

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-1847
[2016] NZHC 1883**

UNDER the Copyright Act 1994
BETWEEN SKY NETWORK TELEVISION
LIMITED
Plaintiff
AND FAIRFAX NEW ZEALAND LIMITED
Defendant

Hearing: 10, 11 and 12 August 2016

Appearances: J G Miles QC, T J Walker and E C Gray for Plaintiff
D Goddard QC, M Gavin and C Herbert for Defendant

Judgment: 12 August 2016

ORAL JUDGMENT OF FOGARTY J

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Introduction

[1] Sky Network Television Ltd (Sky) commenced proceedings three days ago against Fairfax New Zealand Ltd (Fairfax), which was in turn three days after the opening ceremony for the Rio Olympic Games took place.

[2] The International Olympic Committee (IOC) governs the Olympic movement and owns the rights to the Olympic Games, including without limitation, the right to broadcast the Olympic Games.

[3] The IOC acquires this right because the films of the events produced during the Games create a property right, known as copyright.¹ Subject to the need for proof that IOC has not sold this copyright, that is common ground that IOC still has it. There was some discussion about that and I might be overstating this common ground, but certainly I consider it extremely unlikely that the IOC has sold off its valuable copyright to anybody else and as we will see from my reasoning, I think, that is corroborated by the way in which IOC has dealt with Sky.

[4] Fairfax has been streaming footage from Sky's broadcasts of the Olympic Games on its website www.stuff.co.nz.

[5] Sky seeks an interim injunction against Fairfax to limit the Sky content that it streams on www.stuff.co.nz.

The issue of standing

[6] Copyright is created by statute, the Copyright Act 1994, which in turn implements an international convention known as the Berne Convention.²

[7] The first point made in the notice of opposition to the application for the injunction is that Sky has no standing to bring proceedings because there is no

¹ Copyright Act 1994, s 14(1).

² Berne Convention for the Protection of Literary and Artistic Works (opened for signature 9 September 1886, entered into force 5 December 1887).

evidence that the IOC is the owner of the copyright material. This is the point I referred to a moment ago.

[8] On 14 February 2014 IOC and Sky entered into a New Zealand Media Rights Agreement. The first proposition in the preamble (or introduction to the agreement) is as follows:

The IOC governs the Olympic movement and owns the rights to the Olympic Games including without limitation the right to broadcast and exhibit the Games.

[9] Clause 4.4.1 of this agreement is a provision by which IOC licenses solely to RHB³ (Sky) and Sky accepts “the exclusive broadcast and exhibition rights to the Games in the language of the territory by means of each licence media during the applicable term”. The critical lines are the opening phrases “the exclusive broadcast and exhibition rights”.

[10] It is an article of the Berne Convention⁴ and a provision of the New Zealand Copyright Act that there is a qualification to every licence. This appears in s 42 of the Act which provides that fair dealing with a work, in this case a film, does not infringe copyright if such fair dealing is for the purpose of reporting current events by means of film.⁵

[11] Sections 123 and 124 are relied upon by Fairfax to argue that Sky is not an exclusive licensee and therefore does not have standing to bring the proceedings.

[12] Any proceedings before this Court have to be brought under the Copyright Act and s 124 enabled proceedings to be brought by the copyright owner or an exclusive licensee.⁶ The fair dealing clause in fact enables persons who are not licensees let alone exclusive licensees to make some use of a film. It does not follow that because the fair dealing clause enables persons who are not licensees to make some use of a film, that someone cannot hold an exclusive licence. This is because s 42(1) provides that such fair use to report a new event is not a breach of copyright,

³ Right Holder’s Broadcast.

⁴ Berne Convention, above n 2, art 10bis.

⁵ Copyright Act 1994, s 42(2).

⁶ Section 124(1).

it does not infringe copyright. It would turn the statute on its head if s 42 was read in a way which prevented the owner of a work granting an exclusive licence. It is both the owner's rights and the exclusive licensee's rights that are subject to the fair dealing exception.

