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Committee Secretary
Foreign Affairs Sub-Committee
Senate Committee on Environment, Communications, and the Arts
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Dear Secretary

Reporting of Sports News and the emergency of digital media

SBS welcomes the opportunity to provide a public submission to the Senate Standing Committee on Environment, Communications and the Arts inquiry into the reporting of sports news and the emergence of digital media.

SBS believes the current arrangements and conventions guiding the reporting of sports news is adequate and operates well in practice. This submission provides detail on the current arrangements for sports news reporting that SBS abides by, and raises issues which the Committee may wish to consider in its deliberations.

I would be pleased to brief the Committee in person should the opportunity arise.

Yours sincerely

Shaun Brown
Managing Director

Submission to the Senate Standing Committee on Environment, Communications and the Arts

Inquiry into the reporting of sports news and the emergence of digital media

Introduction

SBS was created to give voice to Australia's multicultural community. Since 1975, when it began broadcasting radio services in languages other than English to migrant audiences in Sydney and Melbourne, SBS has supported and promoted the diversity of cultural identity and expression by Australia's cultural communities. The introduction of SBS Television services in 1980 and SBS Online in 1997 enabled SBS to extend its reach and expand the range of cultural expressions it makes available to all Australians.

For more than thirty years now, SBS has been providing Australian audiences with a unique mix of multilingual and multicultural content that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society. No other broadcaster tells such diverse stories about Australian society or enables audiences to engage with the world as directly and creatively as SBS. It has broad support within the community and is recognised internationally as the world's most culturally and linguistically diverse public broadcaster.

For many Australians, SBS is their main conduit to the best of news, sport and current affairs from home and from around the world. The current arrangements governing the use and coverage of sports rights allow SBS to gain value from its investments, whilst also allowing for the reporting of any sports as genuine news items.

As both an owner and non-owner of sports rights, with an obligation to report newsworthy items on television, radio and online, SBS supports the continuation of the current arrangements and in general does not believe a move towards greater regulation would be of benefit to sporting bodies, sports fans and the wider Australian community.

Background – about SBS

SBS is a national broadcasting service operating under the *Special Broadcasting Service Act 1991* (SBS Act). As an independent national broadcasting service, the SBS Act provides for a Board of Directors to decide the objectives, strategies and policies of SBS. It is a hybrid-funded public broadcaster, financed primarily by Federal Government funding through triennial funding arrangements. Under the SBS Act, SBS is permitted to broadcast advertising and sponsorship announcements (subject to certain limitations). The SBS Act also provides for SBS to carry on, within or outside Australia, any business or other activity incidental to the fulfilment of the Charter. Other sources of revenue include sales of SBS produced or licensed programs, sales of program-related and logo-licensed merchandise and revenue from SBS In Language services (translation and subtitling).

In the 2008/09 budget, SBS received a total of \$193.7 million in Federal Government funding which was supplemented by \$56.8 million in revenue from its commercial activities. The majority of SBS revenue is allocated to fixed costs such as employee and transmission expenses.



SBS Charter

The SBS Charter, provided in the SBS Act, sets out the principal function of SBS and a number of duties it has to fulfil in performing its principal function. The Charter states:

- (1) The principal function of SBS is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.
- (2) SBS, in performing its principal function, must:
 - (a) contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities; and
 - (b) increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and
 - (c) promote understanding and acceptance of the cultural, linguistic and ethnic diversity of the Australian people; and
 - (d) contribute to the retention and continuing development of language and other cultural skills; and
 - (e) as far as practicable, inform, educate and entertain Australians in their preferred languages; and
 - (f) make use of Australia's diverse creative resources; and
 - (g) contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the Australian Broadcasting Corporation and the community broadcasting sector; and
 - (h) contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting many points of view and using innovative forms of expression.

As a public broadcaster, it is essential for SBS that its right to report and reflect on matters of public interest is protected.

SBS Services

SBS provides television, radio and online services.

SBS Television

SBS Television – on its main channel and its digital World News Channel – broadcasts a unique mix of Australian and international programming, from hundreds of national and international sources, which SBS either produces, acquires or commissions including news, current affairs, documentaries, sport, dramas, comedies and entertainment.

In 2007/08, the balance of English and non-English language programming on the SBS main channel was equal. For the same period on the World News Channel, 98 per cent of the total hours of programming were in a language other than English.

Each week more than 8 million Australians watch SBS Television. This includes 53 per cent of people born overseas in a non-English speaking country are who reached by SBS Television in an average week.



SBS Radio

SBS Radio is the world's most linguistically diverse network. It broadcasts programs in 68 languages. Each language program presents listeners with a wide range of content covering local, national and international news and current affairs, sport, interviews, features, talkback, community information and music.

