

MAY 2016

In this article:

Key points decided.....	1
Facts	2
Detailed Analysis.....	2
Hosting/Conduit.....	3
The Judgment's Implications.....	3
Application in other jurisdictions	4

K&L Gates LLP. Global legal counsel across five continents. For more information, visit www.klgates.com.

Is Social Media Sharing of Sports Clips Copyright Infringement? Recent UK Judicial Clarification and International Implications

Introduction

In our annual review last year "[Sports Industry 2015: A Year of Unprecedented Landmark Change](#)", we predicted that the battle against media piracy would be a key area for rights holders in 2016, highlighting "social media sharing" as a key battle ground.

Two fundamental issues ripe for legal clarity which we focussed on were:

- i. whether or not clips of broadcasts reproduced and communicated on social media would be considered to be a "substantial" part of the broadcast (a requirement for copyright infringement); and
- ii. whether or not the reproduction and communication of the clips would be exempt from copyright infringement as "*fair dealing... [for the purpose of reporting current events]*".

As foreseen, both of these areas of uncertainty were at the heart of the recent UK judgment in *English Cricket Board (ECB) and Sky UK Limited v Tixdaq Limited and Fanatix Limited (18 March 2016)*. Arnold J in the UK High Court found that video clips from broadcasts of cricket matches and films incorporated into those broadcasts reproduced and communicated on a mobile app, a website and social media, infringed copyright in those broadcasts and films.

Key points decided

- A short video clip (eight seconds of a two hour or longer broadcast in this case) containing a "highlight" from a cricket match was a substantial enough part of the broadcast and film to infringe its copyright.
- "Citizen journalism" (including posts on social media) falls within the definition of "*reporting current events*" for the purpose of defending an allegation of copyright infringement.
- The uploading of the video clips in this case was not considered to be for the purpose of reporting current events. The primary or predominant purpose was merely to share the video clips with other users.
- The conflict between the Claimants' exploitation of the copyright works was not warranted by the Defendants' use and nature and extent of the use of the video clips by the Defendants, so could not be considered to be "fair dealing".

Facts

For those unfamiliar with the case, the Claimants owned the copyright in the television broadcasts of cricket matches organised by the ECB and played by the England men's and women's cricket teams, and in films made during the broadcasts' production (e.g. action replays).

The Defendants operated the "Fanatix" mobile app, allowing users to upload and share screen-captured clips of broadcasts, each lasting up to eight seconds, to which the users add their own commentaries. The Defendants' employees, users and contractors uploaded video clips from broadcasts of cricket matches on to the Defendants' app. Users could view the video clips on the app, as well as the Defendants' website, Facebook page and Twitter feed. The app had been updated several times, introducing the following additional features:

- i. a formal attribution process;
- ii. the removal of clips after 24 hours;
- iii. minimum 70 characters of commentary;
- iv. maximum 2 clips per hour; and
- v. an algorithm restricting the amount of footage from each sports event that can be viewed by a user during a 24 hour period.

As the sharing of content on social media is such a big issue for the sports and entertainment world and this is the first judgment of its type on the issue in this context, what follows is:

- i. more detailed analysis of the judgment;
- ii. a summary of how this compares with the position the position in other jurisdictions; and
- iii. whether this judgment is relevant to those jurisdictions.

Detailed Analysis

UK Copyright Infringement

In the context of copying a broadcast, copyright infringement occurs where all or any "substantial part" of a copyright work is reproduced or communicated to the public without authorisation by the copyright owner. However, there is an exception where an alleged infringer can show the use was "*fair dealing with a work... [including] for the purpose of reporting current events*". The exception requires accompaniment of a sufficient acknowledgement.

Are clips of sports broadcasts substantial?

Arnold J, stated that copyright in sports broadcasts, and films within those broadcasts (e.g. action replays), are "signal" rights (i.e. entrepreneurial rights), not "content" rights (i.e. not creative rights). Therefore, the Claimants' investment in the broadcasts/films, rather than their creative talent is protected. To infringe, the clips would need to take advantage of that investment, by being a substantial part of the copyright works in the broadcasts. The test for substantiality is "quantitative" and "qualitative". Eight seconds was not "quantitatively substantial". However, as most of the clips contained highlights of key moments, such as wickets taken and appeals refused, "qualitatively", these were substantial and, therefore, a "substantial part" of the broadcasts.

