[GB] App for sharing sports clips violated copyright

IRIS 2016-5:1/16

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In an action in the Chancery Division of the High Court of Justice presided over by Mr Justice Arnold, it was determined in a judgment given on 18 March 2016 that the reproduction and communication to the public of clips of TV broadcasts of England cricket matches and films via a sports clip sharing app was not protected by the defence of fair dealing for the purpose of reporting current events.

In this case, the claimants, the England and Wales Cricket Board (ECB) owned the copyright to the TV broadcasts of England cricket matches. The defendants, Tixdaq, owned a website (www.fanatix.com) and developed an app (the Fanatix app) for use in conjunction with the site. The app provided users of the site with the possibility of capturing and uploading clips of the claimants' broadcasts, each lasting up to 8 seconds. These clips were also available on their social media accounts (Facebook and Twitter). The ECB brought an action for copyright in respect of footage of cricket matches (signal copyright) that had been shared via the site. Tixdaq sought to rely on the fair dealing defence in relation to news reporting (section 30(2) Copyright Designs and Patents Act (CDPA)) and on the safe harbour provisions deriving from the E-Commerce Directive (Regulations 17 and 19 of the Electronic Commerce (EC Directive) Regulations 2002). The new defence of quotation (section 30 (1ZA) CDPA) was not advanced (see IRIS 2014-10/19).

The starting point of the Court was whether the work or a substantial part of the work had been copied. In assessing this question, the Court referred to the EU Court of Justice's Infopaq ruling (Case C-5/08, 16 July 2009). The substantial part should reflect the intellectual creation of the author. Mr Justice Arnold noted that it is not just any part of a broadcast that satisfies this test, but that "broadcasters and producers invest in the production of broadcasts and first fixations knowing, first, that some parts of the footage of an event (e.g. wickets in the case of cricket matches and goals in the case of football matches) will be more interesting to viewers than other parts and, secondly, that there is a market for highlights programmes and the like in addition to the market for continuous live coverage."

Section 30 CDPA essentially has three elements: a requirement as to purpose of use; fair dealing; and attribution of source. Mr Justice Arnold affirmed that section 30(2) must be construed in the light of the InfoSoc Directive, Article 5(3)(c), and both provisions should be interpreted in the light of freedom of expression. An

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important factor for assessing section 30(2) “is whether the extent of the use is justified by the informatory purpose”. Mr Justice Arnold also noted that domestic authorities on the application of the test had been handed down before the InfoSoc Directive and should therefore be treated with caution. Given that there is little consideration of “news reporting” at EU level, Mr Justice Arnold however referred to BBC v. BSB [1991] Ch 441, in which news of a sporting character was held to fall within the definition of a “current event” for the purposes of section 30(2). The next question was whether the dealing was fair. While there are a range of factors that could come into play in this assessment, one of the most important is whether the defendant’s use of the copyrighted work is in commercial competition with the owner’s exploitation of the work; another is the amount and importance of the work which has been taken (citing Ashdown v. Telegraph Group Ltd [2001] EWCA Civ 1142). It is also legitimate to consider the defendant’s motive.

Applying the law to the facts, Mr Justice Arnold determined that “[q]uantitatively, 8 seconds is not a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it is clear that most of the clips uploaded constituted highlights of the matches: wickets taken, appeals refused, centuries scored and the like. Thus most of clips showed something of interest, and hence value.” This then was a substantial part.

Considering fair dealing, the Court accepted that citizen journalism could fall within the definition of journalism for the purpose of reporting current events. Although the commentary submitted with the clip facilitated discussion amongst users, the Court concluded that the primary purpose of the app was the sharing of clips: “[t]he clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value.” Thus, the use was not “for the purpose of reporting”, thereby falling outside section 30(2).

Nonetheless, Mr Justice Arnold considered whether the usage could be considered fair. He concluded that it was not. The defendants' activities were commercially damaging to the ECB and conflicted with normal exploitation of the works. Mr Justice Arnold emphasised that the apps were intended to be used by large numbers of users. Further, clips which were uploaded to the app were often also uploaded to the website and/or the social media platforms. In later versions of the app, Tixdaq introduced an algorithm which limited the total number of clips and the amount of content uploaded to bring it closer to that permitted under the Sports News Access Code of Practice ("SNAC"), which sets out the circumstances under which one broadcaster is permitted to use footage from the sports broadcasts of another and which, under the terms of SNAC, is agreed to constitute fair dealing. Mr Justice Arnold held that approximating to the SNAC amounts did not mean that the use was fair. SNAC relates to linear broadcasting in the context

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of news reporting rather than near-live and on-demand services. Moreover, the use of the app was still likely to lead to greater consumption.

The defendants accepted that in circumstances where a user does not correctly attribute the clip, section 30(2) will not apply. In that instance, the defendants sought to rely on the intermediary liability provisions derived from Articles 12-14 E-Commerce Directive. While not dealt with in great detail, the Court suggested that an Article 14 defence would be available to the defendants in respect of user-posted clips which were not editorially reviewed, but not in respect of any which were editorially reviewed.

England And Wales Cricket Board Ltd & Sky v Tixdaq Ltd & Anor [2016] EWHC 575 (Ch), of 18 March 2016

http://www.bailii.org/ew/cases/EWHC/Ch/2016/575.html

Judgment of the Court (Fourth Chamber) in Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening, 16 July 2009

http://curia.europa.eu/juris/document/document.jsf?text=&docid=72482&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1084225

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