



## **Response to Australian Law Reform Commission Issues Paper - Copyright and the Digital Economy**

The Australian Football League (AFL) appreciates the opportunity to make a submission to the Australian Law Reform Commission's Issues Paper on Copyright and the Digital Economy.

Copyright underpins the commercialisation of valuable and important intellectual property rights to AFL matches and events. The protection afforded by copyright allows the AFL to control, license and disseminate content. The protection and exploitation of these rights is fundamental to the current and future success of the AFL and the sport of Australian football.

Since the commencement of the digital age the AFL has embraced the dissemination of content by its licensees through new technologies. The AFL is, and will continue to, actively and innovatively pursue opportunities to exploit its intellectual property rights, which benefit the AFL, AFL's stakeholders and Australian society generally.

The AFL supports reform to copyright law that maintains and clarifies the framework and protection of the legitimate and valuable rights of copyright owners in the digital age. The AFL strongly opposes any possible reforms that may adversely impact the ability of copyright owners such as the AFL to control and commercialise their valuable intellectual property rights or would otherwise undermine the certainty and/or enforceability of those rights.

### **1 Background**

#### *1.1 Australian Football League*

The AFL is a not for profit company that conducts the eighteen team AFL Competition throughout Australia. The AFL Competition currently includes the Pre-season Competition, 198 Premiership Season matches and the Finals Series matches each

year, culminating with the AFL Grand Final and the award of the AFL premiership to the winning team.

In addition to conducting the AFL Competition, the AFL is the national body for Australian football, 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.

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

- ◆ distributions to AFL Clubs, of which there were approximately 707,000 registered members in 2012 and many more supporters;
- ◆ grants for game and facility development, throughout Australia and overseas;
- ◆ payments to the AFL Players' Association; and
- ◆ ground improvements – to assist the upgrade and development of various stadia and facilitates around Australia where AFL, state league and community matches are played.

In 2012 AFL distributed more than \$405 million for these purposes.

### *1.2 Licensing of AFL's media rights*

The AFL regulates access to venues where AFL matches and events are conducted, and grants licences to produce audio-visual and audio (radio) content for broadcast. As part of these arrangements, the AFL acquires ownership of copyright in the films, recordings, broadcasts and communications made by or on behalf of its licensees.

The AFL licences media rights in connection with the AFL Competition and events on free-to-air television, subscription television, radio, internet and mobile platforms. These licensing arrangements are complex, and take into account a variety of commercial and qualitative considerations.

The revenue from licensing of the AFL's media rights is the AFL's largest single source of revenue, comprising approximately 44% of the AFL's consolidated revenue in 2012.

The AFL's current media partners are:

- ◆ the Seven network for free-to-air television;
- ◆ FOXTEL for subscription television;
- ◆ Telstra for new media, comprising internet and handheld device rights;
- ◆ News Limited for print media; and
- ◆ various radio stations across Australia.

Television broadcasts of AFL events are regularly among the most watched television programs. The AFL website (afl.com.au) and AFL Club websites are among the most popular sports websites in Australia.

It is the AFL's experience that the focus and value of its audio-visual media rights is increasingly on access to 'live' content. This is particularly the case in the digital age where there are many content offerings available for consumers and audio-visual content is available on an increasing number of platforms.

### *1.3 AFL's digital media rights*

The AFL has embraced the licensing and dissemination of AFL content in the digital economy. Digital content delivery is a very important means of growing awareness and participation in the AFL Competition and the sport of Australian football, and of increasing the AFL's revenue.

The AFL grants its new media licensee, Telstra, an exclusive licence to communicate AFL matches and events online and to handheld devices (including tablets). Telstra communicates AFL content using feeds and recordings produced by or on behalf of the AFL's free-to-air and subscription television licensees, being copyright material owned by AFL.

The AFL's arrangements with Telstra include what is commonly known as 'holdbacks'. These arrangements restrict the nature and extent of highlights and clips of AFL matches that may be communicated online during a match and for a prescribed period after the conclusion of a match.

The AFL also grants Telstra an exclusive right to communicate online non-live/replayed AFL content, such as a match or highlights of a match played in the previous week, and archive content, such as a match played in the previous year.

Digital communication of AFL content to fans, and other digital engagements with supporters is an important strategic objective for AFL.

In the last twelve months AFL has established AFL Media. AFL Media is a separate business unit of the AFL and operates to support the AFL's new media licensee and the AFL's digital strategy. Through AFL Media, the AFL has undertaken significant investment in infrastructure and personnel to drive content delivery and consumer engagement in the digital economy. The functions of AFL Media include general content production and website programming, running the AFL's website, operating AFL's publishing services and photograph and vision licensing services.

Going forward, the AFL's intention is that its investment in AFL Media will allow it to remain at the forefront of innovative, high quality content delivery. As a result of its investment and innovation, the AFL is confident it will be able to take advantage of the opportunities offered by the roll-out of the National Broadband Network.

#### *1.4 Accreditation of media*

The substantial news coverage the AFL Competition attracts is important to the success of the AFL Competition and the sport of Australian football.

AFL regulates the access of match and event venues by media for reporting purposes through accreditation, in accordance with the *Code of Practice for Sports News Reporting*.

The AFL's accreditation terms allow photographers to take photographs for the purpose of reporting of news, but restrict the commercial exploitation of those photographs. AFL separately licences the commercial exploitation of photographs of AFL matches and events to third parties.

In 2012 AFL accredited 403 print/internet journalists, 354 radio journalists, 233 photographers and 152 television journalists (excluding production staff) to cover AFL matches. In addition, AFL provided 781 multi-use accreditation passes for use by rotating television news staff (in addition to television journalists) and production staff from AFL's television licensees to produce content on match days.

Annexure A to this submission is a copy of AFL's 2012 accreditation arrangements for media.

## 2 General Comments

The ALRC review into copyright law is limited in scope to issues arising from or relating to exceptions to copyright and statutory licenses.

### 2.1 *The Inquiry*

Whilst the AFL agrees the review should not duplicate work conducted by other reviews, the AFL believes that there is significant overlap between the issues raised in this review and the Attorney-General's Department's review on the 'safe harbour' scheme as well as the Convergence Review.

