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## Case of Appeal Involving Copyright Infringement by Chen Shoufu

*Citation: The Shenzhen City Intermediate People's Court's Criminal Judgment*

*No. Shenzhongfaxingzhongzi 415/2008*

*Date of judgment: June 18, 2008*

### **Procedural history**

The Shenzhen City Nanshan District People's Procuratorate sued Chen Shoufu for a crime of copyright infringement in the Shenzhen City Nanshan District People's Court. Chen Shoufu was convicted of the crime in the first-instance judgment, and the defendant appealed to the Shenzhen City Intermediate People's Court.

### **Issue**

1. Whether Chen Shoufu reproduced and distributed the computer software of the copyright proprietor with authorization?
2. Whether Chen Shoufu's revenue from collecting advertising fees from provision of the plug-in card of CORALQQ was illicit income?

### **Facts**

From late 2005 to January 2007, Chen Shoufu added, to the QQ software of Tencent Inc. (Tencent), the Coral plug-in card and made an installation package by the name "Coralqq, and put it on the "Coral studio" website for users to download, and was paid the advertising fees by virtue of inserting, in the Coralqq software, the function of installing the third party's commercial plug-in card.

The first-instance court held that the Coralqq software Chen Shoufu made for the purpose of making profits without authorization from the Tencent contained over 95% of the files in the Tencent's software, and was identical with the latter in the substantive function; meanwhile, Chen Shoufu placed the Coralqq software on the internet for others to download. His acts constituted reproduction and distribution of the Tencent's QQ software, and made profits from it. His acts constituted the crime of copyright infringement.

Chen Shoufu argued in his appeal that his act was authorized by Tencent to develop the Coralqq software and made it downloadable: the Tencent once invited Chen Shoufu to a news conference on announcing its new QQ products, asked his advice about the function of the QQ software, and placed the Coralqq software in a noticeable place on its official website for downloading. Chen Shoufu's revenue from advertising was not one made from the reproduction and distribution of Tencent's QQ software, but made indirectly from users' downloading the Coralqq plug-in card (from advertisement) and no law provided that the indirect income was deemed to be illicit income.

### **Rule of law**

Article 24 of the Copyright Law *Anyone who exploits another person's work shall conclude a copyright licensing contract with the copyright owner, except where no authorization is needed under this Law.*

### **Reasoning**

1. Whether Chen Shoufu had acted with the authorization from Tencent

First, conclusion of a licensing contract was a mandatory requirement for using and licensing a copyright under the law in China. In the present case no evidence showed the conclusion of such a contract between Chen Shoufu and Tencent. Next, Chen Shoufu's infringing act was exactly what was prohibited under the users' agreement of Tencent. Then, Tencent took constant legal action directed to Chen Shoufu infringing act of revising and distributing its QQ software, which showed that Tencent had a clear negative position on Chen Shoufu's infringing act. Finally, the evidence that Tencent invited Chen Shoufu to the news conference on announcing its products, and asked

his advice about the function of its QQ software should not be stretched to such an extent as to mean Tencent's giving its authorization.

2. Whether Chen Shoufu's revenue from collecting the advertising fees in connection with Coralqq software was illicit income

First, Tencent's making its QQ software on internet for free download was conditional in that a user needed to receive other terms attached, such as information of advertisement, which was one of its modes to make its corporate revenue. Its legitimate rights and interests should be protected. In order to gain the advertising fees, Chen Shoufu deleted, without authorization, the advertisement and search function of Tencent's QQ software, and added other commercial plug-in cards, thereby infringed Tencent's lawful rights and interests.

Next, Chen Shoufu deleted the advertisement and search function of Tencent's software, and added other commercial plug-in cards without authorization from Tencent, and in violation of the user's agreement of Tencent and put the package of the plug-in cards on its registered "Coral Studio" website and linked websites for users to download, and performed the various infringing acts of unauthorized revision, and illegal reproduction and distribution of the software in which another party enjoyed its proprietary right. Said acts were a complex set of infringing acts for the sole purpose of making profits. Emphasizing alone the "unique function embodied in the Coralqq plug-in card and its implicit commercial worth" was not true to the facts; it was neither possible to deny the nature and totality of all his infringing acts, nor cut apart the intrinsic relations of the benefits made from his infringing acts.

Then, under Article 217 of the Criminal Law, the subjective and objective elements of the crime of copyright infringement included the purpose of making profits, reproduction and distribution of works, such as computer software, without authorization from the copyright proprietor and relatively large amount of illicit income or other serious circumstances. By illicit income was meant revenue made by performing the infringing act. In the prevent case, Chen Shoufu made his benefits by virtue of advertisement of plug-in card at the QQ software, i.e. attaching a third-party commercial plug-in card to the QQ software and uploading them on the internet for users to download

and using the internet to facilitate third parties to publish advertisement.

Finally, in the view presented in his appeal that Chen Shoufu's advertisement income was made from the Coralqq plug-in cards, was disregarded the common sense that internet users' primary need of Tencent's QQ software, which reversed the relations between the principle and the subordinate of Tencent's QQ software and the Coralqq plug-in cards, and even disregarded the fact that Chen Shoufu's infringing acts of unauthorized revision of another party's software and illicit reproduction and distribution. For that reason, this view of appeal was not based on facts and law.

***Holding***

1. Chen Shoufu's acts to reproduce and distribute of Tencent's QQ software were not authorized by the copyright proprietor.
2. The advertisement fees Chen Shoufu received in connection with the Coralqq software was illicit income.