

2 April 2009

Dr Ian Holland
Secretary
Senate Standing Committee on Environment, Communications and the Arts
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Holland,

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

Getty Images Pty Ltd and its associated companies, Getty Images Sales Australia Pty Ltd and Getty Images Devco Australia Pty Ltd, make the following submission to the inquiry into the reporting of sports news and the emergence of digital media being undertaken by the Senate Standing Committee on Environment, Communications and the Arts.

1 Executive Summary

- (a) Sport is integral to Australian culture and major sporting events are of national importance.
- (b) Some Australian sporting bodies, in particular the Australian Football League and Cricket Australia, have recently sought to impose significant restrictions on the photographic coverage of the sporting events they control.
- (c) There is no copyright in sporting events. The ability of sporting bodies to restrict access to the events they control arises from the physical control of the venues at which matches are played.
- (d) An independent, competitive and impartial news media is a vital part of a modern democracy. The unrestricted right of the news media to photograph and report events of significant public interest and importance is integral to the effective operation of the news media.
- (e) Restrictions imposed on photographing and reporting on sporting events significantly impedes the objective coverage of those events and also significantly disadvantages rural and regional communities as their local newspapers may not have the necessary rights to receive photographic images of major sporting events. The access restrictions are also impeding international coverage of some Australian sports. International media

organisations rely on news agencies to provide editorial material and photographic images in order to provide news coverage. Without this agency-sourced material, the affected sports won't receive international news coverage.

- (f) The internet and mobile telephone platforms form part of the overall editorial media distribution mix, in addition to more traditional news platforms. The restrictions which some sporting bodies have sought to impose on the dissemination of photograph images by means of the internet and mobile telephone platforms is impeding the development of these evolving sources of news delivery.
- (g) The major Australian sporting bodies are significant beneficiaries of public funding and enjoy access to venues on Crown land often on favourable terms.
- (h) In an effort to encourage diversity of choice for the Australian news consuming public and also the development of emerging new media as a reliable source of independently produced news, the Australian Government should ensure that Australian sporting bodies are obligated to continue the tradition of providing unrestricted access to news organisations for the reporting and photographing of sport for news purposes. This need is especially compelling where the use of Crown land or government funding is provided to aid the hosting of events by such sporting bodies.

2 Getty Images

2.1 Getty Images Pty Ltd is an Australian subsidiary of Getty Images, Inc, an international leader in the provision of photographic images and associated products, which was established in the USA in 1995 and in Australia in 1997. In February 1998 Getty Images, Inc, acquired the Allsport group of companies, a sports photography agency whose photographers captured images from sports events throughout the world. The other Australian subsidiaries of Getty Images, Inc are Getty Images Sales Pty Ltd and Getty Images Devco Australia Pty Ltd. For convenience, the three Australian subsidiaries of Getty Images, Inc are referred to in this submission as **Getty Images**.

2.2 Getty Images provides a wide range of services to its clients including the provision of photographic images to newspapers, magazines, corporate communications and other news agencies for editorial use. This is a very a significant part of the company's Australian operations, and Getty Images is a leading provider of photographic images to Australian newspapers, magazines and news agencies. In Australia and New Zealand Getty Images makes available in the region of 200 to 400 new editorial images to its customers every day. These photographic images are used by the clients of Getty Images to illustrate and bring to life their editorial coverage of news and sporting events. Getty Images serves in the region of 270

different customer accounts for the use of editorial images in Australia alone and has an incredibly wide international reach, with images from the Getty Images, Inc group of companies being licensed in virtually every developed part of the world via its network of 20 company owned offices and numerous other delegate partners.

- 2.3 Getty Images also has commercial relationships with a number of Australian sporting bodies including Cricket Australia, Tennis Australia, the Australian Football Federation, and the Australian Olympic Committee to, in particular, originate and provide photographic images to those organisations. Moreover, the Getty Images, Inc group of companies has a deep and unparalleled heritage of partnering successfully with sports governing bodies, often distributing images owned by the sports governing bodies in addition to and distinct from its own editorial coverage of those sporting bodies' events. It currently provides photographic services to over 50 sporting bodies worldwide, having notably been the exclusive official photographic agency to the International Olympic Committee since the Winter Games in Calgary 1988.
- 2.4 This submission is mainly concerned with the activities of Getty Images as an Australian provider of photographic images of Australian sporting events for editorial purposes, and with the rights of the news media to provide independent photograph coverage of sporting events for editorial purposes. However, it also serves to illustrate that these activities and rights can be exercised harmoniously with the commercial exploitation of copyright material owned by those organising the sporting events and the provision of other commercial photographic services.