Further, the AFL sees the enforcement of copyright law as a key issue which must be considered when determining issues surrounding copyright and the digital economy. The AFL believes that piracy and the difficulty in which copyright is enforceable under existing laws (in part due to the scale of the problem, the prevalence of cross-border infringement and the inherent difficulty in identifying infringers) in online and digital environments must be addressed if Australia is to encourage new opportunities in the online and digital age.

As such, the AFL believes enforcement tools that are fit for purpose are required so that copyright law can truly protect rights holders and encourage the creation of new works.

AFL would be pleased to discuss these issues further with the ALRC.

### 2.2 *Guiding Principles for the Inquiry*

The Issues Paper sets out a number of draft guiding principles to inform the ALRC's approach to the Inquiry. The AFL does not agree with some of the stated principles and explanations of those principles.

In particular, the AFL is concerned that an emphasis on technological innovation without recognising and maintaining established and proper protections for rights holders is inappropriate and harmful. AFL is certainly not anti-innovation and/or anti-technology. To the contrary, the AFL realised very early on that the digital era presented a terrific opportunity to grow its business: the AFL has embraced and encouraged new digital technologies and platforms. However, the AFL is firmly of the view that encouraging new technologies and developments cannot be at the expense of existing property rights and the commercialisation of those rights by rights holders.

Further, the AFL is troubled by a blanket suggestion that reform should promote access to and dissemination of content, and that 'new business models should be allowed to develop without copyright hindering these benefits'. Rights holders such as the AFL have existing business model founded on copyright. Many of these models are using the digital economy in innovative ways, and leading best practices in encouraging and promoting participation in the digital economy by vendors and the general public. To suggest that access and dissemination of content without license or cost is a guiding principle of the ALRC's review is misconceived and unfair. It is also likely to be contrary to Australia's international obligations.

The AFL disputes the assertion that digital technology has changed attitudes to ownership. While the digital age clearly makes copying and dissemination of content easier, including by infringers of copyright, the AFL does not believe there has been a widespread change in consumer attitudes towards property rights in relation to AFL content and certainly not to the extent where infringement of AFL's property rights 'may be seen as justified'. Also, it is inappropriate to allow a perceived change in attitude to property rights (which AFL rejects) to drive reform. To the contrary, AFL strongly believes the ease of copyright infringement in the digital age means that further consideration should be given by lawmakers to practical and effective means of enforcing copyright, such as through blocking websites of repeated infringers. The AFL also believes that the Government should support further education and information campaigns as to copyright infringement in the digital age.

The AFL believes the following principles must be central in any review of copyright law:

- copyright law has an essential role to play in the control, licensing and dissemination of content by rights holders;
- any reforms must not undermine the economic incentives and business models of rights holders;
- any proposed reforms must:
  - have a real basis;
  - be supported by evidence;
  - be carefully considered and costed;
- any adverse impact of reforms to rights holders must be compensated;

- any exceptions to copyright infringement must be clear and have as much certainty as possible;
- any new exceptions must:
  - be confined to certain and special instances only;
  - not conflict with normal exploitations of the material;
  - not unreasonably prejudice the legitimate interests of the rights holder.

### **3 Specific Issues in Issues Paper**

The AFL has identified the issues below arising from the Issues Paper that it wishes to address at this time.

#### *3.1 Cloud computing*

Cloud computing services have been around for some time, and have generally developed within the existing legal framework.

The AFL is unaware of any evidence that current Australian copyright law is impeding the development or delivery of legitimate cloud computing services.

The Issues Paper raises the recent *Optus TV Now* litigation, of which the AFL was a party, as an example of how Australian copyright law may be impeding the development or delivery of new and emerging cloud computing services. In that matter, a commercial service that allowed the recording and playback to Optus' customers of free-to-air television broadcasts of AFL matches was found to infringe AFL's copyright.

The AFL does not wish to re-litigate that litigation in the context of the ALRC's Inquiry, however it is worth noting:

- notwithstanding some of the hyperbole reported at the time, the *Optus TV Now* litigation did not consider the legality of storage or uploading of data in the cloud per se;
- the Full Court of the Federal Court of Australia found that the existing time shifting exception in section 111 of the *Copyright Act* does not extend to commercial copying on behalf of individuals;

- the existing exception in section 111 of the *Copyright Act* allows individuals to undertake private copying for a prescribed purpose;
- the existing exception in section 111 of the *Copyright Act* is already technology neutral;
- following the Full Court of Federal Court of Australia's decision, and the High Court's refusal to grant Optus special leave to appeal that decision, the law in Australia on the issues arising out that litigation is now clear and settled.

Any suggestion that the finding of copyright infringement in the *Optus TV Now* litigation is inappropriately holding back cloud computing services in Australia is misguided.

AFL is also unaware of any evidence to support amendments to exceptions in the *Copyright Act* or a new exception to account for 'new' cloud computing services.

The *Copyright Act* already includes numerous provisions which protect cloud computing in legitimate circumstances, including the time shifting exception and the exception for the temporary reproductions of works as part of a technical process of use.

As noted above, AFL grants an exclusive licence to its new media partner (Telstra) to communicate AFL content via the internet. Other sporting organisations and other rights holders have similar arrangements. If any change to the law is proposed that would allow a cloud computing service to undertake commercial copying and transmission of the material via the internet to individuals, it would materially impact on the legitimate interests of rights holders and their licensees. It would also allow third parties to operate commercial services using valuable content accessed at no cost via free-to-air television broadcasts without obtaining a licence or providing consideration to the owner of the relevant copyright. Such services would also cut across existing commercial arrangements for those platforms, such as holdback restrictions for digital licensees.

The AFL is strongly opposed to any expansion or amendment to the exceptions in the *Copyright Act* in relation to cloud computing which would adversely impact the value of its rights and those of other rights holders. The AFL believes the encouragement of new cloud computing services cannot be at the expense of existing rights holders and their licensees.

The AFL also notes that any amended or new exceptions to the *Copyright Act* must not permit the storage or dissemination of unlawfully obtained material via cloud computing

services. Appropriate provisions must be introduced so that cloud computing providers are required to expeditiously remove infringing content and allow the AFL and other rights holders to take action.

### 3.2 *Copying for Private Use*

The AFL does not believe the copying of legally acquired copyright material, including broadcast material, for private and domestic use should be more freely permitted.

