



15 July 2005

CONFIDENTIAL

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Daniels,

**ATTORNEY GENERAL'S REVIEW OF
FAIR USE AND OTHER COPYRIGHT EXCEPTIONS**

In May 2005 the Commonwealth Attorney-General, Mr Phillip Ruddock, MP announced a review into the "fair dealing" provisions of the Copyright Act 1968 ("the Act"). As part of this review, the Commonwealth Attorney-General's Department released an Issues Paper ("the Issues Paper"). The Issues Paper invited comments from interested parties as to the adequacy of the existing provisions, and whether a new general exception based on "fair use" or new specific exceptions might be appropriate.

The Australian Football League ("AFL"), Cricket Australia ("CA") and the National Rugby League Limited ("NRL") only became aware of the call for submissions on 1 July 2005 and were granted an extension of time to file any submission until 15 July 2005. This letter comprises the submission of the AFL, CA, NRL and the Australian Rugby League Limited ("ARL" and, together with the AFL, CA and the NRL, the "Governing Sports Bodies").

Background

Australian Football League

AFL is a company limited by guarantee. Its members are persons appointed by each Club competing in the Australian Football competitions conducted by the AFL throughout Australia. Clubs competing in the AFL Competition do so under licence from the AFL and are regulated by a series of rules and regulations promulgated by the AFL from time to time. The AFL rules and regulations include provisions vesting the right to deal in the media rights of AFL matches and events, exclusively in the AFL.

The major income sources for the AFL are its broadcasting rights, corporate sponsorship, AFL finals series and AFL memberships. After meeting operational costs, the AFL allocates its operating surplus as follows:

- distributions to AFL Clubs, of which there are approximately 500,000 registered members and many more supporters;
- grants for game development;
- payments to the AFL Player's Association; and
- ground improvements - to assist the upgrade of various stadia around Australia at which AFL matches are played.

In 2004:

- distributions to AFL Clubs totalled approximately \$67 million, or on average \$4,184,000 per Club;
- the AFL invested approximately \$18.5 million in game development grants, comprising grants to State and Territory leagues; and
- the AFL invested \$5.11 million in ground development to assist the upgrading of venues at venues at which AFL matches are conducted.

Cricket Australia

CA is a company limited by guarantee. Its members are the six state cricket associations responsible for the governance and growth of cricket in their respective territories. CA is responsible for the overall governance and growth of the game of cricket in Australia. CA also exclusively controls the sale of media rights for matches involving the Australian cricket team played in Australia.

The major income sources for CA are its broadcasting rights, sponsorship, and gate attendance. After meeting operational costs, CA distributes its operating surplus to its members (the State cricket associations) for the purposes of developing the game of cricket (including running grass roots programs in clubs and schools, organising high performance cricket and improving venues and facilities for all cricketers in Australia).

In the 2004/05 financial year distributions to state associations for the purposes described above totalled over \$38 million.

NRL

The NRL, in conjunction with the Australian Rugby League and ARL Development, are responsible for the general administration and propagation of Rugby League. In this capacity it is responsible for the provision of funding for the maintenance and continued development of the game of Rugby League in Australia at both the senior and junior level. The NRL funds both the ARL & ARL Development and as such has a significant reliance on revenues from media rights to support these funding commitments.

The NRL is specifically responsible for the management of the elite Rugby League competition that is conducted in Australia and New Zealand. This is a competition that generates significant public interest in both countries, but particularly in the states of New South Wales and Queensland.

Media Rights Revenue

Revenue from sale of media rights by the Governing Sports Bodies is the single largest source of their funding, making up approximately 50%-70% of their respective revenues. The media rights revenue of the Governing Sports Bodies is currently principally derived from the sale of free to air television rights, pay television rights, radio rights, wireless rights and internet rights.

Maintaining this revenue is critical to the survival of the Governing Sports Bodies and the sports they administer. In addition, the ability to grow this revenue source by improving the ability of the Governing Sports Bodies to deal in their existing rights and to develop new rights, will allow the Governing Sports Bodies to:

- maintain and increase their distributions to members and clubs, which have high levels of community support and interaction;
- increase investment in Australian rules football, cricket and rugby league game development programs in all States and Territories;
- maintain relatively low admission prices for attendees at matches;
- continue and increase support for important community relations programs;
- continue to invest in facility development where appropriate and for the wider community benefit; and
- continue to operate without significant reliance on Government funding.

