

Is Sports Clip Sharing Legal in Australia? Applying the UK Fanatix Decision

Sally McCausland considers the implications of a UK copyright decision for Australian sports media.

On March 18, 2106 the England & Wales Cricket Board and its host broadcaster Sky UK Ltd won a legal action against the Fanatix sports fan clip sharing app (the "Fanatix app").

According to marketing documents tendered as evidence, the Fanatix app was intended to "disrupt the \$40 billion global sports media rights market" by creating "a single brand that users can access from any territory in the world". However, only a year after its launch, a UK court has found that the app infringes copyright. The case, *England & Wales Cricket Board Ltd v Tixdaq*¹, has important implications for the development of the global sports rights licensing market, and more generally for those seeking to rely on copyright exceptions to distribute copyright material on social media.

It also raises the question, considered below, of how an Australian court might rule on a sports video sharing app.

A KILLER APP

The Fanatix app was advertised on the UK Apple App Store as:

"Capture, Caption. Share!

Create 8 second sports news snippets. Caption with Attitude. Share sports video with millions of fans".

The Fanatix app works by letting fans "point their mobiles at their TV screens, and capture the moment that matters most to them, adding their own comments as they do". The clips can then be replayed in near live time by other fans worldwide for free.

The app makers acknowledged it would "[push] legal boundaries" as the clips it distributed were unlicensed. Instead, its business model relied on the "reporting current events" free exception under s 30 of the UK Copyright, Designs and Patents Act (the UK Act).² (It also relied on a safe harbour intermediary host defence not discussed here).

To fit within the exception, the conditions of use required that fans add commentary to their clips, which it appears most did, and attribute the broadcaster by capturing its logo. Further restrictions were added in later versions, such as expiry of clips after 24 hours, and a limit on how much video a user could see or upload within certain periods.

The first version of the app launched in February 2015. By June 2015 when the applicants became aware of it, the app had over 50,000 active monthly users. By early

2016 these figures had more than doubled. Revenue figures from advertising or other sources were not detailed in the judgment.

SUBSTANTIAL REPRODUCTION - PROTECTING THE INVESTMENT OF SPORTS BODIES AND BROADCASTERS

The court found that the taking of 8 second clips of highlights from broadcasts and films of sports events was a "substantial" reproduction and therefore an exercise of copyright.

HIGHLIGHTS MARKET

As UK courts are now bound by EU law, Arnold J interpreted the UK Act "as far as possible" in the light of wording and objectives of relevant EU Directives and of relevant international agreements directly adopted by the EU. These included TRIPS³ and the EU Information Society Directive.⁴ Arnold J cautioned against reliance on UK case law decided before these instruments applied.

Justice Arnold acknowledged that the Information Society Directive rationale for copyright protection of broadcasts and films is to protect the investment of the producer and broadcaster. In his Honour's view, a key investment made in a sports broadcast or film was the skilled, multiple angle capture and editing of highlights such as wickets.

His honour applied a qualitative as well as quantitative test to the question of what was a substantial reproduction of such moments. Arnold J defined the "highlights market" for sports clips as separate to the market for continuous live television coverage of sports events. This meant that some parts of a match would be commercially more valuable than other parts. Applying this test, Arnold J found that 8 second excerpts showing key match moments shared on the app were substantial reproductions of the broadcast or film from which they were taken.

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¹ *England and Wales Cricket Board Limited & anor v Tixdaq Limited & anor* [2016] EWHC 575 (Ch).

² *Copyright, Designs and Patents Act* (1988) (c 48, UK).

³ *Agreement on Trade Related Aspects of Intellectual Property Rights* 1869 UNTS; 33 ILM 1197 (1994).

⁴ *Directive 2001/29/EC*.

FAIR DEALING EXCEPTION UNDER S 30 UK ACT

The most interesting issue in the case was whether the app fits within the fair dealing purpose of "reporting current events" in section 30(2) of the UK Act. The key requirements of this exception are:

- Purpose of the use of copyright material is for "reporting current events";
- Only a "fair" amount may be used; and
- Requirement to attribute the copyright owner.