[13] Fairfax further argued that the owner and the exclusive licensees cannot proceed independently when relying on s 124. This is because that section says relevantly: "the copyright owner or, as the case may be, the exclusive licensee may not, without the leave of the Court, proceed unless the other is joined as a plaintiff or added as a defendant". In other words, put more simply, the argument is that if Sky is going to come to this Court it has to come with the IOC as a co-plaintiff. I do not agree. This argument overlooks the power of this Court to grant leave which is included in s 124.

[14] In the context of this case I have no reason to believe that IOC is not supportive of Sky. These proceedings have been commenced urgently. It is unrealistic to expect the IOC in the middle of the Games to turn its mind significantly to this litigation on the other side of the world. This Court now grants leave for these proceedings to be brought by the exclusive licensee, Sky.

[15] To wrap up this point, I would emphasise that Mr Goddard QC has been arguing that Sky is not an exclusive licensee notwithstanding that it is described as the IOC as an exclusive licensee. As I have pointed out, the IOC treats Sky as an exclusive licensee and by my analysis of the statutory provisions, I agree.

Serious question to be tried and balance of convenience⁷

[16] The next pleading in opposition to this application for an interim injunction is that Fairfax has not copied the whole or any substantial part of the Olympic material. Based on the United Kingdom decision in *England and Wales Cricket Board Ltd and Sky UK Ltd v Tixdaq Ltd and Fanatix Ltd*,⁸ which I discuss later in this judgment,⁹ I

⁷ The conventional test for the grant of an interim injunction requires the Court to determine: (a) whether there is a serious question to be tried; (b) where the balance of convenience lies; and then (c) to stand back and determine the overall justice: *Klissers Farmhouse Bakeries v Harvest Bakeries* [1985] 2 NZLR 140 (CA) at 142.

⁸ *England and Wales Cricket Board Ltd v Tixdaq Ltd & Fanatix Ltd* [2016] EWHC 575 (Ch).

am prepared to accept that on balance that Sky has a reasonable argument of a significant infringement of the Copyright Act by Fairfax.

Fair dealing – overview of argument

[17] Fairfax advances a fair dealing argument on the ground that its use of the Olympic material is in any case fair dealing of that material for the purpose of reporting current events, given that:

- (a) The Olympic material is by definition, current events, and on the basis of widespread of media and public interest and the topical nature of the Olympic material;
- (b) The purpose of Fairfax’s use of the Olympic material is to report on the Olympics, given the overwhelming public interest in the event.

[18] And so we come to the principal issue in this case which is whether or not the conduct of Fairfax can be justified as fair dealing with Olympic broadcast material for the purpose of reporting current events.

The NAR and SNAR

[19] Sky has entered into an agreement with TVNZ and Media Works that provides that those organisations with a “safe harbour” by setting out rules around the length and frequency of Sky’s video material which they can broadcast when reporting on the Olympic Games. I will consider this in more detail. But Fairfax is entitled to decide not to contract with Sky to licence its copyright and instead make use of its legal right to use Sky’s copyright or the IOC’s copyright within the bounds of fair dealing as afforded by s 42 of the Act.

[20] The obligation of fair dealing is addressed between the IOC and Sky in the New Zealand Media Rights Agreement. It is particularly addressed in clause 6.2 under the heading “News Access Rules” (NAR). This is a rule that recognises that:

⁹ See below at [35].

The IOC shall have the right to provide television, radio and other organisations who are not authorised holders of Olympic broadcast and exhibition rights (as well as members of the Olympic Family) with certain rights to use the Sky coverage and the international television and radio signals (ITVR) in the territory and around the world for news purposes as determined by the IOC in its sole and absolute discretion.

(Emphasis added.)