3 Access by the news media to Australian sporting events

- 3.1 An independent, competitive and impartial news media (the so-called "fourth estate") is a vital part of a modern democracy. Since the inception of organised sport in Australia the news media has been granted unrestricted access to public sporting events to take photographs and report news. This has ensured that the public has had access to a wide range of news and photographic images of sports events. In addition, the public has been able to access news about, and photographs of, all aspects of Australian sport, including the results and newsworthy aspects of Australian sporting events, from a range of different media outlets - television, radio, newspapers, and magazines and, more recently, the internet, and mobile telephone platforms.
- 3.2 Recently, two Australian sporting bodies which control sporting competitions which are of great interest to the vast majority of Australians, the Australian Football League (AFL) and Cricket Australia, have sought to impose restrictions on the taking of news photographs at matches of the sports they control. The restrictions are outlined in greater detail below.
- 3.3 Getty Images is very concerned by these restrictions and also by the likelihood that other Australian sporting bodies, as well as overseas sporting bodies with a public following in Australia, may follow their example.

- 3.4 Getty Images is strongly of the view that competing news organisations should have unrestricted access to sporting events for the purpose of reporting news.
- 3.5 Sporting bodies should not be able to limit the news media's use of photographic images taken by or on behalf of the news media at sporting events if the use of the images is for the purpose of reporting news.
- 3.6 At the same time, Getty Images acknowledges that sporting bodies have the right to exclusively license the following rights in the matches they control:
- (a) the broadcast of audio-visual material that is either owned or officially authorised by the hosting sporting body (sometimes known as the "host broadcast") over radio, television, and other directly competing newer media such as via video streaming on the internet and mobile telephones;
 - (b) commercial merchandise rights; and
 - (c) advertising and sponsorship rights.

This submission is not concerned with the granting of those rights, all of which are immediately understood by the public to originate from and/or create revenue for the sporting body.

4 Recent access issues

- 4.1 The AFL and Cricket Australia have recently acted to deny access by independent press photographers to the sporting events they control, unless the photographer (or the media organisation they work for) accepts quite onerous contractual conditions in respect of the use of the photographic images obtained.

AFL

- 4.2 Since the commencement of the 2007 AFL football season, the AFL has appointed a single official photographer, the Slattery Media Group, which has been granted the exclusive right to manage AFL photography. Since the appointment of the Slattery Media Group by the AFL, news agencies including Getty Images have been refused accreditation to attend and source photographic images at sporting events controlled by the AFL.
- 4.3 A copy of correspondence between the CEO of the World Association of Newspapers and the CEO and the AFL on this subject is Attachment "A" to this submission.¹
- 4.4 Getty Images has been a major stakeholder in the AFL game since 1988 by providing editorial coverage and distribution of AFL images. Getty Images and other news agencies editorial coverage and distribution of AFL images included those

¹ <http://www.wan-press.org/article14565.html> .

years when the game would not have been able to succeed on a professional basis without the support and interest generated by such press coverage.

