



Copyright and the Digital Economy

**NRL submission to the Australian Law Reform
Commission - Issues Paper**

3 December 2012

Introduction

- 1 National Rugby League Limited (NRL) is a member of the Coalition of Major Professional and Participation Sports (COMPPS) and supports the submissions made by COMPPS in its submission to the Australian Law Reform Commission dated 30 November 2012.
- 2 The NRL however wishes to address some additional matters.

Rugby League in Australia

- 3 The Australian Rugby League Commission Limited (ARLC) is the governing body of Rugby League in Australia. It is the owner of the elite professional Rugby League competition, the NRL Competition, which is one of the most popular professional sports competitions in Australia.
- 4 The NRL Competition is conducted and operated by the NRL, which is a wholly controlled subsidiary of the ARLC. This submission is made by the NRL on behalf of both it and the ARLC and for the purposes of this submission they will be referred to collectively as the NRL.
- 5 In 2012:
 - (a) 3.48 million supporters attended matches in the NRL Competition;
 - (b) memberships to NRL Clubs exceeded 200,000;
 - (c) the NRL Competition had increases in free-to-air and subscription television ratings, including 61 of the top 100 most watched programs on subscription television, 8 in the top 10; and
 - (d) Rugby League had the largest social media following of any sport in Australia with a cumulative total of 2.8 million fans on Facebook.
- 6 As well as the conducting professional competitions, the State of Origin Series and national teams, the NRL is responsible for the propagation of the sport of Rugby League at all levels throughout Australia.
- 7 In this respect the revenues that it generates from the professional competitions that it conducts are used to administer and develop the game of Rugby League at the grass roots level and to deliver community programs.
- 8 The most significant source of revenue of the NRL is derived from the sale of broadcast rights to the professional Rugby League competitions and matches for which it is responsible. This accounts for up to 70 per cent of its

revenues. The success of the NRL and therefore its ability to foster and develop the sport of Rugby League in Australia is directly linked to the revenues that it generates from the exploitation of its broadcast rights.

The exploitation of broadcast rights by the NRL

- 9 The NRL makes this submission as a rights holder that creates content through the matches played in the NRL Competition, State of Origin Series, Test Matches and other matches conducted under the auspices of NRL.
- 10 The NRL seeks to exploit its exclusive rights as the copyright owner of this content by granting specific licenses for its distribution on the following platforms:
 - (a) free-to-air television;
 - (b) subscription television;
 - (c) the internet, including IPTV; and
 - (d) over mobile telephone networks to mobile devices.
- 11 In August 2012, the NRL entered into agreements with the Nine Network and Fox Sports to broadcast matches on free-to-air and subscription television respectively for the period 2013-2017. In particular inter alia it granted:
 - (a) Nine live and near live rights to broadcast on free-to-air television three NRL Competition Matches per week (together with the Finals Series, the State of Origin Series and Test matches) exclusive across the free-to-air and subscription television platforms; and
 - (b) Fox Sports live rights to broadcast on subscription television the remaining five weekly NRL Competition Matches, exclusive across the subscription television and free-to air platforms.
- 12 The granting of broadcast rights to the NRL competition and other matches to the nine network was in compliance with the obligations that the NRL has under the anti-siphoning scheme contained in the *Broadcasting Services Act 1992* to have its matches broadcast on free-to-air television.
- 13 The NRL is currently in the process of negotiating agreements for the licensing of its broadcast rights over the internet and to mobile devices. These agreements are likely to involve the licensing of rights to digital media partners to:

- (a) distribute live and near live broadcasts of NRL matches to mobile devices over mobile networks and the internet; and
 - (b) make available over mobile networks and the internet highlight clips and replays of matches on an on-demand basis.
- 14 The licensing of broadcast content across digital platforms such as mobile networks and the internet is an important and growing aspect of the overall commercialisation of the NRL's broadcast rights. The NRL aims to be a leading Australian sport in digital media and to exploit digital content in a way that maximises value and experience both to fans and to the game.
- 15 Given this, the NRL is committed to innovation in the way in which it creates and disseminates its broadcast content to its fans. This requires significant investment by the NRL. In order for it to continue to support innovation in the production and distribution of broadcast content across digital media platforms, its rights as the copyright owner of this content needs to be effectively protected by copyright laws as embodied in the *Copyright Act 1968*.

Comment on the guiding principles of reform

- 16 The Australian Law Reform Commission has proposed certain guiding principles in conducting its inquiry into '*whether the exceptions and statutory licences in the Copyright Act are adequate and appropriate in the digital environment or whether new exceptions are available*'.
- 17 The position of the NRL on the proposed guiding principles is as set out in the COMPPS submission. In saying this, the NRL believes that significant weight needs to be given to principle 3 - recognising the interests of copyright owners. In this respect any proposed changes to copyright law should not:
- (a) materially prejudice or harm the interests of rights holders in the exploitation and commercialisation of their copyright works; or
 - (b) discourage or create disincentives for copyright owners in the development of new copyright content or new digital products.