[21] The use of News Access Rules (NARs) for international events is commonplace internationally. To some extent this interim injunction hearing had occasion to look at practices in New Zealand, Australia and the United Kingdom.¹⁰ Typically these NARs provide for the transmission of film of sporting events, whether they be Olympic or other sporting games, such as football, cricket etcetera, for relatively short periods, say two minutes over a day and shorter times enabling the broadcast of a newsworthy event: for example, the fall of the wicket, the breasting of a tape, the scoring of a try falling, but falling well short of significant coverage of the sporting event. These NARs are obviously intended to discharge the fair dealing obligation which is provided in s 42 of the Copyright Act 1994 in New Zealand.¹¹

[22] The NAR is issued by the IOC. A media organisation must sign up to the NAR to be an accredited media organisation at the Olympic Games, and so, therefore, have access to the stadia.

[23] In the NAR persons other than licensees are allowed a maximum of six minutes of Olympic material per day, which can appear in no more than three news programmes per day, no more than two minutes may be used in any one news programme and the news programmes must be separated by at least three hours.

[24] Sky, through its agreement with the IOC, had the power to issue a supplementary NAR subject to the IOC's approval. Sky therefore presented a Supplementary NAR (SNAR), which applies to New Zealand media, which Fairfax refused to sign up to. TVNZ signed up to it but there is affidavit evidence,

¹⁰ *England and Wales Cricket Board Ltd v Tixdaq Ltd & Fanatix Ltd*, above n 8; *Media Works NZ Ltd & Anor v Sky Television Network Ltd* HC Auckland CIV 2007-404-5674, 18 September 2007; *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* [2007] FCA 568, (2007) 72 IPR 89.

¹¹ *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1992] Ch 141 at 157.

reluctantly. Media Works the owner of TV3 signed up to it and there is affidavit evidence, that apparently at least some of its staff considers it to be reasonable. The SNAR governs the ability for the media to broadcast Sky's footage of the Olympic Games on-line. This is something that is not provided for in the IOC's NAR.

[25] In this case Sky as the exclusive licensee and IOC clearly have market power. By market power, I mean that together they have a monopoly over the distribution of the Olympic film, the filming of the Olympics, subject only to the fair dealing obligation. They are in a position to significantly dictate the terms that the other media entities have to follow when broadcasting Olympic Games footage. But they are constrained by this concept of fairness in the term "fair dealing".¹² For practical purposes the IOC and Sky have to allow some copying of the film for the purpose of reporting current events. This is not a significant obligation because it is also in their own interests for there to be reporting of news worthy events, as that in turn encourages and maintains viewer participation in the Games.¹³

[26] In the New Zealand SNAR, persons other than the licensee, Sky, can use a total of six minutes of Olympic material per day, which may only appear in a video highlights package which is designed as a news up-date bulletin and no more than three news bulletins per day, no more than two minutes of Olympic material may be used in any one bulletin, each news bulletin must be separated by at least two hours and Olympic material can only be broadcast at least 30 minutes after conclusion of the live event to which that material relates.

[27] Or, in the alternative the unlicensed party can use a total of three minutes of Olympic material per day and in no more than three news bulletins per day, no more than 60 seconds of Olympic material in any one news bulletin and each news bulletin must be separated by a period of at least three hours and can only be broadcast after the conclusion of the live Olympic event to which the material relates.

¹² Copyright Act 1994, s 42.

¹³ *British Broadcasting Corporation v British Satellite Broadcasting Ltd*, above n 11, at 155.

[28] Or, the party can use a total of two minutes of short extracts of Olympic material per day across all digital news services with the exception that Olympic material can only be broadcast at least 30 minutes after the conclusion of the live Olympic event.

Discussion

[29] There is an argument between the parties as to what extent the NARs can be used by the Court as a guide to the application of the provision in the statute for fair dealing.¹⁴ Sky argues that the Supplementary News Access Rules (SNAR) for New Zealand when set alongside international NARs is consistent with fair dealing, to report news, to the point of being at the liberal end of the spectrum.

