



NINEMSN PTY LIMITED

SUBMISSION IN RESPONSE TO THE SENATE ENVIRONMENT,
COMMUNICATIONS & THE ARTS COMMITTEE INQUIRY INTO THE
REPORTING OF SPORTS NEWS AND THE EMERGENCE OF DIGITAL
MEDIA

APRIL 2009

1. NINEMSN

ninems Pty Limited (a 50:50 joint venture between Microsoft Corporation and PBL Media) is the leading Australian online media company, attracting 7.9 million visitors each month comprising approximately 68 per cent of all active Australian Internet users.¹

The ninems portal comprises a network of over 50 premium websites focussing on local and international news, sports, entertainment, finance, travel, leisure and shopping. ninems is the online presence for a number of ACP magazine titles and Channel 9 television products, and acts as the entry point for Microsoft's consumer products in Australia, including Hotmail, Messenger and Live Search.

An integral part of ninems's news services is its Wide World of Sports (WWOS)–branded sports news website. WWOS offers breaking sports news, live scores, match reports, results, analysis, statistics, blogs and opinion pieces to over 72,300 Australian unique browsers daily.² With approximately 1 million Australian unique browsers visiting each month, ninems has established WWOS as one of Australia's top five online sports news services.³

Through its growing mobile telephony division, ninems also supplies WWOS news content to a number of mobile telephony service providers for distribution by means of SMS and third generation (3G) mobile networks.

ninems welcomes the opportunity to provide this submission in response to the Senate Environment, Communications and the Arts Committee's inquiry into the reporting of sports news in the digital environment. Please contact Nicholas Gray, Chief Financial Officer & Head of Strategy, or Emren Kara, Legal Counsel, if you require any clarification or further information.

2. KEY SUBMISSIONS

- Sport and sporting events are newsworthy and, as such, all media organisations should have the same ability to report sports news as they do other non-sport news. The commercial rights attaching to certain sporting events do not make those sporting events any less newsworthy.
- The decision of what is and isn't newsworthy, and how long an event remains newsworthy, is not the domain of legislation, regulation or industry guidelines or of the sporting bodies. Such decisions should be left to sports news services and their editors, news producers and journalists who have a history of complying with the fair dealing provisions and respecting the fair dealing balance.
- The current fair dealing provisions of the *Copyright Act 1968* adequately balance the public interest and commercial interest in reporting and communicating sports news, including by means of digital technology. The means by which sports news is disseminated does not change the importance of this balance, nor is it a legitimate reason for winding back the scope of fair dealing.
- The fair dealing provisions in the *Copyright Act 1968* should remain technology/platform neutral. There are no demonstrable reasons for making any differentiation between the reporting of news through traditional analogue platforms and digital platforms.

¹ Nielsen NetView home/work panel February 2009

² Nielsen Market Intelligence (March 2009).

³ Ibid.

- Any attempts to regulate the digital reporting of sports news by way of legislation, regulation or industry guidelines would lead to an ineffective, inflexible, overly-complicated environment that would stifle innovation and audience growth in digital media and would limit the ability of Australian digital news services to compete with international services (which would not be subject to Australian regulation but would remain accessible by Australian consumers).
- ninemsn supports the public policy objectives that guarantee all Australians equal access to coverage of sporting events and access to a diverse range of information and opinion, and considers a natural extension of these public policy objectives to be the right of Australians to equal and free access to independent reporting of sports events.
- ninemsn supports the news agencies, journalists and other media representatives in their opposition to the attempts by sporting organisations to control access to text, images and audio-visual content by imposing onerous and restrictive accreditation terms.

