

ECB v Tixdaq – High Court confirms short clips of broadcasts infringe copyright

The recent decision of the High Court in *England And Wales Cricket Board Ltd. & Anor v Tixdaq Ltd. & Anor* [2016] EWHC 575 (Ch) has confirmed that the copying and dissemination of 8-second clips of broadcasts of sporting events amounts to copyright infringement. Given the substantial value attaching to sports media rights, and the particular threats posed to rightsholders by the widespread availability of high-quality recording equipment in the pockets of consumers and high-speed online sharing capabilities, this decision will be of significant comfort to rightsholders. This article offers an analysis of the decision in the *ECB v Tixdaq* case, with a particular focus on the implications for the owners of copyright in broadcasts of sporting events.

Legal Background

The *Tixdaq* case centred around the question of copyright protection of sports broadcasts and, particularly, whether the copying and dissemination of short ‘extracts’ of those broadcasts amounted to copyright infringement. The key legislative provisions at issue were as follows.

Copyright Designs and Patents Act 1988 (“CDPA”)

Section 16 CDPA

Section 16 CDPA provides that copyright is infringed “by a person who without the licence of the copyright owner” does any of the “acts restricted by copyright”¹, including copying of a work and issuing copies of a work to the public².

Section 30 CDPA

Section 30(2) CPDA provides that

“[f]air dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that... it is accompanied by a sufficient acknowledgement.”

The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/3012) (“E-Commerce Regulations”)

The E-Commerce Regulations transpose into national law Directive 2000/31/EC (“E-Commerce Directive”).

Regulation 17 (implementing Article 12 of the E-Commerce Directive)

Regulation 17 provides a defence to an information society service provider whose network is used to communicate infringing content online, provided that the service provider:

- a) “did not initiate the transmission;

- b) did not select the receiver of the transmission; and
- c) did not select or modify the information contained in the transmission”

(the “Mere Conduit Defence”).

Regulation 19 (implementing Article 14 of the E-Commerce Directive)

Regulation 19 provides a defence for a host of online infringing content where that host:

- i. does not have actual knowledge of unlawful activity or information... ;or
- ii. upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information...”

(the “Host Defence”).

Factual Background

The value of sports broadcasts and the importance of copyright

Rights relating to live sports event, particularly rights to film and broadcast such events, are some of the most valuable in the sports industry. For example, the English Premier League’s most recent media rights deal was reportedly worth almost £5.14 billion and, indeed, in the *Tixdaq* judgment itself, Arnold J noted that the fees payable under Sky’s agreement with the ECB ran into “hundreds of millions of pounds”³.

In recent years, the value traditionally attaching to sports broadcasting rights has been threatened by the advent of mobile recording technology in the hands of virtually every consumer, coupled with high-speed mobile internet and the social media phenomenon, which enables the dissemination of high-quality user-generated content (“UGC”) at unprecedented speed. In this regard, rightsholders have been presented with both a legal and commercial challenge.

Legally, the limits of the protection offered by copyright – the principal method of protection available to rightsholders – have been put to the test, particularly in light of the ‘host’ and ‘mere conduit’ defences under the E-Commerce Directive⁴.

Commercially, rightsholders have begun to embrace non-traditional broadcasting models and packages, with a focus on making high-quality, ‘official’ online content available to consumers with the aim of reducing the prevalence of pirate streams and clips.

For sports rightsholders, the importance of the *ECB v Tixdaq* judgment lies, firstly, in the confirmation that a short clip is capable of amounting to copyright infringement and, secondly, in its clarification as to a rightsholder’s ability to pursue a claim for infringement against a service provider such as the Defendant.

The latter is essential, as the pursuit of individual infringers is generally disproportionately expensive and often ineffective given the ‘near live’ nature of much of the UGC in question and the speed with which new clips surface.

The facts of the case

The Claimants are the owners of the copyright in the broadcasts of the majority of matches played by England’s men’s and women’s cricket teams. The Defendant, Tixdaq Limited, is the owner and operator of a website and mobile app, which enables users to upload and share 8-second clips of ‘near live’ footage from sporting events (“**Fanatix**”). The clips at issue were copied from the Claimant’s broadcasts, mostly using the screen capture technology now widely available on smartphones, and uploaded to Fanatix by members of the public (“Users”) and by the Defendant’s employees. It is worth noting that, in more recent versions of the apps, Users were required to attribute the source of each clip to the relevant broadcaster, as well as provide a brief commentary.

