



[2016] JMCC Comm 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015CD00112

BETWEEN	TELEVISION JAMAICA LIMITED	CLAIMANT
AND	CVM TELEVISION LIMITED	DEFENDANT

IN OPEN COURT

Georgia Gibson Henlin QC and Kristen Fletcher instructed by Henlin Gibson Henlin for the claimant

Charles Piper QC and Petal Brown instructed by Charles E Piper and Associates for the defendant

June 20, 21, 22, 23, 24, 27, 30 and August 9, 2016

COPYRIGHT – EXCLUSIVE LICENCE GRANTED BY OWNER OF COPYRIGHT – DEFENDANT USING COPYRIGHT PROTECTED MATERIAL – DEFENDANT HAS NO LICENCE FROM OWNER OF COPYRIGHT OR LICENSEE - BREACH OF COPYRIGHT BY USING PROTECTED MATERIAL – DEFENCE OF FAIR DEALING – WHETHER DEFENCE OF FAIR DEALING APPLICABLE – ROLE OF NEWS ACCESS RULE DEVELOPED BY THE INTERNATIONAL OLYMPIC COMMITTEE – WHETHER THERE IS INTERNATIONAL STANDARD FOR USE OF COPYRIGHT PROTECTED MATERIAL IN NEWS PROGRAMMES – WHETHER THERE IS LOCAL STANDARD – SECTIONS 2, 6, 53 AND 54 OF COPYRIGHT ACT

SYKESJ

The proposition

- [1]** Television Jamaica Limited ('TVJ') is advancing a submission that in this court's view has the consequence of applying a standard said to be have been developed by the International Olympic Committee ('IOC') at the expense of legislation enacted by Jamaica's Parliament. TVJ wishes to this court to conclude that any breach of what has been called news access rules is necessarily a breach of the exclusive licence grant to Television Jamaica Limited ('TVJ'). According to TVJ, the copyright owner, the International Association of Athletics Federations ('IAAF'), acting through a company, Athletics Management & Services AG ('AMS'), granted an exclusive licence to TVJ by virtue of which TVJ would have the exclusive right to broadcast a number of sporting events including the 2015 World Athletic Champions ('WAC'). Under this licence, TVJ says, no other entity can use any of the material, regardless of quantity and quality of material used, covered by the licence unless those persons either act in accordance with the news access rules developed by the IOC or they have a licence granted to them either by TVJ or the owner of the copyright. This is the ultimate conclusion from the evidence given for TVJ by Mr Gary Allen, Managing Director of TVJ, and Mr Milton Walker, Group Head of News for the RJR Communications Group.
- [2]** In this case it is the evidence that no other entity in Jamaica had a licence from TVJ or from the copyright owner to use material from the 2015 WAC. Based on this reasoning TVJ urges that that any use by CVM Television Limited ('CVM') of the protected material necessarily means that CVM was in breach of TVJ's licence and consequently, TVJ's copyright in the broadcasts.
- [3]** This court does not accept this submission. It is overbroad and fails to recognise that Jamaica has in fact enacted the Jamaican Copyright Act which states in section 53 that no breach of the monopoly of copyright owners and licensees

once the statutory conditions are met. TVJ's view of the world in this regard belongs to an earlier era that Parliament has left behind. TVJ's proposition suggests that the 1911 Copyright Act of the UK that applied to Jamaica until the Jamaican Parliament enacted the new statute still applies.

[4] Based on this outdated view of the world of copyright, TVJ has launched a claim against CVM alleging that CVM is guilty of multiple and continuous breaches of TVJ's licence and copyright because CVM

(1) used copyright protected material during its flagship news programme, a nightly programme that airs at 8:00pm and repeated at 11:00pm;

(2) developed a programme called Return to Nest and used during that programme copyright protected material;

(3) used Facebook and Twitter to breach TVJ's licence and copyright by posting material from the 2015 WAC without permission and in breach of the new access rules.

[5] TVJ has succeeded in part of the claim and failed in others. Counsel for both sides assisted greatly by providing material which enabled the court to decide the issues. The court is grateful for the assistance.

[6] This judgment is quite long because it raises a number of issue of practice and interpretation of the law.

The context

[7] TVJ and CVM are competitors for the free-to-air television viewing audience in Jamaica. TVJ has a cable programme service. One way, they believe, each can attract more viewers than the other is by having exclusive licences for sporting events. In this case, TVJ says that it had, for last year 2015, and has for the coming years, the exclusive licence to broadcast the IAAF's WAC. The specific

championship that has given rise to this litigation is the WAC for 2015 that was held in Beijing, China at the Olympic stadium where the 2008 Olympics were

held. It will be recalled that the 2008 Olympic stadium was called the Bird's Nest and is located in Beijing China.

[8] In order to satisfy its viewing audience, both stations developed and promoted their own programme. TVJ called theirs Return to Beijing and CVM's was called Return to the Nest. TVJ built its promotional campaign on the central idea that it had an exclusive licence to broadcast the WAC live and there was no other legitimate source by which the Championships could be viewed. As shall be shown this was either a gross oversimplification or deliberately misleading because it was emphasized during cross examination that more than a year before the 2015 WAC, to TVJ's absolute and certain knowledge, the IAAF intended to stream the Championships live via the internet in order to enable the ordinary man and woman to view the event on any hardware that was available to them, whether, in the privacy of their homes or on their mobile devices.

[9] CVM, engaged in what is called in the broadcast industry in Jamaica counterprogramming. This counter-programming took the form of two one-hour segments per day. The hours were 8:00 am to 9:00 am and 9:00 pm to 10:00 p.m. on weekdays and 8:00 am to 9:00 a.m. and 7:00 pm to 8:00 pm on weekends. TVJ's schedule of broadcasts reveal that the live coverage of the morning sessions began at approximately 4:00am Jamaica time and ended at 8:00am to 8:30 am with a post-game show at 8:30am to 9:00am. The evening live sessions began at about 6:35pm and were preceded by a pre-game show. On some days, the live evening broadcast began at approximately 8:00pm and on others it began at approximately 7:30pm. The evening live broadcasts ended at varying times – 9:55pm, 10:20pm, 10:40pm, 11:30pm and 12:30am. CVM's morning programme was scheduled to coincide with the end of the morning session. In many instances CVM's evening programme ended well before the evening's live broadcast.

- [10] Mr Milton Walker testified on behalf of TVJ, described the programme in unflattering terms. For him it was a '*specially contrived programme*' while Mr Oral Buchanan, the Programmes and Production Manager for CVM, preferred more ameliorative language. He described the programme as '*an analytical review, reporting and discussion of the [IAAF] World Championships 2015 held in Beijing, China.*' Here lay the seeds of CVM's failure to succeed in its defence of fair dealing.
- [11] The expression used by Mr Walker to describe the programme was not accidental because for him there were practical consequences. One of those being that it was not a regularly scheduled news programme and therefore the IOC's NAR could not apply to it and therefore it had no lawful justification for using TVJ's copyright protected material during the programme.
- [12] For TVJ its case rests on the combined effect of the licence and the IOC's News Access Rules ('NAR' or 'IOC's NAR'). The court will speak to the licence first and then the IOC's NAR, and hopefully the basis of TVJ's case will be understood.

The licence

- [13] The IAAF was and still is the owner of the copyright for the 2015 WAC. The 2015 WAC was held between August 22 and 30, 2015. According to TVJ the event is the entire broadcast as well as the individual events that make up the entire Championship. The effect of this from TVJ's point of view was that under its licence, the rights granted covered not only the entire broadcast of the event but also each specific event with the broadcast. For example, each race in each round of the 100m is a work. The fact that the WAC was broadcast in two sessions, morning and evening, with each session comprising several individual events did not mean that each specific event was not a separate work.
- [14] As noted earlier AMS granted a licence to TVJ to broadcast the Championships in Jamaica. No licence was granted to CVM or to any other broadcasting entity of

any description in Jamaica; the licence was therefore exclusive in that sense but it was not absolute. The rights licensed to TVJ were called designated rights. It is appropriate to point that in Jamaica there are statutory defences to what would otherwise be a breach of copyright. It is not just section 53 that creates the defence of fair dealing. Section 66 bars any claim for breach of copyright where anything was done for the purpose of Parliamentary or judicial proceedings and for the purpose of reporting those proceedings. Section 116 also creates a defence of fair dealing in respect of performances. There is also the defence under section 117 of incidental inclusion. Thus it can be seen that to make a claim of absolute rights is somewhat extreme.

- [15] The designated rights 'cover free terrestrial transmission; pay terrestrial transmission; free satellite transmission; free cable transmission; pay cable transmission; and internet transmission.'
- [16] According to Mr Gary Allen, Managing Directors of TVJ, under the exclusive licence, had *'the exclusive and delayed free-to-air broadcasting rights, exclusive cable rights for thirty (30) days and the non-exclusive internet and radio broadcasting rights for the English speaking Caribbean, including Jamaica.'*
- [17] Mr Allen also stated that *'by virtue of the exclusive rights over the English speaking Caribbean region, any entity wishing to broadcast clips from the championships could apply to the claimant for clip rights.'*
- [18] Mr Allen states that as exclusive licensee TVJ had quite extensive rights. TVJ was *'the only person authorised to transmit or broadcast the copyright works to the public in Jamaica in accordance with its licence, and copyrights (sic) subsist in the said works in Jamaica'* and *'copyright material includes all broadcasts, artistic works, sound recordings, musical works, cable programmes, moving images, film and audio associated with the event.'* The copyright covers *'the highlights of the programme of each day either in its entirety or each day as produced by or on behalf of the host broadcaster (China TV).'* *'The material*

includes a basic feed which means an international quality video and audio signal of the event(s) to be produced by China TV, incorporating the live and continuous images with international ambient sound and effects, slow motion replays, customary identifications and graphics to the type determined by the licensor including, without limitation, those relating to official computer timing and replay, sponsors and all recordings of such signals.' The licence permitted TVJ the right *'to transmit the material via media (Designated Rights) defined in the agreement, live, delayed, in whole and in part.'* For good measure, he added that *'media includes the internet.'*

[19] As can be seen the terms of the licence were quite comprehensive. Based on TVJ's understanding, Mr Allen told the court that *'[w]here entities require access to content in the form of clips or portions of the events for news purposes, this is governed by Clip Rights, which involve the use of clips in established editorial news, and News Access provisions for copyrighted events. The international bench mark for arrangements of this nature balances the licences contracted for with a broadcaster against the right of the public to receive news content from the event. The rights holder and the licensee usually provide authorisation for such access arrangements.'*

[20] Mr Allen made the claim that because of CVM's alleged breaches at least one major sponsor, Digicel, *'expressed concern that what had been sold to it as a sponsor of our coverage was not being delivered as CVM was also airing events from the Championships. Representatives of other clients including National Commercial Bank were also in contact with the claimant about what was happening.'* Cross examination by Mr Piper QC revealed that no sponsor or advertiser cancelled their contract with TVJ because of the alleged breach of TVJ's rights.

[21] According to Mr Allen, CVM's showing of some events from the Championships *'has implications for [TVJ] to market the remaining event being the 2017 World Championships as it has already created confusion going forward as to whether*

or not the claimant can actually carry through on an offer of exclusivity. The product is undervalued and there is damage to the claimant when something like this happens as it is seen as being unable to follow through on its promise of exclusivity to sponsors.'

[22] Mr Allen held the view that CVM *'has no ownership of or authority to copy, transmit, broadcast or otherwise deal with the copyright works comprising broadcasts, artistic works, sound recordings, musical works, cable programme, film, free terrestrial transmission; pay terrestrial transmission; free satellite transmission; free cable transmission; pay cable transmission and internet transmission and, by its delayed simulcast transmission and/or the transmission of same or use of the images and sound recordings or material in whatever form, including on the internet, it has infringed on the copyrights in the said works in Jamaica.'* Clearly, Mr Allen, while not a lawyer, does not take the view that section 53 of the Copyright Act is of any moment.

[23] Mr Piper has not taken issue with any of this except to say, and this court agrees, that the breadth of TVJ's claim has been pushed back by section 53. He took his stand on sections 53 and 54 of the Jamaican Copyright Act. Section 53, summarised at this point, states that no breach of copyright occurs if the defendants dealt fairly with the work for the purposes of 'criticism or review' of the work or another work.

[24] Mr Piper stressed in cross examination an important amendment to the licence. It is important to set out the relevant document in full. It is a letter from May 18, 2014. It is entitled IAAF World Athletics Series 2014-2017: IAAF Websites and it was addressed to TVJ. It reads:

Further to the agreement between [AMS] and [TVJ] concerning the grant of certain pan-Caribbean broadcast rights in relation to the IAAF World Athletics Series 2014-2017 dated July 8, 2013 ... the parties would now like to amend the terms of the Agreement.

The Agreement shall be amended, subject to your agreement, as of the date of acknowledgement of this letter as follows:

(a) Clause 10.2 shall be deleted in its entirety and replaced with the following words:

“The Licensee acknowledges that notwithstanding such exclusivity, the IAAF shall be entitled to use the Materials in any manner whatsoever on its Internet (sic) websites at www.iaaf.org, www.worldroadrunning.com and www.spikesmag.org and other official websites including social media pages controlled by the IAAF (including but not limited to YouTube) (the “IAAF Websites”), including during the Licensed Period within the Licensed Territory and in the Licensed Language (sic).

Subject to the foregoing provisions of this letter of amendment, all the terms and conditions of the Agreement remain unaffected and shall remain in full force and effect.

The interpretation, construction and effect of this letter of amendment shall be governed in all respects by the laws of Switzerland.

[25] The original clause 10.2 read:

The Licensee acknowledges that notwithstanding such exclusivity, the IAAF shall be entitled to use the Materials in any manner whatsoever on its Internet website, including during the Licensed Period within the Licensed Territory and in the Licensed Language.

[26] It is this letter that enabled the court to say earlier that to TVJ’s certain knowledge it was not going to be the only legitimate source in Jamaica for seeing the Championships but listening to and reading TVJ’s promotional material the viewer and listener would be left with a different impression.

[27] It is now common ground that the IAAF made the Championships available to wider public. This means that persons in Jamaica did not have to tune in to either TVJ or CVM to view the event.

[28] Ms Samarasinhe, General Counsel, for AMS said that the amendment did not mean that TVJ's exclusive licence was put at nought. It was simply a decision to give members of the public greater access to the event. According to her it was to promote the sport of athletics. Ms Samarasinhe's witness statement was put in by agreement because she was not available to testify either in person or video link.