Was the sharing of clips on social media fair dealing?

As mentioned above, as the clips satisfied the “substantiality” test for copyright infringement, the Defendants sought to establish a defence, that the use was fair dealing for the purpose of reporting the matches as current events.

Arnold J accepted that sporting events could be “current events”, and, as the clips were generally uploaded almost live, the clips were relating to current events. He also accepted that “citizen journalism” (including commentary on social media), in addition to traditional journalism, falls within the definition of “reporting”. Whether the use was for the purpose of reporting current events he said was to be determined objectively. Even comments posted on social media sites could constitute “reporting current events”.

In this case Arnold J relied particularly on an assessment of the functionality of the app and on several presentations that the Defendants had made to investors. He believed both demonstrated that the primary and predominant purpose of the use of the clips was to share them with other users. As a result, he concluded that the clips were presented for consumption because of their intrinsic interest and value, rather than for the purpose of reporting current events.

Notwithstanding that conclusion, Arnold J looked at whether the use could be considered “fair dealing” and applied the three relevant factors in the *Ashdown*¹ case. He determined that the Defendants’ use was commercially damaging to the Claimants and conflicted with the normal exploitation of the copyright works.

The Defendants’ use would have: (i) reduced the attractiveness of Sky’s cricket offering (albeit only to subscribers at the margins, not the bulk of Sky’s subscribers); (ii) conflicted with News Corp’s use of its right to provide their subscribers with up to 18 minutes of clips and 15 minutes of packaged highlights per day; and (iii) conflicted with the ECB’s own proposed use of clips and its future licensing plans. He also said that the amount and importance of the works taken could not be justified by the inforamatory purpose.

He concluded that, on balance, the conflict with the Claimants’ exploitation of their copyrights was not proportionate to the nature and extent of the use by the Defendants and, therefore, the use did not amount to “fair dealing”.

The additional features introduced to the app (mentioned above) did not change his overall assessment, although he opined that the greater the restrictions on use, the more likely it would be proportionate to the rights owner’s conflicting exploitation.

Hosting/Conduit

To a claim for financial remedies, the Defendants put forward defences on the basis of Articles 12 (“Mere Conduits”) and 14 (“Hosts”) of the E-Commerce Directive. They argued that they were not liable as mere “conduits” and/or “hosts” in relation to the clips and, therefore, the proper remedy was for the Claimants to send the Defendants a notice to take down the offending clips.

On both grounds the Defendants did not succeed. The Defendants were not mere conduits as they stored the information as well as transmitted it. Whilst Arnold J did not reach a conclusion on hosting, his provisional view was that clips editorially reviewed would not be subject to the defence, whereas clips that were not editorially reviewed would be.

¹ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 - (a) whether the alleged fair dealing is in fact commercially competing with the proprietor’s exploitation of the copyright work; (b) whether the work has already been published or otherwise exposed to the public; and (c) the amount and importance of the work that has been taken.

The Judgment's Implications

1. Arnold J made clear the infringement applied equally to the website and social media accounts.
2. Arnold J's decision seemingly applies to all sports. He used the example of goals in football by way of illustration.
3. The focus on the value of the clip in the judgment appears to complement rights holders' motives for objecting to such uploads in the first place, namely to protect the value of their investment. In any event, it is difficult to conceive of widespread uploading of valueless parts of a sports broadcast. So, a good day for rights holders and their broadcasters.
4. Although it was no help to the Defendants, the inclusion of "citizen journalism" within the definition of "reporting current events" and the suggestion there could be a level of restriction on use and a style of use which might cause the "*fair dealing for the purpose of reporting current events*" defence to apply creates intriguing possibilities for changing traditional social media models.
5. Arnold J believed that the Defendants were seeking to act lawfully and that their infringement was not "flagrant". However, where infringers know or have reason to believe that they are infringing copyright, which must be a greater risk now with this judgment, they may open themselves up to a successful "flagrant infringement" claim and, possibly, even a criminal prosecution.
6. The case did not consider the position of match clips created and uploaded by spectators on, and from, their own devices whilst in stadia. This may well affect a court's view on the commercial damage and conflict issues if a case was brought where a rights holder encourages that activity by spectators, by, for example, prioritising upload over download speeds through its stadium's closed wifi system.
7. Whilst a UK case, it was analysed and construed in the context of European (the Information Society Directive and E-Commerce Directive) and international (the Berne Convention, the Rome Convention, TRIPS and the WIPO Copyright Treaty) law. UK copyright cases are often influential in international jurisdictions where similar technologies and fact scenarios come before foreign courts.
8. The ECB/Sky did not seek to argue that their broadcasts are intellectual creations, which they might have done, for example, on the basis of selection of camera angles, close ups and slow motion. Had they advanced that argument and succeeded, their creativity, as well as their investment could have been protected. In relation to the creative aspect, the assessment of substantiality may well be different.
9. In the UK there is the Sports News Access Code of Practice (SNAC) signed up to by the leading UK broadcasters. It sets out the circumstances when one broadcaster can use another's sports broadcast footage. Fanatix's attempts to use SNAC's provisions as a guide for its restrictions on usage failed as SNAC covers only linear television and scheduled general news programmes.
10. It is irrelevant that the public cannot (or not at least in an affordable way) access clips officially (e.g. because of warehousing or bundling the rights with other services). Whether such bundling or warehousing is lawful is a matter of competition, not copyright, law.