MEANING OF "REPORTING CURRENT EVENTS"

Justice Arnold was prepared to give a relatively wide interpretation to the term "reporting current events", and both parties conceded that reporting could include "citizen journalism" and not merely reporting by traditional media outlets.

Unfortunately for the defendants, Arnold J considered that the primary purpose of the app was not "reporting current events" but sharing of highlights from sports events. While noting that the commercial nature of the venture was not of itself determinative, his Honour found that the defendant's objective was "purely commercial rather than genuinely informative".

"FAIR" AMOUNT

While finding that the app was not for the purpose of current event reporting in s30(2), Arnold J made some obiter comments about the issue of fairness. The fairness issue is a notoriously difficult issue to litigate, as it is not simply a matter of measuring quantity via seconds or minutes used, but takes into account how the use impacts the rights of the copyright owner.

A key determining factor in fair dealing cases therefore, is the court's conception of the market that the copyright owner should legitimately control, and how far that protected market extends into new areas of licensing which the owner is not yet exploiting.

In a precedential decision, Arnold J decided to directly apply Article 5(5) of TRIPS, known as the "three step test". His Honour acknowledged that the question of whether the three step test should apply to UK courts, or was directed only at the UK legislature when framing national laws, had not been previously resolved. However, as defence counsel agreed with the applicant's counsel that it should apply, his Honour proceeded on this basis.

The three step test consists of the following elements:

- (1) Exceptions should be confined to "certain special cases";

- (2) which do not conflict with a normal exploitation of the copyright material; and
- (3) which do "not unreasonably prejudice the legitimate interests of the rights holders".

Arnold J accepted evidence that the high volume of near live clips offered free on the Fanatix app were affecting sales of the host broadcaster's licensed TV subscription packages. More significantly, he found that future rights deals were being threatened by the "possibility the defendants might be able to offer clips via the App for free". He did not consider relevant the fact that existing industry practice, reflected in the local industry code between broadcasters, enabled free news access to footage by non-rightsholders in "linear" news services. Nor did he consider relevant that the applicants were not offering any standalone clip service to the public. Despite evidence that the applicants' clips constituted only a small portion of what was shared, he considered the potential audience of "millions" of fans to be excessive.

Accordingly, he found that the use of the clips was not fair.

ATTRIBUTION

His honour held that in accordance with settled law, the attribution requirement was satisfied by the inclusion of the broadcaster logo. However, it was noted that in some cases the broadcasters' logo was not included in the screen capture, and those were infringing uses.

ARE THESE KINDS OF APPS LEGAL IN AUSTRALIA?

The following is a brief review of the potential outcome were a similar case to be brought under Australian copyright law.

SUBSTANTIAL REPRODUCTION - SAME RESULT

The determination of what is substantial reproduction of a broadcast or film in the *Fanatix* decision is probably reasonably consistent with current Australian law. Arnold J cited the dual qualitative and quantitative test used by the Australian Full Federal Court in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)*⁵ (the "Panel case No 2"). In that case, a majority of the Full Federal Court found that the respondent had taken a substantial amount of the applicant's broadcasts in instances where the excerpts were between 8 and 26 seconds of "highlights" or "memorable moments" taken from broadcast segments of up to 42 minutes.

THE FAIR DEALING EXCEPTION FOR NEWS REPORTING

The general equivalent to the UK "reporting current events" exception under Australian copyright law is the fair dealing exception for "reporting the news" in section 103B of the Copyright Act.⁶

While there are some minor wording differences between the Australian and UK sections, the relatively broad construction of "reporting current events" in the *Fanatix* case is also generally consistent with Australian

⁵ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53.

⁶ *Copyright Act 1968* (Cth).

courts' interpretation of "news reporting", as applied in the first Panel case before the Full Federal Court⁷ and in *Telstra v Premier Media Group*,⁸ discussed below.

"FAIRNESS" AND MARKET IMPACT - A DIVERGENT APPROACH?