[29] Ms Samarasinhe also said in her witness statement that the licensor retained the right to three minutes of footage via the internet and mobile communications. According to her this right is limited to excerpts of footage *'and is only permitted after the conclusion of the relevant competition session from which the excerpts originate to afford protection to the licensees who have been granted the right to broadcast our events live.'* This led her to conclude that *'any third party entity who wishes to obtain rights in relation to exploitation of these excerpts must enter into a licence agreement directly with AMS and pay the associate licence fee.'* This evidence was used to advance TVJ's case theory. The court, of course, cannot say to Ms Samarasinhe that she and her company cannot enter into contracts with Jamaican media houses but this court is required to interpret and apply Jamaican law and this vision of the world as advanced by Ms Samarasinhe does not take account, and perhaps it realistically could not, of section 53 of the Jamaican Copyright Act which immunises from liability conduct which but for this provision would have given rise to liability in the infringer. The effect, therefore of section 53 is that no Jamaican entity or entity operating in Jamaica, is required to have any licence from anyone if they are acting in accordance with section 53. Indeed as Ms Samarasinhe herself acknowledge, *'AMS' position in relation to news access agreements is not based on any local laws per se, but it reflects the standard to enable our events to be reported more widely without infringing upon the exclusivity of our exclusive rights holders.'*

[30] TVJ outlined the arrangements that must be made in order to receive the signals for broadcast. By all accounts it is a significant undertaking in terms of time, talent and treasure. To that we now turn.

The business model

[31] TVJ's evidence is that once the licence is acquired, TVJ has to make the technical arrangements at its own cost for the audio-visual feeds from the location of the event to the broadcaster's location. In other words securing a licence is not even half of the story important though it is. The licensee must then arrange for (meaning pay) for the signals to come from China to TVJ's facilities in Jamaica. The signal is like a product being taken from one point to another. In so doing the signal may come through multiple entities before TVJ can get it onto its location. In this case, TVJ had to pay the European Broadcasting Union to transmit the signals from Beijing to Jamaica. All this has to be negotiated and paid for before any of the programme can be broadcast by any means by TVJ.

[32] As should be obvious, this is quite a costly thing. In order to recover its expenditure and also make a profit, TVJ has to secure sponsorship and advertisement. One of the things that makes this kind of event attractive to sponsors and advertisers is the ability to say to them that this product is exclusive to TVJ. The idea being that because the WAC has such a fanatical following in Jamaica, any broadcaster who secures the exclusive licence has potentially an attractive product that can be used to entice (or I should say interest) commercial entities to purchase slots during the exclusive broadcast in order to advertise their goods and services.

[33] Mention has been made of sponsors and advertisers. Is there a distinction? Yes there is. The sponsor is the mega advertiser. The sponsor is the crown jewel in the broadcaster's crown. The advertiser is, well just that an advertiser. Every sponsor is an advertiser but not all advertisers are sponsors. Not very helpful but this example should help. The sponsor is the big spender. The sponsor is offered

a package in exchange for a huge sum of money. It is usually a large company with a significant advertising budget. What does the sponsor get in exchange for its mega dollars? Its banner and logo are displayed in studio. Its name, product and tagline are splashed across the screen at the beginning and end of each broadcasting session and at each break within the session. For example, a broadcast session may last three hours. At the beginning and end of each session the name, product and tagline are transmitted. Within each session there are breaks for advertising. It often happens that just before the break and just on the resumption, the sponsor is announced and its product seen. There is virtually no limit to this. All this is part of package that the sponsor pays for once. On the

other hand the advertiser who is not of sponsor status has to pay for each broadcast of its goods and services. He purchases specific times both in terms of the length of the advertisement and the time slot. He gets no banners and the like.

[34] This whole business has become so refined that the exclusive licensee can sell different ways of advertising. In some instances the advertiser gets an advertisement crawl (shortened to ad crawl) which is the scrolling at the bottom of the screen. He may get a logo display. He may purchase a ten second spot. The broadcaster is able to sell specific time slots. The only limit is the imagination of the broadcaster and the pocket of the sponsor/advertiser. For example, the thirty second time slot before the men's 100m final can be broken down into three ten-second slots with the ten-second slot immediately preceding the race being more expensive than the first ten-second slot of the thirty second counting down to the race. An advertising scroll (that line that runs from right to left at the bottom of the screen) is costed differently from a ten-second advertisement just before the event. Thus in a thirty-second time frame it is possible to have a scroll, a logo display and a regular advertisement. Time is quite literally money.

[35] TVJ says that all of this potential revenue stream is at risk if infringers are not kept at bay. It is also the case that if the licensee such as TVJ does not

demonstrate that it is prepared to take action against infringers the owner of the copyright may not take too kindly to this state of affairs and will have it in mind in any future negotiations. Potential sponsors and advertisers may take a jaundiced view of the broadcaster who is not seen to be vigorously fending off infringers. Unless the copyright is protected the investment in the exclusive licence and the subsequent broadcast may result in huge and potentially catastrophic losses to both broadcaster and sponsor/advertiser.

[36] Let us now go to the news access rules.

The influence of the International Olympic Committee ('IOC')

[37] The following is the argument advanced by TVJ through its counsel, Mrs Georgia Gibson Henlin QC. The IOC's NAR has become, without any deliberate and conscious decision on the part of anyone, the standard for indicating what television broadcasters who don't have any licence of any kind can do. The court was told that for over 100 years the IOC has been the organiser of the multisport event known as the Olympic Games. As the event has grown in scope, size and number of athletes the IOC has developed its own standards for permitting access of its events. The IOC developed NAR.

[38] These NAR have become the de facto standard across the globe when considering what news organisations may do when covering sporting events. The argument is that the basic framework has remained unchanged for more than two decades. The adjustments that have taken place were primarily to take account of technological developments whether in television, radio or social media in more recent times.

[39] The evidence was that the IOC acquired this influence because the Olympic movement is made up of nation states and each nation state has an Olympic body that represents that country, for example, the Jamaican Olympic Committee. The Olympic Games is a multisport event and each sport has its own

global body that has responsibility for managing the sport. For example, cycling has the International Cycling Federation, track and field has the IAAF and so on. The impact of this was that whenever each sport was having its own championship outside of the Olympic Games, it would consult the IOC's NAR when developing its NAR for its competition. The individual sporting bodies can make up their own rules or modify the IOC's NAR but that does not negate the point that these bodies do consult the IOC's NAR and in some instances simply adopt them without any modification whatsoever. In those cases where the sporting body did not issue any NAR then it was said that all persons in the broadcast industry would know that the IOC's NAR were the default rules that would be applied. Nothing need to be said expressly. It was simply understood to be the case.

[40] There was evidence that the IOC put out NAR about twelve to eighteen months before the Olympic Games. For example, the NAR for the 2012 London Games were published one year before those games. The document actually says that the rules applied between July 27 and August 12, 2012, that is the duration of the games. The influence of the IOC's NAR was such that if an international sporting body was putting on some major event after the publication of the rules and before the relevant games, it would refer to those IOC NAR for guidance on news access. It may even adopt them in full even though the Olympic Games were months away.

[41] TVJ made mention in its evidence of a three two three or 3-2-3 formula (written 3x2x3) which comes from the IOC's NAR. It means that copyrighted material from the Olympic Games can only be used in three news programmes per day; a maximum of two minutes per news programme and each news programme must be separated by a minimum of three hours between each broadcast. In addition, the IOC's NAR, at least for the 2012 London Olympic Games states that *'[n]o more than one third of any individual event may be used in any one news programs (sic) or 30 seconds, whichever is the lesser time. However, if the*

duration of an individual Olympic event is less than 15 seconds the whole of the event can be shown in a news programme.'

[42] There was evidence indicating that the 3x2x3 formula has been around for some time (Aaron Wise and Bruce Meyer, ***International Sports Law and Business***, Vol 3 (1997) (Kluwer Law International, p 1850). The court will now quote extensively from the text of Messieurs Wise and Meyer. Clauses 1 - 6 are set out below in order to give a flavour of what Television News Access Rules ('TNAR') were like at the time the book was published.

1. *The Olympic Material may be used only as part of regularly scheduled daily news programs, of which the actual new element constitutes the main feature and, in addition, which shall not be positioned or promoted as Olympic programming ("Programs") (sic).*
2. *Subject to the exception for all-news networks as outlined below, the Olympic Material may appear in no more than three Programs (sic) per day.*
3. *The amount of Olympic Material used in any one Program (sic) cannot exceed a total of two minutes. Furthermore, the duration of Olympic Material of any sports competition contained in a Program (sic) shall not exceed one third of the duration of the particular sports competition being reported. (For example, if there is a news report on the 100 meter final, which was run in 9.9 seconds the duration of such race contained in the news coverage shall not exceed 3.3 seconds).*
4. *The Programs (sic) in which the excerpts of Olympic Material appear must be separated by at least three hours. However, if the broadcaster telecasts multiple hard news Programs (sic) from 16:00 hours to 19:30 hours (hard news referring to Programs (sic) focusing primarily on multiple local, regional, national or international current events), it may air reports utilising excerpts of Olympic Material during one locally orientated hard news Program (sic) and also during one network hard new Program (sic) during this time period, so long as the combined time of Olympic Material shown in both*

Programs (sic) does not exceed a total of two minutes. In the case of an all-news network, it may utilise Olympic Material during multiple news broadcasts, as long as the combined time of Olympic Material shown does not exceed a total of six minutes per day and does not exceed a total of two minutes in any one Program (sic).

5. Non-Rights Holders may broadcast Olympic Material, in accordance with the foregoing limitations, beginning eighteen (18) hours after the event or activity takes place, or at such earlier time as may be agreed by the Rights Holder for its particular territory, and ending not later than forty-eight hours thereafter.

[43] The text was printed in 1997 but from this early time there is the three Programs (sic) per day, not exceeding two minutes and at least three hours apart. Here we see the three two three formulation. This may not be the first time it is appearing but what is clear is that from at least 1997 the 3x2x3 formulation was in the IOC's TNARs.

[44] Before going on the court should point out that the IOC's TNAR exhibited in the text of Messieurs Wise and Meyer has a preamble stating that the IOC is the exclusive rights holder of the games and whenever it grants exclusive rights to an organisation in a particular territory 'no other organisation may broadcast images of any Olympic Games events ... beyond that which is allowable under the television and film news access rules listed below.'

[45] The London 2012 NAR has in substance the same thing. Without repeating verbatim the TNAR, they state that Olympic Material may appear in no more than three news programmes per day, no more than two minutes of Olympic Material in any one news programme and the news programmes must be separated by a period of at least three hours.

[46] By the time the London 2012 Olympics came round much work had gone into the NARs. It appears to be a far more refined document. It had TNAR separate from Radio News Access Rules ('RNAR').

[47] The 2016 Rio IOC NAR under the TNAR repeats the 3x2x3 formula. It explicitly states that the broadcast of Olympic Material shall be restricted to news programmes and that news programmes shall not be positioned or promoted as Olympic or Games programme and the material cannot be used in any promotion for any news programme or any other programme whatsoever. It states that non-rights holders may use a maximum of 6 minutes of Olympic material in accordance with all other provisions of the NAR

[48] The 2012 London IOC's NAR defined news programme as:

Regularly schedule daily news programs (sic) of which the actual news element constitutes the main feature and which, for the avoidance of doubt, does not include news updates.

[49] The 2016 Rio IOC NAR defines news programme as:

regularly scheduled Television or radio news programming/bulletins of which the actual local, regional, national or international new elements constitutes the main features(s) of such programming/bulletin and which, for the avoidance of doubt, does not include news updates.

[50] The Rio NAR defines news agency. It is

A bona fide news media organisation whose primary business is the reporting and syndicating of news.

[51] What is news? It is not defined in the NAR. According to the Concise Oxford English Dictionary (12th ed) news is newly received or noteworthy information about recent events. The adjectival phrase 'regularly scheduled' in the IOC's NAR cuts down the ambit of what could be considered news programmes under the IOC's NARs.

[52] The purpose of these definitions is to restrict the ability of non-rights holders to utilise material from the Olympic Games or as in this case the 2015 WAC.

[53] The argument is that although the 2016 Rio Olympic Games were over a year away from the issuing of the rules, the broadcasters of the world and sporting bodies would now look to these rules instead of the London rules for guidance. Thus any event taking place after May 2015 would now use the 2016 Rio rules as the base line. The sporting bodies are free to develop their own rules but more often than not they would be guided by the extant IOC NAR. From this, the argument came that the 2015 WAC were covered by 2016 Rio rules although issued in May 2015 because the Championships were taking place (August 2015) after the issuing of the 2016 Rio rules. The evidence is that the IAAF did not issue any NAR for the 2015 WAC and therefore the 2016 IOC NAR were the default rules. The purpose of issuing the rules so long in advance is to allow broadcasters and others to become familiar with them and plan accordingly. For the purposes of this case and the allegation of breach of TVJ's rights, it is the Rio rules that are in focus.

Were these rules used in Jamaica by CVM and TVJ?

[54] The evidence from Mr Milton Walke is that the IOC's NAR is like the Bible of the sports broadcasting world. Mr Gary Allen testified that CVM had the exclusive licence for the London 2012 Olympics. Mr Allen also stated that CVM had the exclusive rights for the 2010 and 2014 FIFA World Cups and this made it necessary for TVJ to apply for a clip rights licence in order to show clips from the various games of those World Cups. The import of this evidence was to make the point that it is difficult for CVM to contend that it was not aware of the existence of the IOC's NAR and that those NAR were the standard used in sports broadcasting.

[55] Mr Milton Walker stated that he was once employed by CVM. He said he was there for 13½ years. According to him CVM was part of the Caribbean Broadcasting Union ('CBU') where these sorts of things are discussed. He testified that while he was at CVM the station observed the IOC's NAR.

[56] Mr Gary Allen also testified that he had been involved in negotiating rights to broadcast the Olympic Games since 1996. He did it in 1996, 2004 and 2008 for the entire Caribbean. He found that in the last fifteen years or so, the most substantial changes are that the NAR recognise social media. He was very insistent that the IOC's NAR are the standard not only because the Olympic Games event is the single largest global multisport event (26 in London and 28 in Rio) but it would not be practical to have NAR for each sporting discipline. He even went further to say that generally each sporting body mirrors the IOC's NAR. Mr Allen added that he was involved in broadcasting rights with International Cricket Council in 1998, the Pan-American Games and Commonwealth Games and all those bodies, more or less, follow the IOC's NAR.

[57] Miss Shamena Khan, Chief Executive Officer of CVM, states that she has never seen any written standards applicable to Jamaica or indeed anywhere. She said that she has been told of global NARs but she has never seen them. She did not accept that the IOC's NARs apply to television broadcast as the industry standard at least in Jamaica for non-Olympic events. Mrs Khan seems to be saying that there has not been any formal adoption of these NAR as the standard for Jamaica. There is nothing in writing between TVJ and CVM or from the regulator the Broadcasting Commission on this.

[58] Miss Khan said that she is aware of a framework that 'speaks to the use of content within a certain timeframe usually three minutes for newscast.' She stated that they all work within the Copyright Act. When she was asked what was it that governed the framework of three minutes per newscast? Her answer was the 'supposed global access news rules.' This was the exchange between Mrs Gibson Henlin QC and Mrs Khan:

Q What do you say are the industry standards for news access?

A I am aware that the industry works has a framework that speaks to the use of content within a certain timeframe usually 3 minutes for newscast and we all work within the Copyright Act.

Q What governs that framework of which you speak in relation to the 3 minutes per newscast?

A It is this supposed Global Access News Rules.

Q And that is what CVM relies on?

A Correct.

Q So when you look at your witness statement at page 58, paragraph 9.

