

9 April 2009

Dr Ian Holland Committee Secretary
Senate Standing Committee on
Environment, Communications and the Arts
Parliament House
CANBERRA ACT 2600

BY E-MAIL: eca.sen@aph.gov.au

Dear Committee

Inquiry into the reporting of sports news and the emergence of digital media (Inquiry)
Our ref: A Lynch: I Fullagar

We refer to the above Inquiry and provide the following written submission.

Our background

1. Thank you for the opportunity to make a submission in respect of the above Inquiry.
2. We act for a significant number of national and state sporting organisations. We consider we undertake more work for and on behalf of sport than any other law firm in Australia. We make this submission on our own behalf and also on behalf of a number of our clients including Surf Life Saving Australia, Badminton Australia, Bowls Australia, Softball Australia and Australian International Shooting Limited. This submission focuses on the impact of the Inquiry on sporting organisations.

Summary

3. In this submission we:
 - (a) set out the current legal position which enables news reporting agencies to report on sport and which governs the broadcasting of sport events;

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- (b) address the current rights of sporting organisations to use and control the broadcast of sports events and the release of information which relates to sporting events (via both traditional and new media outlets);
 - (c) set out the position of the parties making this submission in relation to how these rights should be governed in future and the additional rights that should be granted; and
 - (d) address the 'public interest' element of this debate and the role that sporting organisations play in relation to furthering the public interest.
4. This submission addresses the use of digital and new media (being media platforms which use text, voice, recorded sound, recorded footage, still images, commentary, internet, web-streaming, on-demand sport coverage, mobile phone technology and direct broadcasting through handheld devices). Further, we consider these submissions would equally apply to any new technologies developed or made available in the future.

Terms of Reference

5. The Senate has referred the provisions of the Inquiry to the Committee for inquiry and report by 14 May 2009.
6. The Terms of Reference address a number of issues relating to the reporting of sports news and the emergence of digital media in Australia. While we have not responded to each of the terms of reference we have provided general submissions which address the issues raised in the Terms of Reference.

Current legal position

7. In order to determine the current legal position, and the rights of news agencies to report on sport, it is necessary to consider a number of sources. Each of these has been set out below.

The Copyright Act and the common law position

8. The *Copyright Act 1968* (Cth) does not provide copyright protection to 'sporting works'. This is in direct contrast with the position under the Copyright Act in relation to literary, dramatic and cinematographic works. Essentially, there is no copyright in the performance of sport.
9. This position is confirmed by current common law in the 1937 High Court decision *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

Protection of broadcasts

10. The Copyright Act does, however, provide protection to the broadcast of a sporting event. Copyright subsists in sound recordings, cinematograph films, television broadcasts and sound broadcasts¹.
11. For copyright to be infringed, a "substantial part" of the subject-matter (eg. the broadcast of a sporting event) must have been copied or reproduced.² The Copyright Act does not provide a definition of "substantial part". However, it has been determined in case law that in considering whether a substantial part has been

¹ ss. 89, 90 and 91 *Copyright Act 1968* (Cth)

² s. 14 *Copyright Act 1968* (Cth)

taken "questions of quality...as well as quantity arise". The first step is to "look at the part taken, compare it with the copyright work and ask whether it is possible to conclude from the comparison whether that part is a 'substantial part'..."³.

12. In order to make a sporting event attractive to broadcasters, and therefore rely on protections under the Copyright Act, sporting organisations must provide a 'protected' broadcast – that is, they must be able to give exclusive rights to one (or a small number) of broadcasters. If the organisation does not do so, then broadcasters are likely to see the event as holding little value. However, as there is no copyright in the performance of the sport (or in the sporting event itself), organisers must try to restrict access to, and otherwise control and regulate, the event area.
13. In some sports this is easy to do as there is a closed venue – for example, in relation to cricket and the football codes which are held within a stadium. Where the sport is performed within a closed venue, the organiser can limit entry to that event on particular terms. However, where there are no walls, fences or enclosures, sports organisations have a much bigger challenge in trying to offer broadcasters a protected venue (or performance area). Some examples of sports that do not have an enclosed sports venue can include road cycling which is conducted on open public roads, surf life saving and surfing which are conducted on public beaches and those sports which are conducted on a field or pitch that is open to the public.

