

8 second cricket highlights hit for six by the UK Court

Kluwer Copyright Blog
April 1, 2016

Theo Savvides and Sean Ibbetson (Bristows)

Please refer to this post as: *Theo Savvides and Sean Ibbetson, '8 second cricket highlights hit for six by the UK Court', Kluwer Copyright Blog, April 1 2016, <http://copyrightblog.kluweriplaw.com/2016/04/01/6532/>*

The English High Court found that an App which allows users to upload, share and view 8 second clips of cricket matches and other sporting events (on a near-live basis) infringed the copyright in the television broadcasts of those matches, and the films made during the course of the production of those broadcasts.

England And Wales Cricket Board Ltd & Anor v Tixdaq Ltd & Anor [2016] EWHC 575 (Ch).

Background

The claimants, the England and Wales cricket board ("ECB") and Sky, own the copyright in the television broadcasts (and films within those broadcasts) of matches played by the England cricket team.

The Fanatix App allows users to upload, share and view 8 second clips of those matches. The clips are captured by users and Fanatix employees using screen capture technology, uploaded to the App (normally accompanied by commentary text), and made available to users on a near-live basis. The uploaded clips can also be seen on the Fanatix website, Facebook page, and Twitter feed, and are almost always deleted from all platforms within 24 hours of first being made available.

In reaching the conclusion that copyright had indeed been infringed, the High Court had to consider some interesting questions for rights holders trying to grapple with the increasingly inventive ways sports fans find to share content online, and in particular on social media platforms.

Findings of the Court

Do 8 second clips constitute a 'substantial part' of cricket matches which last 2 hours or more?

Yes. The Court found that the 8 second clips, which were usually clips of the most interesting parts of a session (such as wickets falling, appeals refused, centuries scored etc), constituted a 'substantial part' of the copyright works. This was despite the clips being, quantitatively, very small parts of sessions which lasted many hours, and which were themselves a part of Test matches which lasted many days.

This finding is not surprising: it is those interesting parts of a cricket match (or the goals or controversial moments in a football match), which are of most interest to viewers and therefore of most value to a rights holder. Clips which were uploaded which did not show such highlights were found not to infringe because they did not constitute a substantial part of the underlying works.

Were the clips made available for the purpose of 'reporting current events'?

No.

Fanatix attempted to rely on the statutory fair dealing defence which protects the making available of content for the purposes of reporting current events.

The vast majority of clips which were uploaded were of contemporaneous sporting events, and often the clips were uploaded on a near-live basis. Whilst users were required to add commentary to their clips (in later versions of the App at least), the Court found that they were not being uploaded for the purpose of reporting current events.

Instead, the Court found that the purpose of the clips was to satisfy the demand from sports fans for near-live highlights of sporting events. It was not to inform users about a current event in the way that a news report might contain a segment at the end which shows the goals from that day's Premier League game.

In reaching this conclusion the judge relied on the fairly superficial nature of the commentary which was added to the clips and the Fanatix' investor presentations which made clear that the App's intention was to satisfy fans' desire for near-live coverage of their teams' key sporting moments - a demand which was not satisfied adequately at present as a result of global sports rights being carved up and often placed behind pay-walls. Fanatix' objective was a purely commercial one, with a stated desire to 'disrupt the global sports clips marketplace'.

If the purpose of the clips had been the reporting of current events, did the use made constitute 'fair dealing'?

No. The Court agreed with the ECB that the availability of clips on the Fanatix App conflicted with the normal exploitation of its rights. Whilst the ECB and Sky do not offer a standalone 'cricket clips' service, they do provide Sky Sports subscribers access to live coverage and Times newspaper subscribers with access to highlights packages on their mobile and tablet devices. The clips uploaded to Fanatix clearly competed with the ECB's ability to exploit those rights commercially.

In addition, the clips were intended to be viewed by large numbers of users, across a variety of platforms, and therefore the extent of the use could not be justified by any purported 'informatory purpose'.

Commentary

The decision will be a relief to rights holders and broadcasters, particularly those who have recently paid large sums of money for the rights to show live Premier League and European football matches over the coming seasons. Nonetheless, sports fans will no doubt find new ways to unlawfully watch those events.