A Yes, ma'am.

Q So when you say that you are satisfied that the uses of clips were authorized by law and were used in accordance with the industry standards for News Access, which industry standards are you referring to?

A I am referring to Global Industry Standards that all reporters seem to work with.

Q Okay.

A And that we have adopted.

Q And would you agree with me that that industry standard is 3, that the material can be used in 3 newscast per day up to 2 minutes of material 3 hours apart?

A My understanding is that it is 3 minutes per reporting.

Q 3 minutes per each event. And in relation to your understanding, is that in regularly scheduled news programmes only?

A Regularly scheduled news programmes and current affairs.

Q So in relation to Return to the Nest, is it regularly scheduled news programmes or current affairs?

A It is classified as current affairs, it speaks to event that were happening.

Q It is?

A It was a programme created to discuss the events that were occurring in the IAA.

Q I am going -- so the industry standards of which you speak at paragraph 9, you are saying you have never seen them but you are aware that CVM abides by them?

A We adopted it, yes.

Q So could it be that those industry standards that CVM abides by, could it be that they are modelled or guided by the International Olympic Committee News Access Rules?

A I believe it is influenced by any News Access Rules and News Access Rules per events are very similar.

Q So that if it were the IOC News Access Rules, you would say that there is not much variation between the news access rules and any other news access rules, for example, an IAAF is similar?

A They are similar and they are all subject to the country's law or laws.

[59] When pressed further, Miss Khan was reluctant to accept that the IOC's NAR was the standard. She was prepared to accept that the NAR for the London 2012 Olympics were the standard for those games but not the baseline standard generally for all sporting events. She insisted that the global standards was a combination of NAR of other sporting bodies and the IOC's NAR were just one of them. She insisted that it was three minutes per programme was the industry standard.

[60] From the cross examination of Miss Khan by Mrs Gibson-Henlin, Mrs Khan eventually agreed that there was a global NAR although she has never seen them. The only difference it would appear between Mrs Gibson-Henlin and Miss Khan was that Mrs Gibson-Henlin was saying it was two minutes per broadcasts, three time per day and at least three hours apart whereas Mrs Khan was saying it was three minutes. The evidence from TVJ has provided a clearer account of the origin of the three two three principle and TVJ has explained how that

principle came to be the industry standard globally and locally as between television broadcasters. CVM did not offer any competing version of events. Mr Delapenha said he was of the view that it was four minutes. This means that the CVM was not clear on whether it was three or four minutes. CVM said that it had no idea where the principle came from.

[61] Mr Richard Delapenha said that he understood that the standard was four minutes per broadcast. He got this understanding from his experience with Reggae Sumfest, an annual music festival in Jamaica. Mr Delapenha gave the rather surprising answer that until this case he has never heard of the IOC's NAR despite being in the industry for at least nine years. When the specific question was put to him that the industry standards were those of the IOC the effect of his answer was that he did not know but it was possible. He indicated that he had never been to any forum or conference where NAR were discussed. He came by his four minutes by working in the industry.

[62] There is also the evidence of Mr Oral Buchanan whose witness statement was admitted by agreement. Mr Buchanan did not testify in court but the rules of litigation make provision for his statement to be admitted into evidence. He said at paragraph 5:

... The accepted television industry standard for the use of copyright material for which one television station has an exclusive licence in the International Olympic Committee's ("IOC") News Access Rules. While these rules were specifically created for the Olympic Games, it has remained the accepted standard in nonOlympic events. The IOC News Access Rules as it relates to television broadcasts dictate that a maximum of three minutes of the copyrighted material can be used in a programme by the nonrights holder for a total of six minutes of footage in one day. It also provides that where a race is 15 seconds or less the entire race can be shown. However, for longer races a maximum of one-third of that race can be shown provided that this duration does not exceed 30 seconds of the race.

[63] And at paragraph 6 Mr Buchanan says:

To ensure that the rules were complied with, I created a reportage to cover several completed events in a short clip. This was achieved by the significant use of graphics and pictures as well as the use of clips of similar but older events from former games.

- [64] The court can appreciate Mrs Khan's reticence about agreeing that the IOC's NAR is the ultimate standard since it could be that she feared that if she agreed that would lead to liability on the part of CVM. She referred to the Copyright Act and said that her company operated within the statute.
- [65] What this court will say and it puts it no higher than this is that IOC's NAR are at best guidelines but do not have the force of law in Jamaica. If a broadcaster breaches those guidelines it would not be accurate to say that such a breach necessarily and inevitably leads to a breach of an exclusive licensee's licence and breach of the Jamaican Copyright Act. It all depends on the facts and circumstances.
- [66] The court will have regard to the practice of both broadcasters but their practice cannot dictate the proper interpretation and application of the law. Mrs Gibson Henlin suggested that the court should have regard for any standard the parties considered themselves bound or constrained by since the statute does not give any formula for assessment of fair dealing.

The law

- [67] The review of the law will be conducted in two parts. The first part will deal with the statutory provisions. Definitions will be set out and other important provisions will be dealt with. Most important for present purpose is the concept of fair dealing. The statutory provisions of this defence will be stated and then the case law will be examined.

The statute

- [68] It is important to set out some definitions from the Jamaican Copyright Act.

Copyright means copyright conferred by Part II of this Act.

Cable programme means any item included in a cable programme service, and any reference in this Act-

(a) to the inclusion of a cable programme or work in a cable programme service is a reference to its transmission as part of the service; and

(b) to the person including it is a reference to the person providing the service.

Cable programme service means a service which consists wholly or mainly in sending visual images, sounds or other information by means of telecommunications system, otherwise than by wireless telegraphy, for reception –

(a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users); or

(b) for presentation to members of the public,

and which is not, or to the extent that it is not, excepted by regulations made under this Act.

A broadcast means a transmission by wireless telegraphy of visual images, sounds or other information which

(a) having regard to section 4, is capable of being lawfully received by members of the public; or

(b) is transmitted for presentation to member of the public.

To broadcast means to transmit by wireless telegraphy visual images or sounds, or both, for reception by the public notwithstanding that

(a) subsequent to the initial transmission, but before the reception by the public, the images or sounds may be carried on a path provided by a material substance;

(b) the public receiving or capable of receiving the images or sounds is in a country other than that from which the original transmission took place; or

(c) no member of the public actually received the images or sounds, provided only that members of the public could, if in possession of suitable apparatus, receive them

and broadcasting and rebroadcasting have corresponding meanings.

Exclusive licence means a licence in writing signed by or on behalf of the owner of the copyright in a work authorising the licensee, to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable by the owner of the copyright.

Film means a recording on any medium form which a moving image may be by any means produced.

- [69] In this case there was not much argument on what constituted 'a work' for the purposes of the case. Was it the entire broadcast? Could 'work' be broken down to individual events such as the heats in sprint events? The court will assume, without deciding, that both questions are answered in the affirmative since the case seems to have been conducted on the basis that both questions are answered in the affirmative.
- [70] There was evidence that the broadcasts from Beijing had a morning and evening session of varying lengths. Each session, morning or evening, was a work and each event within the session was a work. This means that the entire session whether comprised of individual events such as heats, or interviews of athletes, the crowd doing the Mexican wave, a medal presentation, anything that happened during the broadcast - from an ant crawling on the ground to a dramatic finish of track event - is covered by the exclusive licence.
- [71] Thus under Jamaican law, TVJ had copyright in Jamaica, by virtue of the exclusive licence and the statute, to 'sound recordings, films, broadcasts or cable programme' of the 2015 World Championship (section 6 (1) (b)). TVJ necessarily had the right to copy the work, to issue copies of the work to the public, to play or show to the public the sound recording, film or broadcast, to broadcast the work

or include it in a cable programme service (section 9 (1)). Under section 9 (2) 'the doing of any act in relation to any work means the doing of the act (a) in relation to the whole or any substantial part of the work; and (b) either directly or indirectly'. It matters not 'whether any intervening act themselves infringe copyright' (section 9 (2)).

[72] TVJ operates free-to-air transmission and a cable service in respect of its sports channel. The licence permitted TVJ to broadcast (see definition of broadcast) and transmit by its cable service (see definition of cable programme service).

[73] It follows from this that it is no defence to say that the infringement did not actually involve taking, in this case, the live or delayed TVJ broadcast. In other words, the infringer cannot say in defence, 'I got the material from somewhere

else and not from TVJ's actual broadcasts. I did not intercept any broadcast signals intended for TVJ or neither did I feed into TVJ's broadcast after it received the broadcast signals.' Once a person, natural or otherwise, has an exclusive licence then no other person, natural or otherwise, can do any of the acts the exclusive licensee can do by accessing the exclusively licenced material from some other source unless there is a legal exemption or lawful excuse. This takes us to sections 53 and 54. But before that something must be said about the source of CVM's broadcast.

[74] Mr Oral Buchanan explained that he was one of the persons assigned 'to spearhead the production of CVM's sports feature on the [2015 WAC] in Beijing.' According to Mr Buchanan he monitored the WAC on the IAAF's website and the IAAF live YouTube.com stream. He downloaded and compiled footage of the daily sessions from the live stream. He also stated that there was significant amount of footage of the WAC available to the general public via the live stream. He stated as follows at paragraph 4:

Except for the clips obtained from the [BBC] website, the IAAF Youtube live stream was my only source for the clips of the World

Championships 2015. None of the clips were (sic) obtained from a live satellite feed or otherwise.

[75] At paragraph 6 he states:

The footage of the World Championships 2015 was accessed by me from the IAAF YouTube Live Stream. These footage were available for viewing by the general public and I was not required to pay a subscription fee or create any special online user account. I was able to access the footage and download the content free of charge using the online website KeeVid.com. No special device or access privilege was necessary.

[76] From his witness statement the court understood that he used this information to, as he put in in paragraph 3:

*...update the Presenter (sic) and guests analysts on the results,
...write and edit stories on each day's sessions...*

[77] Mr Buchanan explained CVM's position quite well at paragraph 7:

To create a complete, informative and captivating reportage of the completed events and to ensure that the duration of the reportage is within the accepted television industry limits for use by CVM as a non-rights holder, the footage was edited for time, written and voiced-over and merged with older videos and still images. Because the clips were not sourced from [TVJ], the local rights holder, it was not necessary to give any credit mention to TVJ. However, it was imperative that credit was given to the source and rights holder which was the IAAF through its YouTube Live stream. This was done throughout the feature. At no time was any event shown live.

[78] So there it is. CVM utilised the IAAF's live stream for its broadcasts. Now to sections 53 and 54.

Sections 53 and 54 of the Jamaican Copyright Act

[79] Section 53 reads as follows:

(1) *Subject to section 54-*

(a) ***fair dealing*** with a protected work for the purposes of criticism or review of that or another's work or of a performance of a work; and

(b) ***fair dealing*** with a protected work (other than a photograph) for the purpose of reporting current events,

does not infringe copyright in the work so long as it is accompanied by a sufficient acknowledgment.

(2) *No acknowledgment is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme. (Emphasis added)*

[80] Section 54 states:

For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including-

(a) *the nature of the work in question;*

(b) *the extent and substantiality of that part of the work affected by the act in relation to the whole of the work;*

(c) *the purpose and character of the use; and*

(d) *the effect of the act upon the potential market for, or the commercial value of the work.*

[81] Section 52 speaks to fair dealing for the purpose of research or private study. That does not arise in this case.

[82] Section 53 states that fair dealing for the purpose of reporting current events does not breach copyright provided that there is a sufficient acknowledgment. However, where the reporting of current events by means of a sound recording, film, broadcast or cable programme, no acknowledgment is required. It seems that section 53 makes a distinction between 'reporting current events by means

of a sound recording, film, broadcast or cable programme' on the one hand and reporting current events by other media, on the other. It appears that the acknowledgement is only required in respect of the other media such as news papers. Section 54 indicates some of the factors to be taken into account when deciding whether the dealing was fair.

- [83]** Sections 53 and 54 occur in Part VI of the statute entitled 'Exceptions to Infringement of Copyright.' What this means is that in some instances had it not been for these provisions then what the alleged infringer did would have been an infringement of the copyright holder's rights. Section 53 refers to protected work. This takes us back to section 2 (1) for another definition. There is 'work' and there is protected work. Both expressions are defined as follows:

Work means –

(a) ...

(b) a sound recording, film, broadcast or cable programme

(c) ... and accordingly "protected work" means a work of any such categories in which copyright subsists by virtue of this Act.

- [84]** This means that the section 53 defence does not arise unless the work is protected for the simple reason that if it is not protected by copyright there can be no breach of copyright. The court has already indicated that it will assume that the work comprises each session and the individual events in each session. Based on this assumption each race was a protected work. It is therefore no defence to say that only one race of the round was shown in breach of the exclusive licence.

- [85]** At this point there is convergence between TVJ and CVM on the following matters:

(1) both agree that the work, however made up, was subject to copyright protection and one of the holders of that copyright for the purposes of this case was TVJ;

(2) as a protected work then the fair dealing defences can apply;

(3) the 2015 WAC was a current event.

[86] Section 53 (1) (a) does not apply because CVM was not critiquing the work of TVJ or TVJ's broadcast. TVJ's work of broadcasting was not being reviewed and no pronouncement was being made on the actual performance of TVJ as a broadcaster. The concept of fair dealing is not new to copyright law. What is new is its application to 'reporting current events.' Cases on this fair dealing in this context are very few. Surprisingly, there are very, very few reported cases in the United Kingdom. It is appropriate to see how the concept of fair dealing has been interpreted in decided cases.

The case law

[87] Section 53 of the Jamaican Copyright Act was copied substantially from the English Copyright, Designs and Patents Act, 1988, section 30 (2) ('CDPA').¹ That provision has the concept of fair dealing. Fair dealing existed before the 1988 statute. The concept has been interpreted even before the 1988 Act. The

¹(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement. (2) Fair 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 (subject to subsection (3)) it is accompanied by a sufficient acknowledgement. (3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.

cases from England can give some clue as to what the equivalent Jamaican provision may mean.

- [88] The case of **Hubbard v Vosper** [1972] 2 QB 84 is commonly cited for the meaning of fair dealing. It must be noted that the case went to the Court of Appeal on an appeal from an interlocutory injunction. Mr Vosper had published a book in which he was highly critical of the Church of Scientology and its ideas. He used large chunks of works of the church in his critique. The church successfully applied for an injunction and Mr Vosper appealed. The injunction was set aside. Lord Denning MR held at p 94:

It is impossible to define what is "fair dealing." It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.

- [89] In **BBC v British Satellite Broadcasting Ltd** [1992] Ch 141 the facts were that BSB was awarded a fifteen year franchise to transmit sports programmes to the UK. The event that gave rise to the litigation was the 1990 FIFA World Cup. Under the CDPA, the BBC owned the copyright in the broadcast of the 1990 World Cup. For a specified period, BSB broadcast sports news programmes and included excerpts taken from the BBC's broadcast of the matches. The excerpts ranged in length from fourteen to thirty seven seconds and were used in successive sports news bulletins over the twenty four hours after the match from which the excerpts came. BBC alleged infringement of its copyright by BSB. BSB

relied on the fair dealing defence of reporting on current events in section 30 (2) of the UK Act. BBC failed. BSB accepted that it used the BBC's broadcasts which prima facie would have infringed BBC's copyright. Scott J noted that the fair dealing defence was not new to copyright law. What was new in that case was its application to broadcasting. His Lordship accepted the proposition that the fair dealing defence was available under the 1911 UK Act and it was restricted to infringements of literary, dramatic or musical works. The learned trial judge also noted there were no reported case in which the defence was applied to the reporting of current events.