Application in other jurisdictions

The factual background in this case is at the core of a fundamental conundrum regarding sharing footage on social media, which everyone in the sports industry around the world is grappling with. Should uploading of clips on social media be allowed or even encouraged to extend a sport's brand and the reach of its franchise, or should it be stamped upon to prevent value leakage.

It is, therefore, vital to analyse the implications of the judgment in a much wider international legal context. What follows are the views of our sports team colleagues internationally.

Europe

At EU level, the AVMS (Audio Visual Media Services) requires broadcasters with exclusive rights to transmit events of high interest to the public to allow other broadcasters access to take short extracts of those events for use in general news programmes. Although it is accepted that clips of sports broadcasts on social media are currently excluded from this right, a new draft of the AVMS Directive is expected in June 2016. The main purpose will be to extend certain obligations to online channels. The new AVMS Directive may, therefore, re-open this issue for discussion, at least in relation to UGC that does not have a clear commercial purpose.

Australia

Australia takes a very similar approach to the UK regarding broadcast copyright protection and the application of fair dealing defences. The leading case in Australia regarding reproducing broadcasts, *The Panel*, although decided before the widespread dissemination of short clips online, came down on the side of the rights holder. In that case, short excerpts from one television channel's programmes that were broadcasted on another television channel were decided largely to be substantial parts of the initial broadcast and the uses of the excerpts were largely held not to be fair dealing. Consequently, if a case was brought in Australia on similar facts to the Fanatix case, we would expect the Australian courts to reach a similar verdict to that reached by the UK High Court. In Australia, this case would be persuasive in any such court action.

United States

The United States analysis is again similar to the UK approach. In the U.S., the "fair use" doctrine may permit the unlicensed use of copyright-protected works in certain circumstances for purposes such as criticism, comment, news reporting, teaching, scholarship or research. American courts consider the following factors when deciding whether to apply a fair use defence: (1) the purpose and character of the use and whether it is commercial; (2) the nature of the copyright work; (3) the amount and substantiality of the portion used; and (4) the effect the use will have on the potential market for or value of the copyright work. U.S. courts weigh these factors holistically, and there is no clear formula to determine whether particular unauthorised copying will qualify as permissible fair use. Fair use is generally considered to be difficult to prove and we are not aware of a reported U.S. court decision weighing fair use in circumstances closely similar to the Fanatix case. However, one U.S. Appeals Court (the Ninth Circuit which covers California) recently ruled that the Digital Millennium Copyright Act requires copyright owners to consider whether a given use may qualify as fair use before they submit take-down notices. This suggests that certain unauthorised online postings of copyrighted material may constitute fair use in the U.S. In any event, U.S. analysis will likely not be affected by the Fanatix decision because U.S. courts typically do not look to foreign law when interpreting domestic copyright issues.

Germany

German copyright law also takes a similar approach to the UK in this context. In Germany, even the smallest excerpts from sports broadcasts are covered by copyright protection. However, the exclusive rights of the copyright owner are subject to limitations, including allowing the use of protected copyright material for "media coverage of current events". It is unlikely that the use of the clips in this case would be considered to be "media coverage" under German copyright law. Commercial interests alone do not justify an exemption from broadcasters' exclusive rights and conditions required for "media coverage" were in the main lacking in the Fanatix case. Had the case been brought to the German courts, the outcome would probably have been the same.

