

Public Prosecutor v Guan Zhenbang  
[2011] SGDC 47

**Case Number** : DAC Nos. 49957-/2009

**Decision Date** : 11 February 2011

**Tribunal/Court** : District Court

**Coram** : Jasbendar Kaur

**Counsel Name(s)** : Nicholas Ngoh (DPP) for the prosecution; Derek Kang & Ross Tan (Rodyk & Davidson LLP) for the accused.

**Parties** : Public Prosecutor — Guan Zhenbang

11 February 2011

**District Judge Jasbendar Kaur:**

1 The Accused, one Guan Zhengbang who is a 24- year old PRC national pleaded guilty before me on 13 December 2010 to four charges under section 136(2)(a) of the Copyright Act ("CA"), Chapter 63 [DAC 49957 - 58/2010 and DAC 49964 - 65/2010 - Exhibits C1A, C2A, C8A and C9A]. These charges related to his possession of infringing copies of visual recordings for the purposes of sale on 23 April 2010 at 12.45 pm at Sim Lim Square, which building is located at No. 1 Rochor Canal Road, at unit No. #03-31A and the kiosk outside unit No. #01-40. The details of the charges proceeded with are as follows:

(i) In relation to the first charge DAC 49957/2010, the Accused was in possession of 19 infringing copies of the visual recordings published by Universal City Studios LLLP which were contained in 7 external hard disks at the shop unit #03-31A at Sim Lim Square;

(ii) In relation to the second charge DAC 49958/2010, the Accused was in possession of 17 infringing copies of the visual recordings published by Sony Pictures Releasing International Corporation which were contained in 8 external hard disks at the shop unit #03-31A at Sim Lim Square;

(iii) In relation to the 8th charge DAC 49964/2010, the Accused was in possession of 8 infringing copies of the visual recordings published by Paramount Pictures Corporation which were contained in 3 external hard disks at the kiosk outside unit #01-40 at Sim Lim Square; and

(iv) In relation to the 9th charge DAC 49965/2010, the Accused was in possession of 4 infringing copies of the visual recordings published by Sony Pictures Releasing International Corporation which were contained in 3 external hard disks at the kiosk outside unit #01-40 at Sim Lim Square.

2 The remaining 8 charges which were taken into consideration for the purposes of sentencing were under the same provision. All the 12 charges involved a total of 102 infringing articles.

3 On 15 December 2010, I sentenced him to pay a fine of \$1000 per infringing copy making the total fine \$48,000 (in default 4 months and 6 weeks' imprisonment). On 16 December 2010, the Accused filed an appeal against the sentence imposed. Before stating my reasons for imposing this sentence, I will first provide the facts of the case.

## Facts

4 The Accused first arrived in Singapore on a student pass and he pursued his studies in Ngee Ann Polytechnic (from 2005) and then in Nanyang Technological University (from 2008) under the Ministry of Education's scholarship program. In 2007, he decided to start a small business and as he was a student and a foreigner, he asked his friend, one Wu Jia Wang to register as the director of the company with him as the 100% shareholder. This was when the company, M/s Sunjack Tech Pte Ltd (hereinafter referred to as "the Company") was first registered. When his friend had to return to China, the Accused arranged for his mother and one of his friends, Zhong Xu to be registered as the directors of the Company. Although the said Zhong Yu was registered as such, he was in fact the Accused's employee and it was the Accused who was running the Company. At the material time, the Company had a shop unit at #03-31A and two mobile kiosks (outside unit numbers #01-40 and #04-60) in Sim Lim Square.

5 In 2009, the Accused ventured into the Media Player business and he imported the players into Singapore for sale. As the launch of these products was very successful, the Accused decided to expand his business by hiring more employees. The Accused subsequently interviewed and employed three additional persons – Zhang Chengcai, Yu Jiangtao and Wu Lei. Besides selling the Media Players, the Accused also sold hard disks which could be used together with the Media Players. All the employees working for the Company received a daily wage of \$40 and in addition, they received a daily commission that was based on the amount of sales that they managed to make on that day. Investigations showed that it was the Accused who dictated the prices that the employees could quote and that at the end of each day, he reviewed the sale receipts and determined the commission that was paid to each employee.