[90] Scott J made a crucial finding of fact. His Lordship found that the news programme in which the disputed excerpts were included '*seemed to me to be genuine news reports, albeit confined to news of a sporting character*' (p 150). Mrs Gibson Henlin may have derived support from this case on the question of the importance of the news programme being a genuine news programme. His Lordship also held that the '*quality and quantity of B.B.C. copyright material used in each programme seemed to me consistent with the nature of a news report and to be no more than was reasonably requisite for a television news report of the result of an important match*' (p 150).

[91] Another important finding in that case was that Scott J did not find sufficient evidence that there was an industry standard regarding the use of material by one television broadcaster of the content of another television broadcaster. His Lordship examined the expression 'news access' and found that it was being used in two senses based on the evidence before him. Scott J found that in one sense it meant physical access to the particular event and in another sense it meant the right of one broadcaster to use the actual content of transmitted broadcast of another broadcaster. The nature of the evidence before his Lordship did not enable him to find that there was 'any such general guidelines or understanding exist as to the terms on which a broadcaster may, for the purpose of news reporting, make use of the actual broadcasts of another broadcaster' (p

154) and consequently, 'that B.S.B.'s use of the excerpts from the B.B.C.'s World Cup broadcasts was inconsistent with some well-established news access usage' (p 154). Mrs Gibson Henlin said that that was not the case here since both CVM and TVJ have accepted that there are guidelines for the use one broadcaster may make of another's copyright protected material.

[92] On NAR, Scott J also held at p 154:

*The practice regarding news access grew up in order to deal with a quite different problem from that which arises under section 30 (2). Section 30 (2) is new, and whatever usage or understanding may have previously prevailed, the legal basis of that usage or understanding has been changed. **There is no longer an absolute monopoly to which a proprietor of broadcasting copyright is entitled. Parliament has eroded that monopoly by permitting fair dealing with the copyright work for the purpose of reporting current events. There is no justification for limiting the statutory defence so as to apply only to reporting current events in a general news programme.*** (Emphasis added)

[93] Scott J is here saying that the NAR was developed to manage a different problem from that of fair dealing for the purpose of reporting current events. The NAR came up in the era of total exclusivity in terms of physical access to the event. In addition, his Lordship is saying that the absolute monopoly that broadcasters had over their undoubted copyright protected material no longer exists. The legislature broke it and created a fair dealing defence for the purpose of reporting current events. This is exactly what has happened in Jamaica. [94] This passage from Scott J was in response to this submission at p 154:

Mr. Rayner James so submitted. His point was that it had become well established in the broadcasting industry that news access would be allowed only for the purpose of general news bulletins. The Sportsdesk programmes were not general news bulletins. They were sports news bulletins. So news access, for the purpose of the Sportsdesk programmes, was not permissible, and the unauthorised use of the B.B.C. footage was not therefore fair dealing.

[95] Scott J also made the point that football matches ‘*very quickly cease to be current events*’ (p 155). The same point can be made in respect of virtually any sporting event. In this case, it is incontestable that the 2015 WAC was a current event.

[96] At p 159 Scott J found:

*As I have earlier in this judgment remarked, my impression when I viewed the videos of the Sportsdesk news programmes was that the use made of the B.B.C. material was fair dealing for the purpose of reporting the results of the World Cup matches. **These were news reports. They were not programmes of football analysis or of review. The use of the B.B.C. material was short, was pertinent to the news reporting character of the programme, and was accompanied by an attribution to the B.B.C.*** (Emphasis added)

[97] The important points from this aspect of the judgment are that (a) sports news reporting can be regarded as genuine news albeit of a sporting character; (b) the wording of the section is not to be restricted to general news reporting. This court adopts these two principles on the basis that they are sound and make good sense. The fact of the matter is that the sports and leisure industry has grown to such an extent that many cable and free-to-air broadcasters dedicate their entire broadcast to the coverage of sports and leisure activities. They are properly and in their own right news.

[98] In addition Scott J made reference to other important points which must be borne in mind when making the assessment of whether the fair dealing defence for the purpose of reporting current events is made out. His Lordship, in describing the sports news programme, found that the news reports were reporting the result of the matches and were not programmes of football analysis or of review. This court adopts these two statements of principle as applicable to this case. His Lordship also found that the material used were pertinent and of short duration. The import of this is that a fair dealing defence can be lost even if reporting on a current event if the accompanying material was perhaps not relevant to or

pertinent to the report and was too long. Therefore the fair dealing defence is not made out simply by reporting a current event. If the amount of material used is too long then the defence may fail. Implicit in his Lordship's judgment is the suggestion that if the programme is for analysis and review, then the fair dealing defence for the purpose of reporting current events may be difficult to establish, if not impossible.

[99] This approach is not necessarily inconsistent with IOC's NAR of the 2016 IOC's NAR. That NAR said that they are subject to applicable national laws. Also the definition of news in those NAR does not mean the requirement of 'the news element' constituting the main feature is not met merely because it is sporting news as distinct from general news. Sporting news is just as much news as general news.

[100] From the passage from **Hubbard** and from the judgment of Scott J there is a strong suggestion that in determining whether fair dealing has been established the court must have regard to the quality and quantity of protected material that was used and its purpose. In the **Hubbard** case the purpose was criticism. In the case of **BSB** it was for reporting current events. The defence of fair dealing is not lost simply asserting that the infringer took large portions from the work but depends on whether what was taken was 'reasonably requisite' for the purpose. The expression 'reasonably requisite' comes from Scott J in **BSB** who said at p 150:

The quality and quantity of B.B.C. copyright material used in each programme seemed to me consistent with the nature of a news report and to be no more than was reasonably requisite for a television news report of the result of an important match.

[101] It is important to note that Scott J so far has not indicated that the footage used cannot include the highpoints such as goals scored or near misses. This aspect of his judgment is dealt with further in these reasons for judgment.

- [102] Mrs Gibson Henlin cited the case of **England and Wales Cricket Board Limited and another v Tixdaq Limited** [2016] EWHC 575 (Ch). Great care has to be taken in relying on this case. The trial judge, Arnold J, felt that it was necessary to go back to the Berne and Rome Conventions. His Lordship also took account of the various European directives. His Lordship was seeking to come up with an interpretation of section 30 (2) of the CDPA that would harmonise all these conventions and directives. Indeed, his Lordship observed at paragraph 68 that it was *‘common ground [that] section 30 (2) of the 1988 Act must be construed in accordance with Article 5 (3) (c) of the Information Society Directive.’* His Lordship noted that *‘Article 5 (3) (c) derives from Article 10bis of Berne. More specifically, the relevant part of Article 5 (3) (c) for present purposes derives from Article 10bis (2). Article 5 (3) (c) extends beyond “literary or artistic works seen or heard during the course of the event”, however, and thus also gives effect to Article 15 (1) (b) of the Rome Convention.’* Arnold J went as far as saying that *‘for present purposes, it also implements Article 14 (6) of TRIPS and Article 10 of the WIPO Copyright Treaty.’*
- [103] Arnold J stated quite clearly at paragraph 53 that it *‘is well established that domestic legislation, and in particular legislation specifically enacted or amended to implement a European directive, must be construed so far as is possible in conformity with, and to achieve the result intended by the directive’* and in paragraph 54 it was that a *‘European directive falls to be interpreted according to principles of interpretation of European Union legislation developed by the Court of Justice of the European Union.’*
- [104] This court is not familiar with nuances and contours of the jurisprudence of the Court of Justice of the European Union (‘CJEU’). The court is not aware of the underlying philosophy of that court when it comes to interpreting copyright law in the context of European directives and the various conventions. All this means that this court will not, without question, accept Mrs Gibson Henlin’s invitation to

rely on that case for an interpretation of section 53 of the Jamaican Copyright Act.

[105] Notwithstanding what has just been said Arnold J raises an important question and it is whether it is necessary, for the defence of fair dealing for the purpose of reporting current events, that the defendant's allegedly infringing programme must be an actual regular news programme. Scott J in **BSB** is capable of being interpreted to mean that there must be a regular news programme, that is to say, it must already be in existence, must be regular before the defence can be relied, though his Lordship did not say so. Mrs Gibson Henlin stressed the fact that CVM's 'Return to the Nest' was a programme designed to compete with TVJ's programming for the 2015 WAC.

[106] If Mrs Gibson Henlin is insisting on this court adopting that case then it may well be that it is not helpful to her case because Arnold J was recommending an even more liberal interpretation of the fair dealing provisions than already existed in the case law even though the prevailing jurisprudence had already indicated that the fair dealing provisions should be given a liberal interpretation.

[107] Arnold J had this to say at paragraphs 113 and 114:

113. In these circumstances I consider that these provisions should now be interpreted more broadly than they may have been in the past. Thus I consider that it is clear that they are not restricted to the kind of situation which was under consideration when what is now Article 10bis of Berne was first introduced, such as a radio or newsreel report of a public ceremonial occasion which incorporated part of a musical work performed by a military band (see Ricketson and Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond (2nd ed, 2006) at 13.54).

114. Accordingly, I consider that counsel for the Claimants was right to accept that section 30 (2) and Article 5 (3) (c) are not restricted to traditional media and that "citizen journalism" can qualify as reporting current events. If a member of the public captures images and/or sound of a newsworthy event using their

mobile phone and uploads it to a social media site like Twitter, then that may well qualify as reporting current events even if it is accompanied by relatively little in the way of commentary. Thus such a person may well have a defence under section 30 (2) and Article 5 (3) (c) if the images and/or sound happen to include a substantial part of a copyright work.

[108] The point his Lordship is getting at in these passages is the fact that when the Berne Convention came into being social media did not exist, the 'citizen journalist' was not clearly recognised even if he or she existed in the nineteenth century. The Berne Convention had in mind governmental or formal news agencies. His Lordship was raising the issue of whether a citizen can actually report on current affairs and take advantage of the fair dealing defence even if he or she is not part of a news organisation such as TVJ, CVM, CNN, BBC and the like.

[109] The court agrees with Arnold J but gets there by a different route. Arnold J referred to ' "living" interpretation' in paragraph 112 where he said:

112. In considering these submissions, the starting point is that the verb "reporting" is capable of bearing a broad or narrow meaning depending on context. It follows that it is necessary to construe it purposively. The purpose of section 30 (2) of the 1988 Act, Article 5

(3) (c) of the Information Society Directive, Article 10bis (2) of Berne and Article 15 (1) (b) of Rome is to provide an exception to, or limit upon, copyright protection in the public interest, namely freedom of expression. As discussed above, this favours a broad interpretation. Furthermore, the exception is not an unqualified one: even if a use is for the purpose of reporting current events, it will not be protected unless it satisfies the additional criteria considered above. Again, this favours a broad interpretation. In addition, the exception must be given a "living" interpretation, at least in the sense that it must be interpreted in manner that takes into account recent developments in technology and the media.

[110] In this court's view there is no need to go through all this effort to arrive at the conclusion that the defence is available to the citizen journalist. There is no need

to embark upon this living interpretation to arrive at the liberal interpretation his Lordship sought. What this court will say is that there is a danger in this purposive interpretation. The danger is that one comes up with the purpose with very little reference to the actual text of the statute by referring to the Bill and its memorandum of object, statements by the promoter of the Bill and other similar material. The correct approach is to read the entire statute and from its text discern its purpose or purposes bearing in mind that a statute can have multiple purposes. The legislative process is not always smooth. In Jamaica, the promoter of the Bill, usually a member of the executive branch of government has the advice of experts in the particular ministry for which he has responsibility. The policy he or she wishes to become law is ultimately transformed into a Cabinet Submission where the relevant minister takes his proposals to the Cabinet. If the Cabinet approves then drafting instructions are given to the Chief Parliamentary Counsel whose task is to turn the policy into law. The draftsman more often than not comes up with coherent Bill. All the pieces fit together like Leggo toys. There are no rough edges.

- [111]** When the Bill gets to Parliament, the Members of Parliament may not see the policy in the same way as the minister who has carriage of the Bill. Various interest groups may lobby their Members of Parliament for changes to be made. As the Bill progresses through the House of Representatives or the Senate, all sorts of changes are made. The coherent language of the statute becomes distorted. Disparate concepts and ideas are now cobbled together. Members of Parliament are not giving the Bill the refined reflection of the draftsman; they are more interested in addressing the concerns raised by their constituents and whatever interest group has his or her ear. In virtually all instances the Members of Parliament do not have the time or the resources, material and human, to come up with a refined substitute. When the passage through the legislature is over, the statute that emerges has the changes agreed upon by the elected members of the House of Representatives and the nominated Senators. The

draftsman may be having nightmares about the changes demanded by the elected members. He may shake his head ruefully but he is bound by what the elected members want the law to say.

[112] Often times the draftsman is blamed for producing an incoherent law. This is far from the truth. The draftsman can only produce his or her best effort and the minister may reject, add, alter or correct it. So too the legislators. If this happens the draftsman is stuck with what the people's representatives have produced. The draftsman may gently suggest that some of the corrections are perhaps difficult having regard to the policy he sought to translate into law. The executive and the legislature may either gently or forcefully remind him or her that they are the final decision makers and they are not or no longer accepting his recommendations. If the Bill is enacted that it becomes law as imperfect as it may be.

[113] All this explains why the purpose or purposes must be derived from the actual words used and not by reference to any ministerial statement, memorandum of objects and reasons. Once the law is read by the interpreter the next step or more accurately, the simultaneous process that accompanies the reading is to determine whether the actual words used can bear the meaning being advanced by the interpreter. As courts have become more open about this whole business of interpretation, they are now willing to say that there is in many instances no obvious plain meaning. More frequently there is a range of meanings and the

court selects the meaning that is most appropriate to the words used having regard to the context. Context means, the immediate section or subsection in which the word appears, the rest of the Part in which the word is located, the entire statute, whether the statute is a stand-alone statute or it is part of series of legislation covering the same subject matter, the existing law, whether the law is a consolidating law, an amending law or enacting some law for the very first time or replacing the law that existed before etc.

[114] It is also accepted that a statute unless repealed is always speaking, meaning, it is telling readers of the statute many years after it was passed what the law is. It may be that the language used was restrictive and if that is the case then effect must be given to that restrictive meaning even if it produces a result we do not like. On the other hand, the language may have been wide. Moderns tend to think that the legislators of times past were deficient in their use of language and were somehow unable to appreciate that things may change. That is arrogance and hubris. We must recognise that users of language can indeed actually intend a restrictive or broad meaning to be given to a particular word at the time it was used.