Italy

In Italy there are two news-reporting exceptions to copyright infringement that could theoretically apply to the unauthorised reproduction and communication of short extracts of sporting events online. First, the online reproduction of up to 90 seconds of a "sports event" as part of a short news report is permitted for a limited amount

of time, but only between midnight of the day after the event and 48 hours after the conclusion of the relevant event. Second, footage of events of major interest to the public (within which sports events can fall) may be used as part of short news reports of the events within news programmes, provided that the clips are not longer than 90 seconds of each event.

Whilst the Italian courts tend to provide much protection for rights holders where their copyright works have been streamed online, we are not aware of an Italian case on similar facts to the Fanatix case. Had the Fanatix case been brought in Italy, many of the clips would probably not have satisfied the time-window requirement for the first exception as most of the clips were reproduced “near live”. However, the second exception might apply as the clips were within the 90 second time-limit.

Whilst an Italian court would decide a case on similar facts on the basis of local law and regulations without regard to the Fanatix judgment, the Fanatix judgment is likely to be discussed amongst Italian scholars and influence future practice, particularly if European legislation harmonises in this area as desired by the Digital Single Market Project.

Poland

Fanatix are unlikely to have had any greater success in Poland. Poland’s equivalent of the UK’s “fair dealing for reporting current events” exception could not have applied as, under Polish law, only the press, radio and television stations are subject to the exception. It is most unlikely a Polish court would sanction citizen journalism as being part of the “press”. However, in Poland, the Fanatix judgment would be persuasive in any court action.

France

A different approach is taken in France. French law does not have a fair dealing defence. Sports broadcasts are protected by conferring on sports event organisers a monopoly over the right to broadcast their events. Statute sets out different levels of liability that online infringers of the monopoly right will incur, based on whether they are “Host Service Providers” or “Publishers”.

However, freedom of expression and the public’s right to information can legitimise certain online publications. In 2013 the French High Council of Audiovisual set out conditions for showing a short extract of a sports competition within an “information programme”. These include not showing the extract before the end of the rights holder’s original broadcast. As Fanatix’s model would seemingly not have satisfied these conditions, it is likely that French law would have also come down on the side of Sky and the ECB if the same facts were litigated in France, albeit on different grounds to the UK High Court.

Whilst not entirely similar to the Fanatix case, in March 2015, the French courts considered a case relating to unauthorised sports broadcasts. The Paris Court of First Instance made an order requiring a Spanish company to cease publishing broadcasts of Ligue 1 and Ligue 2 football matches on its website “rojadirecta” and to pay the French League EUROS100,000 for the “moral prejudice” suffered as a result.

Considering the discrepancies between the English and French approach, if a similar case was brought before the French courts, it does not seem likely that they would be influenced by the UK High Court’s decision in the Fanatix case.

Lead authors:**London****Warren Phelops**

Warren.Phelops@klgates.com

+44.(0).20.7360.8129London

London**Daniel Clyne**

Daniel.Clyne@klgates.com

+44.(0).20.7360.6441

International contributors:**Boston****John Cotter**

John.Cotter@klgates.com

+1.617.261.3178

Boston**Eric Lee**

Eric.Lee@klgates.com

+1.617.951.9240

Melbourne**Chris Round**

Chris.Round@klgates.com

+61.3.9640.4364

Brussels**Ignasi Guardans**

ignasi.guardans@klgates.com

+32.(0)2.336.1949

Milan**Alessandra Feller**

Alessandra.Feller@klgates.com

+39.02.3030.2939

Warsaw**Aleksandra Stachera**

Aleksandra.Stachera@klgates.com

+48.226.534.256

Paris**Claude Etienne Armingaud**

Claude.Armingaud@klgates.com

+33.(0)1.58.44.15.16

Berlin**Friederike Gräfin von Brühl**

friederike.bruehl@klgates.com

+49.(0)30.220.029.415

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai
Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Newark New York
Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle
Seoul Shanghai Singapore Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises approximately 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2015 K&L Gates LLP. All Rights Reserved.