SBS Radio broadcasts two services in Sydney, Melbourne and Canberra and Wollongong, and a national service to other major centres around Australia including Adelaide, Brisbane, Darwin and Perth. Together with the ABC and commercial radio broadcasters, SBS will launch digital radio services in 2009, which will further add to the services SBS provides the Australian community.

SBS Radio provides a bridge to link the 3.1 million Australians who speak a language other than English to the wider Australian community.

SBS Online

SBS Online extends and enhances SBS Television and Radio programming and creates and commissions innovative content and interactivity that is exclusive to SBS Online. The SBS Radio website has audio streaming of SBS Radio's language programs as well as podcasting services and archived news and other reports.

In 2008 an average of 667,000 people visited SBS Online each month (an increase of 32 percent over 2007), with an average of more than 9.9 million unique browsers per month (an increase of 40 percent over 2007).

SBS & the reporting of sports news – The impact of new technologies

As a public broadcaster with a strong commitment to providing quality and relevant news to its audience via all three media (television, radio, online), SBS is continually reporting on the latest sports news.

SBS's sports television programmes have historically drawn large audiences to the network, and at the same time SBS has developed a reputation for the quality presentation of football, cycling, athletics and other major events.

SBS holds contracted rights to provide exclusive and non exclusive coverage of a number of sporting events. These events include the 2010 and 2014 FIFA World Cup Finals, FA Cup Finals, UEFA Champions League, the Tour de France, the Dakar Rally, the 2009 Ashes, and the 2009 IAAF World Athletics Championships. SBS Radio also holds rights to broadcast the A-League and has a long standing arrangement to cover the Australian Open tennis.

SBS includes sports news as a segment on its evening television news bulletins, in sports programs, as part of its radio broadcasts and online, both on the SBS news website and on dedicated, sport-specific websites including the World Game and the Tour de France. In short, SBS is a large, net user and aggregator of sports news and is a trusted source of information for its audience. The availability of news resources online also serves to allow greater access to information for Australians. Australians can digest news anytime, anyplace, indeed in places SBS Television or Radio cannot reach, provided they have access to the internet.



SBS's sports coverage is of direct benefit to the public given the important role of sport to Australia's social fabric and the intense interest in sports issues. SBS's sports coverage is also beneficial for the exposure of the various sporting codes to a national audience. In line with the SBS Charter to inform, educate and entertain all Australians, and in so doing, reflect Australia's multicultural society, SBS's sports coverage will often focus on sports or aspects of a particular code which are neglected by dominant mainstream media coverage.

By way of example, SBS has invested heavily in its football website www.theworldgame.com.au as a 'one-stop shop' for football fans to receive the latest news and results on football from around the world. The site includes a mix of exclusive-rights content, "fair dealings" content and original analysis, video clips of news reports and game highlights, interviews, blogs and reporting. Football fans can access game highlights, results, and news updates on demand. The growing popularity of this website strongly indicates that this is increasingly how football fans want to access football content. The website attracted growth of 20 percent in average monthly unique browsers and a 33 percent increase in monthly page impressions from 2007 to 2008.

As this example highlights, the public demand is increasingly for more and more information, at a time and place of their own choosing – in effect, a 'dip in, dip out' form of news consumption on-demand. In this environment, the application and extension of fair dealing to the online and digital portals is vitally important. The imposition of rigid frequency limitations on news reports would not be of benefit to the community and consumers of sports news.

On SBS Radio, many of the in-language programs include sports news as part of their news bulletins, as part of a separate segment on sports news, or as part of a feature segment (if there is a sporting event on of particular significance to a particular community). As examples, SBS included segments, with interview and photos (online), from the Socceroos v Uruguay World Cup qualifier in 2005. The Italian program also has a one hour segment, once a month, dedicated to Italian sports news. Again, all of this information is also available on demand, in an online format.

SBS Radio also has a large international audience that accesses and enjoys SBS content, including sports news and coverage. For instance, during SBS's coverage of the 2008 UEFA European Championships, SBS Radio coverage of games was available in-language to stream online, a service enjoyed by many fans living in the countries contesting each game.

The introduction of digital radio in 2009 introduces another, new form of technology to the market, with an increased range of services available for the community. Digital radio will allow consumers to access information, including sports news, in a text format, thus providing the community with even more choice in how they access sports news. Again, this resource will be a net-consumer of sports news.

Sports news reporting in-language on SBS Radio serves a vital community and social inclusion interest. It helps ethnic communities maintain a link with sports of interest to each community, helps maintain cultural links to their homelands, and also helps often minor, less popular sports gain exposure.



The application of “fair dealing” in the reporting of sports news – The balance of commercial and public interests

The reporting of sports news in Australia is, in essence, self regulated by the broadcasting industry.

