

Rugby World Cup: TV3 versus Sky – one-nil or a draw?

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September's Rugby World Cup court tiff – between TV3 and Sky TV – ironically had the boot on the other foot. In the game between Free to Air and Pay TV, who really won commercially: Free to Air, Pay TV or both?

The Court addressed copyright questions around whether Sky TV can run TV3 clips in news and sports shows, taken from TV3's exclusive (live and recorded) Rugby World Cup match broadcasts.

The problem applies to all the channels. TV3, TVNZ and Sky all want to be able to run short clips when another of them has the exclusive rights, such as for the Super 14 series (where Sky has exclusive rights and the FTA channels want to report on the games). Sports are a big part of commercial TV financial models. So this is a major issue for broadcasters.¹

The channels thrashed out a deal to resolve use of footage when another has exclusive rights. However, this agreement largely left in place existing copyright law on a key point: "reporting current events" does not infringe copyright if it amounts to "fair dealing".² The competing channel can show footage if it meets the Copyright Act's fair dealing exception.

Sky were running clips on various programmes, taken from TV3 World Cup match coverage. They were doing this at least every 25 minutes on six or seven channels including Free to Air channel, Prime. The Sky programmes ranged from normal news

bulletins, through to a 30-minute programme focusing on the World Cup, called "The Cup". Presented by former All Black, Ian Jones, it features expert analysis, interviews, and highlights from World Cup games, using TV3 footage.

The Judge decided³ that "The Cup" did not qualify as "reporting current events" as it was in the nature of a magazine programme rather than a hard news or sports news programme. At the other end of the spectrum, reporting in news and sports news programmes was allowable, so long as there was "fair dealing" (the other key limb of the Copyright Act provision).

The fair dealing requirement raises a key tension in relation to copyright. Copyright should protect owners and licensees of copyright, and provide a legal framework for investment. TV3 paid considerable sums for exclusive rights with a view to attracting advertising revenues and audiences. Those rights should be protected.

However, that needs to be balanced with the wider public interest, including free speech.

Central is whether a competitor, that did not pay for the rights, should be able to take advantage of those rights. If the market for the copyright holder's work (the Rugby World Cup broadcast rights in this instance) is affected, or there could be unfair competition

¹ Pay TV, for example, generally pivots its subscription funding model around sports coverage. But they tend to go for extended sports series rather than one-offs like the Rugby World Cup. So it's not surprising that Sky TV has the Super 14 rights but they didn't bid enough to win the one-off Rugby World Cup rights.

FTA, where it's commercially funded, relies on advertising. Sky gets its revenue predominantly from customer subscriptions. While the different funding models impact respective approaches, ultimately each platform will want to protect its expensive and exclusive rights to sports events. However, it will also want to be able to report on the events where another broadcaster has exclusive rights.

² Copyright Act 1994, section 42(2).

³ *Media Works and Another v Sky Television* (18 September 2007) CIV-404-5674, Winkelmann J.

with the copyright holder, the “fair dealing” requirement is less likely to be met.

No doubt aware of its own interest in broadcasting clips when Sky has exclusive rights, TV3 agreed that 2-minute clips from matches was acceptable: that’s more than courts have allowed elsewhere such as the UK.

TV3’s concern was about the large number of times the clips were played (at least every 25 minutes).

The judge concluded there was a strong case that:

- Sky couldn’t play the footage in magazine programmes such as “The Cup”; and
- there was too much repetition of the footage on the various Sky channels (including Prime).

This was an urgent interim injunction application, to restrain Sky from excessive use of the TV3 footage. So, it is not, theoretically at least, the final decision. Courts go through a process, when deciding whether to grant an interim injunction (pending trial), of weighing up a number of factors. Having decided there was a strong case, and considered the other factors, the Court granted an interim injunction

limiting Sky to using footage only in news and sports news programmes, and on a much reduced frequency.

It would be unusual for parties, in a case like this, to take further steps in the litigation.

There are plenty of tensions in broadcasting, such as between Sky and the emerging Freeview platform, regulatory review, potential competition law issues,¹ changing allegiances (such as the move several years back from TV3 doing delayed sports broadcasts toward Prime doing them), the impact of convergence between content and content delivery platforms, and so on.

This case plays out within that much wider commercial context. It is a rare example of where the issues get to court in New Zealand. All broadcasters stand to gain and lose from the decision. Whether the FTA broadcaster or the Pay TV broadcaster won or lost is not clear, against the broader background.

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