



## SUBMISSION TO THE SENATE ENVIRONMENT, COMMUNICATIONS AND THE ARTS COMMITTEE – INQUIRY INTO THE REPORTING OF SPORTS NEWS AND THE EMERGENCE OF DIGITAL MEDIA

The Senate has referred an inquiry into the reporting of sports news and the emergence of digital media to the Senate Environment, Communications and the Arts Committee. The Committee is to consider the reporting of sports news and the emergence of digital media. The Committee has invited written submissions from interested individuals and organisations.

Australian Football League (AFL) appreciates the opportunity to make a submission to the Senate Committee. AFL is a member of the Coalition of Major Professional Sports (COMPS). COMPS has made a separate submission to the Inquiry. This submission is a stand-alone submission, but AFL endorses the overall approach taken in the COMPS submission.

### **Background – Australian Football League**

AFL is a not for profit company limited by guarantee. Its members are persons appointed by each of the sixteen Clubs competing in the Australian football competition conducted throughout Australia by the AFL. Clubs competing in the AFL Competition do so under licence from AFL and are regulated by a series of rules and regulations promulgated by the AFL. The AFL's rules and regulations vest the right to deal in media rights for AFL matches and events exclusively in the AFL.

Australian football is Australia's only indigenously created national game. The sport is popular throughout Australia, in terms of participation, attendances at matches and events and media audiences.

The major income sources for the AFL are media rights, corporate sponsorships, the AFL Finals Series and AFL membership. After meeting operational costs, AFL allocates its operating surplus as follows:

- distributions to AFL Clubs, of which there were almost 575,000 registered members in 2008 and many more supporters;
- grants for game development, throughout Australia and overseas;
- payments to the AFL Players' Association; and
- ground improvements – to assist the upgrade and development of various stadia around Australia where AFL matches are played.

In 2008:

- distributions to AFL Clubs totalled approximately \$131.7 million, or on average \$8.23 million per Club;
- there were 714 registered players in the AFL Competition (across the 16 AFL Clubs);
- throughout Australia almost 700,000 persons participated in Australian football across all levels of the sport;
- the AFL invested approximately \$25.87 million in game development grants, comprising of grants to state and territory leagues, funding of the Auskick junior development, indigenous and community programs and funding of international development programs; and
- the AFL invested \$5.095 million in ground development to assist the upgrading of venues where AFL matches are conducted.

The AFL has recently announced the conditional licensing of a new AFL Club to be based in the Gold Coast, Queensland. This Club will compete in the AFL Competition from 2011.

## AFL Media Rights

The AFL licences media rights in connection with the AFL Competition on various platforms: free to air television, subscription television, radio, internet and mobile rights.

The AFL's current media partners are:

- the Seven and Ten networks for free to air television;
- Foxtel for subscription television;
- Telstra for new media, comprising internet and mobile rights; and
- various radio stations across Australia.

There is no copyright per se in an AFL match. AFL regulates access to venues where AFL matches are conducted. The AFL grants exclusive venue access to its audio-visual and audio (radio) licensees to produce audio-visual and audio content for broadcast. As part of these licensing arrangements, AFL acquires ownership of copyright in the cinematograph film and television and radio broadcasts of AFL matches (*AFL content*).

In the case of its new media rights, AFL procures a feed of AFL content to Telstra to allow Telstra to utilise that content on the internet and to mobile devices. The AFL has not granted Telstra rights to live audio-visual communication of AFL matches and events. Rather, Telstra has exclusive, limited duration highlight rights in those forms of digital media, and the right to communicate the full version of the match (as well as highlights) after a prescribed "hold back" time.

The AFL also derives revenue from licensing of photographic images of AFL matches and events. Photographers accredited by the AFL to take photographs at AFL venues for news purposes are restricted from commercially exploiting these photographs of AFL matches.<sup>1</sup> The AFL licences the right to commercially exploit (most commonly by syndicating to other

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<sup>1</sup> See clause 2.5 of the AFL's 2009 Media Accreditation Terms and Conditions: Annexure 1

commercial entities) photographic images of AFL matches and events to certain third parties.

