internet.

Internet file-sharing is undoubtedly a huge problem, not just in Hong Kong but worldwide. The Motion Picture Association of America says its members lose US\$900 million in potential revenue to piracy each year in Asia alone. Similarly, the International Federation of the Phonographic Industry blames online and CD piracy for a 63% drop in music sales revenues in the past decade and a fall in annual turnover of US\$14 million in 2004.

BitTorrent is one of the latest and most widely used manifestations of P2P file-sharing. It uses similar principles to programs such as Kazaa and Grokster to enable users to exchange digital files – often songs or films – directly with each other over the internet.

The essence of the BitTorrent system is the efficient delivery of packets of digital information. When the packets are put together in the right order, they create a large file, such as a film, which can then be viewed. It is the way in which the packets of information are shared between users that sets BitTorrent apart from other, less sophisticated file-sharing programs.

BitTorrent allows users to download packets from multiple sources, with each source supplying a small packet of the whole film or song. The use of multiple sources allows much faster download speeds.

The BitTorrent case dates back to 10 January 2005, when a Chinese customs officer was browsing a newsgroup in Hong Kong. He saw that "Big Crook" had uploaded a file relating to the film "Daredevil" to the BitTorrent newsgroup, as well as images of the film's inlay cards. The customs officer downloaded the film, as did two illegal downloaders, before the connection was broken.

On 11 January 2005, the same procedure was followed for two other films, "Red Planet" and "Miss Congeniality". A full copy of each of the films was acquired by the customs officer and, in relation to "Red Planet", two illegal downloaders.

The Internet Protocol address in the downloaded file led to the defendant's home. Customs officers raided his flat at about 7am the next morning. They found Chan sitting at a computer in the living room. Adjacent to it was a camera, used to make the images of the inlay cards. Nearby were Video CDs of the three films that were downloaded by the customs officers. The Video CDs were lawfully purchased copyright works.

Taken together with the defendant's subsequent admissions, it was proven that the defendant had used the computer to make infringing copies from the three legitimate films, that he had made "torrent" files relating to those films and that he had made photo images of the inlay cards and stored them on the computer using the camera seized from his home. Furthermore, he had sent the torrent files and the inlay images to the BitTorrent newsgroup. His computer was then kept online, enabling the customs officer and illegal downloaders to download full copies of the films in question.

### A line of cases

This BitTorrent case against an individual follows hard on the heels of similar cases relating to P2P systems such as Kazaa and Grokster.

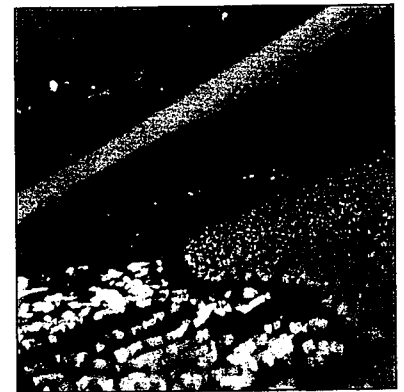
In the Australian Federal Court in September 2005, several defendants linked to the operators and owners of the Kazaa network were held liable for authorising copyright

infringements by Kazaa users, and ordered to stop<sup>1</sup>. It marked the fall of a giant in P2P file-sharing: Kazaa claimed over 380 million users worldwide and reportedly accounted for 79% of worldwide P2P file-sharing.

The Kazaa judgment was preceded in June 2005 by the ruling in the case of *MGM v Grokster*<sup>2</sup>, when the US Supreme Court found that Grokster and Morpheus could be sued for copyright infringement carried out by users of their P2P software, because the companies promoted their systems for that purpose.

The Chan case differs significantly, however, in that it was the prosecution of a single user,

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rather than the operators of the software. Mr Chan was targeted by the prosecuting authorities because he was a "seed" of the BitTorrent network; that is, he was the original uploader and distributor of illegal copies of the three films mentioned in the case.