[30] Of course, Sky cannot take the argument in this preliminary hearing to the point of establishing that compliance with the SNAR and/or any applicable NARs discharges the fair dealing requirements of the Statute. But if this case goes to trial, there will be a significant argument that weight can be attached to the content of other NARs around the world.

[31] It is common ground that the Sky material being uploaded and displayed on Fairfax's stuff.co.nz site is outside the constraints of the SNAR. Quite properly, Mr Goddard QC has argued that the SNAR cannot be treated by the Court in an interim injunction hearing as setting the bounds and discharging the obligation to provide for reporting of current events.

[32] Mr Goddard is right to also point out that the very concept of fair dealing is a standard whose application can be, and usually is, a question of degree.¹⁵ There is always going to be room for argument as to the bounds of the fair dealing obligation and correspondingly the legality of the limits contained in the NARs.

¹⁴ This is something that Winkelmann J did in *Media Works NZ Ltd & Anor v Sky Television Network Ltd*, above n 10, at [77] and that Scott J did in *British Broadcasting Corporation v British Satellite Broadcasting Ltd*, above n 11, at 157.

¹⁵ *Pro Sieben Media AG v Calton UK Television Ltd* [1999] 1 WLR 605 (EWCA) at 613.

[33] Because of this doubt, Fairfax argues that this dispute should go to trial and not be resolved by any interim remedy.¹⁶

[34] Fairfax's argument is that it should be able to continue broadcasting Sky's material online in the way that it has been doing for the duration of the Games so far. It says that is not possible to resolve this matter at a trial before the Olympic Games end, which is in about two weeks. However, Fairfax argues that justice can still be done if the matter goes to trial on the basis that Sky can still advance a claim for damages if it can prove that Fairfax's broadcasting went beyond fair dealing for the purpose of reporting current events into obtaining a free ride for profit on property owned by IOC and exclusively licensed to Sky. This is property which Sky paid millions of dollars to acquire. Mr Miles QC, quite reasonably, did not disclose the precise value given by Sky, but he described it as "many millions of dollars".

[35] Of the authorities dealing with news coverage as distinct from the full recording of a sporting event, I am principally guided by the recent English case of *England and Wales Cricket Board Ltd and Sky UK Ltd v Tixdaq Ltd and Fanatix Ltd (Fanatix)*.¹⁷ I rely on this case because the judgment was delivered in the High Court of Justice Chancery Division in London on 4 March of this year. I have received submissions from the Bar that it is consistent with the reasoning of the 2007 case of *Media Works New Zealand Ltd and TV Works Ltd v Sky Television Network Ltd*¹⁸ decided in the High Court by my sister Judge, Winkelmann J. The reason I am not going to refer to her decision is that it was decided nine years ago, which is a long time in the digital world. What may be understood as a reasonable time for news coverage in 2007 may not be the same now. Indeed, there is expert evidence filed in the Court that public expectations to see news is much higher now than they were then. And I recognise it is inevitable, and indeed reflected by all the NARs, that on-line reporting of news events is typically these days, where possible, accompanied by a short stream of film or photographs. Indeed, I think that can be accepted as a notorious fact without the need for proof by experts.

¹⁶ Relying on the decision of Allsop J in *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd*, above n 10.

¹⁷ *England and Wales Cricket Board Ltd v Tixdaq Ltd & Fanatix Ltd*, above n 8.

¹⁸ *Media Works NZ Ltd & Anor v Sky Television Network Ltd*, above n 10.

[36] The claimants in *Fanatix* were the owners of the copyright in television broadcasts of most of the cricket matches played in England. The defendants operated a website with various mobile applications up-loading a considerable number of clips of broadcasts of cricket matches lasting up to eight seconds to the App where they could be viewed by users. The owners of the copyright of the game claimed that this was an infringement of their copyright. *Fanatix* argued they were relying primarily on the defence of fair dealing for the purposes of reporting events. Exactly as is the case here. The copyright law of the United Kingdom, for material purposes, is the same.¹⁹ Counsel did not suggest any difference.