Cricket Australia

- 4.5 Since 2007 Cricket Australia has required news media organisations seeking accreditation to attend Cricket Australia-controlled games to enter into contracts which contain onerous and restrictive terms.
- 4.6 In 2007, prior to a test series between Australia and Sri Lanka, Cricket Australia would not grant accreditation to media organisations that did not agree to Cricket Australia's standard terms and conditions. These terms and conditions were onerous and included the surrender of all intellectual property rights in images taken at match venues, payment for the right to distribute images of the events, and restrictions on website updates.
- 4.7 A spokesperson for the then Communications Minister, Senator the Hon Helen Coonan stated that:
- “It is not Australian, and it's not cricket.”²
- 4.8 The then ALP communications spokesperson, Mr Stephen Conroy MP stated that:
- “This is an abuse of power by Cricket Australia... Cricket Australia should come to its senses and allow a fair coverage of Australian cricket.”³
- 4.9 In 2007, a compromise was reached between Cricket Australia and the relevant media organisations.
- 4.10 Prior to the 2008 test series between Australia and New Zealand, Cricket Australia would not provide news agencies with accreditation unless those news agencies:
- (i) provided to Cricket Australia a list of their respective web clients; and
 - (ii) granted to Cricket Australia the right to prevent the news agency from distributing images to any non-sports web client or to any mobile phone provider, or to any legitimate non-sports magazines that Cricket Australia determined in its sole discretion should not receive images and text coverage of the games.⁴
- 4.11 Most recently, international news agencies including Getty Images did not cover the 2008 Australian cricket test series between Australia and South Africa. This was as

² www.theaustralian.news.com.au/story/0,25197,22721877-27654,00.html

³ www.theaustralian.news.com.au/story/0,25197,22721877-27654,00.html

⁴ www.abc.net.au/news/stories/2008/11/20/2425529.htm

a result of Cricket Australia making media accreditation conditional on agencies signing restrictive contracts which give Cricket Australia the power to veto copyrighted material to be distributed by agencies and to block distribution of editorial material on mobile news platforms.

- 4.12 A copy of Cricket Australia's 'Terms and Conditions for 2008-2009 Season Media Accreditation' is Attachment "B" to this submission.

5 Consequences of access and news reporting restrictions

- 5.1 The steps taken by national sports bodies such as the AFL and Cricket Australia to restrict news media coverage has had, and will have, a significant adverse effect on the breadth and quality of news coverage of those sports. It will also significantly disadvantage rural and regional newspapers which generally rely completely on news agencies such as Getty Images to provide them with photographic images of major sporting events.
- 5.2 For example, in 2007 14 regional newspapers in Queensland and 2 in Victoria were not able to publish photos of AFL games because they were unable to reach photo agreements with the AFL.⁵
- 5.3 In addition, the restrictions imposed by sports bodies have adversely impacted upon the international coverage of Australian sport. For example, various of the international clients of Getty Images have ceased to publish editorial or photographic images of AFL matches because Getty Images has been unable to supply photographic images as a result of the AFL's access restrictions.
- 5.4 It is inappropriate for sporting bodies to restrict access to competing news organisations as this will impede the public's right to access information from alternative sources. It will also impede the public's right to obtain objective independent information about sporting events. This is because of the likelihood that sporting bodies will seek to ensure that all photographic images of their sports are as positive as possible and that any negative images are not communicated to the public.
- 5.5 Many regional and international media outlets that rely on the agencies that have refused to sign onerous accreditation conditions and have accordingly been refused accreditation to sporting events have not been able to source photographic images from the affected events. For example, in regard to cricket, in 2008 the New Zealand Press Association (NZPA) refused to agree to Cricket Australia's demands in respect of the test series between Australia and New Zealand.⁶ New Zealand newspapers attended games reluctantly.⁷

⁵ <http://www.news.com.au/story/0,23599,23435204-29277,00.html>

⁶ http://www.news.com.au/heraldsun/story/0,21985,24681605-11088,00.html?from=public_rss

⁷ http://www.news.com.au/heraldsun/story/0,21985,24681605-11088,00.html?from=public_rss

- 5.6 In regard to the AFL, the AFL's decision to refuse entry of agency photographers has effectively isolated readers of newspapers in regional areas that are not affiliated with major media groups that have been able to reach agreement with the AFL.⁸
- 5.7 There is a risk that the public will lose the right to access unbiased photo-journalism. This is particularly relevant to the situation with the AFL, where there is a reported unease concerning the impartiality of the official AFL photographer.⁹ There is a risk that the AFL will enforce or be perceived to enforce editorial control over the distribution of images.
- 5.8 The editorial manager of the West Australian News, Peter Jeans, has expressed concern that:
- “...there'll be a sort of censorship applied to AFL Photos, so that if, for example, a spectator spits on a coach, and one of the AFL photographers gets that picture, it might not be distributed because it might be deemed by the AFL that it brings the game into disrepute.”¹⁰
- 5.9 Another significant consequence of the access restrictions which have been imposed by some sporting bodies is that sponsors of the affected sports have been denied publicity opportunities. Sponsors support sports in order to obtain widespread exposure for their goods and services, including as a result of news coverage of the sports they support. Steps taken by sporting bodies which result in limiting editorial and photographic coverage adversely impact the sponsors of the sport. In the longer term this is likely to result in reduced sponsorship of major sports, which will mean the organisers need to rely more heavily on broadcasting revenues which ultimately leads to tighter exclusive rights and less diversity for the news consuming public.