6 In the course of conducting his business, the Accused noticed that the sales of the Media Players in his shop were declining and this was mainly due to the fact that his neighbouring shop was selling the same product with pre-loaded movies. The Accused decided to follow suit and he arranged to surreptitiously make purchases from his neighbouring shop in order to acquire the visual recordings that were being uploaded by the said shop. As a result of the purchases that were made, the Accused managed to amass nine catalogues of movie titles which he then offered to his clients when they purchased the hard disks from his shop.

7 Investigations showed that the Accused had personally uploaded the movies onto the hard disks for purposes of sale and that it was only when he was not around that his staff, Zhang Chengcai took over this task. The Accused sold a blank hard disk at \$150 (minimum price) and a hard disk that was uploaded with movies for \$200 to \$220 (minimum price), depending on the quality of the movie that was uploaded. When the Accused acquired these visual recordings and subsequently uploaded them onto the hard disks for sale, the Accused was aware that the visual recordings were copies that have infringed the copyright.

8 On 23 April 2010 at about 12.45 pm, the Intellectual Property Rights Branch of the Criminal Investigation Department conducted a raid at Sim Lim Square against the Company under the provisions of the CA. During the raid, the Accused, Zhang Chengcai and Zhong Xu were found in the shop at unit #03-31A and they were placed under arrest. A search was conducted on the premises and the following items were seized as case exhibits:

- (i) 299 pieces of Media Players
- (ii) 8 pieces of hard disks; and
- (iii) 2 pieces of Media Player with hard disks.

9 At 2.30 pm, the mobile kiosk outside unit #01-40 was raided and the following exhibits were seized:

- (i) 3 pieces of one-terabyte hard disk;
- (ii) 3 pieces of Amoi Media Players;
- (iii) 2 pieces of RCA Media Players; and

(iv) 1 receipt book.

10 The police then raided the mobile kiosk outside unit #04-60 and the following exhibits were seized:-

(i) 1 piece of Media Player;

(ii) 1 piece of hard disk; and

(iii) 1 invoice booklet.

11 The seized hard disks containing visual recordings were subsequently examined and a total of 102 infringing copies were found which were the subject matter of the 12 charges preferred against the Accused. The Regional Director of Content Protection, Operations of Motions Picture Association-International confirmed that the seized copies of the movies were infringing copies.

### **Mitigation**

12 The Accused was represented by Counsel who tendered a written Mitigation Plea (Exhibit DS1) on his behalf seeking a non-custodial sentence. They highlighted the fact that the Accused had pleaded guilty at the earliest possible opportunity and that he was a first offender. They also mentioned that he had cooperated with the police not just in relation to his own investigations but that he had also assisted the police to arrest those operating the neighbouring shop who were similarly selling infringing articles. The Mitigation Plea also mentioned that this was his one serious mistake in his life.

13 They also stated that the Company's primary business did not involve the sale of hard disks and that all the charges arose from the seizure of only 12 hard disk drives. They stated that the hard disks containing the infringing copies of the movies were not openly displayed for the purposes of sale and that in fact the Company had not sold any hard disk containing the infringing copies for several months prior to the raid. The Defence also urged the Court to note that there was an "overlap" in the charges preferred just because the infringing copies were found at three different locations when in fact the three locations were part of the same business entity.

14 The Defence referred to two cases - **PP v Poh Kim Video Pte Ltd** [2004] 1 SLR(R) 373 and **PP v Tan Wei Ling** [2006] SGDC 232 and submitted that "*a lower (but certainly not low) overall fine of about \$15,000 would suffice*". They in fact submitted that the Accused was less culpable than the offender in **PP v Tan Wei Ling's** case as:

(i) he was a young student when he committed the offences;

(ii) the infringing copies in the hard disks were not openly offered for sale and the sale of these products was not part of the shop's primary business; and

(iii) he did not personally profit from the sale of the hard disk drives.

### **Prosecution's Position**

15 The Prosecution did not press for a custodial sentence but added that this case should be distinguished from the case of **PP v Tan Wei Ling** as the sale of infringing copies in that case was not related to any trade or business and it was not part of a large scale set up. They also submitted that there was no official record of the Accused assisting the police in their investigations and that in relation to the neighbouring shop, the Accused had merely arranged for a trap purchase.