The Claimants brought an action against the Defendant for copyright infringement. The Defendants asserted that their actions constituted “fair dealing” for the purposes of reporting current affairs under Section 30(2) CDPA or, alternatively, if the clips did infringe the Claimants’ copyright, that they benefited from the Mere Conduit and/or Host Defence.

It is important to note that the Claimant advanced its claim on the basis of “signal copyrights”. In other words, they did not seek to argue that the extracts of their broadcasts and films constituted dramatic works. This is of note as signal copyrights do not require an element of originality and protection arises immediately upon fixation of the film or broadcast in question.

This raised the question of how the infringement test set out in *Infopaq I5* (which sets out the test for infringement of literary and dramatic works, i.e. an author’s “*intellectual creation*”) might apply to such works, particularly in relation to the determination of what might constitute a “substantial part” of such works.

The Decision

Infringement – the question of a ‘substantial part’⁶

Infringement under section 16 CDPA requires the unauthorised reproduction of a “substantial part” of a copyright work. Arnold J noted that, as the Claimants’ relied upon signal rights in their claim, the test in *Infopaq I*, in relation to literary and dramatic works, was not applicable. Thus the question as to what constituted a “substantial part” fell to be determined. The Claimants contended that this was both a qualitative and quantitative test. Whilst the Defendants conceded that the test could not be purely quantitative, they contended that the qualitative element of the test for infringement bore less relevance to works such as signal rights, which do not require intellectual creation or originality.

Arnold J agreed with the Claimants, holding that the test was both qualitative and quantitative, and applied a test analogous to that in *Infopaq I*. In this regard, he noted that signal copyright protected the Claimants’ investment

in creating the works. He recognised that, in addition to the value of live broadcasting, a principal reason for investment in the recording of sports events is the creation of the recordings of the more interesting parts of the event, known as the ‘highlights’ (such as wickets in the case of cricket and goals in the case of football).

This was particularly the case given that there is a distinct commercial market for ‘highlights packages’; for example, the Claimants had licensed such a package to News UK. On this point, Arnold J concluded as follows:

“Quantitatively, 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... Thus most of the clips showed something of interest and hence value... Thus each clip substantially exploited the Claimant’s investment in producing the relevant broadcast and/or film... [and] constituted a substantial part of the relevant copyright work(s).”⁷

Importantly for rightsholders, although Arnold J accepted that there would still be some clips which did not show highlights and therefore did not amount to a substantial part of the work(s), this did not assist the Defendant because the case was essentially concerned with the lawfulness of the Defendant’s services as a whole.

The section 30(2) defence

To rely on the defence under section 30(2), a defendant must show that its use of the work(s) in question

- (i) was for the purpose of reporting current events, and
- (ii) amounts to ‘fair dealing’.

(i) use for the purpose of reporting current events⁸

The Defendants argued that, in the age of ‘citizen journalism’ where consumers (particularly those aged between 18 and 34) increasingly access news online and through social media, the defence under section 30 ought to be just as open to operators of outlets such as Fanatix as it is to traditional news broadcasters. Whilst Arnold J agreed that ‘citizen journalism’ was not excluded from the scope of the defence, he ultimately found that the Defendants’ use of the Claimants’ works did not amount to the reporting of current events. His reasoning was as follows.

Applying section 30(2) in light of the Information Society Directive (2001/29/EC), Arnold J held that sporting events, such as the Claimants’ cricket matches, are “*current events*” for the purposes of section 30(2) (there was no dispute on this question). As the majority of clips were uploaded on a ‘near-live’ basis, those clips could be said to relate to a “current event”. However, the Judge made clear that this would not be the case where clips captured punditry or interviews unless the interview or analysis itself could be said to amount to a current event.

The judge further noted that the concept of “reporting” is capable of having either a broad or narrow meaning depending on the context and, consequently, it was necessary to adopt a purposive construction of the term. In this sense, he considered that ‘citizen journalism’ is capable of qualifying as the reporting of current events

within the meaning of section 30(2).