These issues have been extensively considered prior to the enactment of the *Copyright Amendment Act 2006*. The Explanatory Memorandum identified the problem of existing law (at that time) as consumers wanting to record a broadcast to watch or listen to at a later time, and in particular, using a range of new consumer devices such as PVRs, DVD recorders and digital TV tuner cards. The AFL is not aware of any evidence that the provisions are unsatisfactory.

If the ALRC wishes to make any amendments to the copying for private use exception, then the AFL strongly believes that any amendments to the law must maintain a balance between the interests of the copyright owner and the private user.

The AFL does not see any reason why the existing exceptions should be abolished in favour of a single format exception. In particular, the AFL notes the differences between the various format shifting exceptions.

In a response to a question specifically posed in the Issues Paper, the AFL believes there is a fundamental distinction between recordings made by consumers and stored remotely, and recordings made by third party companies and stored on remote servers for their subscribers.

As noted above, the Optus TV Now decision recognised that a commercial service could not copy broadcast material under the exception in section 111 of the *Copyright Act*. The AFL strongly objects to any new exceptions aimed at permitting third party commercial services to format shift or time shift free to air television broadcasts on behalf of users.

The existing time shifting exception is technology neutral and, following the consideration of the matter by the Full Court of the Federal Court in Australia, it is clear that users with the prescribed purpose who store legitimately copied material on cloud computing services do not infringe copyright law.

Section 111 strikes an appropriate balance between a user's private copying and the copyright holders' rights. In AFL's view, no change is required to section 111 of the *Copyright Act*.

The AFL is opposed to any reactive change to the *Copyright Act* to alter the recently confirmed legal position, particularly if any change is on the basis of a mischaracterisation of the decision in the *Optus TV Now* litigation that the existing exceptions in the *Copyright Act* prohibit all uses of cloud computing. As noted above, that case found that a commercial copying service cannot invoke the exception in section 111 of the *Copyright Act*.<sup>1</sup> Any extension of the exception to allow for a service of the kind in question in the recent litigation undermines the legitimate rights of copyright owners and their licensees and must be avoided.

The AFL objects to any extension of the time shifting extension to content broadcast over IPTV. The AFL does not see any reason why this should be permitted.

The AFL does not object to clarification of the Copyright Act to confirm that the making of copies of copyright material for the purposes of back-up and data recovery do not infringe copyright laws.

### *3.3 Online use for social, private or domestic purposes*

User generated content that involves unauthorised use of copyright material can readily impact on commercial rights and the value of those rights.

A significant amount of what is described in the Issues Paper as 'social, private or domestic use' involves the unauthorised uploading or sharing on or via the internet of valuable copyrighted material. This material includes recordings of AFL matches or substantial parts of AFL matches, such as highlights, videos of goals or key moments in a match. Each year there are thousands of unauthorised attempts to post AFL content on content sharing websites, such as You Tube. The AFL is forced to monitor and try to prevent this type of conduct, including through 'take down' arrangements with some service providers.

It is incorrect to characterise the uploading and sharing of content on the internet, where it can be viewed by many, many people and monetised outside the control of the rights holder, as simply private, domestic or social use. Most social networking websites are commercial websites. Users who upload content into such websites may, in some cases, obtain revenue. Such revenue may be dependant on the number of

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<sup>1</sup> Paragraph 89 of the judgment

'views' of the particular video or image. It is also possible for content to initially be uploaded for 'social, private or domestic purposes' but then changes to be used for commercial purposes. These types of activities can infringe copyright and cut across AFL's legitimate accreditation and licensing activities.

Any suggestion that the law should be changed to allow copyright materials to be more freely permitted in such a manner is opposed by AFL for numerous reasons.

A general exception for social, private or domestic use of copyright materials would be excessively broad and would fail to meet the requirement of the 'three-step test' for the introduction of any copyright exceptions, which are part of Australia's international obligations.

Further, such an exception would unreasonably prejudice the ability of AFL to exploit its content online and mobile, including by undermining the exclusivity of rights granted to licensees and permitting third parties (eg video sharing sites) to gain financially from content they are not licensed by the copyright owner to use. For example, it is unfair to AFL and its digital licensee if an unauthorised individual is permitted to upload content from a free-to-air television broadcast of an AFL match to a social media site to share with that individual's 'friends' in circumstances where AFL's licensee has been granted an exclusive right to commercialise that content over the internet. The impact of such conduct is exacerbated during the holdback period where, for reasons associated with protecting the rights of the free-to-air and subscription television licensees, the new media licensee is restricted in what it can and cannot do. An untenable situation may arise in that content may be uploaded and shared by a third party without rights before the authorised, exclusive licensee is permitted to do so.

A general exception for social, private or domestic use of copyright materials would undermine the fundamental principle of copyright law which provides that the owner of copyright has discretion regarding when and how content will be licensed. This is particularly important for AFL which, in addition to commercial considerations, is required to control use of content for the 'good of the game'. There is also a possibility that the uploading or authorisation of these videos may also be incorrectly attributed to AFL or its exclusive licensee.

AFL also considers that concepts such as 'social, private or domestic purposes', 'commercial/non commercial', 'use that does not conflict with normal exploitation of the copyright material' and 'use that does not unreasonably prejudice the legitimate interests of the owner of the copyright' are unhelpful. The AFL is concerned that any legislation using such terms would result in more complexity and confusion in the

*Copyright Act*. It appears inevitable that litigation would be required to assess the boundaries of such concepts. This would result in further transaction costs and unnecessary litigation.

Significantly, the AFL is not aware of any evidence whatsoever that such an exception is required or justified. The AFL considers that the fair dealing provisions and the requirement that a substantial part be reproduced already provide sufficient protection for user generated content. These concepts are widely understood by businesses and the Australian public and there is no suggestion that they are no longer suitable.

### 3.4 *Transformative Use*

The AFL is aware that many individuals use AFL footage (such as footage of games, player interviews etc) for transformative use.

The right of a copyright owner to control use of copyright material in derivative works or adaptations is a fundamental principle of copyright law. There is no justification or evidential basis for a general exception for 'transformative' use. If a person uses a substantial part of an AFL owned copyright work in an unauthorised manner, the AFL needs to be able to prevent that and be compensated for that use.