3. ONLINE SPORTS NEWS MARKET IN AUSTRALIA

The Internet has triggered a massive redistribution of how news is being seen and heard. Consumers are increasingly shifting their traditional media format consumption to the online environment. According to a report issued by Nielsen Online earlier this year, the Internet has become the medium that most Australian would be 'lost without' and is the preferred source of information, provides the best access to opinions and is the Australian internet users' most 'trusted' source of information and news.⁴ The Australian Communications and Media Authority found that almost three-quarters of all Australian Internet users now access news and sport updates online.⁵

With regards to the online sports news market, approximately 795,000 Australian unique browsers visit an Australian sports website each day; a 22 per cent year-on-year increase in the average daily unique browsers and page impressions to online sports services.⁶ Approximately 84 per cent of all 'sports website' page impressions are generated by online news portals such as the ninemsn/WWOS, Fox Sports and Sydney Morning Herald websites, rather than the websites operated by the sporting bodies.⁷ Additionally, approximately 32 per cent of all Australian Internet users regularly access audio-visual sports clips.⁸

Traffic numbers to sports websites experience a considerable spike during the months, days and hours prior to, during and after matches involving Australia's primary sporting codes. During the winter months, WWOS website traffic usually peaks in the period between Friday to Monday. NRL and AFL tipping competitions drive consumers online as they research their tips and they return online on Monday to check up on match results. During winter weekends, traffic spikes during the hours of 4pm and 7pm, as viewers come online to check live match scores. The summer months are largely driven by cricket, with WWOS online visitor numbers peaking on weekday afternoons, as office-workers follow the days' play from their computers.⁹

4. THE NATURE OF SPORTS NEWS REPORTING IN THE DIGITAL AGE

Sports news reporting in the digital age has had to keep pace with the growing expectations of consumers. Depth and breadth of coverage, variety, interactivity and, perhaps most importantly, speed and immediacy of information, are now all defining characteristics of online sports news

⁴ Nielsen Online, *The Australian Internet and Technology Report* (Edition 11), (February 2009), 82.

⁵ Australian Communications and Media Authority, *Telecommunications Today – Internet activity and content (Report 6)*, (September 2008), 15.

⁶ Nielsen Market Intelligence (March 2009).

⁷ Nielsen Market Intelligence and Nielsen Netview (12 months to February 2009).

⁸ Nielsen Online, above n 4, 160.

⁹ Omniture Site Catalyst.

production.¹⁰ Dedicated sports services on other platforms, such as television and mobile telephony, face similar consumer expectations and editorial challenges.

The 'on demand' nature of the digital environment, coupled with its 24-hour-a-day availability and accessibility, means that digital sports news services must have the capacity to offer immediate and 'real time' updates of sports news. Unlike traditional analogue media platforms, the nature of the digital space enables 'breaking news' to be reported as it happens. The digital medium enables virtually no time-lag between the moment a sports producer receives information to the moment that information is passed onto the consumer. An article can be published online immediately upon the occurrence of a newsworthy event, with the sports producer able to edit and provide prompt updates as and when events unfold.

ninemsn publishes approximately 60 articles on the WWOS website each day covering over ten categories of sports. Depending on the nature of the sporting event and how newsworthy the event is, articles can be updated as many as ten times over the course of one or more days. An article on a cricket Test match involving the Australian national team may, for example, be updated between five and ten times during the course of a days' play, whilst a tennis match being played overseas may only report the final result.

Visual elements are an essential requirement for any reputable television, print, online or 3G mobile sports news service.¹¹ Online sports journalism, in particular, has seen a convergence of text with additional elements like photographs, audio, video, multimedia graphics, discussion boards and hyperlinks to create one all-encompassing experience. Users of online news services will visit a sports website frequently but for relatively short periods of time; the average session time for a typical user of the WWOS website, for instance, is approximately 3.3 minutes.¹² As such, there is a real necessity for online sports news services to rely on imagery to communicate sports news. Photographs, graphics and picture galleries are no less legitimate or effective ways of communicating news than text and video.

5. THE BALANCE OF PUBLIC AND COMMERCIAL INTERESTS IN THE REPORTING & BROADCASTING OF SPORTS NEWS

Like its online competitors and counterparts in other media, ninemsn relies on the fair dealing defences in the *Copyright Act 1968* in its reporting of sporting events. The provisions relating to the fair dealing of audio-visual works for the purpose of news reporting are contained in section 103B of the *Copyright Act 1968*.