6 International examples

- 6.1 The existing media access arrangements maintained by the AFL and Cricket Australia set a dangerous precedent both domestically and internationally. Similar issues in respect of sports reporting have occurred overseas, including:
- (a) the 2007 Rugby World Cup, where organisers attempted to limit the number of photographs that could be published from the event and demanded that all photographic credit rights were waived to the benefit of the International Rugby Board (IRB);¹¹

⁸ http://www.theaustralian.news.com.au/story/0,,23435652-7582,00.html?from=public_rss

⁹ <http://www.realfooty.com.au/news/news/afl-in-row-over-match-photos/2007/06/26/1182623886879.html?page=fullpage#contentSwap2>

¹⁰ <http://www.realfooty.com.au/news/news/afl-in-row-over-match-photos/2007/06/26/1182623886879.html?page=fullpage#contentSwap2>

¹¹ www.guardian.co.uk/media/2007/sep/07/presandpublishing.sport1

- (b) the Ladies Professional Golf Association (LPGA), where the LPGA attempted to compel photographers to provide to the LPGA unlimited, perpetual rights to use their photos free of charge;¹²
- (c) the Indian Premier League (IPL) 2008 cricket competition, where the Board of Control for Cricket in India (BCCI) refused to grant accreditation to websites for the event, and claimed sole copyright over all news photographs taken by newspapers and agencies during the games;¹³
- (d) the 2008 Indian test cricket series between India and Australia, where the BCCI attempted to enforce onerous accreditation terms including prohibiting the distribution of photos to cricket websites;¹⁴ and
- (e) the Fédération Internationale de Football Association (FIFA) 2006 World Cup, where FIFA attempted to restrict the publishing of event images on the internet and to impose editorial restrictions on the use of photos in print publications.¹⁵

6.2 On each of these occasions the relevant sports body subsequently softened its initial position and made concessions to ensure news media coverage of the sports event. Getty Images, as an international provider of editorial images, is concerned that if the current practices of the AFL and Cricket Australia are maintained, sports bodies internationally will be emboldened to introduce similar measures to the detriment of public access to news information on a global basis.

7 Legal foundation

7.1 The long-standing legal principle established by the Australian High Court in the Victoria Park Racing case¹⁶ in 1937 is that sporting bodies do not own the copyright in the sporting events they control. In fact, no copyright subsists in the event. Rather, the right of sporting bodies to restrict coverage of the events they control arises from their ability to restrict physical access to the grounds where the sport is played.

7.2 For example, if a news organisation were to arrange for its photographer to fly over the Melbourne Cricket Ground in a blimp to take photographs of the AFL Grand Final, that news organisation would not be infringing any right of the AFL or otherwise be behaving unlawfully (assuming that relevant air traffic laws were complied with).

¹² <http://www.crikey.com.au/Media-Arts-and-Sports/20070314-AFL-in-for-a-fight-over-photos.html>

¹³ www.foxsports.com.au/story/0,8659,23520895-23212,00.html

¹⁴ <http://www.abc.net.au/news/stories/2008/10/09/2386400.htm>;

¹⁵ <http://www.guardian.co.uk/media/2006/mar/02/pressandpublishing.newmedia>

¹⁶ *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor & Others* (1937) 58 CLR 479

- 7.3 Copyright law (in Australia and internationally) provides that the copyright in a photograph is owned by the photographer or his or her employer. It is this fundamental principle of copyright law that some sporting organisations, such as Cricket Australia, are seeking to interfere with by insisting on altering copyright ownership arrangements as a condition of accreditation.
- 7.4 The rights which sporting bodies have to legally restrict access to sports grounds should not be able to be used to unreasonably impede the legitimate activities of news organisations, nor to restrict the public's right to access sports news.
- 7.5 In addition, the recent attempts by some sporting bodies to place limitations and controls over the use of editorial material and photographic images by requiring news organisations to provide the sporting body with a right of pre-approval over the use of material on websites, mobile platforms, magazines and for specific purposes is particularly restrictive and will impede the public's right to timely access impartial and objective sports news.