As the Committee would be aware, in Australia, the reporting of sport and sporting events is dictated by the *Copyright Act* and its provisions for “fair dealing”. Fair dealing is the over-riding principle that governs the reporting of sports news in Australia. The Copyright Act provides that a “fair dealing” with copyright material such as a clip from a sports match does not infringe copyright if it is “for the purpose of, or is associated with, the reporting of news”.

This law means that a media outlet which is a non-rights holder can use footage of a sports or other newsworthy event, without permission from the rights holder, to report the news, provided its use is “fair”. Under the principles of fair dealing, SBS and other broadcasters will often arrange for feeds to non-rights holder media of an event to which SBS has exclusive rights. This ensures fair access for all media outlets without compromising the legitimate interests of the rights holder.

Over time, the application of fair dealing has evolved on television and radio to an industry-accepted and self-regulating standard whereby there is common consensus as to what type of usage is “fair”. Broadcasters and media outlets have regard to a range of factors, including conventions such as the ‘3x3x3’ arrangement which is frequently included in the Accreditation Conditions established for media access by many sporting organisations. That is, a useful a convention for sports news reporting on television and radio is that non-rights holders will use no more than 3 minutes of footage, spaced at intervals of longer than 3 hours, no more than 3 times a day. However, this convention may be flexible in particular circumstances – such as where an extraordinarily newsworthy sporting event demands more regular reporting. Such a convention is therefore not susceptible of uniform regulation and SBS does not believe that any such codification should be introduced. This is reinforced by the fact that sporting organisations themselves will often vary the 3x3x3 arrangement in their Accreditation Conditions for particular events.

These industry practices and cooperative sharing of feeds operate without major problems in SBS’s opinion and experience. This benefits all broadcasters and media outlets, as no single broadcaster owns the exclusive rights to all sports, making it essential that all outlets share footage and content. All broadcasters endeavour to preserve the integrity of this convention, as it serves all and would benefit none to act outside of the ‘fair dealing’ arrangements. The ultimate beneficiary under these “fair dealing” arrangements is the Australian community.

For the reporting of sports news online, SBS again adheres to a ‘fair dealing’ regime. Online fair dealing conventions and industry practices are currently evolving and again, it would not be appropriate to introduce codification of fair dealing in this context.

The *Telstra v PMG (2007, Federal Court)* case provided some guidance around the scope of fair dealing rights for news reporting available to non-rights holders in the online and digital environments. Although the case settled before trial, the interim judgement contains some useful pointers on the extent to which a non-rights holder can use a rights-holder’s footage without permission to report the news. The judge found that footage may remain newsworthy for 48 hours after the completion of a match, despite Telstra arguing for 24 hours.



The judge also noted that in television there has been over the years a similar use of footage in 'sports news programs', including SBS's "World Sport" and "World Game". The judge did not decide definitively on whether TV industry standards of fair news reporting applied in online and digital contexts, or whether PMG's use of two minutes of footage per match was fair. However, as Telstra had accepted in a different rights agreement that non-rights holders may take two minutes at match-end as fair dealings for online and digital news reporting, the judge did not believe PMG's use of two minutes to be definitively unfair.

The low number of cases in this area demonstrates that industry convention and flexible practices are appropriate self-regulatory principles and that codification is not needed.

Simply put, SBS relies heavily on fair dealing and access to copyright material as a key part of program making.

Accreditation

The current accreditation process for journalists and media representatives at sporting events is similar to the fair dealing arrangements, in that it is largely self regulating.

SBS relies on securing accreditation to sporting fixtures as an important part of its coverage of sporting events. As part of its Summer of Tennis coverage every year, SBS Radio sends a team of broadcasters to the Australian Open to create extensive content – with the latest news, interviews (in both English and the language of the individual player), and results being made available to tennis fans on radio and online, allowing the community to access the news at a time of their own choosing, and (in some cases) in their preferred language. As a non-rights holder to the live broadcasting of tennis matches, SBS's Summer of Tennis coverage is based on the proper accreditation of its staff who are provided with access to the venue. SBS is legally obliged to not infringe on the exclusive broadcast rights of the rights-holder, and respects the copyright of the respective network.

In this instance, a mutually beneficial balance has been struck between the owners of the rights to the event, the sporting body, and SBS as an accredited news service. The ultimate beneficiaries of this arrangement are the tennis fans of Australia.

SBS would be very concerned to see further restrictions being placed on the accreditation of journalists and non-rights holder media representatives, either through contract or by the sport governing bodies themselves. Such a development would not be in the public interest.