It is well established that sports and sporting events are newsworthy.¹³ Sport is an integral part of the 'news-sport-weather' format that has historically defined all major print, radio, television and online news services around the World. In Australia, the inherent appeal of sport to a broad cross-section of the community means that there is an enormous public interest in the on-field and off-field actions of sportspeople. The fact that the list of "events of national importance and cultural significance" that are subject to the anti-siphoning regime is comprised exclusively of sporting events, speaks volumes.¹⁴

¹⁰ An Nguyen, Elizabeth Ferrier, Mark Western and Susan McKay, 'Online news in Australia: Patterns of Use and Gratification' (2005) 15 *Australian Studies in Journalism* 5.

¹¹ *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd* [2007] FCA 568 (Allsop J). In this interlocutory judgement Allsop J observed, at 30, that: (a) modern news journalism relies on adequate visual images; (b) visual images in news journalism are elements that the public have come to expect and could not be regarded as a mere "commercial attribute"; and (c) that the public interest in having visual images in news journalism is protected by the fair dealing exceptions in the *Copyright Act 1968*.

¹² Omniture Site Catalyst (March 2009).

¹³ For instance, see *Telstra Corporation Pty Limited v Premier Media Group Pty Limited* [2007] FCA 568 (Allsop J). His Honour pointed out that "to a not insignificant section of the population, [sporting events] ... are of some importance as news" (at 30).

¹⁴ The current anti-siphoning list, which has effect until 31 December 2010, contains sports events within 12 sporting categories including the four football codes, cricket, tennis, horse racing, motor racing, golf, netball and the Olympic and

Section 103B of the *Copyright Act 1968* has enabled news services to make use of a reasonable portion of the audio-visual footage controlled by the exclusive broadcast rightsholder for the purpose of reporting on sporting events. The central role of the fair dealing exceptions is to effect an appropriate balance between the exclusivity of rights vested in a copyright holder and the public interest in promoting the free flow of information, knowledge and ideas. This public interest was acknowledged by the former Attorney-General Lionel Bowen who, in introducing section 103B into the *Copyright Act 1968*, stated that “[t]he purpose of the [fair dealing] provisions is to ensure that people who, in the community’s interests, disseminate news and provide legitimate criticism and review for the benefit of consumers and audiences ... may use copyright material without risking infringement action”.¹⁵

ninemsn recognises the need of sporting bodies to protect their broadcast rights, as well as the right of exclusive rightsholders to obtain a financial return on their investment. However, it is important to stress that the fact that significant commercial rights attach to certain sporting events does not make those events any less newsworthy. The existence of such commercial rights neither changes the importance of the balance between the commercial and public interests, nor does it present a reason for limiting the scope of fair dealing.

Historically, an appropriate balance has been struck between the commercial and public interests in reporting sports news; evidenced by the notable lack of case law in this area. In fact, the existing balance has *benefited* both media organisations and sporting bodies. The rise of dedicated sports news programs and channels on television has seen a contemporaneous rise in the value of the television broadcast rights of major sporting events. It was reported that Channel Nine and Fox Sports acquired the exclusive free-to-air and subscription television broadcast rights to the 2006 - 2012 National Rugby League seasons for over \$500 million; representing a 60 per cent annual increase in the NRL’s then existing arrangements.¹⁶ In 2006, the Australian Football League sold the exclusive free-to-air and subscription television broadcast rights for five years to the Seven and Ten Networks for a reported \$780 million; a \$280 million increase on its previous rights deal.¹⁷

It is therefore ninemsn’s view that the current fair dealing provisions are adequate to maintain an appropriate balance between commercial and public interests in the reporting and broadcasting of sports news, no matter the delivery mechanism. As we have submitted below, the dissemination of sports news by means of digital technology does not change the importance or adequateness of this balance, nor does it prejudice the commercial interests of the sporting bodies and exclusive rightsholders.

6. FAIR DEALING IN THE DIGITAL AGE: TECHNOLOGY NEUTRALITY

Over the past four decades the *Copyright Act 1968* and the principles underpinning copyright law have remained technology neutral despite the massive technological advances that have revolutionised the manner and ease in which copyright material can be disseminated.