Amending the *Copyright Act* to provide a general exception for material which appropriates, without permission or compensation, the original works of others would also conflict with the three-step test, in particular the requirements that any new exceptions do not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interests of the owner of copyright.

In any case, the AFL notes that copyright law currently prohibits the use of a substantial part of copyright material. It may be that a transformative use does not meet the threshold of 'substantial part', and therefore, the issue of infringement does not arise. However, where a user wishes to use a substantial part of a copyright material, it is appropriate for a licence to be obtained.

The AFL does not agree that 'transformative use' of its copyright material should be more freely permitted or that any amendments are required to the *Copyright Act*.

A transformative use exception would unreasonably prejudice the ability of rights owners such as AFL to exclusively license their content and allow third parties to 'free ride' on the content. This could cause significant financial harm to rights owners.

Further, rights holders such as the AFL must be able to have control over the use of their content for qualitative reasons. The AFL wishes to avoid situations where, for example, a 'mash up' of reportable offences is created and posted on social networking websites thereby portraying players and the sport of Australian Football in an unfair and potentially damaging way.

The AFL is also concerned that a general exception permitting transformative use would encourage the creation of works which infringe on any moral rights and in particular the right to attribution and the right against derogatory treatment.

The AFL believes that any exception would also be open ended and almost inevitably lack certainty. Such an exception would incentivise rights holders and other parties to litigate to determine the scope of the exception, with resulting uncertainty and transaction costs.

The Issues Paper requests responses on whether 'transformative use' can be defined. Under cover of AFL's objection to any such exception, AFL notes with concern the possible introduction of a broad definition.

There is a suggestion in the Issues Paper that a threshold of originality may be a possible test for determining a transformative use. The concept of 'originality' is a concept already well known under the *Copyright Act*, and does not appear appropriate in this instance, given originality means 'not copied' and that is precisely what transformative use involves.

The AFL is also troubled by the suggestion that any publicly available work could be used in a transformative manner. In the case of audio-visual material, this distinction is illogical. Why should content that is available on free-to-air television be more open for (mis)use than audio-visual content available behind a pay wall?

Any suggestion that transformative use could be quarantined to non commercial use is impractical and impossible to clearly define. Uploading content onto the internet has commercial aspects even where the creator does not have a commercial motivation: the content will be monetised by third party platform operators and will also interfere and conflict with commercial arrangements of rights holder.

Further, a test for transformative use linked to the '*normal exploitation of the copyright material and [that] does not unreasonably prejudice the legitimate interests of the owner of the copyright*' involves uncertain concepts such as '*normal*', '*unreasonably*' and '*legitimate*'. It is not clear when this assessment of the copyright owners rights

would be made – now? when the rights are licensed? when the use occurs? Also, it would be incumbent on the AFL to enforce its rights against any person relying on a transformative exception, and therefore the AFL would have to establish what is ‘normal’ exploitation or what constitutes ‘unreasonable’ prejudice. Any amendment that requires the AFL to carry the burden of establishing these matters is unfairly loaded against the copyright owner.

### *3.5 Retransmissions of free-to-air broadcasts*

Various parties, including regional and remote broadcasters and FOXTEL, retransmit free-to-air television broadcasts of AFL matches and events. The AFL receives payment, in accordance with the established statutory royalty scheme, from the relevant collecting society, Screenrights, in respect of these transmissions.

The AFL does not believe the retransmission regime in Australia should allow retransmission of free to air broadcasts via services other than via traditional licensed television services (eg - free to air television and subscription television delivered via cable). The AFL is opposed to the extension of the retransmission arrangements to cover retransmissions on or via the internet for a number of reasons.

First, any such extension is inconsistent with the purpose and rationale of the retransmission provisions. The retransmission provisions were originally inserted as a ‘self help’ mechanism for broadcast coverage issues to allow Australians access to free-to-air television.

Second, and very importantly, allowing retransmission on the internet would undermine the significant and valuable right to exclusive communication via the internet that AFL and other rights holders grant to third parties. To suggest that unauthorised third parties can retransmit on or via the internet and pay nothing or a statutory license fee would undermine the exclusive granting of rights and inevitably result in a significant financial detriment of copyright owners such as AFL.

Third, to the extent that content is broadcast on a delay into a particular market, an internet retransmission using an earlier free-to-air broadcast in another market would allow for earlier communication into delayed markets despite, and in breach of, agreements with local broadcasters. It would be difficult to police and restrict retransmissions by IPTV providers, who do not have to be licensed.

If the ALRC proposed to introduce a statutory licensing scheme for the retransmission of free-to-air broadcasts via the internet, the remuneration payable to rights holders must reflect the true commercial value of such rights and not be a token amount.

To the extent there is any uncertainty about the retransmission of free-to-air broadcasts to internet protocol television (IPTV), section 135ZZJA of the *Copyright Act* could be amended to clarify that the retransmission provisions do not apply to transmission over IPTV.

### 3.6 *Fair dealing*

The most significant issue for the AFL under the existing fair dealing exceptions is the exception for the reporting of news.<sup>2</sup>

The AFL Competition is very popular and the AFL appreciates the genuine news coverage it receives. This coverage supports the AFL Competition, the game in general and assists with generating exposure and promotion for other stakeholders (including sponsors and Clubs).

However, the AFL Competition – and other high profile sports - is an entertainment product and organizations and individuals have inappropriately sought to rely upon the fair dealing exception for the reporting of news to provide entertainment offerings without the authorization of the AFL.

The AFL is concerned about the excessive use of AFL content by non-rights holders under the guise of the reporting of news exception.

For example, the 'Real Footy' website operated by Fairfax Media uses a significant amount of the AFL's or its exclusive licensee's content to create product for its users. As at the date of this submission, the website featured a 6 minute 59 second clip titled 'Front & Centre" Celebrations in Sydney, recriminations at Hawthorn'. The clip relates to the AFL Grand Final, played 8 weeks earlier (on 29 September 2012), and features extensive use of audio-visual footage of the Grand Final taken from the AFL's free-to-air licensee's broadcast. Fairfax asserts this usage is reporting of news or not a substantial part of the work. The AFL is also aware of many instances where dozens of photographs of AFL matches are featured on a websites, for an extended period, purportedly as news.