However, on an objective assessment of the Defendants' use of the Claimants' copyright works (in particular by reference to presentations made by the Defendants to their investors and prospective investors), he found that the predominant purpose of the Defendants' use of the clips was to facilitate the sharing of clips amongst Users and that the Defendants' objectives were "purely commercial rather than genuinely informative"⁹. This was outside the scope of 'reporting current events' for the purposes of section 30(2) CDPA.

(ii) 'fair dealing'¹⁰

The Judge went on to consider whether, if the Defendants' use had amounted to reporting current events, such use would amount to fair dealing. He found that the evidence demonstrated a conflict between the Defendants' use of the clips and the Claimants' normal commercial use of their works. In particular, as noted above, the Fanatix service conflicted with the Claimants' licensing (and future licensing plans) of 'highlights packages'. Accordingly, the extent of the Defendant's use of highlight-type extracts from the Claimants' work could not, on the facts, be justified by an informative purpose and did not amount to 'fair dealing'.

Mere Conduit and Host Defences¹¹

Arnold J was able to dispose quickly with the Defendant's reliance on the Mere Conduit defence, holding that it provided no defence on the facts "because the Defendant's service does not merely involve transmission of information but also storage".

The Defendant's defence under Article 14 (the Host Defence) also failed because, on the facts, the majority of the clips were editorially reviewed, and in some cases edited, by the Defendants' staff before being made available on Fanatix. The Defendants could not, therefore, be said to have had "no knowledge" of the nature of the clips. However, Arnold J did expressly acknowledge that the Host Defence would have been available if the clips had not been editorially reviewed¹².

Comment

The decision will doubtless be welcome news to rightsholders. Whilst the prevalence of online UGC continues to present a threat to the value traditionally attaching to sports media rights, the confirmation that short extracts of sports broadcasts/films amount to copyright infringement, alongside the confirmation that the Mere Conduit and Host Defences will not apply to proactive providers of illegitimate 'highlights' services such as Tixdaq, should be of substantial comfort to rightsholders.

Nonetheless, the significance of the decision should not be overestimated. In particular, it should be borne in mind that Tixdaq's Host Defence failed predominantly due to

the fact of editorial intervention by Tixdaq employees. In this sense, Tixdaq is in the minority. There exist a vast number of websites and social media applications which do not engage in any editing or monitoring of UGC and are likely to continue to benefit from the Host Defence. Coupled with Arnold J's express acknowledgment of the legitimacy of 'citizen journalism', it is clear that many of the existing challenges remain.

In that regard, rightsholders will have to continue balancing the costly pursuit of individual takedowns against more commercial solutions, such as partnering with social media outlets to make high quality legitimate content available, thereby reducing the market for piracy. Indeed, it seems that the more heavily rightsholders commercialise rights packages, the more likely to benefit from protection, as any copyright infringement test will involve the court assessing the extent of the conflict between the alleged infringer's use of the material and the rightsholders' normal commercial exploitation (as is evident in the *ECB v Tixdaq* judgment¹³).

Finally, it is worth noting that the Defendants chose not to advance a defence under section 30(1ZA) CDPA, which provides a defence to infringement where the restricted act is undertaken for the purposes of quotation from a work which has been made available to the public, provided that use of the work constitutes 'fair dealing' and the extent of the quotation is "no more than is required by the specific purpose for which it is used". To the author's knowledge at the time of writing, this defence remains untested in the courts and may yet be an avenue open for the exploitation of 'unofficial' sports content.

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For further information or advice in relation to any of the issues discussed in this article, please contact rosie.duckworth@squirepb.com.

1. Section 16(1) CDPA
2. Section 16(2) CDPA
3. *ECB v Tixdaq*, judgment of Arnold J, para 9
4. See R. Duckworth, "Live streaming social media tools – the latest threat to sports rightsholders", SLA&P, June 2015 (Vol. 22, No. 3)
5. *Case 5/08 Infopaq International AIS v Danske Dagblades Forening* [2009] ECR I-6569
6. Judgment paras 60 – 66
7. Judgment para 66
8. Judgment paras 105 – 129
9. Judgment para 129
10. Judgment paras 136 – 166
11. Judgment paras 67 – 71
12. See *Case C-324/09 L'Oréal SA v eBay International AG* [2011] ECR I-6011
13. Judgment paras 137 – 151