The revenue derived by the AFL from the sale of its media rights is the single largest source of the AFL's funding, comprising more than 50% of its revenue in 2008.

AFL, like other governing bodies of popular sports in Australia, is heavily dependent upon the maintenance and growth of its media rights revenue to administer and further develop its sport. The ability of the AFL to grow this revenue source will allow the AFL to:

- maintain and increase distributions to member clubs, which have a high level of community support and interaction;
- increase investments in Australian football;
- expand the AFL Competition, such as through the new Gold Coast team;
- maintain relatively low admission prices for attendees at matches in the AFL Competition;
- continue and increase support for important community programs and other participation-based programs, such as the AFL's community camps program, multiple indigenous programs, the "1Seven" healthy living program and its football academies and talent pathway programs;
- continue to invest in facility development, which benefits not just the AFL but the community generally; and
- continue to operate without significant reliance upon Government funding.

## **Sports News Reporting in the Digital Age**

The Inquiry concerns the reporting of sports news and the emergence of digital media. One of the specific terms of reference for the Committee is the nature of sports news reporting in the digital age, and the effect of new technologies on the nature of sports news reporting.

Sporting content, including sports news, is a key driver of interest in media offerings.

The AFL recognises that its success as a sporting code in Australia is due, in part, to the substantial news media coverage it attracts. This media coverage assists the AFL in generating support and interest for the AFL Competition and promoting the sport of Australian football generally. Further, news media coverage of the AFL also assists commercial interests associated with the AFL Competition, such as AFL Clubs and sponsors.

Media organisations are using digital technologies and platforms such as the internet and mobile services to provide reporting on all forms of news, including sports news. News media outlets clearly benefit from coverage of AFL matches, as AFL news and content attracts fans to all forms of media, including digital distribution platforms.

The landscape for sports news reporting has changed significantly in recent years from the traditional radio, print and television model.

Digital technology allows for the fast and easy transmission of information. Information delivered digitally can be provided on a non-linear, “on demand” basis and can be accessed as often as the user requires.

The use of content for digital sports news reporting by non-rights holders is low cost as the content is available from services provided by rights holders. This content can be readily communicated via websites and other digital platforms. This communication can occur very soon after the content is first communicated by a rights holder. Protection of copyright in this

content is then up to the copyright owner or licensee to police and enforce. This is both costly and time consuming.

A significant difference between news reporting in the traditional environment and the digital era is that media organisations can digitally “archive” their sports news reporting so that content, originally posted as news, remains available on-line or in digital format for an indefinite period (compared with the temporary nature of a radio or television broadcast or a newspaper report). Accordingly, users can access the digital content long after the match or event has concluded.

### **Accreditation of Media for Sporting Events**

One of the terms of reference for the Committee is the current accreditation process for journalists and media representatives at sporting events, and the use of accreditation for controlling reporting on events.

It is standard practice in Australia and overseas<sup>2</sup> for sporting organisations to accredit members of the media to provide sports news reporting from venues where matches and events are conducted.

Sporting organisations control access to venues to enable them to licence media rights and to ensure compliance with the sporting organiser’s and ground owner’s standards of conduct. The terms of media access to venues is and must remain the right of the competition organiser.

For at least 80 years AFL (and its predecessor bodies) has accredited journalists to provide news coverage of AFL matches. In 2008 the AFL accredited 267 print journalists, 240 radio journalists, 159 photographers and 96 television journalists (excluding broadcast technical staff) to cover AFL matches. In addition, AFL provided 76 multi-use accreditation passes for use by rotating television news staff (in addition to television journalists) and accredited 520

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<sup>2</sup> For example, the organisers of the 2006 FIFA World Cup and the 2008 Beijing Olympics each had media accreditation arrangements.

persons from AFL's licensed television broadcasters for television crews on match days. A copy of AFL's 2009 media accreditation policy is attached as Annexure 1.

### **Communication of AFL Content by Non-Rights Holders in the Digital Age**

The AFL is embracing the digital era. It has licensed digital television, internet and mobile rights in respect of AFL matches and events. Digital content delivery is an increasingly important means of generating awareness and participation in the AFL Competition and Australian football and increasing the AFL's revenue.