The AFL is firmly of the view that this type of use, featuring a high volume of AFL content, is not reporting of news, but rather the unauthorised use of copyright material to drive website traffic. The AFL has previously raised this concern in submissions to the Attorney-General's 2005 '*Review of fair use and other copyright exceptions*', and the 2009 Senate Environment, Communications and the Arts Committee '*Inquiry into*

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<sup>2</sup> Section 42, 103B of the *Copyright Act*

*the reporting of sports news and the emergence of digital media*". Since the time of those submissions the AFL has become aware of greater frequency of extensive and unreasonable use of its content on websites of media organisations. It appears to AFL that these sites are pushing the boundaries further and further under the guise of fair dealing for the reporting of the news.

The AFL's position remains that the fair dealing exception for the purpose of news reporting is unnecessarily imprecise, is costly to enforce and should be amended to:

- (a) promote certainty by introducing criteria to be considered when assessing whether the reporting news exception should apply. Such an approach is already taken with assessing other fair dealing exceptions. Significantly, the criteria would include whether the purpose of the use of the material has an impact on the market or potential market for the content;
- (b) introduce specific restrictions on use of 'in match content'. AFL understands that a one size fits all quantitative test is not appropriate for all of the sports.

Since the 2009 Senate Committee Inquiry sports bodies and the media have adopted the Code of Practice for Sports News Reporting. While useful, the Code does not extend to audio-visual guidelines for news content.

Failure to resolve this issue means that unauthorised and unfair use of content under the veil of news reporting is a real threat to AFL's digital licensing arrangements, which include granting highlights rights. To say that sports bodies can litigate to deal with these matters is naïve, given the proliferation of these activities and the high cost of litigation. Further, to leave the matter for negotiation between sports bodies and the media as part of the accreditation arrangements is unlikely to be productive.

The AFL does not believe there is any basis for any further fair dealing exceptions in the *Copyright Act*.

### 3.7 *Other free-use exceptions*

The AFL does not believe there is any basis for any further free use exceptions in the *Copyright Act*.

### *3.8 Fair Use*

The AFL believes that the importation of a 'fair use' style exception into Australian copyright law will increase uncertainty. Such an exception will give rise to considerable costs to rights holders as parties seek to work out if the goal posts have shifted and where the line is now drawn.

The AFL has previously made submissions to the 2005 Fair Use Inquiry opposing the introduction of such an exception. The AFL does not believe there is any basis or evidence to depart from the findings of that review on this issue, namely that a fair use exception should not be introduced into Australian law.

The AFL does not support amending the Copyright Act to include a broad, flexible 'fair use' style exception.

### *3.9 Contracting out*

The AFL's media rights agreements and accreditation arrangements are entered into with substantial and sophisticated media organizations, who are very aware of their legal rights and enter into these arrangements on an arms length, commercial basis.

As a practical matter, contracting out of existing exceptions under copyright exceptions is not really an issue for the AFL and its licensees.

However, the AFL believes that these types of parties should be free to contract out of copyright exceptions.

## **4 Other matter - enforcement**

In addition to the matters identified in the Issues Paper AFL believes the ALRC's current review should consider strengthening the provisions of the Copyright Act relating to enforcement of copyright.

Digital technology makes copying and dissemination of copyright material much easier. This has led to a proliferation of unauthorised use of copyright material. It is often difficult to identify the infringer in the digital environment where the infringement occurs from a virtual location, and conventional detection methods are often no longer effective.

However, the costs of enforcing copyright remain high and the procedures for enforcement have not been updated for the digital age.

The rights of sporting bodies such as the AFL should be supported by effective and cost efficient mechanisms to enforce copyright.

The AFL urges the ALRC to consider these matters as part of addressing the concerns of copyright holders about enforcing copyright in the digital economy.

## **5 Conclusion**

The AFL's view is that many of the possible reforms arising from the Issues paper are not required. The AFL disputes the implicit assumption in the Issues Paper that there is an urgent need for wholesale reform and suggests that Australian copyright law is, on the whole, generally fit for purpose.

The AFL believes that the starting point for considering any possible reforms must be for any party seeking change to provide evidence as to the need for the change. The AFL also urges the ALRC to consider the innovative practices that existing rights holders, such as AFL and its licensees, have developed under the current legal framework, and in particular whether any amendments to the current law will have an adverse impact on the rights of existing copyright owners and their licensees.

Representatives of the AFL are available to discuss any questions or comments the ALRC may have arising from this submission.

**Australian Football League**

30 November 2012

## **2012 Media Accreditation**

# **AUSTRALIAN FOOTBALL LEAGUE**

Australian Football League owns copyright in audio visual and audio broadcasts of AFL matches. Sales of AFL rights for broadcast as entertainment are the AFL's major source of revenue, and are vital for the on-going development of the sport.

The AFL respects and supports the right of the public to be informed of news; including news coverage of AFL Matches and events. The AFL also supports the principle of 'fair dealing' under the law of copyright and editorial freedom in news coverage. However, access to material for legitimate news reporting as envisaged under the existing framework must not be confused with an entertainment offering in the form of short clips or commercial extracts.

The AFL has prepared the following terms and conditions of media accreditation with a view to translating what is generally accepted to be fair dealing in a linear context, in a proportionate and consistent manner, into the digital media environment.

Please review the attached terms and conditions of accreditation for the 2012 AFL Season and sign and return to the AFL, enclosing the signed form, at 140 Harbour Esplanade, Docklands, Victoria 3008.

## Terms and Conditions of 2012 Media Accreditation

These Terms and Conditions of Accreditation (**Terms**) set out the terms upon which AFL grants the applicant and/or his/her employer and/or principal (**Applicant**) accreditation for access to the Venues.

Nothing in these Terms limits the rights of the Applicant pursuant to the *Copyright Act 1968* (Cth). Notwithstanding any provisions of these Terms, AFL reserves its right to take any action under the *Copyright Act 1968* (Cth) and these Terms do not in any way limit its ability to exercise those rights.