However, the affirmation by the Hong Kong customs department that it would continue to prosecute only seed uploaders such as Mr Chan is not as clear-cut as it may first appear. Mr Chan was convicted of the illegal distribution of copyright-infringing files, but it was the definition of distribution which was questioned by his defence and which potentially makes the impact of the case much more wide-ranging.

The nature of the BitTorrent file-sharing system means that it is not easy to define "distribution" or to differentiate between uploaders and downloaders. Every downloader is automatically an uploader and is arguably therefore involved in illegal distribution – leaving every user of BitTorrent open to the risk of criminal prosecution.

Nevertheless, chasing individual file-sharers is generally regarded as unrealistic, given the anonymity inherent in P2P networks and the enormous amount of file-sharing that goes on. The Kazaa software, a previous market leader, was downloaded on 389 million occasions in five years. At any given time there are estimated to be around 7 million file-sharers logged on in the United States alone; and a survey in Hong Kong found that 41% of those questioned admitted to illegally sharing files over the internet.

The fact that Mr Chan was held criminally liable is also causing debate. Whoever wants

a copy of a file makes a decision to download it. The person who uploaded it has no control over who does what and, so the argument goes, should not be held criminally accountable.

Mr Chan's defence argued against the criminal charges, claiming that he was only "making available a copy" of the files. Under the Copyright Ordinance this amounts to copyright infringement, which is subject to civil remedies, but not criminal sanctions.

By successfully pursuing a criminal case against Mr Chan, the Hong Kong authorities are clearly – and openly – hoping that it will act as a deterrent against other file-sharers.

In his reasoning, the Magistrate referred to the need to apply "a firm, deterrent-based sentencing policy." He went on to cite the Court of Appeal case of *Choi Sai-lok*<sup>3</sup>, which dealt with pirated CDs and DVDs. In *Choi Sai-lok*, the judge stated that "the open flouting of the law in this trade requires sentences, even for first offenders, to act as a deterrent to others".

The maximum penalty for copyright infringement is a fine of HK\$50,000 per

### In summary

- ⊗ Hong Kong Magistrate, Colin Mackintosh, jailed a 38-year-old unemployed man for three months for illegally distributing three films using the BitTorrent system
- ⊗ Thought to be the first custodial sentence for P2P file sharing the ruling has been portrayed as a landmark victory
- ⊗ What does it really mean for the music and film industries? The authors review the judgment and contrast it to other recent cases

infringing copy and four years' imprisonment. A sentence of such severity was unlikely to be imposed on Mr Chan. Sentences of six to 12 months in prison are generally imposed on offenders who trade in infringing copies. Given that there were no commercial motives behind Mr Chan's actions, his sentence was always likely to be more lenient.

The deterrent effect is questionable. An individual user – one among millions – downloading a few films or music tracks is unlikely to be worried about being prosecuted, in the same way that music lovers who used tape-to-tape recorders 20 years ago did not worry about being prosecuted, or people with illegal satellite-television decoders today are not worried by the threat of prosecution. Indeed, since the RIAA began prosecuting individual file-sharers in the United States in 2003, the P2P population has exploded from 2.9 million users to 6.7 million users.

Besides, if there are individuals who share files from a commercial motive, presumably making significant sums, is the risk of a three-month jail sentence really going to deter them?

Many users of file-sharing networks are unaware that they are breaking the law merely by downloading a single file. Some file-sharing software sites have disclaimers that misleadingly inform users that, because the software provider is based in a particular jurisdiction or because the software has certain characteristics, no laws have been broken.

There is also the issue of anonymity. It is an expensive, time-consuming and complicated process to trace a specific individual from a file-sharing "username".

So, despite the headlines trumpeting the success of the Chinese authorities in bringing Chan Nai-ming to justice, the long-term impact of the case is questionable.