[115] This means that the starting point is always the words used and understanding the meaning of the words at the time they were used. The meaning being advanced at any particular time is then measured against what the words were intended to mean at the time they were used and if the word, albeit that they have been enacted eons ago, may allow the interpretation being advanced without distorting the original meaning. This is the safeguard against judges who may be tempted to give their vision of the world under the guise of interpretation. This prevents judges from becoming closet legislator masquerading as interpreters of the law enacted by a democratically elected Parliament.

[116] In respect of section 53 of the Jamaican Copyright Act, this court is of the view that firstly, the statute is one of general application to all citizens. There is nothing in section 53 and the rest of the statute that precludes an ordinary person from running a blog, a vlog or some other form of communication on social media for the purpose of criticism or review of a protected work. Equally, there is nothing in the provision that precludes an ordinary person from reporting on current events. The word 'reporting' in the phrase 'reporting current events' simply means giving an account of some event. The expression 'reporting current events' means giving an account of something that is happening now or if it has occurred in the

past is sufficiently connected to present events to make it properly part of current events. For example, the attacks on the World Trade Centre in 2001 can properly be regarded as a current event if sufficiently connected to a present event such as the recent attacks in Paris.

[117] There is no reason why an ordinary citizen unconnected with any news organisation cannot report on a current event. There is nothing in the section that restricts the act of reporting to journalists or news reporters. The wording is sufficiently wide to include ordinary citizens even though the framers of the law had in mind news organisations. Thus in this regard this court agrees with Arnold J on the result but not the route to the result. If this is correct then it means that the ordinary citizen does not have to have any on-going news programme. If this is so for the ordinary citizen then it must also be so for the a television broadcaster because there is nothing in section 53 to suggest that the meaning and scope of the section would operate differently for an ordinary citizen than it would for a television broadcaster.

[118] It means that so far Mrs Gibson Henlin suggested that the 'Return to the Nest' was not a regularly scheduled news programme and therefore not able to take advantage of section 53, this court does not agree. It follows that a specially created programme for a current event does not necessarily lose the ability to rely on section 53 merely because the programme is new or specially designed for the occasion. The reason for this can be gleaned from Lord Phillips's reasoning in **Ashdown** where he said at paragraph 64:

As this Court said in Pro Sieben AG v Carlton Television Ltd [1999] 1 WLR 605, [1999] FSR 610, at 614G of the former report, the expression 'reporting current events' should be interpreted liberally. The defence provided by s 30 (2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public.

[119] Lord Phillips is saying that if the programme is more about giving information than for consumption based on its intrinsic commercial value then the defence is

made out whether the programme is new or old. This court agrees with this position. The court says ‘more about giving information than for consumption’ because it accepts Arnold J’s idea that a programme can have more than one purpose and in those circumstances the predominant purpose needs to be identified and the decision on fair dealing rests on which of the purpose is the predominant one (see paras 128 and 129 of **English and Wales Cricket Board**).

[120] This passage should not be taken as being of benefit only to the media as that expression is commonly understood. The value that is protected by the provision (section 53 in Jamaica) is freedom of expression and that value applies to all persons and not just the media.

[121] The conclusion can be tested another way. Let us suppose that a new television broadcaster has just received its licence and came on air a day before the WAC, if Mrs Gibson Henlin is correct then it necessarily follows that such a broadcaster could not rely on section 53 because of necessity it would not have any regularly scheduled news broadcast. Such a broadcaster, even if he scheduled a bona fide news programme as defined in the 2016 Rio NAR could not rely on those NAR because his programme would not meet the definition – truly remarkable result.

[122] The **BSB** case had found that there was no agreed standard for news access. To remedy this the broadcasters in the UK developed an industry code called the Sports News Access Code of Practice (‘SNAC’). Arnold J had this to say about it in **England and Wales Cricket Board Limited**. His Lordship stated at paragraph 17:

17. SNAC does not displace or constrain the law of fair dealing as enacted by Parliament and interpreted by the courts. As Mr Burgess noted, SNAC provides certainty that use of footage within its terms will not provoke complaint, but does not preclude signatories (or anyone else) from relying on the fair dealing

provisions of the 1988 Act to defend use of footage that may be beyond the scope of SNAC. (Emphasis added)

[123] Mr Piper QC is therefore absolutely correct in his insistence that even if the court were to find that there was a global standard that was adopted in Jamaica or Jamaica has its own standard the Copyright Act is ultimately the yardstick by which liability is determined in the event of a dispute over the use of protected material. Thus while the court acknowledges Mrs Gibson Henlin's invitation to have regard for the standard that the parties themselves applied the court has to be careful not to give effect to an understanding of the parties at the expense of what Jamaican law actually permits. This court agrees with the observation of Arnold J.

[124] Another important case is **Pro Sieben Media AG v Carlton UK Television Ltd** [1999] 1 WLR 605. In this case the Court of Appeal of England and Wales gave consideration to the meaning of fair dealing and the expressions 'for the purpose of criticism or review' and 'for the purpose of reporting current events.' The facts are not important. At p 613 - 614 Robert Walker LJ stated what he regarded as general principles applicable to the fair dealing defence. With appropriate reference to authority, the principles identified were:

- (1) it is a question of degree;
- (2) the degree to which the challenged use competes with exploitation of copyright by the copyright owner (in the present case, the exclusive licensee) is important but not determinative;
- (3) the extent of the use but depends on the circumstances of the case;
- (4) in some case the quotation of an entire short work might be fair dealing;
- (5) if the fair dealing is for the purpose of criticism then regardless of how strong and unbalanced the criticism the defence is not lost;

- (6) fair dealing is not a dressed up attempt at infringing the copyright under the guise of criticism or reporting current events;
- (7) it is not fair to take someone's protected work and use it for one's own benefit;
- (8) fair dealing refers to the true purpose, that is, the good faith, the intention and genuineness of the activity;
- (9) the expression 'reporting current events' is a term of wide and imprecise boundaries and should be interpreted liberally;
- (10) there is not much to be gained by comparing 'current events' with 'current affairs' or 'news';
- (11) the closer to the boundary the use of the protected material comes the less likely it is that the fair dealing defence is made out;
- (12) it appears that determination of whether the use was for the purpose of reporting current events should be determined objectively;²
- (13) the intention and motive of the infringer are highly relevant to the fair dealing defence;³
- (14) it is not sufficient for the infringer to have a sincere belief that he is reporting current affairs.

² The court states this principle in the way that it has because Robert Walker LJ did not make a clear and unambiguous statement that he accepted the submission to that effect a pp 613 – 614 but his judgment is capable of being so understood on the point. The editor of the head note has taken the bold step of stating unequivocally that the test is objective.

³ Robert Walker LJ is not clear on how the intention and motives of the infringer assist in the fair dealing defence.

[125] Reference has been made to the intention and motive of the alleged infringer when talking about fair dealing. What that means is that an aspect of the defence to consider is whether the true purpose is that which the alleged infringer asserts, namely, that the purpose of the infringement was indeed directed at the purpose for which the infringement was done. That is to say, whether the infringement was genuinely and in good faith for reporting current events or for criticism or review or was it for something else. The fair dealing defence fails if the court concludes that what was really happening was that the infringer was utilising the protected works as if it were his own for his own benefit. The line may be hard to draw but it must be drawn. But in conducting this assessment the overall test is objective.

[126] There is the case of **Time Warner Entertainments Company LP v Channel Four Television** [1994] EMLR 1. Like **Hubbard**, it was an interlocutory injunction that went on appeal. The facts were that a decision had been taken to withdraw a film from UK distribution but it was being shown in Europe. The second defendant had decided to make a programme about the film. The first defendant was interested in a critical appraisal of the film. In order to get a copy of the film the second defendant sent an employee to Paris to purchase a laser disc. The film was transferred to a BETA tape and then converted to PAL format. The programme used about 12 clips varying in length from 10 seconds to 115 seconds and in aggregate was about 12 ½ minutes. The claimant sued for infringement of copyright and was granted a without notice injunction. This was challenged on appeal. The injunction was set aside.

[127] The defendants relied on section 30 (1) of the English statute. The claimant submitted four grounds why the court should reject the fair dealing defence. Three are relevant for present purposes. These are:

1. That the programme did not constitute fair dealing because the laser disc of the film had been obtained in an underhand manner.

...

3. *That the programme did not constitute fair dealing because the clips amounted to over 8 per cent of the film as a whole and about 40 per cent of the programme.*

4. *That the purpose of the programme was not for criticism and review but was in order to give a public viewing of some of the most controversial scenes in the interests of sensationalism and as part of a campaign to persuade Warners to allow the film to be shown and to criticise them for declining to release the film for exhibition.*

[128] In relation to the first ground while acknowledging that in some instances, especially unpublished works, the manner in which the work was obtained would be important to fair dealing nonetheless Neill LJ rejected that submission and held at page 10:

*In my judgment it is important to emphasise that the defence of fair dealing is primarily concerned with the treatment of the copyright material in the publication of which complaint is made. I do not intend to throw any doubt on the decision in the Beloff case itself, but it is my present view that criticism and review of a work already in the public domain which would otherwise constitute fair dealing for the purposes of section 30(1) would seldom if ever be rendered unfair because of the method by which the copyright material had been obtained. If confidential material is improperly used it can usually be protected by an action for breach of confidence. Indeed it is to be noted that in the Beloff case *Ungoed-Thomas J* at 259 described the action as 'an action springing from breach of confidence but framed in breach of copyright'.*

In the present case the laser disc was bought in a shop in Paris. The editing no doubt constituted a breach of copyright but we are concerned with the proposed publication of the film. I am satisfied that the defence under section 30 (1), if otherwise available, is not destroyed by the method by which the defendants obtained the clips. (Emphasis added)

[129] This is an important point to grasp. The defence is focused on the use or treatment of the protected work and not the manner of its acquisition. The fact

that it was obtained from the IAAF website does not mean that the defence of fair dealing is unavailable to CVM.

- [130] In relation to ground three Neill LJ, while accepting that total length of the clips was the most troubling aspect of the case, (greater than 8% of the film) held at pp 12 - 13:

In addition to seeing a screening of the programme we have been provided with a transcript. In the light of what I have seen and read I have come to the firm conclusion that this programme does not go beyond the bounds of fair dealing by reason of the length of the excerpts from the film.

- [131] This makes the point that fair dealing is not denied simply because the portion used may be substantial in quantity. In **BSB** the defence succeeded even though qualitatively the defendant selected a substantial part of the broadcast – the goals and near misses. In the **English and Wales Cricket Board** case, the defence failed because of the two purposes identified by the court the predominant one was for sharing the clips with other users. Arnold J found that *'clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value'* (para 129). Arnold J had also found that the clips were a substantial part of the work, qualitatively. Even so, this finding did not lead to the automatic conclusion that the fair dealing defence must fail. Rather it was the purpose that caused the defence to fail. Arnold J and Scott J are therefore consistent with the view that the fact that a significant part of the broadcast was used (qualitatively) that was a factor and even then not necessarily a decisive factor against the defence of fair dealing for reporting current events.

- [132] On ground four, the argument was that the programme was not a criticism or review of the film but a challenge to the decision to withdraw the film. Neill LJ emphasised at paragraph 13:

But one has to look at the programme as a whole. The producers of the programme are seeking a re-examination of the film and of its social and artistic importance. It is said that the film has not been shown in this country for 20 years and that therefore the programme cannot be for the purpose of criticism and review. But the producers of the programme clearly regard the film as a work of long-term significance.

It may be that at trial the claim by the defendants that the purpose of the programme is for criticism and review will be shaken. But at an interlocutory stage it seems to me that a prima facie defence within section 30(1) has been made out under this heading also.

[133] Henry LJ at page 14 held:

'Fair dealing' in its statutory context refers to the true purpose (that is, the good faith, the intention and the genuineness) of the critical work — is the programme incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism, and so profit unfairly from another's work? As Lord Denning said in Hubbard v Vosper ([1972] 2 QB 84 at 93): 'It is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit.'

[134] This position of Henry LJ was reaffirmed in **Pro Sieben** already cited. The true import of the case on this point is the breadth given to fair dealing for the purpose of criticism and review. The claimant sought to place a very restrictive interpretation on the fair dealing for criticism and review by arguing that that provision only applied to criticism of the actual work itself and what had occurred was a criticism of the decision to withdraw the work. The court held that the defence applied in those circumstances. Arnold J in **English and Wales Cricket Board** is suggesting that even this interpretation of fair dealing for the purpose of criticism and review is to be broadened even further.

[135] Mrs Gibson Henlin cited the following from the **English and Wales Cricket Board** case, paragraph 83:

83. In *Ashdown* Lord Phillips cited with approval at [70] the following summary of the law in *Laddie, Prescott & Vitoria*, *The Modern Law of Copyright and Designs* (3rd edition, 2000) at 20.16:

"It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

[136] The court has no difficulty with this summary as a very general statement. As shall be demonstrated by further references to **BSB** the presence of a commercial angle is not determinative one way or the other.

[137] Finally there is the case of **Ashdown v Telegraph Group Ltd** [2002] Ch 149 from which the passage at paragraph 83 in the **English and Wales Cricket Board** came. In **Ashdown**, the primary issue was whether the right to freedom of expression under human rights convention was a defence to copyright infringement. The main point for this court is found at paragraph 33 where Lord Phillips said:

[33] We agree that these provisions reflect freedom of expression in that, in the specific circumstances set out and provided that there is 'fair dealing', freedom of expression displaces the protection that would otherwise be afforded to copyright.

[138] Mrs Gibson Henlin, in closing submissions, urged the court to give full effect to the property rights of TVJ. In response to this Lord Phillips stated in **Ashdown** at paragraph 64:

...As this Court said in Pro Sieben AG v Carlton Television Ltd [1999] 1 WLR 605, [1999] FSR 610, at 614G of the former report, the expression 'reporting current events' should be interpreted liberally. The defence provided by s 30 (2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public. That was the approach adopted in Fraser v Evans [1969] 1 QB 349, [1969] 1 All ER 8, to the predecessor of s 30(2), and in our judgment it remains applicable to the present sub-section.

[139] It is fair to say that section 53 may have had in mind news agencies and broadcasters in radio, television and cable but there is no reason to limit the statute to those entities. Section 53 applies to journalists, reporters as well as ordinary citizens. Broadcasters, journalists and reporters have no greater rights under this provision than ordinary citizens. It is not about who can report current events but whether the report is of current events.