### 1. General Obligations

#### 1.1. Conduct

The Applicant will:

- (a) comply with any terms of entry into the Venues as prescribed from time to time by AFL;
- (b) abide by all lawful and reasonable directions of AFL while in the Venues, including but not limited to the times and areas of access to the Venues, and will not enter the field of play at the Venue whether before, during or after the conduct of a Match at the Venue without the prior written approval of the AFL Media Manager;
- (c) at all times while within the Venues:
  - (i) wear such identifying badge, pass and/or vest as may be provided by AFL and ensure that such badge, pass and/or vest is visible at all times; and
  - (ii) not tamper with or obscure any items described in (c)(i) above and return such items to the AFL immediately upon request or otherwise at the conclusion of the 2012 AFL season;
- (d) not breach the intellectual property rights of any person involved in the staging of a Match;
- (e) not at any time permit, encourage or allow any person under the age of eighteen (18) to enter into any media facility areas at a Venue without the prior written consent of the AFL;
- (f) conduct himself/herself in a manner that will not bring the Match and/or the game of Australian football into disrepute; and
- (g) conduct himself/herself in a manner that will not cause offence to, or otherwise inhibit the enjoyment of other media, rights holders, players, teams or patrons at the Venues.

#### 1.2. Indemnity, Risk and Access

- (a) The Applicant agrees to indemnify and hold harmless AFL and each of its employees, officers and agents against any loss, claim, expense or damage to

AFL or any of its employees, officers and agents resulting from the breach of these Terms by the Applicant (whether or not the Applicant is acting within the scope of the Applicant's employment with the employer) or resulting from the revocation of accreditation by the AFL.

- (b) The Applicant acknowledges that the Applicant shall move in and around the Venue at his/her own risk.
- (c) Access to the Venue will be refused to any person noticeably under the influence of alcohol, narcotics, stimulants or any behaviour-modifying substance, or to any person behaving or likely to behave violently, harmfully or in a manner contrary to public order. Furthermore, access will be refused to any person whose appearance or behaviour negatively affects the public standing of the Match or the AFL. For the avoidance of any doubt, neither this clause 1.2(c), nor clause 1.1(f), are intended in any way to fetter the editorial rights of the Applicant for bona fide News Reporting.
- (d) The Applicant is strictly prohibited from using, possessing or holding promotional or commercial, political, religious or racist objects and materials, offering to sell, selling or possessing with intent to sell goods such as drinks, food, souvenirs, clothes, promotional and/or commercial items at any time in or at the Venue. All such items may be removed or temporarily confiscated by stewards and/or any other duly authorised persons.

### **1.3. Accreditation Not Transferable**

The Applicant acknowledges that any accreditation granted to the Applicant is personal to the Applicant and granted for the sole purpose of working at a Match and may not be licensed or assigned to another person or entity for any purpose.

### **1.4. Anti-Corruption**

The Applicant acknowledges that the AFL has policies and procedures in place to maintain the integrity of competitions played under the auspices of the AFL (**AFL Competitions**), including protection from conduct of a corrupt nature in relation to AFL Competitions. Accordingly, the Applicant agrees that any information the Applicant obtains by virtue of his/her accreditation will only be used for bona fide News Reporting and will not be used or disclosed by the Applicant in connection with any betting (by the Applicant or other person) on a contingency related to an AFL Competition or to induce any other person to do the same.

### **1.5. Grant of Request**

- (a) Failure to abide by these Terms may result in the Applicant's accreditation being revoked (and that of its employees and agents).
- (b) AFL also reserves the right to revoke accreditation at any time in its absolute discretion.
- (c) AFL has the right to grant or reject the request for accreditation in its absolute discretion. In exercising this discretion, AFL may have regard to any matters including:
  - (i) safety and security concerns;

- (ii) genuine issues of space;
  - (iii) the need to ensure representation across international, national and local Media Organisations;
  - (iv) the reach of the Applicant's coverage, and for news agencies, the scale of the client base.
- (d) AFL may impose such further terms and conditions on an Applicant's accreditation in its absolute discretion (subject to such further terms and conditions being consistent with the Code). Once granted, AFL may revoke the accreditation at any time in its absolute discretion without being liable to compensate the Applicant or any other person.
- (e) All accreditation devices remain the property of AFL. In the event of a breach of any of these Terms, accreditation devices shall, upon request by AFL or by a person authorised by AFL, be delivered immediately to AFL (or to the duly authorised person).

## **1.6. Minimum Age Requirement**

The Applicant warrants and represents to AFL that the Applicant is or will be over the age of eighteen (18) prior to attending any Venue for the purposes of accreditation under these Terms and the Applicant agrees that AFL may revoke the accreditation at any time in its absolute discretion if the Applicant is not over the age of eighteen (18) at the time of attending any Venue.

## **1.7. Use of Attributes**

The Applicant agrees (to the extent permitted by applicable laws) that the Match is a public event and so agrees that incidental use may be made, free of charge, of the Applicant's name, voice, image and likeness by means of incidental coverage of the Match at a Venue by way of live or recorded Audio/Video display, broadcast or other transmission or recording, Photographs or any other current and/or future media technologies from within a Venue.

## **2. Specific Obligations**

The following provisions outline what the Applicant is permitted to do with content that is generated, captured, recorded or produced within a Venue by the Applicant on the day of a Match played during the 2012 AFL Season. Any rights not specifically granted to the Applicant are expressly reserved to AFL.

### **2.1. Audio and Video**

- (a) AFL television and radio broadcast rights holders

Notwithstanding these Terms, the AFL's television and radio broadcast rights holders are permitted to record and/or transmit any Audio or Video from within a Venue in accordance with the terms of their respective rights agreements with the AFL.

- (b) Limitations on Use

Except as otherwise permitted by clauses 2.1(c) or as permitted under the *Copyright Act 1968*, the Applicant is prohibited from:

- (i) recording, broadcasting or transmitting or assisting any person to record, broadcast or transmit from within or at a Venue by any means whatsoever (including, without limitation, radio, television, over the Internet or by way of mobile telephone or any other Mobile Device, modem or other form of technology or by way of any Wireless Service) any Video or other moving images and/or Audio (including or excluding commentary) of or relating to a Match, a Venue, attendees or any activity at any Match; and
- (ii) selling, licensing, distributing or otherwise publishing, disseminating or reproducing for any purpose (commercial or otherwise), whether in whole or in part, any recordings of or relating to a Match, a Venue, attendees or any activity at any Match taken or made inside or at a Venue (including, without limitation, Video recordings, moving image recordings or Audio recordings), unless otherwise approved by the AFL.