Fair Dealing for News Reporting

14. The Copyright Act provides fair dealing provisions for acts that would otherwise constitute copyright infringement where that act is done for the purpose of the reporting of news⁴. Under these provisions, the reproduction of a broadcast does not constitute an infringement of copyright if it is for:
 - (a) the purpose of, or is associated with, the reporting of news in a newspaper, magazine, or similar periodical and a sufficient acknowledgement is made; or
 - (b) the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.⁵
15. This exemption currently provides news agencies and new reporting services such as the print, radio and television media a way to report on sports news without being in breach of the Copyright Act. It is submitted that this exemption applies equally to new and digital media. It is also submitted that such exemptions do not need to be any wider. However, the parties to this submission would not be opposed to expressly clarifying this position in the Copyright Act so that it is clear that these exemptions apply to all forms of media (including digital and new media), should the Committee consider this necessary.
16. In the recent case *Telstra Corporation Limited and Australian Football League v News Limited*⁶ the Court ordered that News Limited had infringed the copyright in certain AFL footage by providing hyperlinks to the footage on YouTube from certain newspaper websites. However, the parties entered into consent orders to settle the case so it is difficult to determine the effect this case had on the law (if any).

³ *TCN Channel Nine v Network Ten* [2005] FCAFC 53; see also *Hawkes & Son (London) Ltd v Paramount Films Service Ltd* [1934] 1 Ch 593, Lesser J at 606-607; *Ladbroke v William Hill* [1964] 1 All ER 465 at 473; *Collier Constructions Pty Ltd v Foskett Pty Ltd* (1991) 20 IPR 666 at 669; *Autodesk In v Dyason [No 2]* (1992) 176 CLR 300.

⁴ See ss. 42 and 103B *Copyright Act 1968* (Cth)

⁵ s.103B *Copyright Act 1968* (Cth)

⁶ In the Federal Court of Australia, New South Wales District Registry, No. NSD 959/2008

The Broadcasting Services Act

17. The rights of the public, to view certain sporting events in certain ways, are enshrined in the *Broadcasting Services Act 1992* (Cth) (**BSA**). The BSA allows the Minister to specify an event or events of a kind, the televising of which should be available free to the general public.⁷ These provisions are known as ‘anti-siphoning’ provisions and they provide free-to-air television stations with the first option to purchase the right to broadcast important sporting events. If this opportunity is not accepted, pay-television stations are then able to buy the right to broadcast those events that are on the anti-siphoning list. The anti-siphoning list currently includes the Melbourne Cup, AFL and NRL matches, international rugby union and league matches, international test and one-day cricket matches, national football (soccer) finals, each of the ‘Open Championship’ tennis tournaments, international netball matches, national basketball playoffs (finals), Australian, US and British golf ‘Open tournaments’ and ‘Masters tournaments’, Formula 1 races, Moto GP races, V8 Supercar races, IndyCar races, the Olympic Games and the Commonwealth Games.⁸
18. In addition, Part 10A of the BSA sets up a regime to discourage commercial television broadcasting licensees, program suppliers, the ABC and the SBS from hoarding rights to provide live television coverage of certain sporting events.⁹ This regime is known as ‘anti-hoarding’. The provisions require licensees who acquire the right to televise a designated event, but who do not propose to fully use that right, to offer the unused portion to the ABC and SBS for a nominal charge within a specified time.¹⁰
19. Whereas anti-siphoning imposes a legislative restriction on pay television broadcasters, anti-hoarding provisions are directed towards restricting the actions of free-to-air broadcasters.¹¹ The anti-hoarding provisions and anti-siphoning regime provide a framework to protect the public’s right to see live coverage of important sporting events.

Proposed legislation in Victoria – *Major Sporting Events Bill 2009*

20. The Victorian government is proposing to introduce the *Major Sporting Events Bill 2009* (the Bill) as legislation in Victoria. Under the Bill an event organiser may authorise a person to broadcast, telecast or transmit sound or images of an event and makes it an offence to broadcast the event or make a recording without the authorisation of the event organiser.¹² A breach of these sections can result in a fine of up to \$45,368 for a natural person or \$272,208 for a corporation.¹³
21. In the Explanatory Memorandum, it is stated that substantial penalties are required for this offence to deter “ambush broadcasters” who may generate a sizeable profit from unauthorised broadcasting.¹⁴

⁷ s.115 *Broadcasting Services Act 1992* (Cth)

⁸ *Broadcasting Services (Events) Notice (No. 1) 2004* (Cth)

⁹ s.146A *Broadcasting Services Act 1992* (Cth)