8 The importance of sport to the Australian public

Sport in Australia

- 8.1 As the Australian Productivity Commission has stated, "Sport is integral to Australian culture."¹⁷ Major sporting events are matters of public importance, of which the public has a right to be informed. National sports events affect the Australian public at large, they create a legitimate public interest and invite public discussion and debate.¹⁸

Anti-siphoning

- 8.2 In 1995, subscription television (Pay TV) was introduced into Australia and consumers had the opportunity to subscribe for additional channels for a fee.
- 8.3 Prior to the introduction of Pay TV, public debate centred on whether Pay TV providers would outbid free-to-air broadcasters for exclusive broadcasting rights of sports events thus causing many Australians who could not afford to subscribe to Pay TV to be restricted from accessing broadcasts of these events.
- 8.4 In 1992, the Federal Government foreshadowed the introduction of Pay TV and pre-empted the issues that might have arisen in respect of sports coverage of major sporting events by enacting so-called 'anti-siphoning' legislation. The anti-siphoning rules require that the broadcasting rights in sporting events which are specified by

¹⁷ Productivity Commission Broadcasting Inquiry Report, 3 March 2000, page 29.

¹⁸ These are all factors that have been taken into account in case law in determining matters of public interest. See: *London Artists Ltd v Littler* [1969] 2 QB 375; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183.

the Minister for Communications in a list of sports¹⁹ must be offered to free-to-air broadcasters prior to subscription broadcasters.

8.5 The Explanatory Memorandum to the Broadcasting Services Bill 1992 (Cth) stated that:

“siphoning in this context means the obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally been televised by free-to-air broadcasters”,

and that the anti-siphoning process:

“should ensure, on equity grounds, that Australians will continue to have free access to important events.”²⁰

8.6 The same principles that underpin the position taken by the Federal Government in respect of anti-siphoning legislation also apply to the reporting of sports news. The reporting of sports news, by images and editorial content, should not be controlled by commercially-motivated sports bodies to the detriment of public access and the public’s right to know.

8.7 The national importance of sports events is reflected by the list of sports on the anti-siphoning list, which includes all matches in the AFL premiership season and all test and one-day cricket games involving the Australian national team played in Australia or the UK. Notably, the anti-siphoning legislation, which commenced in 1992, was renewed in 2004.

9 Public funding and legislative power

9.1 Sport in Australia is supported by the Federal and State Governments in many ways. The Australian Sports Commission (ASC), a Federal Government body, provides direct funding to various national sports bodies in Australia, including significant amounts to both the AFL and Cricket Australia.²¹ A portion of ASC funding goes toward the development of sports in Australia, such as the Australian Institute of Sport (AIS).²²

¹⁹ Pursuant to section 115(1) of the *Broadcasting Services Act 1992* (Cth).

²⁰ *Broadcasting Services Bill 1992* (Cth), Explanatory Memorandum.

²¹ A schedule of ASC funding of national sports organisations (NSO’s) on the ASC website indicates that the AFL receives approximately \$485,000 each year and Cricket Australia receives approximately \$790,000 each year. See:

http://www.ausport.gov.au/__data/assets/pdf_file/0020/270119/NSO_funding_2008-09_as_at_12_February_09.pdf

²² http://www.ausport.gov.au/__data/assets/pdf_file/0020/270119/NSO_funding_2008-09_as_at_12_February_09.pdf

- 9.2 As stated above, the right of a sporting body to restrict access to the sporting events they control is a result of its physical control of the sporting venue and its control over access. Accordingly, an issue to be considered is whether the Federal Government has legislative power in respect of this issue. As many of the venues on which sports events take place are on crown land, which is a public asset usually owned by State Governments, those Governments almost certainly have some power to legislate in respect of this issue.
- 9.3 It is inconsistent for sporting bodies such as the AFL and Cricket Australia to receive significant financial and other support from government and then seek to restrict the public's right to receive impartial and objective information about their sports from a variety of competitive media sources.