The AFL is concerned about various aspects of the communication of AFL-related content on digital platforms:

- excessive use of AFL content by non-rights holders under the guise of the reporting of news; and
- unauthorised use of photographs of AFL matches and events beyond what is justifiable for the reporting of news and the digital archiving of such photographic content.

### *Excessive Use of AFL Content and The Reporting of News Defence Under the Copyright Act*

For some time the AFL, and other major sports in Australia, have been concerned about the potential for unauthorised and unfair use of their content in the digital environment through the broad interpretation and application of the reporting of news defence in the *Copyright Act (the Reporting of News Defence)* by media organisations.<sup>3</sup>

The Reporting of News Defence allows communication of copyright material for the reporting of news, without the permission of, or compensation to, the content right's owner. The AFL supports the principles of free news reporting that underpin the Reporting of News Defence. However, the Reporting of News Defence originated in a non-digital environment and in its

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<sup>3</sup> See joint submission of AFL, Cricket Australia and National Rugby League to the Attorney-General's review of fair use and other copyright exceptions in July 2005. The Australian Rugby Union also made a similar submission.

current form, in our opinion, does not adequately prevent unfair exploitation of AFL content by media organisations on digital platforms.

The current Reporting of News Defence creates an imprecise and uncertain environment for rights owners. In simple terms, media organisations can exploit sports content (film, broadcasts or photographs) via digital technologies to provide entertainment offerings, call it reporting of news, and commercialise or otherwise exploit the content without a licence from the copyright owner. An example of this is where media organisations use the internet to communicate an excessive volume of vision of an AFL Match, purportedly as part of a “news” report, which directly competes with the online highlights rights AFL has granted to Telstra.

The Reporting of News Defence can apply if the communication of the copyright material reporting is for the purpose of, or is associated with, the “reporting of news” and the dealing is “fair”. There is no legislative guidance on the wide and indefinite scope of these concepts, and the limited case law suggests that what will fall within the defence is a matter of impression. This gives little comfort to content rights owners and their licensees, and encourages non-rights holders to continually push the boundaries under the cloak of the Reporting of News Defence.

These problems are exacerbated by the ease with which content can be appropriated in the digital environment, the multiple digital platforms upon which content can now be easily disseminated and the high cost of policing infringement and enforcing copyright through litigation.

#### *Misuse of Photographs of AFL Matches*

AFL is also concerned about the unreasonable exploitation of photographic images of AFL matches by some media organisations on digital platforms.

AFL draws the attention of the Senate Committee to the following current examples:



1. the “Real Footy” website operated by Fairfax media ([www.realfooty.com.au](http://www.realfooty.com.au)) features a “multimedia” section. Accessing “*Pies ruffle Crows*” delivers a 1.37 minute slideshow featuring 27 photographic images of the Collingwood v Adelaide finals match conducted on 6 September 2008. As at the date of this submission, this “news” content remains accessible on the website notwithstanding the match was played over 6 months ago;
  
2. the “Real Footy” website also offers photo galleries relating to AFL matches and events. The AFL-related news section of the website includes recent matches but also goes back to events in November 2008. The image gallery in relation to the round 1 2009 Richmond v Carlton match contains 30 separate images of the match: <http://www.realfooty.com.au/news/photogallery/clubs/carlton/blues-belt-tigers/2009/03/26/1237657068547.html>. By contrast The Age newspaper (a Fairfax publication) on the day after the match featured only 10 photographic images of the match. The number of photographs in the website gallery alone is 3 times more than what the same organisation published in its newspaper. Also, this content continues to be accessible at the date of this submission – almost 2 weeks after the match.

The above examples illustrate how photographic images are being used to drive website traffic. A large number of images are being used, and this material can be accessed for a considerable period after the event has occurred. Such use cannot be justified as the reporting of news. The use of photographic images in this way is in contravention of AFL’s accreditation arrangements and damages the AFL’s ability to licence the online and mobile photographic image rights of AFL matches.

## Reforms to Protect Valuable Intellectual Property Rights

AFL needs to be able to:

- generate and grow its media rights income;
- retain intellectual property ownership;
- preserve and develop its public image and brand; and
- control the delivery of its highlight and live audio-visual and audio content, and the commercial delivery of photographic image content.