(c) Media Conferences

The Applicant may record and/or transmit any Video, moving images and/or Audio from within or at the Venue solely of an official AFL media conference and not of any other occurrence at the Venue, subject to the Applicant complying with all reasonable directions of AFL representatives.

## 2.2. Text

- (a) Subject to clauses 2.2(b), 2.5 and 2.6, Text captured, generated or produced by the Applicant within a Venue may be transmitted from the Venue at any time:
  - (i) for the purpose of bona fide News Reporting by the Applicant; and/or
  - (ii) to an outside agency for publication (by that agency or any third party recipient) for bona fide News Reporting.
- (b) The Applicant agrees to ensure that the frequency of updates using Text (including, for the avoidance of doubt, Text transmitted from the Venue by any other employee or agent of the Applicant's employer and/or principal) is not published or updated more than is reasonable to provide News Reporting, which, for the avoidance of doubt, does not include Text or Text updates, or Text and Data updates together, approximating live or continuous coverage for the duration or a substantial period of a Match.

## 2.3. Data

- (a) Subject to clauses 2.3(b), 2.3(c), 2.5 and 2.6, Data captured, generated or produced by the Applicant within a Venue may be transmitted at any time:
  - (i) for the purpose of bona fide News Reporting by the Applicant; and/or
  - (ii) to an outside agency for publication (by that agency or any third party recipient) for bona fide News Reporting.

- (b) For the avoidance of doubt, nothing in clause 2.3(a) permits an Applicant (save for the AFL's official statistics provider) to operate an AFL match statistics business or provide an AFL Match statistics service, that competes with the AFL's official statistics provider, using AFL Match statistics captured, generated or produced from within a Venue by the Applicant. This does not prevent the integration of basic AFL Match statistics observed by the Applicant within a Venue in the ordinary course of News Reporting.
- (c) The Applicant agrees to ensure that the frequency of updates using Data (including, for the avoidance of doubt, Data transmitted from the Venue by any other employee or agent of the Applicant's employer and/or principal) is not published or updated more than is reasonable to provide News Reporting, which, for the avoidance of doubt, does not include Data or Data updates, or Data and Text updates together, approximating live or continuous coverage for the duration or a substantial period of a Match.

## **2.4. Photographs**

- (a) Subject to the provisions of this clause 2.4, 2.5 and 2.6, Photographs taken within a Venue by the Applicant may be transmitted at any time:
  - (i) for the purpose of bona fide News Reporting by the Applicant; and/or
  - (ii) to an outside agency for publication (by that agency or any third party recipient) for bona fide News Reporting.
- (b) The Applicant agrees to ensure that the frequency of updates using Photographs (including, for the avoidance of doubt, Photographs transmitted from the Venue by any other employee or agent of the Applicant's employer and/or principal) is not published or updated more than is reasonable to provide News Reporting, which, for the avoidance of doubt, does not include Photographs or Photograph updates approximating live or continuous coverage for the duration or a substantial period of a Match.
- (c) The Applicant agrees to ensure that Photographs transmitted from the Venue are not published or updated to simulate Video of a Match or a part of a Match or anything that occurs within the Venue.
- (d) The right to publish Photographs under this clause 2.4 is subject to the Applicant being prohibited in all circumstances from permitting the use of Photographs in any manner that creates a false impression that a person or business has a sponsorship, approval or affiliation with AFL, any AFL Club or any AFL activities or events (for example - by in any way including any corporate logo or other designation of any third party in close proximity to the Photograph that would in any manner suggest any association between that third party and the subject of the Photograph).
- (e) The Applicant acknowledges and agrees that it is a condition of these Terms that the AFL is granted a non-exclusive, perpetual, licence to use any Photograph published by the Applicant for use in:
  - (i) the non-commercial promotion of Australian football by the AFL, AFL Clubs or the AFL's State affiliates (eg. use in AFL annual reports, policies, AFL Club membership initiatives, game development promotions etc.) on a royalty free basis: and

- (ii) commercial marketing, advertising or promotional purposes, on a negotiated discount fee basis,

in any medium where the primary purpose of its use is the promotion of the game of Australian football. Each particular use is subject to obtaining the approval of the Applicant which will not be unreasonably withheld.

- (f) Subject to the provisions of this clause 2.4, 2.5 and 2.6, the Applicant may sell Photographs to members of the public for private, non-Commercial Purpose and/or Use only.
- (g) The Applicant agrees that there must be no use of Photographs for any Commercial Purpose and/or Use whatsoever without the prior written consent of the AFL (which may be withheld in its absolute discretion), including without limitation in or on:
- any calendar;
  - packaging;
  - collector cards;
  - posters (other than those that form part of a newspaper or sports-related magazine of the same size and with print on the reverse and with no logos or designations of any third party other than AFL or any sponsor of AFL (as designated by AFL));
  - stickers;
  - pop-up, stand-up or other cards;
  - competitions;
  - recordings;
  - videos and films;
  - advertisements, promotional and point-of-sale material (other than as permitted in the definition of Commercial Purpose and/or Use);
  - games (including computer games);
  - software, including applications for Mobile Devices (other than applications that are or will be genuinely and ordinarily used for bona fide News Reporting);
  - clothing;
  - memorabilia;
  - avatars; or
  - merchandise.
- (h) Notwithstanding anything else in these Terms, the sale or production or use of Photographs for advertising or promotional or merchandising purposes, including Photographs being used by a non-Media Organisation on a website or webpage or Mobile Devices, in a publication or via some other medium for any purpose other than bona fide News Reporting on any technical platform including individual publications, webpages, digital platforms or print media where that platform or medium is not, or will not, be genuinely and ordinarily used for bona fide News Reporting, is strictly prohibited.

## **2.5. Distribution to Third Parties**

- (a) News Content may be distributed to a third party in accordance with the Terms, provided the Applicant ensures that the use of the News Content by the third party is not for a Commercial Purpose and/or Use and is in accordance with the Terms.

- (b) The Applicant is responsible for enforcing the provisions of this clause 2.5 on any third party to whom it distributes News Content.