Should there be an exemption for an Optus TV Now type service?

- 18 The Issues Paper considers the decision of the Full Federal Court in the Optus TV Now case and poses the question of whether there should be an amendment of some form to the *Copyright Act* to permit such a service.

- 19 The NRL supports the written submissions of COMPPS in relation to the Optus TV Now case generally and the need for legislative intervention in response. In doing so the NRL would like to emphasise the following additional matters.
- 20 First, it is plain that any amendment to the Copyright Act that permits an Optus TV Now like service would be to the significant financial detriment of the NRL.
- 21 The NRL licenses the distribution of live broadcasts of NRL Competition matches over the internet and to mobile devices over the mobile telephone networks. These are valuable economic rights given the intrinsic value of live broadcasts of sporting content. If a telecommunications provider was able without payment of a rights fee to transmit recorded NRL matches to customers almost simultaneously with the live broadcast, this would place it in a significant competitive advantage to the official NRL licensee as it would be able to monetise the transmission of the NRL Match footage without payment of a rights fee or being subject to contractual licensing terms.
- 22 In this respect the NRL, as is its right as a copyright owner, seeks to licence as separate and distinct rights:
- (a) the right to communicate footage of NRL Competition Matches as free-to-air television broadcasts; and
 - (b) the right to communicate footage of NRL Competition Matches as a digital stream over the internet and to mobile devices over mobile networks.
- 23 The creation of an Optus TV Now like service exemption has the potential to inhibit the separate exploitation of these different rights of communication.
- 24 In this context it is necessary to recognise what was a significant commercial purpose of the Optus TV Now service - to distribute recorded free-to-air broadcasts in real time to consumers for viewing on mobile devices while they were away from their residences. This requires both format and platform shifting as copyright material that was distributed to the public as a broadcast, is converted into a digital stream to be transmitted for viewing on mobile devices. Transmission by digital stream is however a method of distribution of audio-visual content that the NRL as copyright owner is entitled to separately licence for economic return.
- 25 Diminishing the value of the live NRL on-line and mobile rights will inevitably lead to significant disincentives to innovation in these areas as well as on-line and mobile products and content. As the explanatory memorandum to the

Copyright Amendment Bill 2006 which introduced the time shifting and format shifting exemptions expressly recognised: *'the exclusive economic rights granted to copyright owners promote creativity and innovation. Copyright enables creators to profit from their work. It protects creators from 'free-riding' or unauthorised exploitation by others which would by others which would undermine the incentive to create and invest in works wanted by the public'*.

- 26 The second matter needs consideration is the extent to which other legislative provisions impact on the potential exploitation by rights holders of copyright material. These in some instances already distort the market for the allocation of these rights.
- 27 The anti-siphoning legislation scheme is a good example of this. Under the current proposed amendments to the scheme the NRL is required to make available for broadcast on free-to-air television the equivalent of 3 of its 8 weekly NRL Competition matches, as well as all NRL Finals Series, State of Origin Series and Test matches.
- 28 The NRL is therefore compelled by legislation to distribute nearly half of its available match content to consumers on a free basis outside any contractual framework. The NRL is therefore not permitted to impose, by contract, limits on further use of the material - a right that nearly all other copyright owners retain in the distribution of their content.
- 29 This is a significant factor to weigh up when considering the prejudice to the legitimate interests of the NRL as a copyright owner that would be caused by extending the existing exemptions in the *Copyright Act* to permit an Optus TV Now like service. The NRL has no choice but to make this content available as a free-to-air broadcast but if a further exemption is permitted, it will also be compelled to make it available for digital streaming by unauthorised third party providers.
- 30 The making of this further exemption will also have the consequence of providing a significant disincentive to a rights holder making content available of free to air television. Unlike the contractual framework that will govern the distribution of content over subscription and internet platforms, distribution by free to air broadcast will leave a rights holder open to unauthorised secondary distribution - the *'free-riding'* from which the 2006 Amendments sought to provide protection.

Retransmission of free-to-air broadcasts

- 31 The final issue that NRL seeks to comment on is the statutory licensing scheme for copyright materials retransmitted over the internet.
- 32 While the NRL believes that the Inquiry is not the best forum for consideration of this scheme, it nevertheless submits that the statutory scheme should not be extended to retransmission over the internet. To do so would create precisely the same problems for the licensing by rights holders of live rights over the internet and mobile networks as are addressed in paragraphs 18-30 of this submission.
- 33 The NRL does however believe that the scheme should be reviewed for the purpose of seeking to remove anomalies that have arisen with the advancement in streaming technology to mobile devices. Given the purpose of the retransmission right there seems to be little justification in the scheme permitting the retransmission of copyright content over mobile telephone networks.

Conclusion

- 34 The NRL welcomes the opportunity to submit on this important project and is available to meet with representatives of the Australian Law Reform Commission to discuss any of the relevant issues.

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