¹⁰ Department of Broadband, Communications and the Digital Economy website, http://www.dbcde.gov.au/media_broadcasting/policy_and_legislation/antisiphoning_and_antihoarding, webpage dated 23 March 2009

¹¹ Rowe, M., *Anti-Hoarding – Broadcasting Services Act 1992*, Issue 1, 2001, National, Rigby Cooke Lawyers 2001, p.1

¹² ss.40-44 *Major Sporting Events Bill 2009*

¹³ s.43 *Major Sporting Events Bill 2009*

¹⁴ *Major Sporting Events Bill 2009*, Explanatory Memorandum, clauses 40-44

22. However, this part of the Bill only applies if the Governor in Council, on the recommendation of the Minister, has ordered that an event is a “major sporting event”.¹⁵ In determining whether a sporting event is a “major sporting event”, the Minister must take into account a number of factors, including whether it is in the public interest to make the order, whether it is an international, national or State level event, the size of the event, the number of spectators, the likely media coverage, its projected economic impact, its contribution to Victoria’s international profile as a host of major events, the proposed commercial arrangements, the experience and expertise of the organiser, the factors affecting the operational organisation of the events (such as traffic and transport plans, emergency management plans and security plans) and the views of the local council where the event is to be held.¹⁶
23. In the second reading speech, Minister Merlino (Minister for Sport, Recreation and Youth Affairs)¹⁷ states,

“This is a vital addition to Victoria’s major events legislation because revenue from broadcast rights underpins the commercial viability of many major sporting events, but existing law does not provide a remedy for an event organiser whose sporting events is broadcast by an unauthorised party. Unauthorised broadcasting can seriously compromise the value of official broadcast rights and threatens the ability of event organisers to stage major sporting events where they cannot guarantee exclusive rights to the official broadcaster. This protection is needed in part because technology has made it increasingly easy for a person to make, and to broadcast, telecast or transmit a recording of an event.”

24. This Bill clearly proposes to strengthen the rights and position of Victorian sporting organisations. However, it only applies those additional rights to designated major sporting events. It is submitted that the Victorian government should consider expanding the Bill so that the provisions set out above relate to all international, national and state sporting events. It is also submitted that both the Victorian and Federal government should consider how ambush broadcasters can be deterred throughout Australia and, in doing so, should consider the proposals in the Victorian Major Events Bill.

The rights of sporting organisations

25. The framing of this debate as a ‘balance between commercial and public interests’ in relation to the reporting and broadcasting of sports news means that a crucial third interest, being the interest of sporting organisations, is ignored.
26. The athletes, clubs and sporting organisations put on the ‘show’. It is our submission that they should be rewarded by ensuring the Copyright Act protects their performance. That is, that there should be copyright in the performance of sport. Sporting organisations should be able to use and commercialise this intellectual property in the same way they can with other intellectual property assets. Whilst some discussion will need to be had to properly define this right, we submit that the government should recognise ‘sporting works’ as a category of protected works under the Copyright Act. Using this approach, the rights of news agencies would still be protected under the fair dealing for news reporting provisions of the Copyright Act.

¹⁵ s.7 Major Sporting Events Bill 2009

¹⁶ s.9 Major Sporting Events Bill 2009

¹⁷ Second reading speech, Parliamentary Debates (Hansard), Legislative Assembly, 56th Parliament, First Session, 26 February 2009, p.502

