

EIP

Sharing of video clips infringed Sky and ECB copyright

In England and Wales Cricket Board Limited and Sky UK Limited vs Tixdaq Limited and Fanatix Limited, the High Court has found that the reproduction and communication to the public of short clips of broadcasted sporting events (in this case each only eight-seconds in length) can (and in this action does) infringe copyright.

Background

The England and Wales Cricket Board Limited (“ECB”) and Sky UK Limited (“Sky”) hold the copyright in television broadcasts of cricket matches staged under the auspices of the ECB, as well as rights in films made during the course of the production of these broadcasts - in particular those films made by recording broadcast footage for the purposes of action replays.

Fanatix Limited and Tixdaq Limited (the “Defendants”) had developed various mobile applications, including the Fanatix app (the “App”) which allowed for the copying and uploading of sports broadcast footage to the App by making use of a screen capture technology. These high-quality clips, each up to eight-seconds in length, were often available to view in near real-time via the App as well as via the Defendants’ website and social media accounts. Uploaders could also add written commentary to the uploaded video clips and share them with other users.

The ECB and Sky claimed that the Defendants were jointly liable with App users for the infringement of copyright in the broadcasts and films. At trial there was no dispute over the ownership of the rights. However, the Defendants sought to rely on the defence of fair dealing and on the protections provided to those acting as a mere conduits and/or service providers under the Electronic Commerce (EC Directive) Regulations 2002.

Judgment

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Substantial Part

Neither broadcasts nor films are required to be original in order to attract copyright protection and in this context a question arose as to the correct test for assessing what amounts to a substantial part of the works in question (the nature of the test having knock-on consequences for an assessment of fair dealing). After relating the rights in issue to “entrepreneurial rights” to protect the investment of the broadcaster or film producer, Arnold J held that the correct test for substantiality was to “consider the degree of reproduction both quantitatively and qualitatively, having regard to the extent to which the reproduction exploits the investment made by the broadcaster or producer.”

Applying this test to the facts in issue, the court found that each clip did constitute a substantial part of the relevant copyrighted work. While the clips, quantitatively, were only a small proportion of the film/broadcast (8 seconds), significantly most constituted highlights of the matches (and something of interest and value).

Fair Dealing

Pursuant to section 30(2) of the CDPA: “Fair dealing with a work (other than a photograph) for the purpose of **[1]** reporting current events does not infringe any copyright in the work provided that... it is accompanied by a sufficient acknowledgement.”

The Defendants argued that this defence applied as the reproduction and communication to the public of the video clips was for the purposes of reporting the associated sporting events. While the judge found that reporting was not as narrow as, for example, a traditional newsreel report, and could include so-called “citizen journalism”, its scope was not broad enough to capture the Defendants’ activities. Influenced by matters such as the way in which the Defendants had advertised their App - “Capture, Caption. Share! Create 8 second sports news snippets. Caption with Attitude. Share sports video with millions of fans”, and similar statements in presentations, the judge found that the primary purpose of the App was to facilitate the sharing of video clips and that these clips were presented to viewers “for consumption because of their intrinsic interest and value” rather than as a report on a current event. In addition, even if the purpose could have been considered to be for reporting current events, the use of the video clips conflicted with the normal exploitation by ECB and Sky. The Defence was therefore not available.

Conduit / Hosting Service Provider

Arnold J ruled that the mere conduit defence could not be relied upon as the Defendants' service did not merely involve the transmission of information. The video clips were stored and, in some circumstances, subject to editorial review by the Defendants. Further, many of the video clips in question were uploaded by the Defendants' own employees.

Comment

Rights holders in the broadcasting arena will welcome this ruling, not least the equating of substantial part of the overall copyrighted work with investment in and importance of the material in issue. Though this case demonstrates that the categories of use exempted from liability will be construed broadly, it also indicates that where an unauthorised third party's primary aim is to extract commercial value from copyright works, rather than merely report on current events, it will be difficult for them to make out a defence of fair dealing (which will again be welcome news to rights holders).

[1] To be interpreted in line with "in connection with" from Article 5(3) of the Information Society Directive (which is to be judged objectively).

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