Even if it did herald a turning-point in the fortunes of BitTorrent and of similar systems and their users, there are dozens of other file-sharing programs that could fill the gap, each a step up from the previous software. Just as Napster was superseded by Kazaa and Grokster, even at the time of Mr Chan's arrest BitTorrent was already being eclipsed by other file-sharing programs. Next month, it could be another one, such as Shareaza, that moves to the top of the popularity pile.

A key point is that most of the file-sharing networks facilitated by such software do not require the support or aid of a central "home base" once they are established; that is, users can continue to swap files with each other regardless of what happens to the company that designed the software in the first place.

But, if trying to stem the demand for file-

sharing seems to be a Canutian task, rights-holders could have more success by focusing on the supply.

### Focusing on supply

In the United States, the *Grokster* case appears to be the latest step in a move towards greater control of supply in the file-sharing market. On 7 November, the same day as Mr Chan was sentenced, Grokster settled its litigation. It agreed to shut down its file-sharing software and to pay US\$50 million in damages. Grokster promises to return, but this time with a new "legal" system.

Similarly, in September, three other P2P operations – WinMX, eDonkey and Limewire – closed following pressure from the RIAA. However, all three were based in the United States, prompting some to speculate that P2P operators could simply move abroad and operate from jurisdictions with little regard for US copyright laws, such as Russia or the Cayman Islands.

Some of the closed networks, are expected eventually to follow Grokster's lead and re-open as legitimate P2P operations distributing licensed material. The hope is that licensing file-sharing systems would enable copyright owners and official authorities to move quickly against non-licensed systems. Clearly, the decentralised nature of file-sharing would make it impossible to eliminate it entirely, but it should prevent any future systems from becoming a global phenomenon in the way that Kazaa or BitTorrent did.

Another option being debated is keyword filtering. The industry would compile lists of songs or films that P2P network operators would have to block from search results.

Technology has also been developed which would, in theory, enable Internet Service Providers to block P2P traffic entirely, although there has been relatively little take-up of the technology so far.

In terms of the supply of films in particular, there is a view that rights-owners themselves must share some of the blame for the rise in popularity of file-sharing; that is, they have not done enough to meet the demand for online access to the latest films and music, with the result that viewers are more likely

turn to other sources, such as P2P networks. The argument is that, if more were done to make music and films legally available online, there would be less need to swap illegal files.

As long as *Chan* remains an isolated case in a distant country, its global impact may be minimal. The threat of three months in jail will certainly deter some people from illegal file-sharing, but most infringers are likely to see Mr Chan as nothing more than the victim of hard luck. It will have more impact if the fight against individual infringers could be brought closer to home. Currently championing this cause is the International Federation of the Phonographic Industry (IFPI), with its new enforcement sweep announced on 15 November 2005. The targets are "seeds" throughout Europe, South America and Asia, and bring the total amount of actions to more than 3,800 in 17 countries.

Unfortunately, file-sharing technology is fast-paced and extremely manoeuvrable.

Targeting the P2P systems leads to some success in jurisdictions with strong intellectual property protection, but, no matter how many systems the US or Australian courts manage to shut down, there are plenty of jurisdictions with less stringent intellectual property laws where P2P operators are free to set up. There is also the issue that, even if an operation is closed down so that no new users can download the software, existing users are still free to share files with each other.

Although *Chan* has made great strides towards protecting copyright in a territory riddled with piracy, criminal prosecutions against individuals across Europe and the US will provide a much more powerful deterrent.

Strategically, to effect any measurable reduction in file-sharing infringements worldwide, a parallel approach needs to be maintained. If recent successes against individuals and P2P systems could be replicated on an international scale, copyright holders might slowly see the pendulum beginning to swing in their direction. ☞

### Notes

- 1 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.
- 2 *MGM Studios Inc. v Grokster Ltd et al*, No. 04-480, 545 US.
- 3 *Secretary for Justice v Choi Sai-Lok* [1999] 4 HKC 334.

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