[140] The legislature in Jamaica recognised that copyright is at its core is not compatible with free speech. The 1911 UK Act which previously applied to Jamaica, the fair dealing defence was available under section 2 (1) (i) but only if the 'fair dealing with any work [was] for the purposes of private study, research, criticism, or newspaper summary.' The Jamaican Parliament extended the fair dealing defence to literary, dramatic, musical or artistic works as well as to reporting current events. In other words, the legislature made a clear choice to restrict the ability of copyright holders to prevent persons from using their copyright protected material for the purpose of reporting current events. Scott J dealt with this point in **BSB**. In response to the proposition that BBC's exclusive right was undercut. Scott J accepted that was the case when he said at pp 158 – 159:

*Another point made by Mr. Rayner James was that the B.B.C. had acquired, via the F.I.F.A. agreements with the E.B.U., and jointly with the other United Kingdom members of the E.B.U., an exclusive right to television coverage of the World Cup. These arrangements had been made at a time before section 30(2) had come into effect, and therefore at a time when the statutory monopoly over use of copyright broadcast material was absolute. It was unfair, he said, that B.S.B. should be able to use this material without the B.B.C.'s consent and without paying for it. This argument invites me to second-guess Parliament. **Once section 30 (2) has come into effect pursuant to the provisions of the Act of 1988 it must be given the effect that Parliament intended. The circumstances that the B.B.C.'s contractual rights, via the E.B.U. and F.I.F.A., predated the coming into effect of the Act seems to me a matter of irrelevance. The Act did not interfere with the B.B.C.'s contractual rights. It did, however, make less extensive, and therefore less valuable, the statutory monopoly obtained by the B.B.C. when, in exercise of its contractual rights, it transmitted live broadcasts in the United Kingdom.***
(Emphasis added)

[141] As a last ditch effort, BBC resorted to the usual anarchy-that-may-result argument. Scott J would have none of this when he said at p 159:

Sir Paul Fox in his evidence invited me to restrict "fair dealing ... for the purpose of reporting current events" to use of copyright material in general news broadcasts only. Use of copyright material in specialist news reports, such as sports news reports, ought not in his opinion to be covered by the fair dealing defence. Otherwise, he suggested, anarchy would result in the broadcasting industry. I am not impressed by the suggestion that anarchy would result. It is a cri de coeur raised very frequently by those who have previously enjoyed some commercial or professional monopoly when they see their monopoly being threatened. It is almost always impossible to disprove. In my experience, events usually show the fears to be unfounded. I can see no reason why anarchy or disorder in the broadcasting industry should follow if specialist news reports, as well as general news reports, are permitted to take advantage of a fair dealing defence under section 30(2).

- [142] Had the first sentence in this passage been accepted by Scott J it would have been an endorsement of the restrictive approach to (a) reporting of current events and (b) the use of copyright material to do so.
- [143] This court agrees with everything Scott J has said in the passages cited. It is good law and good sense. It is an example of applying the law in a manner that recognised the new world in which broadcasting was taking place and was also giving effect to the liberalising effect of statute.
- [144] Therefore in respect of Mrs Gibson Henlin's submission about giving effect to property rights, the court has to be guided by the fact that the legislature has already decided that the balance is tilted in favour of permitting a breach of property rights in copyright by enacting the fair dealing defence.
- [145] As Scott J pointed in **BSB**, the fact that a rival is doing the reporting on current affairs is nothing to the point. It is whether the dealing is fair. In fact in Scott J's judgment his Lordship recognised the strong commercial interest in the defendant being able to use the material broadcast by the BBC to build up its audience. His Lordship noted that when the arrangement were made for the broadcast of the 1990 football World Cup the defendant was 'in an embryonic

stage of development' and it had not commenced broadcasting until April 1990, just a few weeks before the football World Cup which began in June 1990.

[146] The claimant, BBC, had 21 million television sets at its disposal. In this context, Scott J noted it '*was obviously an important commercial concern of BSB to build up its audience figures as rapidly as possible.*' His Lordship observed that World Cup was a major sporting event and no '*television sports channel or sports new programme worthy of the name could retain credibility without reporting on the progress of the World Cup matches.*'

[147] By parity of reasoning, given the place that track and field has in Jamaica, no station could possibly attract viewers if it was unable to report on what for Jamaicans, is a major very major national event – the participation of our athletes in international competition.

[148] It is this court's considered view that for the fair dealing defence to apply it is not necessary that there should already be in existence, prior to the alleged infringing use, any news programme such as Prime Time News on TVJ, or News Watch on CVM or the like. To make that a requirement would be to reduce the ambit of the provision when the words do not require such an interpretation and neither is there any policy reason for imposing that limitation on the words of section 53. In this regard even if the court were to say that IOC's NAR were applicable to Jamaica they could not supplant the statute as interpreted by the courts.

[149] Sporting news is as much news as the usual form of news that tell us of the latest atrocity of criminals, failed banks, successful business launches, the peccadillos of public figures, the virtue of the ordinary man and the most recent earth quake or other natural disaster.

[150] The 3x2x3 formula while making for harmonious relationships between broadcasters cannot override the provisions of Jamaican law. The fact that both

television broadcasters appear to rely on some version of the 3x2x3 formula does not preclude any of them from relying on section 53.

[151] In summary then at the heart of TVJ's case is the idea that they have an absolute monopoly under its licence except as permitted under the IOC's NAR or any licensing arrangement with either TVJ itself or the IAAF. As Scott J said in **BSB** at p 150:

It is worth repeating that until the Act of 1988 came into force a fair dealing defence was not available in order to justify the unauthorised use by one broadcaster of the copyright work of another. Broadcasters had been accustomed to regard their copyright monopoly as absolute, save to the extent that agreement or practice permitted its use by another.

The additional importance of BSB

[152] In **BSB**, Scott J had to deal with a number of submissions that sought to restrict the ambit of the fair dealing defence. His Lordship's analysis and conclusion are adopted by the court.

[153] In order to show how far reaching the fair dealing defence in respect of reporting current events is Scott J had this submission made to him at p 155:

The use made by B.S.B. in its Sportsdesk programmes of excerpts from the B.B.C.'s live broadcasts took place necessarily after the broadcasts had been transmitted, but took place before the B.B.C.'s or the I.T.V.'s World Cup review programmes had taken place. It was suggested by Mr. Rayner James that thereby the audience appeal of the review programmes would have been reduced.

[154] His Lordship rendered harmless the seemingly strong point by saying at p 155:

*I regard this suggestion as fanciful. If anything, the B.S.B. news reports, with their use of the excerpts, would have been likely in my opinion to have whetted the appetite of the football enthusiast. **In any event the reporting of current events must be done promptly. Football matches, even important ones, very quickly cease to be current events. To have required B.S.B. to***

postpone its use of the material until after the material had been used in the B.B.C.'s or in I.T.V.'s World Cup review programmes would in practice have barred the use of the material as an adjunct to the reporting of the World Cup matches as current events. If B.S.B. was to use the material at all, it had to be used promptly. (Emphasis added)

[155] The fundamental importance of this passage cannot be overstated. BSB was using footage from BBC in its sports reports **after the event had taken place but before BBC or ITV had presented their own review programmes**. Scott J endorsed the view that there is nothing wrong with reporting on current events promptly. This court agrees with that statement completely. If TVJ's case theory is correct then no entity could possibly report on the 2015 WAC by using any of the material that TVJ had rights to under the licence. This would be to reverse the intended effect of section 53. Section 53 places no restriction on how quickly after the event it can be reported. In fact the provision does not even say that it cannot be reported on an as-happening basis.

[156] In response to the proposition that BSB was making their programme more attractive to viewers and therefore their motivation was not fair dealing but some other reason Scott J eviscerated a similar argument at p 157:

...Mr. Rayner James submitted that B.S.B.'s use of the B.B.C. footage was not solely for the purpose of reporting current events, but was for various other purposes as well. There was, he said, an oblique motive that disqualified B.S.B. from establishing a fair dealing defence. He formulated the oblique motive in a number of different ways. He said B.S.B.'s motive was to compete with the B.B.C. for a sports audience by making, through the use of the B.B.C. material, the Sportsdesk programme attractive to viewers. He said that B.S.B.'s motive was to build up audience loyalty more quickly than would have been possible without using the B.B.C. material. He reminded me that Mr. Hunter in his evidence had agreed that it was vital to the development of B.S.B.'s sports channel to use moving pictures to illustrate its sports news reports. This evidence, Mr. Rayner James submitted, demonstrated B.S.B.'s oblique motive.

It is perhaps too obvious to need stating that the compilers of the Sportsdesk news programmes were endeavouring to produce programmes that would be attractive to viewers. But if a programme is a genuine reporting of current events, it is, in my opinion, absurd to say that an endeavour to make the programme more attractive is an oblique motive... (Emphasis added).

[157] If the programme is a true reporting of current events then it is nothing to the point to say that the alleged infringer is making the programme attractive to viewers.

[158] It was submitted to Scott J that it was unfair for BSB to seek to build up its audience by using copyright protected material from its rival. His Lordship's response at p 150 was:

Mr. Rayner James submitted that it was unfair for B.S.B. to endeavour to build up its audience figures by use of the copyright work of its commercial rival, the B.B.C. But section 30(2) contemplates that the use of a broadcaster's copyright work may, subject to fair dealing, be made by another broadcaster. The fact that the other broadcaster is a commercial rival of the copyright owner does not, ipso facto, take the case outside fair dealing. It is a factor, and perhaps in some cases a very weighty factor, to be taken into account in considering whether there has been fair dealing, but it is no more than a factor. Nor, in my opinion, is a commercial rival seeking to build up its broadcasting business, such as B.S.B., in any worse position than a commercial rival already well established in the broadcasting industry, such as the B.B.C. The building up of audience loyalty is no more an oblique motive than the retention of audience loyalty.

[159] It was also said that BSB took the best parts of the clip such as the goal-scoring, the near misses. Scott J said at p 158:

*As to duration, the excerpts were very short in relation to the length of the match broadcast in question, 30 seconds or thereabouts out of a broadcast lasting, say, 90 minutes. **The excerpts tended, naturally, to show highlights of the matches.** This was criticised*

by Mr. Rayner James. They had taken the best bits, he said. **But to show the goal-scoring sequence when reporting on the result of a football match is such a normal and obvious means of illustrating the news report as, in my opinion, to deprive Mr. Rayner James's criticism of any weight.** The number of times each excerpt was shown must be taken into account. The fact that the excerpts were repeated in successive news reports over a 24 hour period is not, in my opinion, a matter of justifiable criticism. The fact that part of each excerpt was repeated up to three times in each news report was also, in my opinion, consistent with fair dealing.

Use of menus is a well-established device in introducing news reports, whether of general news or of sports news. The menus used in the Sportsdesk news programmes were an integral part of each news programme. Similarly, the use of replays is common in the reporting of the results of a sporting event, whether racing, football, cricket, or any other type of event. The use of the B.B.C. material, first, in a menu, second, in the main report, and third, in a replay, was all for the purpose of reporting current events and was, in my judgment, a fair use of the material and for that purpose. (Emphasis added)

[160] His Lordship is saying that the fact that the clips showing the best parts were used repeatedly in a 24 hour period and even repeated three times in one broadcast cannot deprive the defendant of a defence of fair dealing despite the fact that his Lordship recognised that the number of times each excerpt was used was important. This undercuts the IOC NAR 3x2x3 principle and shows by the court cannot be bound by the IOC's NAR.

[161] From this extensive review of the case law it is clear that no one factor decisive. The determination of whether there was fair dealing is an intensely factual question. Each case stands on its own. What is significant in one case may well be not so important in another. This is why the trial court must actually view the material or as much of it as is possible. It is looking at things in the round. The length of the extract, the part that is extracted, the type of programme, how it was promoted, the purpose of the programme are all important matters. What is to be prevented at the end of the day is the defendant taking the claimant's protected work and treating as it were his own

and trying to pass off his misuse as fair dealing. As should be clear from the cases it is often a close thing. The ultimate decision one way or the other is not precise as in mathematics but a judgment call based on the overall impression the court is left with after taking into account all the relevant factors of the particular case.

The infringements, the analysis and conclusion

[162] It was noted earlier that TVJ complained about CVM's News Watch programme, the specially developed programme called 'Return to the Nest' and CVM's use of social media (Facebook and Twitter). The court will deal with them in the order just stated.

CVM's News Watch

[163] CVM has a news broadcast called News Watch. It is a nightly news broadcast that airs at 8:00pm with a repeat at 11:00pm. TVJ alleges that the clips shown during the two broadcasts of August 27, 2015 infringed its copyright.

[164] The News Watch programme is a regularly scheduled news programme and lasts an hour. It has a number of components. It has the usual murder and mayhem, business news, sports and weather. On the face of it the two broadcasts are three hours apart. The complaint is that during the news portion of the programme it showed the full 200m men's final was shown. The same race was shown during the sport news section. In addition it was said that during the sports section CVM showed the full 400m women's final, the three men's 110m high hurdles semi-final. The same races were repeated in the 11:00pm broadcast. All the clips were from the 2015 WAC and unless the fair dealing defence can be made out then CVM would be liable for breaching TVJ's copyright.

[165] The court has viewed the August 27, 2015 several times and this is the court's finding of fact:

(1) during the regular news portion of the News Watch broadcast, the last 100 – 110 metres of the 200m men's final was shown and included some postrace footage. This ran for approximately 55 seconds.

(2) during the sports section of the News Watch broadcast entire portion for the World Championship report ran for 120 seconds. The first 9 seconds was the introduction to the feature. Then there were the entire men's 200m final, the last 100m in the women's 400m final, then the men's long jump and the women's hammer events. After this came a reference to the medal table and that segment lasted approximately 10 seconds. The broadcast acknowledged that the source was the BBC. There was no analysis, commentary or review. The newscaster simply stated what happened and the report was augmented by the races.

(3) the court did not see the pleaded infringement of the full women's 400m, neither did the court see the three men's 110m high hurdles semi-finals. But even if they were present the court's conclusion is not altered in any way.

[166] Based on TVJ's case theory since the total time of the clips exceeded two minutes and despite the fact that it was during a schedule news programme it breached the IOC's NAR that meant that the fair dealing defence was not available.

[167] The News Watch broadcast covered not only news in the commonly understood sense (blood, gore, mayhem, finance, politics and world affairs) but current sports. The court has already decided that sports news is equal in status in every respect to regular news. The court has already decided that the 2015 WAC was a current event.

[168] The court is required to ask itself, was this genuine, good faith and bona fide reporting or is it commercial utilisation of another's protected work masquerading

as reporting? The answer depends on duration of the segment, what came before and after it, how was it presented, was it being presented as a substitute for the protected work, the degree to which the challenged use competes with the exploitation of the copyright by the copyright holder or as in this case the licence holder, the whole circumstance is looked including the fact of an exclusive licence.

[169] The court now addresses the section 54 factors. The court accepts that showing the entire race is a substantial part of the event. This is on the basis that each race constitutes an event and also on the basis that showing the finish alone would be a substantial part of the event. The court concludes that the purpose and character of the use was for reporting purposes solely. The 2015 WAC was of great importance to Jamaica. Track and field has been Jamaica's most successful sport. Many Jamaicans have a keen interest in the performance of their sporting heroes and heroines.

[170] It is difficult to see what adverse effect the News Watch broadcast could have on the potential market or commercial value of the work. The court does not agree that the quantity and quality of the clips exceeded what was appropriate for the report. The court does not agree that the clips were wholesale appropriation of substantial parts (meaning amount and not just an important segment, for example the last 10 metres of the 100m final men's and women's) of TVJ's work under the guise of reporting current events. No sensible person could consider that instead of watching TVJ's broadcast he or she would tune in to CVM's News Watch.