### **Sentencing Considerations**

16 The prescribed punishment that the Accused was liable for was a fine up to \$10,000 per infringing article with a maximum aggregate of \$100,000 or a jail term up to five years or both. The Accused in this case had hoped for a total fine of \$15,000 on all four charges. I sentenced the Accused to pay a fine of \$1000 for each infringing article making the total sentence a fine of \$48,000. I will now explain why this sentence was an appropriate one to impose.

**(i) Nature of the Offence – It warranted a deterrent sentence**

17 It is trite that criminal infringement of property rights is a serious offence as it does not just involve the violation of property rights but also the exploitation of those rights for commercial gain or profit. When this is carried out as part of a business strategy, it is often well organised and planned and involve more than one person. It is exploitation of this nature that the legislation protecting copyright rights aims to deter<sup>[note: 1]</sup>.

18 Further, if such offences are not dealt with appropriately and property rights are not adequately protected in Singapore, it will have a detrimental effect on our reputation as a country and consequently, attract sanctions. In addition, these offences are easy to commit and difficult to detect. All an offender need to do is to reproduce or replicate the design, form or the item with the copyright and this is often an inexpensive exercise which can be done without the owner's knowledge. Therefore, it was necessary to impose a sentence that appropriately reflected the seriousness of the offence and the sentence had to be one that would effectively deter others.

**(ii) Aggravating Factors – There were many.**

19 In this case, there were several factors that strongly indicated that a lenient sentence would not be appropriate. First, while I accepted that the Accused's primary business activity did not involve the sale of hard disks, I could not ignore the fact that the Accused was able to better his profit margin when he sold the Media Players together with the hard disks. In fact, he was able to make the highest profit margin when he sold the hard disks that were pre-loaded with infringing copies of visual recordings.

20 Secondly, the Accused's decision to acquire the movies to upload onto the hard disks was motivated purely by greed. According to the Statement of Facts, the Accused began to lose his customers to a neighbouring shop after the initial success of his Media Player business. He then discovered that the neighbouring shop was able to attract the customers as they were selling the hard disks with pre-loaded infringing copies of movies. In order to compete with the neighbouring shop, the Accused proceeded to surreptitiously obtain the infringing copies of movies by making third-party purchases of the pre-loaded hard disks. Therefore, the deliberate decision on the part of the Accused to obtain the infringing copies was one purely motivated by his strong desire to effectively compete with the neighbouring shop and to improve his own sales.

21 Thirdly, I also could not ignore the fact that the Accused did not just make arrangements to obtain one or two infringing copies. Instead, he proceeded to accumulate numerous titles and at the time of the raid, his customers were able to choose movie titles from nine albums. This strongly suggested that the option of purchasing hard disks with pre-loaded movies had probably become a critical part of his business strategy to improve his sales and it was also likely that his business improved when he started selling such hard disks with the Media Players. All this just meant that instead of helping to eradicate the problem by reporting the neighbouring shop, the Accused chose to engage in the same criminal behaviour in order to improve his sales, thus increasing the criminal activities in Sim Lim Square.

22 Fourthly, I also noted that the Accused was not too concerned with the fact that this was a criminal act. The manner in which he deliberately amassed the movie titles to directly compete with the neighbouring shop was a clear indication that he was prepared to do what it took in order to improve his profits. What was most telling was the fact that he was not deterred when one of his employees indicated to him that he felt uncomfortable selling the infringing copies.

**(iii) Mitigating Factors – None were exceptional**

23 In terms of the factors in his favour, the only matter that was of any mitigatory value was the fact that the Accused was a first offender and the fact that he had decided to plead guilty. The Accused highlighted the fact that he had cooperated with the police by informing them of the sale of infringing copies in the neighbouring shop. While this information was undoubtedly

useful to the police, I could only give very little weight, if at all, to this cooperation on the part of the Accused. This was mainly because I was compelled to infer that he was not motivated to do this out of any sense of civic-mindedness. After all, this information concerned his main business competitor and it was from this shop that he had surreptitiously obtained the infringing copies. It was likely that he was unhappy with the fact that he had suffered a raid and had been arrested when the neighbouring shop was still thriving. In light of this, I felt that there were no exceptional or extenuating circumstances in this case for the Court to exercise leniency towards the Accused.

