

SINGAPORE

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What is an article? *Yu Peng Hsueh-Shu v. Public Prosecutor*

By David Zeng



Section 136(2) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) provides that a person who has in his possession or imports into Singapore an infringing copy of a copyrighted work, which he knows or ought reasonably to know to be infringing, for the purposes of sale or distribution, is guilty of an offence and liable to a fine not exceeding S\$10,000 (approx. US\$7,690) for each article or S\$100,000, whichever is lower, or to imprisonment for a term not exceeding five years or both.

In *Yu Peng Hsueh-Shu v. Public Prosecutor* [2011] SGHC 198 (*Yu Peng*), the Singapore High Court (the Court) considered the question of what constitutes an 'article' for the purposes of s 136(2).

Facts: The appellant had in her possession 45 external hard disks with 14,843 infringing copies of sound recordings. The prosecution proceeded with charges on 24 external hard disks and 8,436 infringing copies, while the rest were taken into consideration. The appellant's business involved distributing karaoke players equipped with hard disks containing the infringing copies. The trial judge seemed to have considered each infringing copy to be an 'article' and sentenced the appellant to seven months imprisonment. The appellant appealed to the Court.

Held: The Court held that what constituted an 'article' for the purposes of s 136(2) was a question of fact. The Court followed *Public Prosecutor v. Poh Kim Video Pte Ltd* [2004] 1 SLR(R) 373 (*Poh Kim*) which held that a box set of a single drama series was an 'article' for the purposes of sentencing. In *Poh Kim*, the Court reasoned that as 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, it should be 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.

In the present case, the Court did not find it reasonable to equate the number of 'articles' with the number of 'infringing copies'. This is because each copy of a movie would contain different types of copyrightable subject matter within the movie. The Court reasoned that s. 136(2) should be interpreted based on the legislative policy in penalising the trade in the articles, and consequently the meaning of 'articles' must be construed based on how the pirated materials are traded. As the appellant intended to sell hard disks and not infringing copies, it was the hard disks which were the 'articles'. The Court opined that each infringing copy would be construed as an 'article' if the appellant was selling copyrighted songs online instead.

Accordingly, the appellant's seven month sentence was replaced with a fine of S\$96,000. While the usual tariff where there was a small number of infringing items was between S\$400 to S\$600 per article, the Court imposed a fine of S\$4,000 per article here, taking into

account the high number of infringing copies and the appellant's profit margin for distributing each article.

The Court in *Yu Peng* appears to have defined an 'article' under s. 136(2) as the relevant subject-matter which an offender intends to deal in and profit from.

If VCD box sets were sold, then the VCD box sets would constitute the articles. If hard disks were sold, then the hard disks would constitute the articles.

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