[171] It is the finding of this court that the section 53 defence has been established. The manner in which the footage was packaged, the context in which it was presented it is clear that it was a pure reporting of a current event. Yes, CVM is a private company set up for the purpose of making money from broadcasting and in that broad and generic sense there was commercialisation of the clips but that is not what is meant when the law speaks of whether the infringer's use was a commercial competitor to the

rights holder's ability to exploit his copyright or rights received under licence. The total amount of the footage in the hard news segment and the sports news segment was approximately 175 seconds. The sports news segment gave a summary of other finals and showed approximately 10 – 12 seconds of the women's 400m final, a jump of the winner of the men's long jump and the winner of the women's hammer. All this is consistent with reporting a current event and not capturing the copyright holder's work.

[172] The fact that Mr Bolt's success was the lead story in the general news segment and then again in the sports news section is merely an indication of how significant track and field is in Jamaica that Mr Bolt's triumph was more important than any other news story of the day.

[173] There was no breach of Jamaican copyright law. The purely informative nature and purpose of the broadcast was so dominant that it was indeed a reporting of current events. The amount of the protected material used was not excessive. It was not intended and could not in any rational sense be regarded as a commercial product designed to undermine TVJ's copyright.

CVM's Return to the Nest

[174] What was Return to the Nest? This was CVM's evidence. Miss Khan said at paragraph 7 of her witness statement:

*It is in this context that the counter-programme "Return to the Nest" was created by CVM **in the absence of CVM having the exclusive licence to the IAAF World Championship 2015**. The programme was not created for a commercial purpose but was created in the public interest as several Jamaican athletes were performing. (Emphasis added)*

[175] Mr Richard Delapenha's view and Mr Milton Walker's were noted much earlier.

[176] Mr Oral Buchanan said at paragraph 2:

*Given that on this occasion **CVM was a non-rights holders of the event** and therefore could not provide extensive coverage or show live footage of the event, it was necessary that CVM produced (sic)*

a captivating and informative programme that was based on accurate reporting, current and timely information, in-depth analysis and statistics on the events at the World Championships 2015. (Emphasis added)

- [177] From TVJ's stand point these statements are damning. To use the tennis expression: it is game, set and match in favour of TVJ. It was not consistent with the IOC's NAR in that it was not a regularly scheduled news programme and that it was neither news nor regular. No licence was granted to CVM by the rights owner. No licence granted to CVM by TVJ. All this points to the fair dealing defence failing.
- [178] Mr Piper has properly stressed the fact that the IOC's NAR are subject to applicable national law.
- [179] CVM is accused of 'downloading and broadcasting the internet transmission, being a cable programme or service within the meaning of the Copyright Act, of entire races and/or events or parts thereof ... without the authorisation of the [TVJ] or the copyright owner.
- [180] More coals are being heaped upon CVM by TVJ. The allegation is that during the Return to the Nest programme, CVM directed viewers to the IAAF Live Stream YouTube channel to view the live feed and not the claimant's live broadcast thereby deliberately attempting to substitute the claimant's market for the live feed.
- [181] Generally and in summary the allegations are that CVM failed to observe the rights of TVJ as the exclusive licensee for the event and had no valid licence to broadcast any of the events it did.
- [182] CVM, like natural persons. has the constitutional right to freedom of speech. CVM was simply informing members of the public of what was the truth. There is no evidence that TVJ informed the Jamaican public that there was another lawful

source to view the 2015 World Championship. As Mr Milton Walker said this in his evidence:

...the live and exclusive, exclusive is a huge issue in sports broadcasting, it it (sic) essentially says you won't be able to see the particular event anywhere else except on our station ...
(Emphasis added)

[183] The court has examined the promotional material used by TVJ and it is plain that TVJ was sparing no effort to convince the Jamaican public that unless they tuned in to TVJ's programme there was no other way to see the event. We now know that was not accurate. All CVM did was to tell the truth about the actual state of affairs. This court sees nothing wrong with truth telling. The members of the public who viewed the Championships via the IAAF's live stream would not be committing any breach of copyright. If they called in to a programme to discuss what they had seen they would not be committing any breach of copyright.

[184] When CVM directed the viewers to the IAAF's website and asked them to call in to CVM's programme and engage in discussion, CVM was doing what any sensible business person does – see how it can take lawful and legitimate advantage of developments in their sphere of business. As to whether it was successful is another matter.

[185] The court will now analyse CVM's Return to the Nest. The court has viewed every broadcast that was available. In respect of one of the broadcasts played in court the court was not able to find it among the agreed exhibits thus the court relied on the testimony of Mr Milton Walker for the description of the content. Generally, the format of the programme was discussion and analysis of the current event rather than reporting the current event. Most of the programmes utilised moving images and showed various races involving Jamaican athletes.

None of the races was shown live. There were some broadcasts which used only still images.

[186] Mr Charles Piper QC very helpfully summarised the minutes and percentage of the whole broadcast where moving images were used. The court will adopt those figures generally since they do not appear to be disputed by TVJ. The court will refer to one broadcast in which moving images and clips were used in order to give an indication of what the broadcasts that had clips were like. In respect of the broadcast that is about to be analysed the court did its own calculations.

Day 2 – August 22, 2015

[187] This broadcast was 57:28min. It had a host and two analysts. The court observed the following:

- (1) twice the host referred persons to the IAAF website for live streaming of the event;
- (2) the first actual track event shown was from the 2009 World Athletic Championships men's 100m final. That clip ran for 88 seconds;
- (3) all the heats from the men's 100m of the 2015 World Championships (6 of them) were shown and that segment ran for 191 seconds. The heats were shown twice and that second showing ran for 184 seconds. The full races were shown twice. The second showing was followed immediately with an interview with Mr Bershawn Jackson, a 400m hurdler from the United States of America;
- (4) the segment with all the men's 100m heats was followed by a split screen showing the host and analysts on one screen and one of the men's 100m heats from the 2015 World Championships;
- (5) five heats of the men's 400m final were shown. The races were shown at varying points: in the first heat the last 200 – 250m; the second – the last 200m; the third – the last 100 – 110m and the fourth – last 100 – 110m.

This was followed immediately by an interview with Mr Nicholas Beth from Kenya. The entire segment lasted 184 seconds;

(6) there were interviews inside the stadium with Mr Usain Bolt (12 seconds); Mr Nickel Ashmeade (31 seconds) and Mr Anssert Whyte (21 seconds) – all Jamaican athletes.

[188] The total time of footage shown was approximately 11 minutes. The total broadcast time included advertisements. The clips used were significant in terms of total time and significant in terms of the parts of the races (those where parts of the races were shown) and significant in term of the fact that all the races for the men's 100m heats were shown. In the world of copyright very significant portions has both a quantitative and qualitative dimension to it. The last 10 metres of a race is very significant because the last 10 metres will show the medal winners. This is track and field's equivalent of goals and near misses of football. It is ultimately that type of information that many members of the viewing public want to know.

[189] It seems clear to the court that this broadcast was not reporting as the term is commonly understood in this context. The term 'reporting' in this context means giving an account of something. That is to be its primary focus. It is undoubtedly true that a discussion and analytical programme can have an element of reporting but that would be incidental to the programme's purpose. The element of reporting would be usually to give the basic facts of what is to be discussed and/or analysed and in that sense there is reporting, and where the event is current then it could be said to be reporting current events. However, it would give the programme an incorrect nuance if it were to be described as a report of current events.

[190] This court concludes that CVM's broadcast of August 22, 2015 was not primarily for the purpose of reporting current events. The use of the clips was not for the

purpose of fair dealing for reporting a current event. The fair dealing defence therefore fails. This conclusion applies to the entire series of Return to the Nest.

[191] It matters not whether moving images or stills were used. TVJ's exclusive licence covered all images, moving or still. It does not matter that CVM did not get the material from TVJ's feed, once it used material covered by TVJ's licence and the fair dealing defence does not apply then CVM was in breach of TVJ's rights.

There has been a breach of TVJ's exclusive licence in relation to the 2015 World Championships.

[192] The court has not placed any significance on whether the Return to the Nest was a regular programme or not. It should be clear from this court's reasons given already that the regularity of the programme is not very important despite the apparent importance attached to that fact by the IOC' NAR. The nature and character of the programme is the determinative factor from this court's perspective. The fair dealing defence fails in respect of the Return to the Nest not because it was not a regular programme but because of its nature. Its focus was not reporting the 2015 WAC as a current event but analysing performances from the event.

Social media

[193] TVJ alleges further CVM committed further breaches using Facebook and Twitter. The allegations here are that CVM engaged in commercial, and/or promotional and marketing campaign around the event and promoted its use of the material including on the programme 'Return to the Nest' and social media.

[194] It is said that on August 20, 2015, CVM created the hashtag #CVMWorlds which was used to promote the programme 'Return to the Nest' and offered prizes to persons who correctly answered the questions on Twitter.

[195] CVM, it is alleged, directed persons to the hashtag #CVMWorlds, on Facebook and Twitter. TVJ stridently asserts that the #CVMWorlds hashtag was also linked

to CVM's Facebook page which carried whole races or excerpts fo races. Each broadcast had a sponsor it is said.

- [196] The particulars continue by particularising specific races that were uploaded to Facebook. These included men's 100m semi-final and final, the men's 100m final, the women's 200m semi-finals and final, the women's 100m hurdles final and the men's 110m high hurdles. CVM is accused of showing Jamaican athletes in training, finishing races, post-race interviews. These events were the ones in which Jamaica athletes were involved.
- [197] TVJ asserts that even after the World Championships the material was still available on CVM's social media pages as late as October 27, 2015. TVJ then produces an eight-page list of alleged infringements. The list has the date, the programme, the time played during the broadcast and the duration of the alleged infringing broadcast.
- [198] TVJ secured the services of two experts, Mr Shawn Wenzel and Mr Conrad Mathison. Mr Wenzel was asked to report on CVM's online marketing campaign that was developed in support of the Return to the Nest. Mr Mathison was to report specifically on the use of Twitter and hashtags by CVM. Mr Mathison's evidence and report will be dealt with first.
- [199] Mr Mathison gave a brief history of the origin and use of hashtags. A hashtag is simply a word preceded by the # sign. It is quite literally # + word = hashtag. Mr Mathison stated that hashtags have become a popular way for persons and commercial entities to interact and promote products. He noted that there was a difference between brand hashtags and campaign hashtags. The former is used for the company's name or tag line as in #KFC or #FingerLickingGood. The campaign hashtag is designed more for marketing campaigns as in #Blowoutsale or #Brownsclearancesale.

- [200]** The court was told about trending hashtags which are hashtags that are very popular at a point in time. Sometime companies can use the trending hashtag to promote their brand.
- [201]** In this particular case CVM created the hashtag #CVMWorlds. 'Worlds' was added to CVM in order to promote the Return to the Nest. This kind of hashtag would be called a campaign hashtag or a brand hashtag. It was a campaign hashtag because it was used as a marketing tool to make the public more aware of CVM's coverage of the 2015 World Championship. It was a brand hashtag because CVM's name was part of it and therefore would make it more recognisable in the market place. The court sees nothing wrong with this.
- [202]** In the report were examples of members of the public interacting with CVM via the hashtag. TVJ was also offering prizes to members of the public who participated in trivia competition about the Championships.
- [203]** Under cross examination Mr Mathison said that he did not do any comparison of activity associated with CVM's hashtag and TVJ's. He was not able to give any idea of how successful the hashtag branding or campaign was because he did not conduct any surveys and he did not have any access to data that might have been collected by CVM. What he can say is that there was interactivity.
- [204]** He said that the simple conclusion from his report was that 'that it was used for branding and marketing purposes or "Return to the Nest".' This is permissible.
- [205]** The court will now examine Mr Wenzel's evidence. He established that CVM had Twitter and Facebook accounts. That was not disputed. He also said that CVM conducted an excellent campaign using Twitter and Facebook. The campaign was to promote their programme 'Return to the Nest.' Mr Wenzel told the court that it appeared that CVM got its material from the IAAF website. The reasons for this conclusion need not be explored now since the evidence in Mr Buchanan's statement is that the IAAF website was CVM's only source of material.

[206] His significant findings for the purposes of this case were:

- (1) CVM posted 18 videos on its Facebook page;
- (2) the videos were largely snippets from the IAAF Live Stream and they were largely about Jamaican athletes. The content were interviews of Jamaica athletes or races, in part and whole, in which they had participated;
- (3) that it would be more convenient for persons as inconvenient as it was to search the IAAF archives on line than get up early (because of the time difference between Jamaica and China) in the morning to watch the races;
- (4) only 6% of persons in Jamaica had home broadband. 39% had smart phone access but the high cost data that would facilitate viewing would make it less likely that person would use that option as a way to see to the races. In addition, many smart phones had small screen that would undermine viewing pleasure. This data was based on a survey done by the Office of Utilities Regulation, January to March 2015;
- (5) viewing on YouTube would be a better option but for only 6% percent of the population;
- (6) 'by taking videos from YouTube and putting them on television, CVM has enabled the 94% of Jamaica who do not have or who do not have sufficient internet access to properly view those YouTube videos and to watch replays of the races in a way they would not have been otherwise able to do so, other than by tuning into TVJ's coverage.

[207] The report noted that there was no control for the risk of double counting in that those who had 6% home broadband may well be part of the number who had mobile broadband. He also noted that the report did not consider the effect of limited bandwidth and screen size of mobile devices on viewing choice for watching events.

- [208] Mr Wenzel concluded that since the YouTube videos were not time stamped and indexed and anyone who wished to watch the archived footage would need to scroll through the entire programme to find what they were looking for then it would be more prudent to go to CVM's Facebook page via Twitter and Facebook to watch the footage that was there.
- [209] Mr Piper made the challenge that Mr Wenzel had not done any actual survey to find out whether Jamaicans would get up at odd hours to watch the event live. Mr Wenzel's response was that that was unlikely because persons had to go to work and do other day time activities. This was indeed a proper challenge to make but the fact of the matter is that even with this weakness it does not affect the conclusion that CVM had posted material from the IAAF Live Stream on its Facebook page what was accessible via Facebook and Twitter.
- [210] The question is whether use of the material in this way was protected by the fair dealing defence.
- [211] The report drew a distinction between the 6% who had home broadband and 39% who had mobile broadband. Both figures were added together to arrive at 45% of total broadband penetration.

The Facebook postings

- [212] As noted there were eighteen of them. The court has examined all eighteen. Some of them were pure reporting without analysis or commentary and others carried interview and post-race activities.
- [213] The court will describe all eighteen and after that description indicate its finding and conclusion of each. The court followed the order they appeared on CVM's flash drive and not the order in which Mr Wenzel placed them in his report. If the description is read and the clips viewed then they can be easily correlated.

- (1) The first was an interview with Miss Kaliese Spence, 400m hurdler. It was 49 seconds.