The *Copyright Act 1968* was propelled into the “digital age” in 1999 with the passing of the *Copyright Amendment (Digital Agenda) Act 1999*. In introducing this legislation into Parliament, former Attorney-General Daryl Williams confirmed that “[t]he central aim of the bill ... is to ensure

Commonwealth Games: *Broadcasting Services Act 1992* (Cth), s 115; Australian Communications and Media Authority, *Anti-siphoning list commencing 2006* (2009) < http://www.acma.gov.au/WEB/STANDARD/pc=PC_91822> at 7 April 2009.

¹⁵ Australia, *Parliamentary Debates*, House of Representatives, 21 May 1986, Second Reading Speech, Hon Lionel Bowen.

¹⁶ ABC News Online, *NRL secures \$500m rights deal* (2005) <http://www.abc.net.au/news/newsitems/200507/s1405199.htm>> at 6 April 2009.

¹⁷ Lisa Murray, *Seven, Ten win \$780m battle for AFL* (2006) Sydney Morning Herald

<<http://www.smh.com.au/articles/2006/01/05/1136387573051.html>> at 6 April 2009. See also Roger Vaughan, *Demetriou talks up next AFL rights deal* (2009) ninemsn WWOS <<http://wwos.ninemsn.com.au/article.aspx?id=794673>> at 8 April 2009.

that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment”.¹⁸

In their joint submission to the Attorney General’s Department in response to the 2005 *Review of Fair Use & Other Copyright Exceptions*, the Australian Football League, Cricket Australia and the National Rugby League submitted that the current fair dealing provisions as they relate to news reporting were not adequate to deal with ‘on-demand’ services provided over the internet or by mobile telephony.¹⁹ The sporting bodies went on to propose significant amendments to the reporting of news exception in the *Copyright Act* in order to protect the value of their broadcasting rights.

As noted earlier, the underlying philosophy of the fair dealing provisions is to strike a reasonable balance between the commercial interests of an exclusive holder of copyright and the public interest in ensuring a free flow of news and information. There is nothing to indicate that the online distribution of sports news would either tilt this balance in favour of online media organisations, or prejudice the legitimate commercial interests of the sporting bodies and exclusive rightsholders. In this regard, ninemsn submits that:

- a news report of a sporting event cannot in any sense be compared with the live broadcast of a full match. That is to say, the reporting of a small selection of newsworthy events of a soccer match, for example, is in no way a substitute for the tension, excitement, emotion and anticipation that the spectacle of a live 90 minute soccer match can offer a viewer;
- there is no evidence to suggest that the reporting of sports events over the Internet has had, or will have, any negative impact on the (real) market value of exclusive online broadcast rights. In fact, as the technical capability and audience for live online streaming increases, there is every reason to expect that the value of exclusive online rights to these events will increase, as has been the case with television broadcast rights; and
- in light of the convergence of digital and traditional platforms, any attempt to protect the commercial interests of sporting organisations by establishing more onerous fair dealing provisions for ‘on demand’ platforms, is redundant.

With regards to this final point, consumers have, since 2006, been able to legally ‘time switch’²⁰ television broadcasts for private and domestic use so that they can watch programs at a more convenient time.²¹ The advent of digital personal video recorders (PVRs)²² enables consumers to digitally record and store of dozens of hours of DVD-quality television broadcasts, to pause and rewind live television and to build their own library of television highlights.²³ PVR functions that enable timed recording and “series linking” means that there is no longer a need for consumers to come to their television screens at a set time to watch a program. And though not permitted under the *Copyright Act 1968*, new technologies also enable a consumer to ‘format shift’ a recording of a television broadcast from a PVR to the hard drive of a personal computer and/or portable media player; enabling recorded television broadcasts to be viewed multiple times ‘on-demand’ and on any number of devices.

¹⁸ Australia, *Parliamentary Debates*, House of Representatives, 2 September 1999, Second Reading Speech, 9749, the Hon Daryl Williams.

¹⁹ Australian Football League, Cricket Australia and National Rugby League, *Submission in response to the Attorney General’s Review of Fair Use & Other Copyright Exceptions* (15 July 2005).

²⁰ *Copyright Act 1968* (Cth), s 111. The rationale behind this ‘time-shifting’ exception to copyright infringement is to ‘provide flexibility to allow copyright material to be used for socially useful purposes; and [to] better recognise the rights of consumers to enjoy certain copyright material that they have legitimately acquired, where this does not significantly harm the interests of copyright owners’, Explanatory Memorandum, page 3.