**(iv) Application of *Tan Wei Ling v PP* – This case was more serious in nature.**

24 The Defence relied on the case, ***Tan Wei Ling v PP*** to submit that a total fine of \$15,000 should suffice. In this case, the offender pleaded guilty to one charge under section 136(2)(a) of the CA and this was in relation to her being in possession of 43 infringing copies of the Hong Kong drama serials for the purpose of selling. She had downloaded TVBI serials from the Internet for her own personal viewing and thereafter, she started an account on Singapore Yahoo! Auction site to sell the serials after she had downloaded them onto CDs and DVDs. She made a profit of 50 to 60 cents per CD and \$6 to \$13 per DVD by selling the downloaded serials and she made a monthly profit of \$100 to \$200. The trial judge had imposed a fine of \$500 for each infringing copy with a total fine of \$21,000.

25 Having analysed the facts of ***Tan Wei Ling's*** case, I found it difficult to accede to the Defence request for a total fine of \$15,000 as I found that the criminal conduct of the offender in that case was certainly not as serious as that of the Accused. First of all, the offender in that case pleaded guilty to only one charge and this one charge referred to 43 infringing copies of the TV serials. The Accused on the other hand had a total of 12 charges and he pleaded guilty to 4 charges.

26 In relation to the 12 charges, he was found to be in possession of 102 infringing articles. As for the argument that there was an "overlap" of charges, the fact remained that the infringing copies were found at three different locations and this was because the Accused was selling the hard disks to his customers at these three separate locations.

27 Further, while it was true that the offender in ***Tan Wei Ling's*** case like the Accused in this case, was aware of the illegality of her conduct and that she did it for personal gain, her entire set up to sell the infringing copies was certainly not on the same scale as that of the Accused. The offender in ***Tan Wei Ling's*** case had made copies of the TV serials that she had first downloaded for her own personal viewing in order to sell them on her Singapore Yahoo! account. Hers was a very simple small-scale set up and it was quite clear that she was not doing this as part of any trade or business that she was involved in.

28 On the other, the Accused was running a company which was involved in business of selling of Media Players when he decided to sell hard disks that were pre-loaded with movies and he did this in order to improve his falling profits. His business set up was certainly not a small-scale operation. He was running a registered company which had its business operations in three locations and he had five employees working for him. In addition, he had obtained infringing copies of about 40 movie titles with the copyright belonging to seven different copyright owners<sup>[note: 2]</sup>. He had also accumulated sufficient number of infringing copies that allowed him to offer to his customers the option of choosing movie titles from nine albums.

29 The Defence emphasised the fact that all the infringing copies were only found in 12 hard disks. While it was true that only a dozen disks were seized, this was not the only factor that I had to consider. The fact was that each hard disk is capable of storing huge amount of data and the Accused could have easily uploaded more than one movie onto each hard disk. Therefore, what I had to consider was the total number of infringing articles that the Accused had in his possession and not just the number of hard disks that were seized. In relation to the number of infringing copies that were found in the Accused's possession, the charges showed that there were a total of 102 such copies and this was more than twice the number that the offender in ***Tan Wei Ling's*** case had in her possession.

30 In light of the foregoing, it was clear to me the fine imposed in this case could not be lower than that imposed in ***Tan Wei Ling v PP's*** case.

31 In conclusion, in light of the aggravating factors mentioned above and the lack of extenuating mitigating factors, it was in my judgment appropriate to impose a fine that was double to that imposed in ***Tan Wei Ling v PP's*** case. It was for this reason I decided to impose a fine of \$1000 for each infringing copy making the total fine \$48,000 (in default, 4 months and 6 weeks' imprisonment). The Accused being dissatisfied with this sentence has filed an appeal. The Accused has paid the fine in full.

[note: 1]See the Ministerial Speech at the 2<sup>nd</sup> reading of the Copyright (Amendment) Bill 1998, at cols 310 and 332.

[note: 2]Universal City Studios LLLP, Sony Pictures Releasing International Corporation, Paramount Pictures Corporation, Walt Disney Studios Motion Pictures, 20<sup>th</sup> Century Fox International Corporation, Warner Bros, Pictures International & Universal International Films, Inc.

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