[37] In the context of that case there were, like here, supplementary news access rules, called the United Kingdom Sports News Access Code of Practice or SNAC. This is an industry code established by the then television broadcasters in the United Kingdom, the BBC, ITV, ITN, BSkyB, TV-AM and Channel 4. *Fanatix* was operating unilaterally outside that code. The Judge found on the facts that the purpose of its App and the content of the App went beyond the purpose of reporting current events. To get an idea of to how the Judge reasoned here is at [99]:

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: wickets taken, appeals refused, centuries scored and the like. Thus most of clips showed something of interest, and hence value. The majority of the clips also involved action replays of the kind discussed above. Thus each clip substantially exploited the Claimants' investment in producing the relevant broadcast and/or film. Accordingly, in my judgment, each such clip constituted a substantial part of the relevant copyright work(s).

And so by that finding, in conjunction with the findings that the infringement was not for the purpose of reporting current events and that the use of the App had a commercially damaging effect on the plaintiffs, the Court held that the defendants' *Fanatix's* infringing acts fell outside fair dealing and so breached the United Kingdom Copyright Act.

[38] In that case there was some correspondence between the content on the App and the rules of the local SNAC. The Judge said at [163]:

¹⁹ See Copyright Designs and Patents Act 1988 (UK), s 30.

In my view the mere fact that the extent of the use corresponds more closely with that permitted under SNAC does not justify the conclusion that it is fair dealing. It remains the case that the nature of the use differs from that permitted under SNAC in two key respects: it is not linear television broadcasting and it is not limited to scheduled news programmes. On the contrary, the use is on demand and near-live.

[39] And at [166]:

Nor am I persuaded that the extent of the use is justified by the informatory purpose. The essence of the Defendants' service remains the same: to enable fans to share on demand and near-live clips of the highlights from sporting events that are of interest to them. Overall, the balance still comes down against this being fair dealing.

[40] And so at 174:

Accordingly, the Defendants' infringed the Claimants' copyright in those works.

[41] This is to my mind essentially the argument that Sky is mounting against Fairfax. It is a serious argument.

[42] Counsel for Fairfax agrees that Fairfax is operating outside the New Zealand SNAR. There were some negotiations between Sky and Fairfax over the terms of the SNAR. They broke down.

[43] There was some dispute during the hearing before me as to the extent of the up-loading and retention of an accessible clip of Olympic Games' events on Fairfax very popular site, stuff.co.nz.

[44] Mr Goddard argued that it was impossible for a Court sitting urgently on an application for interim relief to create a bright-line rule used to measure whether or not the up-loading by Fairfax, for the most part, of Sky material was in breach of fair dealing. I agree with Mr Goddard. As I have said previously, the standard of fair dealing is just that, it is a standard and not a rule. It cannot be applied precisely. I use the term "rule" to cover simple law such as no parking on this spot between 9.00 am and 5.00 pm. Whereas here it is a standard saying, "you must deal fairly". Applications of standards can be obvious. Do not go outside, if it is wet. If it is

pouring with rain one knows one does not go outside. But what if the odd spot is falling, is that rain?

[45] Of course, if this case goes to a substantive hearing, which I doubt, it is the function of the Judge to make a call as to whether the standard of fair dealing applies or not, to one or more of the up-loads. In the course of the hearing I was taken illustratively through various tables of the NAR rules in New Zealand. The use of IOC programme differs depending on whether the broadcaster is the internet or television or radio. I was shown comparative tables for example, with New Zealand rules and United Kingdom rules. For example I was told that at the London Olympics in 2012 for the internet, the daily cumulative maximum of film was 180 seconds (three minutes). The maximum number of uses per day was four bulletins. The individual maximum per use was 60 seconds. The separation between uses was two hours. The data could be loaded only after the broadcast and the material had to be taken down in 48 hours.