27. In addition, the footage, images and broadcast (**Recordings**) of the show are also valuable property (and currently recognised as such). Any revenue received for the use of Recordings (regardless of whether they are used or created via new or traditional methods of media) is one of the few ways sports can fund (or partially fund) themselves. This source of revenue is especially valuable in these uncertain financial times, when there is less sponsorship money available to all organisations.
28. This source of revenue is even more valuable to small and mid-tier sports that, generally, do not raise any (or much) revenue from 'gate attendances' (i.e. from the public attending the event/match). For many sports matches or competitions (even at national or international level) crowds are very small and sometimes limited to friends and family of athletes. Other sports are unable to control entry into the area where the sporting performance takes place, such as when the venue is a beach or other public location. To limit or remove this right directly affects the amount of revenue being directed into sport, which ultimately means there are less funds available for athletes, athlete development and the support of grassroots clubs and associations.
29. The potential for earning funds via the use and sale of digital and new media rights is particularly relevant to small and mid-tier sporting organisations. Most sporting organisations (other than cricket and the football codes) are often overlooked by traditional broadcasters. Digital and new media, for example through internet streaming or mobile phone telecasts, provide small and mid-tier sports with a much more cost-effective method of providing live coverage or information updates of their sport.
30. Alternatively, sporting organisations may choose to place Recordings or information obtained from Recordings on their own website in order to build their public profile. Again, the parties to this submission believe that any limitations on an organisation's ability to control Recordings and to choose where and how to make such Recordings available, is unreasonable and inappropriate.
31. Therefore, it is strongly argued by the parties to this submission that the government should regulate to define and protect sporting organisations' right to own and control all media use of any Recordings of their sport. At the very least, the parties argue that their current rights should not be limited or restricted in any way. It is our submission that the current law provides adequate protection to the right of news reporting agencies to report on sports news.
32. As explored above and identified in a submission to the 2005 Attorney General's Review of Fair Use and Other Copyright Exceptions:
- "...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 [the] 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."¹⁸*
33. It is submitted that market forces will ensure that sporting organisations do not act in a way that unreasonably limits access of media outlets. Where restrictions on representatives of news agencies are considered to be too onerous, those news agencies will (and have in the past) refuse to comply with the restrictions by refusing to attend and report on the event. As the coverage and publicity of sporting events is important to sporting organisations, those organisations will ultimately have to modify

¹⁸ Submission of Cricket Australia, AFL and NRL to the Attorney General's Review of Fair Use and Other Copyright Exceptions, dated 15 July 2005, p.4

their behaviour to ensure an optimum balance between their ability to regulate the making and use of Recordings while protecting their commercial interests. Most sports are not in a position to 'knock back' any publicity and would openly welcome and actively encourage news reporting agencies to attend any and all of their events.

34. The parties to this submission believe that news agencies should be entitled to report on sporting events or sports news. Indeed, the parties consider that it is in the best interests of the public to have a free, independent press and we are not proposing to prevent news reporting agencies from continuing to do so. The current fair dealing provisions allow news reporting agencies to report on sports news and, as submitted above, to do so via both traditional and new media platforms.
35. In fact, the parties to this submission, and indeed many other Australian sporting organisations (particularly small and mid-tier sports) would welcome more reporting of their individual sports on news outlets.
36. Some sporting organisations argue that there should be a process in place to regulate a better balance of news reporting for a wider range of sporting activities so that news coverage of sporting events (and different types of sports) is more even.
37. It is arguably in the public interest to ensure the Australian public is offered as wide a range of sports news as possible, covering as many different types of sport as possible. This would serve to provide more, and more varied, role models in sport for young Australians (and, indeed, for all Australians).

Public interest and the role of sport

38. Australian sporting organisations clearly perform a function which serves the public interest.
39. Without access to the revenue generated from the commercialisation of Recordings, in a complete and unrestricted manner, the 'visual property' of sporting organisations will have even less value and therefore, such organisations will receive less money from broadcasters. Any reduction in broadcasting revenue, whether such revenue is derived from new or traditional media sources, will have a direct affect on the organisations' ability to fund and sustain their elite development programs and grassroots community sporting programs.
40. It is acknowledged that federal, state and local governments provide facilities and venues (often for a fee) to and for sporting organisations and that it is in the public interest to allow all Australians to access these events or to read or watch news reports of the events. Certainly sporting organisations encourage members of the public to attend their events (for an appropriate fee) and the reporters of sports news (or those taking Recordings of sport for news purposes) to report on those events. Whilst sporting organisations are not usually required to build venues or event locations they are often responsible for the maintenance of these venues. The right to control both the actions of those that enter the facilities and the way in which Recordings are used by setting accreditation standards and requirements (subject to the fair dealing provisions in the Copyright Act) is essential for sporting organisations. This allows them to be in a position to earn revenue via broadcasting and to maintain their facilities and programs to an appropriate standard. As long as sporting organisations do not breach the fair dealing provisions in the Copyright Act, they should be entitled to continue to enter into contractual terms with news reporting agencies to define how Recordings are used.