AFL encourages the Committee to give serious consideration to the introduction of two related reforms:

- (a) **reform 1:** the updating and enhancement of the Reporting of News Defence in the *Copyright Act* to set out matters that should be considered when assessing whether the use of content is a fair dealing; and
- (b) **reform 2:** the imposition of benchmark volume, frequency and duration restrictions on the use of content in digital reporting of sports news.

The **first reform** seeks to increase certainty by identifying matters that should be considered when assessing whether the Reporting of News Defence should apply. Such an approach is already used in other fair dealing defences under the *Copyright Act*.<sup>4</sup> One significant consideration when assessing whether the dealing is a fair dealing for the purpose of reporting news is the impact of the dealing on the market or potential market of the content.

Under the **second reform** the AFL proposes that restrictions be introduced on the way audio-visual, audio and photographic content can be used by media organisations on digital

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<sup>4</sup> Sections 40(2) and 103C(2) of the *Copyright Act*, relating to fair dealing for the purpose of research or study.

platforms for the communication of content concerning sporting events for the purpose of reporting news.

The restrictions would apply to “in-match” content and involve:

- (a) restrictions on communicating more than a specified duration of audio or audio-visual content, or a specified number of photographic images, in any one news report;
- (b) restrictions on making audio, audio-visual or photographic content available until after the conclusion of the relevant match or event;
- (c) subject to (d) below, obligations to take down the audio, audio-visual or photographic content by a certain time after the conclusion of the relevant match or event;
- (d) restrictions on making audio, audio-visual and photographic content available only on a “one up one down” basis, whereby news reports can not be archived and no more than one news report containing audio, audio-visual or photographic content of a particular match will be able to be accessed at any one time;
- (e) prohibitions on audio, audio-visual or photographic content being offered as a download, that is, a digital copy delivered using the internet or to a mobile device that may be kept and viewed on a permanent basis, or otherwise disseminated;
- (f) obligations to only use the content in an editorial context, that is, for genuine news reporting. Without limitation, the following conduct would not be use of content in an editorial context:

- (i) use of content in conjunction with any sponsorships or advertising embedded in or immediately preceding or following the communication of the content;
- (ii) inserting advertising into the content;
- (iv) allowing access to the content by way of payment of a fee;
- (v) syndicating or otherwise distributing the content to third parties for commercial gain; and
- (vi) the retail sale of photographs of matches and events.

The above restrictions will provide some clarity to content owners and their licensees, while giving guidance to media organisations about the type of material they can legitimately use in the digital environment and how they can use it. Importantly the restrictions do not prevent media organisations providing objective, critical and meaningful news coverage of sporting events.

Restrictions on sports news reporting is not a new concept. In one of the few reported fair dealing for the purpose of news cases, the English High Court of Justice considered favourably guidelines published by the BBC in relation to use of its soccer World Cup broadcasts by other television broadcasters.<sup>5</sup> Those guidelines included, among other things, restrictions on the maximum length of vision excerpts (60 seconds per match), volume (no more than 4 times a day) and duration (within 24 hours of a match being played). It is noted that restrictions existed prior to the proliferation of sports content on digital platforms.

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<sup>5</sup> *British Broadcasting Corporation v British Sky Broadcasting Ltd* (1991) 21 IPR 503

Restrictions already apply to digital sports news reporting in some international sports:

- (a) the International Olympic Committee's '*supplementary news access rules for the broadcast of Olympic material on the internet within Australia for the Beijing 2008 Olympic Games*' limited the use of Olympic material on the internet to bona fide news organisations provided that use was in a video package designed as a news update bulletin and in no more than 3 such news bulletins per day; each news bulletin had to be one continuous video clip; no more than 60 seconds of Olympic material could be used in any one news bulletin; the news bulletin had to be removed within 24 hours; the news bulletin had to give an on-air credit to Seven (being the host television broadcaster) and the material could not exceed one third of the duration of any Olympic event or 30 seconds, whichever was the lesser. The news access rules also contained restrictions on advertising. A copy of the IOC's news access rules is attached as Annexure 2;
- (b) the National Football League in the United States prohibits media organisations using more than 45 seconds of game vision per day online, prohibits use of content on a live basis, prohibits content being available after 24 hours and only allows the content to be used in an editorial context (i.e. – no sponsorship or advertising around the content);
- (c) Major League Baseball (*MLB*) restricts news websites from posting more than 120 seconds a day of audio or video from MLB facilities and also restricts the online posting of more than 7 photographs from any game.<sup>6</sup>

The above mentioned sports organisations have either imposed or required these restrictions including in the case of NFL and MLB via their respective accreditation terms.