²¹ According to Nielsen Online, the average weekly time Australian internet users spend watching time-shifted television is approximately 5.7 hours – Nielsen Online, above n 4, 24.

²² Such as the Seven Network’s TiVo and FOXTEL’s IQ device.

²³ Note that TiVo also provides added Internet connectivity and has stated an intention to offer services to enable users to download online content – see <http://home.tivo.com.au/>

ninemsn is of the view that the policy served by the fair dealing defence remains valid regardless of the technology employed to disseminate the copyrighted material.²⁴ We do not consider it desirable or necessary for a converging media environment to be potentially subject to very different levels of regulation. As such, ninemsn submits that there are no demonstrable reasons for the fair dealing provisions in the *Copyright Act 1968* not to remain technology neutral.

7. MEDIA ACCREDITATION TO SPORTING VENUES & EVENTS

Whilst ninemsn does not propose to make detailed submissions with regards to media accreditation to sporting venues and events, we are opposed to sporting bodies imposing onerous and draconian accreditation terms on media organisations, news agencies, photographers and journalists as a method of controlling access to text, images and audio-visual content.

8. RESPONSES TO TERMS OF REFERENCE

a. *The balance of commercial and public interests in the reporting and broadcasting of sports news*

Please see Sections 5 & 6.

b. *The nature of sports news reporting in the digital age, and the effect of new technologies (including video streaming on the Internet, archived photo galleries and mobile devices) on the nature of sports news reporting*

Please see Sections 3 and 4.

c. *Whether and why sporting organisations want digital reporting of sports regulated, and what should be protected by such regulation*

This is a question for the sporting organisations. ninemsn believes that it is incumbent on the sporting organisations to demonstrate that digital technologies have tipped the fair dealing balance in favour of media organisations to such a significant degree so as to render the existing fair dealing provisions unworkable and obsolete. The onus should not be on the media to defend the current position.

d. *The appropriate balance between sporting and media organisations' respective commercial interests in the issue*

Please see Sections 5 & 6.

e. *The appropriate balance between regulation and commercial negotiation in ensuring that competing organisations get fair access to sporting events for reporting purposes*

Please see Sections 5 & 6.

²⁴ A position echoed in the interlocutory judgement, *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd* [2007] FCA 568 (18 April 2007) where, in considering the fair dealing exceptions as they apply to reporting of sports news by means of digital delivery, Allsop J was, "not persuaded that there is a case to distinguish delivery of such programs on the internet and telephony from free to air and pay television." (at 36).

- f. *The appropriate balance between the public's right to access alternative sources of information using new types of digital media, and the rights of sporting organisations to control or limit access to ensure a fair commercial return or for other reasons***

Please see Sections 5 & 6.

ninemsn believes any move to restrict the public's right to access alternative sources of information would be contrary to the current Government's stated aim of ensuring 'that Australians have access to a diverse range of information and opinion in Australia's media'²⁵.

- g. *Should sporting organisations be able to apply frequency limitations to news reports in the digital media***

No. Sports organisations are not qualified to determine the amount of time an event remains newsworthy. Nor do sporting organisations have an interest in protecting the public interest in promoting the free flow of information and news to the Australian public. Such decisions should be left to sports news services and their editors, news producers and journalists, who have a long history of complying with the fair dealing provisions and respecting the current balance.

- h. *The current accreditation processes for journalists and media representatives at sporting events, and the use of accreditation for controlling reporting on events***

Please see Section 7.

- i. *Options other than regulation or commercial negotiation (such as industry guidelines for sports and news agencies in sports reporting, dispute resolution mechanisms and codes of practice) to manage sports news to balance commercial interests and public interests.***

ninemsn considers that the current fair dealing provisions are adequate to maintain an appropriate balance between commercial and public interests in the reporting and broadcasting of sports news, no matter the delivery mechanism or platform. Set industry guidelines or codes of practice are neither warranted nor are they desirable.

²⁵ Australian Labor Party, *2007 National Platform and Constitution* (April 2007), Chapter 16, para 15 (at p 281).