10 Public policy

- 10.1 An important public policy objective which is reflected in the Australian anti-siphoning legislation is the need to protect the access of Australian viewers to events of national importance and cultural significance.²³ The same policy considerations apply to the reporting of sports news. There is a need to ensure that the access of photo journalists from a variety of media organisations is not unreasonably restricted thereby protecting the Australian public's ability to obtain independent media coverage of events of national importance and cultural significance in a timely manner. The stances taken by the AFL and Cricket Australia seek to curb this fundamental right of access of photo journalists which in turn impacts on the public's ability to obtain independent photo journalism of sports events.
- 10.2 This is a situation where the community interest must outweigh the private interest of sports bodies. It is appropriate for the Federal Government to maintain the equity objective of access to events of public interest. The correct public policy position is that the reporting and taking of photographs at sporting events should not be restricted and it is appropriate for the Federal Government to intervene to ensure that this is the case.
- 10.3 Because the restriction arises from the sports body's physical control of sporting venues, the Federal Government must seek to ensure continued access for the purpose of news reporting of sports events. This is true of all sports events of major public interest where the rights of photographic copyright owners must continue to be respected, and it is especially acute where there exists government funding or State support for sports bodies (e.g. by providing favourable access to Crown land), in which event such funding or support must be made conditional on free news access.

11 Getty Images Commercial Sports Relationships

- 11.1 As indicated in Section 2 above, Getty Images partners successfully with sports governing bodies and their sponsors in addition to providing unbiased editorial coverage of their events, i.e. it effectively has two sides to this area of its business.

²³ Broadcasting Services Amendment (Anti-Siphoning) Bill 2004, Second Reading Speech.

- 11.2 On the one side it undertakes vast and respected editorial coverage worldwide, always adhering to a strict code of conduct as enshrined in its Editorial Policy available via the link available on every page of its website.²⁴
- 11.3 On the other side, the commercial photographic services it provides include the following:
- (a) the undertaking of commercial assignment work according to specific briefs commissioned by sports bodies and their sponsors;
 - (b) the marketing and distributing of images owned by sports clubs (thus creating an additional revenue stream for the club in the form of royalties on license sales);
 - (c) the hosting of photographic exhibitions on behalf of sponsors;
 - (d) the syndicating of publicity material for sponsors; and
 - (e) the provision of digital asset management solutions to sports governing bodies.
- 11.4 When providing all of the above commercial photographic services, Getty Images similarly takes care to adhere to its editorial principles by only entering into new agreements to market/distribute the images owned by a sporting body or club where such coverage is supplemental rather than mutually exclusive to independent photographic news coverage.
- 11.5 The fact that Getty Images has a proven record of partnering successfully with sporting bodies, their clubs and sponsors, often creating additional revenue streams for them, is testament to the fact that Getty Images understands and supports the legitimate needs and interests of securing income for the good of the game and that this needn't be at the expense of restricting legitimate news reporting. These two facets of Getty Images' business are proven to happily co-exist to the good of the respective sports and the public at large.

12 Conclusion

- 12.1 The public relies on news organisations, including news agencies such as Getty Images to deliver timely, unbiased and cost efficient information to media outlets globally. Restrictions placed by national sports bodies on the reporting of sports events:
- (a) impede the public's right to access independent photo illustration of an event of public interest; and
 - (b) jeopardises domestic and international media coverage of Australian sport.

²⁴ <http://www.gettyimages.com/Corporate/EditorialPolicy.aspx>

13 Opportunity to appear before the Committee

- 13.1 Getty Images requests the opportunity to appear before the Committee to discuss this submission and to answer any questions which any member of the Committee may have.

Yours sincerely,

Stuart Hannagan
Vice President, Australasia