Of particular concern are the recent controversies surrounding Accreditation Terms and Conditions in relation to media coverage of a range of cricket events in 2008 and 2009. One much disputed condition was that the accredited media organisation could not use or make available any image without the prior permission of the sports governing body. Whilst commercial concerns about online use of cricket images potentially undermining the business model for payment of large rights fees for exclusive media coverage may have been a catalyst for the cricketing bodies imposing such a condition, the potential for censorship by the sporting code to prevent public disclosure of any negative aspect of the game they wish to suppress must be taken into account.



Incidents such as acts of violence on the field, or disputed referee decisions, which reflect adversely on the sporting code and its high profile players and referees, are examples of coverage which a sporting body may wish to suppress. The significance of sport to the fabric of Australian society referred to earlier highlights the public interest in disclosure of such information. One possible solution is for law reform to clarify that the fair dealing rules which permit the dissemination of fair amounts of copyright material for the purpose of reporting the news or for criticism and review, are not overridden by contracts such as Accreditation Conditions. SBS has previously pressed for law reform on this copyright versus contracts issue. A copy of our submission is attached for your reference.

Issue of concern

SBS notes the following issue of potential concern on which it is maintaining a watching brief.

IceTV appeal

SBS is awaiting with concern the High Court's judgement in *Nine Network v IceTV Pty Ltd*, an appeal by IceTV against the judgement of the Full Federal Court (2008) FCAFC 71. This case concerned a successful claim by Nine that IceTV's copying of its "time and title" information about its broadcast schedule was a copyright infringement.

As commentators have observed, the Full Federal Court has applied an extremely low threshold test to copyright protection of data compilations. If this decision is upheld, it has the potential to seriously affect the free public flow of facts and data – such as sports fixtures and other publicly available sports statistics – by putting them under proprietary control. The impact on digital sports news reporting could include preventing the following, currently unlicensed online activities from being carried out by SBS, local communities or other media without a licence from one official source:

- running football tipping and pools competitions (see www.freethefixtures.com , which is a website tracking the attempts by a football licensing company from the United Kingdom to obtain large licensing fees from fan sites with legal threats, despite having no obvious legal basis to do so);
- displaying basic fixtures information about upcoming matches in various sporting codes. SBS has received demands for licensing of such activities on www.theworldgame.com.au . SBS maintains that sports fixtures, like public transport timetables and other basic information of everyday public discourse, should not be the subject of proprietary control. Information such as what team is playing where and when, is vital information SBS wishes to deliver for the benefit of its many sporting enthusiasts. If it is forced to licence such data from every code the costs are likely to be prohibitive, and would not serve the public interest;
- using player and other historical sports statistics in commentary and analysis of sporting events. SBS currently compiles such data variously by itself or from third parties, including in one case an individual sports enthusiast, who have used their independent effort to research and aggregate publicly available sports data. The Full Federal Court decision in IceTV, while it remains undisturbed by the High Court or overridden by legislative amendment, suggests that it will be difficult for those activities to be done without a licence because it will be very difficult to do so without verifying some facts from the official source from time to time. This verification practice proved to be

“copying”, in the opinion of the Full Federal Court, when done by IceTV to check weekly variations to Nine’s schedule.

SBS submits that such a proprietary bottleneck on the use of sports data is anti-competitive and not in the public interest. If the High Court rejects IceTV’s appeal, Australia will be out of step with the laws of the European Union and United States. The laws of these major economic centres recognise the public interest in the free availability of facts and data and the balance to be struck between proprietary and aggregator business models in the digital world. SBS is of the opinion that if the High Court does not reverse the Full Federal Court decision and uphold a general right to compile, analyse and report on sporting and other facts of public interest, that legislative reform should be required.

Conclusions

SBS relies heavily on fair dealing arrangements to access copyright material in order to report on sports news in a timely and accessible manner. As a public broadcaster, it is essential for SBS that its right to report and reflect on matters of public interest is protected.

SBS’s Charter requires the organisation to “inform, educate and entertain all Australians”, which is why SBS places such a premium on delivering a reliable, independent, trusted and timely news, current affairs, and sports content on the platforms that the community desire – on television, radio, and online.

As the exclusive free to air rights holder to a number of high profile and popular sporting events, SBS strongly believes in the right for rights-holders to extract a fair commercial return on their investment. This is particularly the case as the community has increased opportunities to access their chosen sport in the digital age. But the pursuit of commercial return should be balanced against the right of the community to freely access news that is part of the everyday public discourse.

The well established and long standing practice between Australian broadcasters of fair dealings made from each other’s satellite feeds or from tapings off air has worked well to maintain a balance between the interests of right-holders and users. As digital media gains in popularity and relevance, it is vital that fair dealing conventions are extended and evolve to meet the needs of the community. SBS believes this process should be allowed to continue, free from regulation, as is currently the case. Status-quo arrangements represent the best possible model for the future.