In addition, recent technological developments, including webcasting and the ability to communicate content over third generation (3G) mobile communications networks (see

further detail below), presents sports content owners¹, including the Governing Sports Bodies, with opportunities to maintain and grow revenue vital to their survival.

The Governing Sports Bodies are however becoming increasingly concerned by their inability through the *Copyright Act* to restrain the unauthorised use of their copyright broadcasts by third parties for their own commercial uses. This has arisen from the potential created by new media technologies for the delivery of digital broadcast content to consumers. This potential enables third parties to deliver what the Governing Sports Bodies believe is in substance sporting content under the guise of it being a news service protected by the existing fair dealing for reporting of news provision in the *Copyright Act*. Unless addressed, the ability of the Governing Sports Bodies to exploit their products and associated revenue opportunities offered by these emerging technologies will be significantly impeded, if not completely compromised.

To be clear, there would be little or no value in purchasing rights from Governing Sports Bodies for multi-media content (or developing these rights in the new media areas) if our laws provided unlicensed third parties with an opportunity to utilise that content without paying for it in a manner that effectively satisfies the consumer market. As noted above, current laws already place this funding at risk. Any further uncertainty or relaxation of the laws will undoubtedly exacerbate the situation.

What are the New Media Technologies?

Some of the relevant technological developments are the ability to broadcast moving images over the internet (webcasting) and over third generation (3G) mobile telecommunications networks. These developments, together with the control that is given to consumers by digital broadcasting and devices over content that the consumers receive, have created a paradigm shift in the sports broadcast rights area. The Governing Sports Bodies believe that the *Copyright Act* has not kept pace with these changes in technology.

These broadcasts are generally provided for a fee or as part of a service to attract a customer to a particular telecommunications carrier. This is contrasted with a traditional broadcast news or sports news service where the viewer would have to watch the service in the order determined by the broadcaster and would only be able to watch the particular news item once unless it was re-broadcast.

Reform Options Raised in the Issues Paper

The Governing Sports Bodies have reviewed and considered the options for reform of the “fair dealing” provisions of the Copyright Act 1968 (Commonwealth) (“the Act”) set out in

¹ For the purpose of this submission, the term “sports content owner” is synonymous with the owner of copyright in the sports content. It is the current and future position of the Governing Sports Bodies that they will own copyright in any broadcast or other communications of their matches and events.

the Issues Paper. Subject to the comments below, the Governing Sports Bodies do not believe that the existing fair dealing defences in the Act require any change and the Governing Sports Bodies do not support any of the reform options identified in the Issues Paper. Specifically, the Governing Sports Bodies oppose the introduction of an open-ended “fair use” style defence, whether as part of a provision consolidating the existing fair dealing defences or as a separate defence. The Governing Sports Bodies are tremendously concerned that any such open-ended defence will only lead to further uncertainty, difficulty in predicting outcomes in copyright infringement disputes and increased reliance upon litigation to determine the boundaries of the exceptions to copyright infringement.

Alternative Proposal - Reform of Reporting of News Fair Dealing Defence

It is particularly important to recognise the peculiarities of professional sport in this context when considering the fair dealing defence and issues of substantiality. The value of sporting rights are particularly susceptible to being damaged by the broadcast of relatively small proportions of them by an unauthorised user. This is particularly so in the sports administered by the Governing Sports Bodies, where there may only be a small number of scoring movements or wickets and other highlights in an entire game. If a third party was able to broadcast footage of the entirety of those highlights, even though that footage may only occupy one or two minutes out of a game lasting many hours, that would mean that a significant proportion of the potential viewers of a broadcast of a match would no longer be interested in watching the broadcast.