## 2.6. Commercialisation of Content

The Applicant is prohibited from using any Text, Data, Photographs, Audio or Video for a Commercial Purpose and/or Use, except as specifically permitted in accordance with the Terms or as otherwise agreed by AFL.

## 3. Definitions & Interpretation

“**Audio**” means and includes any sounds from within a Venue and any commentary or verbal description of a Match or post Match interviews or press/media conferences.

“**Code**” means the Sports News Reporting Code of Practice.

“**Commercial Purpose and/or Use**” means the sale or production or use of News Content for advertising, promotional, marketing or merchandising purposes, including:

- (a) News Content being used by a third party other than the Applicant on a website or webpage on the Internet, in a publication, in a mobile or Internet application (also known as an “app”) or via some other medium for any purpose other than bona fide News Reporting;
- (b) News Content being used for or in any advertisements, marketing, promotional materials, for merchandise including but not limited to memorabilia, collector’s cards, calendars, clothing or packaging; and
- (c) News Content being used for operating a statistics service,

but excludes:

- (d) the sale of Photographs to individuals solely for their own non-commercial private use; and
- (e) publications using News Content collected for the purposes of bona fide News Reporting in order to promote that bona fide News Reporting. However, use of such material is subject to the rights of AFL, AFL Clubs and AFL players and officials with respect to passing off and misleading and deceptive conduct.

“**Data**” means and includes all data, information and statistics of whatever nature relating to a Match, Venues, attendees and any activities at any Matches or Venues.

“**Internet**” means the global network of computer systems using TCP/IP protocols known as the internet including the world wide web.

“**Match**” means an Australian football match played (but not necessarily completed) under the auspices of the AFL in the 2012 AFL season and includes all matches forming part of the 2012 AFL Pre-Season Competition, 2012 AFL Premiership Season and 2012 AFL Finals Series.

“**Media Organisation**” means an organisation whose primary purpose is providing News Reporting by any technical platform including individual publications, news websites, digital platforms, radio and television broadcasters, print media and news agencies. Such an organisation will usually:

- play a significant role in informing the mass public;
- accept the responsibilities and ethics of journalism;
- employ properly trained media personnel.

For the avoidance of doubt, in accordance with the Code, there are two classes of Media Organisation:

- (a) news agencies: organisations whose primary business is the syndication of news, rather than its publication.
- (b) general media: organisations whose primary business is the publication of news, rather than its syndication.

**“Mobile Devices”** means any device (whether now existing or hereafter invented) capable of receiving and/or displaying Text, Data, Photographs, Audio and/or Video, by means of a Wireless Service or tablet device.

**“News Content”** means content collected by a Media Organisation at a Venue that is not sold or produced or used for Commercial Purposes and/or Use, namely:

- Text;
- Data;
- Photographs;
- a combination of two or more of the above forms.

**“News Reporting”** means the reporting of News Content by a Media Organisation.

**“Photograph”** means any single still visual image and/or material or information capable of being converted into a still visual image relating to a Match, Venues, attendees and any activities at any Matches or Venues.

**“Text”** means all forms of written material relating to a Match, Venues, attendees and any activities at any Matches or Venues (other than Data) and includes descriptions of play.

**“Venue”** means any football ground or stadium at which a Match is played.

**“Video”** means any moving visual image or series (being at least two) of single still images and/or information made available to simulate a moving visual image

**“Wireless Service”** means a service provided through any wireless technology (whether now known or subsequently developed, other than a radio or television broadcast transmitted through the broadcast service bands) which is or may be used with radio frequency spectrum in any band to enable or facilitate transmission of any textual material, data, voice, video, multimedia or other services and which includes (without limitation) wireless technology employed in General Packet Radio Services (GPRS), the Global System for Mobile Communications (GSM), Personal Communications Networks (PCN), i-mode, Code Division Multiple Access (CDMA), Time Division Multiple Access (TDMA), Tetra, Edge, Wireless Application Protocol (WAP), the Universal Mobile Telecommunications System (UMTS) and Digital Video Broadcasting to a Handheld (DVB-H) and similar technologies, services and products and their respective related or derivative systems (including any fixed line component

of such systems) and services or any combination of them. For the avoidance of doubt, a wireless service may carry content from the Internet, but unlike the Internet or other computer network, it does not require access by a fixed line (e.g., wireless broadband). Accordingly, a wireless service will not refer to a service on the Internet or any other publicly accessible computer network which is for viewing by the public.

**Your completion and signing of this form confirms that you and your employer have read, understood, and agreed to abide by the Terms and any Annexure to these Terms.**

**Applicant's printed name:**

.....

**Applicant's signature:**

.....

**Date:** .....

**Authorised representative's (Applicant's Employer) printed name:** .....

**Authorised representative's (Applicant's Employer) signature:**

.....

**Date:** .....2012

## **ANNEXURE 1 - MCC Media Access Rules**

The Melbourne Cricket Club (**MCC**), ground manager of the Melbourne Cricket Ground (**MCG**), has agreed to provide access to the MCG to media authorised by the AFL.

Set out below are the access rules which allow the bearer of an access code issued by the MCC access to the MCG for the purpose of providing media coverage in the manner set out in these Terms on days upon which Matches are played at the MCG.

It is agreed that:

- (c) The access code/accreditation pass referred to in these Access Rules must be presented on entry to the MCG and on demand by any MCG official. It is a condition of access that each individual entering the MCG under an access code/accreditation pass issued under these Terms comply at all times with these Access Rules.
- (d) The access code/accreditation pass holder will have access to the areas of the MCG specified in these Terms.
- (e) The access code/accreditation pass holder must not alter, modify or manipulate any video or audio signal, images, data or other recording of the MCG or events recorded at the MCG in such a way that the physical signage displayed at the MCG is altered, not displayed, superimposed or misrepresented in any way, without the prior written consent of the MCC.
- (f) Whilst within the MCG the access code/accreditation pass holder is bound by the MCG Regulations promulgated by the MCG Trust in relation to conduct.
- (g) The access code/accreditation pass of any person may be withdrawn if the access code/accreditation pass holder breaches these Access Rules.
- (h) Access codes/accreditation passes issued by the MCC are strictly non-transferable and must be carried by the bearer at all times within the MCG.
- (i) These Access Rules are in addition to the Terms imposed by the AFL from time to time as part of any accreditation arrangements.