While UK decisions remain persuasive in Australian courts, the directive impact of EU law on UK decisions means that Australian and UK copyright law is diverging. This divergence may be apparent in Arnold J's comments on the issue of fairness in the *Fanatix* case, and in his construction of the purpose of the app.

In *Telstra v Premier Media Group*, the only reported Australian case on fair dealing and digital sports rights, Telstra sought an interlocutory injunction to prevent the first respondent from supplying video clips of up to two minutes, with accompanying voiceover commentary, of NRL match highlights compilations to online services. It was acknowledged that Telstra had paid premium sums for digital highlights rights to NRL broadcasts. Telstra claimed that these rights were being devalued by the respondents' activities. Telstra sought orders to limit the duration and availability of clips to what it considered a "fair" amount.

In rejecting Telstra's application, Allsop J referred to the fact that Telstra had factored news access by third parties into its calculations for buying the rights. He also referred to the "public interest" in sports news, and that the Australian public had "come to expect" sport news to be delivered to them. While *Telstra v Premier Media Group* was only an interlocutory hearing, the case since seems to have confirmed that there is scope for new forms of unlicensed services using sports clips under fair dealing in the Australian market, provided such usage is not excessive. There have been no reported cases on sports fair dealing disputes since this case in 2007.

In contrast, Arnold J's judgment in the *Fanatix* case does not acknowledge that in future, if not already, legitimate news reporting by third parties will encompass new forms of online distribution of sports news and that this would be a factor in any valuation of the "highlights market".

A key difference in the approaches taken in these cases may lie in the direct import of the TRIPS three step test by Arnold J. The judicial application of the three step test is controversial. While evidence of the market impact of the defendant's use has always been relevant, the three step test is about protecting the interests of rights holders. As a directive to legislatures considering how to frame a copyright exception in the public interest, it is appropriate. However, used in court it may invite the court too readily to quarantine "future" markets for the applicant, leaving little room for new uses by third parties. Although Arnold J proclaimed that the use of the three step test did not substantially change the fairness analysis, he seems to have emphasized the question of whether the use "conflicts with normal exploitation of the work". While the *Fanatix* case turned on purpose rather than fairness, the import of the three step test may be felt in

future UK cases if not overturned on appeal. Such an approach could make it more difficult for UK copyright users to avoid a "future market impact" argument by the copyright owner.

To date Australian courts have not imported the TRIPS three step test into their fairness analysis of copyright exceptions.

Another difference which may emerge is the Australian "expectation" of free access to sport given judicial notice in *Telstra v Premier Media Group*. While the UK court in *Fanatix* considered that highlights which were "of interest" to fans were not sufficiently newsworthy to permit fair dealing, it's hard to overestimate how important sport news is to Australians. It would be interesting to see how an Australian court would weigh the arguments by a sports rights holder if a video sharing app case were run here.

But at first glance it seems that a carefully designed video sharing app may fare better here than in the UK.

IMPACT OF THIS CASE INTERNATIONALLY

The UK decision is not binding on Australian courts, but is likely to be influential. It is one of the first international cases to comprehensively review fair dealing in the context of social media.

The UK is a key territory in the global sports rights market. The *Fanatix* decision may impact international contractual sports and other event rights negotiations, where provision is made for news access to non-rights holders, and fair dealing laws are factored into pricing.

WHAT NEXT?

While at first blush the *Fanatix* decision looks like a clear win for rights holders seeking to protect their interest in emerging digital licensing markets, the decision still leaves quite a lot of scope for those who may wish to design a "genuinely informative" unlicensed sports video sharing service. If such an app were to be tested in court here, the outcome is uncertain. Arguably, there were factors in the *Fanatix* case, such as the high volume of the videos shared and the distribution of clips worldwide, which would have been just as problematic in an Australian court. But at first glance it seems that a carefully designed video sharing app may fare better here than in the UK.

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⁷ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146.

⁸ *Telstra Corporation v Premier Media Group Pty Limited* [2007] FCA 568.