Given the particular susceptibility of sporting rights to being cannibalised by the unlicensed broadcast of a small portion of an event, there has always been a tension that has existed between the desires of the rights holders to protect their rights and those third parties who wanted to avail themselves of the fair dealing for news defence that the *Copyright Act* provided. This defence enabled an unlicensed third party to broadcast sporting content provided that this was for the purpose of reporting of news and that the dealing was fair pursuant to Sections 42 and 103B of the Act. In order to rely on the reporting of news defence it is necessary to establish two elements. First, it must be established that the dealing was for the purpose of, or associated with, “the reporting of news”. Secondly, it must be established that the dealing is a “fair dealing”. The terms “news” and “fair dealing” are not defined in the Act.

There are a number of problems with the existing defence.

The elements of the reporting of news defence are imprecise. This imprecision creates uncertainty and the potential for unfair exploitation of the reporting for news defence, particularly by persons utilising new technology to communicate sports content for commercial benefit.

For example, a 3G mobile communication service provider may seek to hide behind the reporting of news defence when providing a service communicating unlicensed highlights packages of matches on demand. In the current digital environment, content, including news

services, is being provided to consumers via the internet or through direct broadcasting through handheld devices. They are in substance being provided with a service by which through the choices they make digitally, they receive specific content on demand. When that content is unlicensed highlight packages of matches, it is the view of the Governing Sports Bodies that these broadcasts go far beyond what should be protected by a news fair dealing defence, that the protection of such a broadcasts by the reporting of news defence is inconsistent with the policy behind the defence that is identified on page 38 of the Issues Paper, and it would deprive the Governing Sports Bodies of a potentially significant revenue stream. Additionally, the Governing Sports Bodies would be unable to control the context in which content was provided to consumers. It is the view of the Governing Sports Bodies that this type of broadcast constitutes the direct exploitation of their copyright material by a third party for commercial gain. In simple terms, we believe that it is content of the Governing Sports Bodies that is being sold, and not a news service. We believe that the tension that has always existed between rights owners and those who wish to rely on the fair dealing for news defence is no longer capable of being fairly resolved through the existing provisions of the *Copyright Act* and that a new fair dealing for news defence is needed.

The effect of a dealing upon the potential market for or the value of copyright work has been recognised “as the single most important element of fair use”.² The Governing Sports Bodies believe that in order to protect the value of their broadcast rights, it is necessary for the news fair dealing defence in the *Copyright Act* to be amended. In its current form it has the clear potential to allow unauthorised third parties to communicate sports content for commercial benefit for the purpose of commercial benefit under the guise of it being a new service. The Governing Sports Bodies submit that the reporting of news defence should be amended to expressly provide that a dealing with copyright material will not be a fair dealing if the dealing has a material impact on the value of the copyright material. Such an amendment is intended to prevent a person dealing in sports content under the guise of reporting news where to do so would decrease the value of any rights that the sports content owner licences, or wishes to licence.

In addition to the above amendment, the Governing Sports Bodies also submit that the reporting of news defence should be further amended to adopt express statutory guidelines as to when a dealing will be a fair dealing. Statutory guidelines already exist with respect to the fair dealing defence for the purpose of research or study.³ It is submitted that appropriate statutory guidelines for the purpose of reporting of news defence include, in the case where only part of the copyright material is reproduced or communicated that - the amount and substantiality of the copyright material copied taken in relation to the whole of the copyright material. The guidelines should also include:

- the purpose and character of the dealing;
- the nature of the copyright material;

² Lehane, *Copyright and Design*, Butterworths, 2004, 40, 139.

³ See Section 40(2) of the Act.

- the ability to obtain the copyright material within a reasonable time at an ordinary commercial price;

In summary, in the digital space sports cannot realistically expect to be able rely on the acceptable exploitation of the reporting of 'news' agreed between television and radio broadcasters. As more and more media companies compete for customers in the digital space the potential for sports media rights to be 'cherry picked' under the guise of news will be too great without legislative intervention.

Conclusion

The position taken by the Governing Sports Bodies in this submission is designed to protect and promote the sports content owners' ability to generate revenue from copyright material they own. If the revenue of Governing Sports Bodies from the sale of their copyright material is threatened, then it will have a significant and undoubtedly disastrous impact on their operations, including distributions to members and clubs, investment in game and community development programs and investment in venues.

Representatives of the Governing Sports Bodies, including each of us, would be happy to speak with you about the matters set out in this submission.

Yours sincerely,

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CRICKET AUSTRALIA



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