- (2) The second was an analysis of the 100m men's battle between Mr Usain Bolt and Mr Justin Gatlin. It lasted 184 seconds. It traced the build up to the men's final of both men. The clip showed the semi-final runs of both men as well as the final. This was more the nature of a feature presentation.
- (3) The third was an interview with Mr Jevon Francis, 400m sprinter. It lasted 80 seconds.
- (4) The fourth was an interview with Mrs Veronica Campbell Brown. It lasted 28 seconds.
- (5) The fifth was a promotional video showing images of Mr Usain Bolt, Mrs Shelly Ann Fraser Pryce, and other persons from track and field. It lasted 156 seconds. There is no evidence indicating where the moving images came from. It is by no means certain that it came from the 2015 World Championships. It may have come from other championships. This means that there is no proof that TVJ had any rights to any of the clips shown. If there was an infringement TVJ was not proven to be the proper claimant.
- (6) The sixth was a showing of the men's 100m final at the 2015 World Championship in fast action, slow motion post-race celebrations. It lasted 70 seconds. It was accompanied by a song extolling the speed of Mr Usain Bolt.
- (7) The seventh was an interview with the Mrs Novlene Williams Mills. It lasted 36 seconds. It was not reporting of a current event.
- (8) The eighth showed the women's 200m, the men's 110 hurdles with Messieurs Hansle Parchment and Omar McLeod, interviews with Miss Elaine Thompson, Mrs Veronica Campbell Brown, Mr Hansle Parchment and Mr Omar McLeod. It lasted 188 seconds. But for the interview

segments this would have qualified as fair dealing for the purpose of reporting a current event. The races were short even where they were shown in full;

- (9) The ninth was an interview with Miss Natasha Morrison, the 100m sprinter. It lasted 34 seconds.
- (10) The tenth was an interview with O'Dayne Richard, a discus and shot put specialist, who became the first athlete from the Caribbean (the entire Caribbean and not just English speaking) to win a medal (bronze at global championship excluding the Commonwealth Games). It lasted 60 seconds.
- (11) The eleventh was a report on the day's events using still images of the athletes that were being spoken about at the specific point in the report. It lasted 66 seconds. There was synchronisation between the names and the still images. The images were used to enhance the report. There was no excessive use of any of the images.
- (12) The twelfth was a feature on Mr Usain Bolt about whether he would be ready in time for the Championships. It lasted 241 seconds. The video ends with men's 100m final in slow motion picked up at about 80m from the finish line. There is a snippet of post-race activity. The slow motion and post-race celebration lasted approximately 33 seconds. There is no evidence that the other parts of the video came from TVJ's copyright protected material.
- (13) The thirteenth was a report of the women's 400m final and other races. The video began at about 350m from the finish line. It also showed the three women's 200m semi-finals from about 100m out. The report also showed the whole of the two men's 110m high

hurdles semi-finals. Each race had a short bit of commentary on the race from the onsite commentators with the CVM reporter making his report. The entire video was 158 seconds. There was no analysis of any kind.

- (14) The fourteenth was the montage that was used to promote Return to the Nest. It has the pictures of Mr Usain Bolt and Mrs Fraser Pryce. It lasted 15 seconds. The London 2012 is clearly seen on the vests of both athletes.
- (15) The fifteenth was another promotional video for the Return to the Nest programme. It lasted 45 seconds. It is not clear that the material used was TVJ's protected work.
- (16) The sixteenth was an interview with Mrs Fraser Pryce. It lasted 52 seconds. It was not a report of a current event.
- (17) The seventeenth was an interview with Mr Rusheen McDonald, 400m sprinter. It lasted 44 seconds.
- (18) The eighteenth was a video on the women's 100m hurdles final which showed Miss Danielle Williams winning the gold medal and giving a post-race interview. It also showed Miss Williams' semi-final race. It lasted 150 seconds.

[214] CVM has admitted that it took most if not all the videos and clips it used from the IAAF website. As the court has already noted, at the end of the day, when assessing the fair dealing defence and after taking all the factors into account the court is to decide whether what has happened is on the side of fair dealing or on the side of inappropriate use of protected material.

[215] In respect of those Facebook postings that consisted solely of interviews with Jamaican athletes or indeed any athlete (nos 1, 3, 4, 7, 9, 10, 16 and 17) and

were not in the context of reporting the event, the fair dealing defence fails. The fair dealing defence while it is to be given a liberal interpretation draws the line at the point where no reporting occurred but was simply a taking of the protected material and using it. The court is not basing this conclusion on the fact that CVM is a competitor of TVJ. The fair dealing defence does not depend on whether the alleged infringer is a competitor but on the use of the material.

[216] If the court were to hold in favour of CVM on the interviews then it would be setting the stage for unrestricted utilisation of interviews without the need for any context such as reporting on current events. The interviews were not reporting and therefore they were in breach of TVJ's exclusive licence.

[217] The fact that they were taken from the IAAF's website which itself was lawfully available in Jamaica did not mean that CVM could simply take them and do with them as it wished. As the court understands it, when the IAAF made the live stream available it was for the ordinary man and woman to view for his or her own pleasure not for anyone to circumvent TVJ's licence by linking it to or making the stream available through wider dissemination whether or not a commercial objective was in view.

[218] The feature on the Beijing shown down between Mr Usain Bolt and Mr Justin Gatlin (no 2 above) was not the reporting of a current event. It was an analytical piece reviewing the history of both men leading up to the men's 100m final. The clips showed both semi-finals and final. It is true that it provided information but the statute requires **reporting** of current events and not the analysis of current events and while it may be difficult to draw the line between analysis, comment and criticism on the one hand and reporting (as in simply disseminating information) on the other, the statute and case law requires this distinction to be made because fair dealing for one purpose (such as review and criticism) may not be fair dealing for another purpose (such as reporting current events). CVM is not relying on fair dealing for the purpose of criticism and review but rather fair dealing for the purpose of reporting current events. It is therefore that aspect of

the fair dealing defence and that aspect alone which is to be considered. The court has concluded that the overall impression it has is that this piece was not for reporting current event although a current event was indeed the subject of the clip. The defence of fair dealing therefore fails.

[219] In respect of the promotional video featuring Mr Usain Bolt and Mrs Fraser Pryce (no 5 above) and other athletes, there was no proven infringement. Mr Wenzel does not say that the clips used came from TVJ's copyright protected work in the 2015 World Championships. Thus the defence of fair dealing does not arise for consideration since the very nature of the defence requires proof that the claimant's copyright was infringed and then the defence is that the infringement is excused because the dealing was fair.

[220] In respect of the video showing 100m men's final in fast action and slow motion (no 6 above). It came from the IAAF's live stream. The IAAF's live stream was not intended for this kind of use but for private viewing of persons and not for wider dissemination. It was not reporting a current event. The fair dealing defence fails.

[221] The video (no 8) showing the women's 200m and other races along with an interview was not easy to decide. There was indeed a reporting element. The court appreciates that just like the general news there is a place for using the clip along with a bit of the commentary from the onsite commentators to enliven the report. The court appreciates this because it is common in general news broadcast to use, for example, a clip and voice of CNN and BBC reporters at the scene of some tragedy, as part of the news and no one has ever argued that such use deprives the general news broadcast of the quality of a general news broadcast. The court has already held that sports news stands on equal footing in every single respect as general news and it not be regarded as inferior merely because it does not speak about the latest murder, rape, bank failure and fallen

politician. It is the court's view that interviews with five athletes tilted the balance against the fair dealing defence.

[222] At eleven (no 11) above the fair dealing defence succeeds. There was no analysis. It was a purely informative report of what took place. It utilised still images of the subject matter of the report. It coordinated the images with the names of the athlete so that viewers would be able to identify the athlete who was being spoken about at any point in the report. It is difficult to see how this could be anything else but fair dealing regardless of who owned the copyright. The defence of fair dealing succeeds.

[223] The twelfth posting (no 12) had among other things the final 50m of men's 100m final the slow motion replay and post-race activity. The core of the story was about whether Mr Usain Bolt would be able to defend his 100m title given his travails leading up to the Championships. There is no evidence that the other material came from TVJ's protected material. Had the matter stood there no infringement would have been established but the slow motion presentation and post-race activity of 33 seconds pushed it over the line because TVJ's copyright protected material was used. It was not a reporting of current events. It was an analytical piece primarily. The fair dealing defence fails.

[224] The thirteenth posting (no 13) was a report on a number of races. There was no analytical content. The entire video was 158 seconds. The interspersing of the onsite commentators with the CVM report's report does not make this video anything other than reporting of current events. The analogy between using the same combination of onsite reporting with local reporters doing some reporting on the same issue has never been said to make such practice any less reporting on general news. Any other conclusion can only be based on the idea that sports news has some inherent defect that prevents it from getting the same respectful treatment. This court sees nothing wrong with what has happened and therefore the defence of fair dealing succeeds.

[225] There is no evidence that the fourteenth and fifteenth (nos 14 and 15) videos had any copyrighted material such that would make TVJ the proper claimant. There is no need to consider fair dealing since there is no evidential foundation for TVJ to bring a claim in respect of these videos and in any event, the present claim is concerned solely with alleged breaches of TVJ's rights under the exclusive licence in relation to the 2015 World Championships. There is thus no liability against CVM in respect of these promotional videos based on TVJ's present claim.

[226] The eighteenth video was 150 seconds. The Return to the Nest logo was shown for 12 seconds. It was a report of current events but it had a substantial portion dedicated to the interview with Miss Williams. The interview began after 65 seconds and ran for 20 seconds, then a second portion of the interview ran for 11 second, and then a third part of the interview ran for 17 seconds. There were post-race scenes and the voice of the onsite commentator for 9 seconds. The total interview time was 48 seconds. But for this interview portion the fair dealing defence would have been clearly established. The clip of the races albeit the entire race, had that stood alone without the interview would have qualified as a reporting of current events.

What happens next?

[227] In intellectual property cases it is common for the trial to take place in two stages. The first stage deals with liability and if there is liability then the second stage deals with the remedy. They may be (a) damages; (b) additional damages; (c) account for profits; (d) delivery up of infringing material for destruction; (e) injunction and increasingly (f) publicity orders. Time is usually given for the claimant to determine what remedy will be pursued. There is authority for this.

[228] Mrs Gibson Henlin relied on **Island Records Limited v Tring International Plc and another** [1995] 3 All ER 444 for the proposition that after liability has been determined then the successful claimant may pursue damages or an account for

profit. It is at the election of the claimant. TVJ has now elected for damages. The principle and practice was stated by Lightman J at pp 446 – 447:

In proceedings in which the plaintiff claims in the alternative damages or an account of profits, the plaintiff may seek and obtain a trial at which will be determined all issues of liability, of the assessment of damages and of calculation of profits. In such a case full discovery will include all documents relevant to the assessment and calculation, and the plaintiff can make an informed election between damages and profits in the course of the trial in the light of the information revealed on discovery and in the evidence at the trial.

*With a view to the saving of costs, the practice has developed, in particular in intellectual property cases, when this is practicable, to have a 'split trial'. The action is divided into two stages. The first stage is the trial at which the issue is limited to that of liability, ie whether the plaintiff's rights have been infringed. The second stage, which is contingent upon liability being established at the first stage, is concerned with the question of assessment of damages and calculation of profits. In this way, the costs of exploring the issue of damages and profits are put off until it is clear that the defendant is liable and the issue really arises and requires determination. As a concomitant with this practice, there has likewise developed the practice of limiting discovery at the first stage to documents relevant to the issue of liability and excluding documents relevant only to the second stage. In this way the burden of discovery at the first stage is reduced, and the invasion of confidence necessarily involved in discovery is postponed and (if liability is not established) entirely obviated (see *Baldock v Addison* [1995] 3 All ER 437, [1995] 1 WLR 158). (It may be noted that this practice was in appropriate cases adopted by the courts of equity in the nineteenth century: see *Benbow v Low* (1880) 16 Ch D 93 at 98 and *Fennessy v Clark* (1887) 37 Ch D 184.)*

The price at which this cost and time saving is achieved is that the plaintiff will not before judgment at the first stage on the issue of liability have the benefit by means of discovery or otherwise of the information otherwise available on which the plaintiff is able to make an informed election as to remedy between an assessment of damages and an account of profits. The question which arises is

whether in this situation (as in the case of a motion for judgment where likewise the plaintiff is deprived of the opportunity to obtain such information before judgment) in the course or at the conclusion of the hearing the plaintiff must elect between the two remedies or is entitled first to sufficient information to make an informed election.

Four principles are clear. First, whilst a plaintiff can apply in proceedings in the alternative for damages and an account of profits, he cannot obtain judgment for both: he can only obtain judgment for one or the other (see Neilson v Betts (1871) LR 5 HL 1 and De Vitre v Betts (1873) LR 6 HL 319 at 321). Second, once judgment has been entered either for damages or an account of profits, any right of election is lost: any claim to the remedy other than that for which judgment is entered is forever lost (see United Australia Ltd v Barclays Bank Ltd [1940] 4 All ER 20 at 38, [1941] AC 1 at 30). Third, a party should in general not be required to elect or be found to have elected between remedies unless and until he is able to make an informed choice. A right of election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in case of both the two alternative remedies. It is quite unreasonable to require the plaintiff to speculate totally in the dark as to whether or not the sum recoverable by way of damages will exceed that recoverable under an account of profits. In an analogous situation, it has been held unreasonable to require a plaintiff to speculate whether a payment into court is sufficient to satisfy his claim for damages for infringement of copyright before he has been afforded inspection of the records of sales in the defendant's books (see Mate & Son v Samuel Stephen Ltd [1928-35] Macg CC 257 at 261). Fourth, the exercise of the right of election should not be unreasonably delayed to the prejudice of the defendant.

[229] TVJ is asking that the court considers additional damages under section 32 (2) of the Copyright Act. TVJ says that CVM's conduct comes within the meaning of flagrancy as used in the statute. According to TVJ, CVM had too many warnings of a possible breach. The first was a notice to cable operators and to free-to-air broadcasters that TVJ had rights to 2015 WAC. The second was Mr Allen's conversation with Mrs Khan on August 22, 2015. The third was Mr Allen's letter to Mrs Khan about the matter. The fourth was TVJ in-house counsel Mr Stephen

Grieg writing to CVM about possible breaches of TVJ's copyright. The fifth was the injunction hearing lasted 4 days.

[230] The authority cited by Mrs Gibson Henlin, **Ravenscroft v Herbert and New English Library Limited** [1980] RPC 193, does not support the idea that additional damages under the statute for flagrancy automatically arises merely because the defendant's conduct may be egregious. It arises, according to Brightman J, because 'effective relief would not otherwise be available to [the claimant] giving regard to the flagrancy of the infringement, any benefit shown to have accrued to the defendants by reason of the infringement, and other material considerations' (**Ravenscroft** p 208).

[231] Mrs Gibson Henlin submitted that flagrancy was established on the evidence. The court need not decide that now.

[232] Mrs Gibson Henlin has said that TVJ has suffered from CVM's breach. It is not clear what the 'suffering' is since the evidence is that TVJ did not lose any sponsor or advertiser from the 2015 WAC. As yet there is no evidence that TVJ has lost any profits or suffered any other kind of damage measurable in damages.

[233] The law does say that where damage cannot be proved then nominal damages and an award of costs and, depending on the circumstances, an injunction may be appropriate.

[234] The second phase of the trial is set down for September 21, 2016 at 10:00am.