[46] This Court during the hearing did not have a reliable understanding as to the extent of the use by Fairfax of Olympic or Sky material. There is no dispute that it was outside the bounds of the relevant NAR and SNAR. A particular complication was demonstrated in the Court. The demonstration in the Court opened the stuff.co.nz home page and selected an Olympic topic. The screen (which of course can be maximised to a full screen) then showed the completion of a shooting event. At the end and interspersed by advertising, there was a prior news event in a different sport, appear on the screen. The submission to the Court was that, if having opened the site and taken no further steps a viewer could, by waiting patiently through the advertisements see not one, but several up-loads of Olympic material which had not been taken down. The extent to which this was a breach of the SNARs was not clear. However, later in the hearing the Court received an assurance that the function which allowed this to happen has been disabled. This morning I issued a minute requesting an update on the position so as to have clarity. I did this because if there was a blatant disregard for the limits of the relevant NAR and SNAR to the point where there was gross divergence between the standards in the SNAR and what Fairfax was doing I would have seriously considered granting a mandatory interim injunction against Fairfax to prevent that occurring. I now accept as I have

had a further minute in reply, that part of the problem is that the prior clips had to be taken down manually, in the meantime to avoid human error I have been advised just before lunch, that Fairfax has disabled the function in the meantime, meaning while it has to be operated manually, to avoid human error.

[47] To the extent that Sky is just covering the end of a race or the winning shot and largely describing the event in print rather than by film, I do not think it is justiciable on an interim injunction hearing to decide whether or not that conduct goes beyond the fair dealing exception in the Statute. Both senior counsel recognise that it is no function of the Court to substitute some bright line as it were, an outer fence around the question of degree as to fair dealing. On the other hand, as I have just recognised, the Court can identify egregious examples.

[48] Although it has a reasonable argument that Fairfax's behaviour should have been closer to the terms of the SNAR, it is not possible for this Court to make a ruling on that without a full trial. The issue cannot be and has not been fully examined before me. If an injunction were granted it is likely to end the dispute, the Court looks for a strong argument in favour of the application in such a case.²⁰ I am of the view that such a strong argument is there for the applicant, Sky, in respect of the automatic playlist function.

[49] It is my understanding that Fairfax has agreed that the automatic playlist function, as it was set up before this case, cannot be defended as fair dealing under the Act. Therefore, any future occurrence of it is likely to be met by a mandatory interim injunction and leave is accordingly reserved to the plaintiffs to bring an application at short notice. The reasons are that this conduct is well beyond the SNAR and outside in my view, any sensible interpretation of fair dealing under s 42(2) of the Copyright Act. There is no realistic possibility of relief between now and the games finishing, this leaves only an action for damages, if the matter had to

²⁰ *Red Bull New Zealand Ltd v Drink Red Ltd* [2016] NZCA 373 at [75] referring to a series of High Court decisions where this approach has been taken: *Finnigan v Rugby Football Union Inc (No 2)*[1985] 2 NZLR 181 (HC) at 183; *DB Breweries Ltd v Lion Nathan Ltd* (2007) 12 TCLR 25 (HC) at [16]–[17]; *Meat Services Ltd v Moses* (1983) 1 TCLR 94 (HC) at 97; *Watson & Son Ltd v Active Manuka Honey Association Inc* HC Hamilton CIV-2008-419-1495, 30 July 2009 at [44]–[47] and [55].

go to a full trial. Therefore, should this conduct resume justice requires me to impose a mandatory injunction in this regard.

[50] In all other respects, the Sky's application for interim relief fails.

Costs

[51] I reserve costs. I would observe that it is my assessment at present that the conduct of Fairfax has been significantly modified by Sky bringing this application and the hearing of these proceedings. So that for me, a decision whether or not one party or the other obtains costs is likely to be complicated. I would suggest a solution is better negotiated between the parties. Of course, failing agreement an application for costs can be made to this Court by either party.