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<sup>6</sup> *MLB imposes restrictions for online content*, Sports Business Journal, 25 February 2008, [www.sportsbusinessjournal.com/article/58189](http://www.sportsbusinessjournal.com/article/58189)

Australian sporting organisations could theoretically impose the suggested restrictions as part of their media accreditation process. However, Australian sports have not historically been able to secure restrictions of this kind given their relative power to the two major Australian print media organisations.

As the Committee is no doubt aware, disputes have previously arisen between media organisations and sporting bodies in the context of commercial negotiations about the terms of media accreditation: see for example, Cricket Australia's dispute with media organisations during the 2007 / 2008 cricket season.

To avoid protracted disputes with media organisations and to ensure a minimum standard of protection across digital sports news reporting in Australia, AFL believes that the best means of introducing these restrictions is by way of amendments to the *Copyright Act* or a mandatory industry code. If a regulatory approach is taken the restrictions will presumably also then be incorporated into the media accreditation arrangements for sporting events.

#### *Public Right to Access Sports News in the Digital Environment*

AFL does not see there being tension between the public's right to fair access of sports news using digital media, and the rights of sporting organisations to control and limit access to their content to ensure a fair commercial return or for other reasons. Indeed, AFL's policy in dealing with its media rights has always been to achieve a balance between commercial gains and its aims to promote the AFL Competition and the sport of Australian football.

The reforms identified above ensure that the public has access, at no cost, to a reasonable amount of sports news reporting, for a reasonable period of time, and do not unreasonably prevent the reporting of news.

#### *No Interference in Editorial Control Over Digital Sports News Reporting Within Restrictions*

The AFL is, of course, not seeking to involve itself in the substance of what the media reports as part of a bona fide news service. However where media organisations wish to

utilise content owned by a sporting organisation or another third party, then they need to comply with restrictions of the kind referred to above. The type of match vision, audio or photographs the media can disseminate will remain a matter of discretion for the relevant editor, providing they comply with the restrictions.

### *No Expansion of Scope of Reporting of News Defence*

Any expansion or relaxing of the Reporting of News Defence would seriously impact the AFL's ability to grant exclusive digital media rights, particularly in relation to online and mobile highlights rights, and is unwarranted and opposed by the AFL.

### **Summary**

The AFL is greatly concerned about the misuse of its intellectual property as commercialised entertainment in the digital era under the guise of the Reporting of News Defence.

The threat to AFL's (and other major sporting bodies) revenue streams and brand is real and immediate, and impacts on the AFL Competition, other stakeholders of the AFL and the sport of Australian football in general. If the revenue of the AFL is undermined by allowing current unfair practices to continue, it will have a material and irreversible impact on the AFL's operations, including its distributions to member clubs, investments in sport and community development programs and investment in venues.

The AFL recommends to the Committee reforms of the nature set out in the submission above. The introduction of a non-exhaustive list of considerations to be taken into account when assessing whether conduct is fair dealing for the purpose of reporting of news will assist in clarifying the scope of the Reporting of News Defence. The introduction of compulsory restrictions on the volume, frequency and duration of the use of sports news content by news organisations in digital media is a practical and fair means of balancing the interests of the copyright owners, their licensees and media organisations engaged in bona fide news reporting, as well as facilitating the public's access to sports news content.

Representatives of the AFL are available to meet with the Senate Committee to discuss the issues raised in the Inquiry in this submission. To arrange a meeting, please contact my assistant Donna Rowse on (03) 9643 1848.

**Gillon McLachlan – Chief Operating Officer**

**Australian Football League**