

**The Hong Kong BitTorrent Case (HKSAR v CHAN NAI MING):
Will Big Crook Go Down Big Time for a Little Infringement?**

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Abstract

Background:

Chan Nai-Ming, a Hong Kong citizen, is believed to be the first person in the world to be convicted of a crime for using BitTorrent P2P file sharing. Chan is currently bailed awaiting the outcome of his appeal. Accused of uploading three movies (Daredevil, Miss Congeniality and Red Planet) onto the Internet using BitTorrent under the alias "Big Crook", Chan was convicted on three counts of "attempting to distribute an infringing copy of a copyright work (otherwise than for the purpose of, in the course of, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, without the licence of the copyright owner, contrary to sections 118(1)(f) and 119(1) of the Copyright Ordinance, Cap. 528 and section 159G of the Crimes Ordinance, Cap. 200." As a first time offender and because this conviction is the first of its kind anywhere in the world, Tuen Mun Magistrate Mr Colin Mackintosh sentenced Chan to three months in prison on 24 October 2005 although the maximum penalty Chan could have face was four years in prison.

The Appeal:

Chan was released on bail for HK\$5000 while waiting for the results of the appeal to the High Court. On 12 December 2006, however, Justice Claire-Marie Beeson of the High Court upheld the original verdict and refused to grant Chan a certificate for Chan to take his case to the Court of Final Appeal ("CFA") and denied him bail. On 3 January 2007, Chan was bailed by Mr Justice Ribeiro PJ for HK \$5000 to seek leave for appeal to the CFA (leave can be granted by either the High Court or the CFA). On 7 February 2007, the CFA granted Chan leave to appeal certifying two points as the basis for his appeal setting 9 May 2007 as the date for the appeal to be heard before a three-judge criminal appeal panel.

The Significance:

The significance of this case is to be investigated in this paper. This is the first time that an individual has been jailed for putting pirated movies on the Internet. Chan's lawyer Kevin Pun Kwok-hung argued that Chan had never actively "distributed" any "copies" of the movies online but only made them available for others to download. Pun further developed this argument that since Chan's case did not involve any physical copy of the movies, it could not be considered a "distribution of copies in the copyright sense." Are these arguments legally correct? Should courts allow an exemption for infringement for merely uploading infringing materials to the Internet? Is unauthorized uploading a victimless crime? Or is it merely a neutral act that should not incur liability? The authors will consider these issues in the context of current multi-jurisdictional trends in addition to the specific arguments advanced in respect of Hong Kong law.

- [TMCC 1268/2005 HKSAR v CHAN NAI MING](#) original judgment
- [HCMA 1221/2005 HKSAR v CHAN NAI MING](#) High Court appeal judgment
- [FAMC 0061/2006 HKSAR v CHAN NAI MING](#) CFA bail pending leave application
- [FAMC 0061A/2006 HKSAR v CHAN NAI MING](#) CFA bail pending appeal