41. It is clearly in the public interest for grassroots community sport to be supported and developed and for Australians to have the opportunity to play and watch local sport. Further, the federal government has recently placed an even greater emphasis on the health benefits of the participation in sport by all Australians. The Australian government has stated its commitment to supporting sport, particularly at the community level, and increasing Australians' participation in physical and recreational activities to promote physical and mental health.¹⁹
42. Grassroots community sport could not survive without the support (both financial and in the provision of administrative and education resources and advice) of state and national sporting organisations. The welfare of state and national sporting organisations and their ability to support and encourage greater participation is dependent on their ability to seek and pursue methods of raising revenue, other than via government grants. Therefore, it is essential that sporting organisations are entitled to ownership, use and control of Recordings of sports events and the terms of entry into those events.
43. In addition, some news reporting agencies would argue that the ability of Australians to watch and learn about elite sport performances is central to our cultural identity.²⁰ The parties to this submission would agree with this position and reiterate that the success of Australian elite athletes and the ability of sporting organisations to fund development programs and provide even a limited means of support to elite athletes are directly related to the organisations' ability to raise revenue. Without this support, there is a risk that Australia's most talented athletes would relocate to other countries which can provide this support. Again, we emphasise that digital and new media is seen as having the potential to provide sporting organisations (particularly small and mid-tier organisations) with a more cost-effective and easier to access avenue of revenue raising.
44. Further, some sporting organisations provide additional public benefits. An example is Surf Life Saving Australia and its state surf lifesaving bodies and local clubs which provide important services and benefits to the public. Surf Life Saving Australia plays a vital role in the provision of aquatic safety and education, lifesaving services and the operation of beach patrols to ensure the safety of our community at its local beaches. An erosion of Surf Life Saving Australia's ability to resource its operations will have a negative effect on its ability to provide programs and activities such as lifesaving, training and education and beach patrol. Surf Life Saving Australia actively protects its intellectual property (including its brand and its many registered trade marks). It relies on corporate sponsorship to fund its programs and activities and is acutely aware that sponsors pay a fee for their association with it and for the right to use its intellectual property. Surf Life Saving Australia sees that the use and commercialisation of broadcasting rights has the potential to be a major 'asset' to its operations in the future as long as it has the right to control and regulate the use of this asset.

¹⁹ Department of Health & Ageing (Sport) website, <http://www.health.gov.au/internet/main/publishing.nsf/Content/sport-1>, webpage dated 18 December 2008

²⁰ Submission of the Associated Press to the Australian Senate Standing Committee on Environment, Communications and the Arts for its Inquiry on the Reporting of Sports News and the Emergence of Digital Media, submitted by David Tomlin, The Associated Press, New York, undated, p.2

45. We also draw the Committee's attention to the fact that national and state sporting organisations are not-for-profit organisations. Under their own constitutions and the law, not-for-profit organisations are required to act in the interests of the sport as a whole and to use any profits to further the objects of the organisation and the sports. The distribution of profits to members of incorporated associations or companies limited by guarantee is prohibited under the relevant legislation²¹.

Conclusion

46. The parties to this submission wish to protect their 'visual property' and their related intellectual property rights from unauthorised access and use in order to safeguard their commercial interests and partners. They also want the government to amend the Copyright Act so that it protects the performance of the sport itself as 'sporting works' so that they can treat the performance as an intellectual property asset.
47. The parties to this submission see digital and new media as having the potential to be a particularly useful tool as they may be able to harness these avenues, in a way which is cheaper and easier than the use of traditional media, to promote their sport. However, for this to occur, the sporting organisations must have the right to own and control the broadcast of their events and any Recordings taken of the event. Any restrictions or regulations that inhibit these opportunities would be seen as detrimental to the sport, which would have a negative effect on both elite athletes and grassroots community sporting clubs which are supported by their state and national sporting organisations.
48. Such sporting organisations also hope that as digital and new media becomes more common place there will be increased reporting of a wider variety of sports. There is no reason why news agencies cannot rely on the current copyright 'fair dealing for news reporting' exemptions to enable them to report on all sports.
49. If sporting organisations are not entitled to protect and commercialise their visual property, they will become more dependent on government funding and assistance. Such dependence is a risky position to be in, especially in these uncertain financial times. There is certainly no guarantee that federal and state governments will be in a position to continue to fund sporting organisations at the same or (preferably) at an increased level. As the cost of living continues to increase, so too does the cost of providing community and elite sporting programs and opportunities. It is therefore imperative that sporting organisations are not further restricted or limited in their ability to commercialise broadcasting and publicity opportunities in either traditional or new media technologies.

²¹ See the *Corporations Act 2001* (Cth) and the various State incorporated associations legislation.

50. Should the Committee require any clarification on any matter above please do not hesitate to contact us. If the Committee decides to hear oral submissions we would appreciate the opportunity to present and also to clarify the matters set out above if necessary.

Yours faithfully

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